



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAKURU

CIVIL SUIT 62 OF 2012

REGINA PACIS UNIVERSITY COLLEGE THROUGH

THE BOARD OF TRUSTEES 1ST PLAINTIFF

ASSUMPTION SISTERS OF NAIROBI

REGISTERED TRUSTEES 2ND PLAINTIFF

VERSUS

WILLIAM CHARLES FRYDA DEFENDANT

RULING

This matter was due for ruling on 26/06/2012, however I was away on official duties from 23rd May 2012 to 10th July 2012 and was unable to write and deliver the ruling. I apologise to both counsel and litigants for the delay.

The Notice of Motion made under **Article 159** of the **Constitution 2010**, **Section 1, 1B and 3A** of the **Civil Procedure Act**, and **Order 40 Rules 1, 3, 6 and 7**, **Order 51 Rules 1 and 4** and **Order 45 Rules 1, 2 and 3** seek that:

1. The interim injunction orders granted by Hon. Justice Mweru on 23/2/2011 be reviewed and/or extended for another twelve months pending the final hearing and determination of this suit.
2. The plaintiff's application dated 9/2/2012 for leave to amend the plaint be heard on a priority basis.
3. The Provincial Police Officer, Nairobi area do provide 24 hours security for the plaintiff's suit premises LR No.27229 situate at Nairobi, Langata which houses ST. MARY'S GUEST HOUSE, REGINA PACIS UNIVERSITY COLLEGE and THE ST. MARY'S CONVENT occupied by the 2nd plaintiff's sisters until further orders of the court.
4. An injunction do issue compelling the Defendant either by himself, servants and/or agents to remove the students of ST. MARY'S HIGH SCHOOL from the ST. MARY'S GUEST HOUSE (owned by the 2nd plaintiff and return them to the usual residential hostel (outside the compound of LR No.27229).
5. An injunction do issue restraining the Defendant either by itself, agents and/or servants or employees of ST. MARY'S HOSPITAL, LANGATA NAIROBI or otherwise from entering and/or trespassing or interfering with the plaintiff's use and enjoyment of all premises known as LR No.27229 situate at

Langata, Nairobi where 1st plaintiff and ST. MARY'S GUEST HOUSE and the 2nd plaintiff's ST MARY'S CONVENT are situate.

6. The application is based on grounds that the orders issued by Justice Mwera on 23/2/2011 automatically lapsed after 12 months on 23/2/2012 and as a consequence, the Defendant and its agents have between 23/3/2012 and 26/3/2012, forcefully ejected the applicants from the suit premises in Langata, Nairobi. The police have declined to offer security or protection unless the orders are extended. Since 23/3/2012, there have been running battles between the parties and the defendant has brought in students from St. Mary's High School or occupy the Guest House referred to herein, yet it is the 1st plaintiff who holds Title for the suit premises.

In a lengthy affidavit sworn by Sister Marie Theresa Gacambi, she reiterates what is stated on the face of the application saying the plaintiff's peaceful occupation, management operations of the Guest House, the Convent and Regina Pacis University College has been affected and resulted in forcing out all the lecturers, students, guests sisters and workers. She explains that St. Mary's Guest House is owned exclusively by the 2nd plaintiff and is meant for their guest and not for use by students from St. Mary's High School, who have hostels outside St. Mary's Campus.

The defendant through the Administration of St. Mary's Hospital (Father Rev. Odemary Bahati) and Dr. Konya, have used students of St. Mary's High School and employees of St. Mary's Hospital every night to chase away the applicants sisters and employees from the suit property, put off lights and yell at the sisters. On 27/03/2012, they broke into the applicant's accounts office and threw out all the books of accounts, then broke into the sister's rooms at the Guest House and threw out all their belongings. In the meantime, the defendant through the main gate guards has locked out the applicants from the premises are annexed. The lapse of the order is blamed on the applicant's counsel who failed to seek an extension of time and the court is urged not to visit the sins of the counsel on the litigants. The applicants are said to be serving poor and vulnerable children at the 1st plaintiff's University and also have guests staying at the house and the defendant's action amounted to illegal eviction.

The application is opposed on grounds that since the orders lapsed, there would be nothing to extend or review, and the applicants have not disclosed to this court that Hon. Justice Nambuye on 20/12/2011 ordered the case file **No.9 of 2010** to be relocated from the Central Registry of the High Court Nairobi to the District Registry of the High Court at Nakuru, and what had to happen after that.

Further the applicants have withheld from the court, the existence of a temporary injunction issued against the 2nd plaintiff by itself, servants and/or agents in **HCCC No.224 of 2010** at the High Court Nakuru on **4/3/2011** and which remains in force. It is also pointed out that the applicants have withheld from this court, the order by Justice Mwera on 23/3/2011 which clarified matters regarding the order of 23/2/2011, and in fact the 2nd plaintiff/applicant had sought temporary injunction orders against the Respondent in **HCCC No.224 of 2010** at Nakuru, and that application was dismissed.

In any event, the 2nd plaintiff is not capable of prosecuting this suit as it is a party in HCCC No.224 of 2010 where it has filed a counterclaim; and the case in **Nairobi HCCC No.9 of 2011** was ordered relocated to Nakuru to avoid making conflicting orders in respect of the same subject matter and same parties.

In a replying affidavit sworn by William Charles Fryda (the Respondent), he states that after filing a suit in Nakuru where he sought temporary injunction against the applicant, they filed a cross application against him, and both applications were heard and injunction orders were issued in his favour, while the cross application was dismissed – this was on **4th March, 2011**.

It is the Respondent's contention that he has been involved in the acquisition of the suit land, construction of the buildings thereon, and running of the institutions on the land, from their inception, and he personally knows which building was constructed for what purpose – saying there was no building constructed to be a Convent. He describes himself as the Chief Executive Officer of the hospital in

Langata, although it is under the supervision of Dr. Konya. It is deposed that Dr. Konya is the one who allowed the University to use the premises at Langata, and is the one who withdrew the permission – a letter to that effect dated 10th July 2007 is annexed. The applicants' complaints are described as being largely untrue and exaggerated, and that is why police have declined to take any action.

The deponent further states that there is a difference between individual members of Assumption Sisters of Nairobi, and the registered Trustees of Assumption Sisters of Nairobi, and this matter has caused a lot of confusion. It is also deposed that **LR 27229** was originally **LR No.18591/11** and the applicants have misled the court into believing that they are two separate pieces of land, and there was a typographical mistake where LR 18590/11 was recorded in the pleadings instead of LR 18591/11.

At the hearing of the matter, Mr. Kihara submitted that the dispute is over ownership of buildings and premises on property LR 2229 Nairobi, and although the LR may be different, there is no dispute on the physical site. He also points out that the property is registered in the 2nd plaintiff's name.

The orders of 23/2/2011 granted an injunction to issue in favour of the applicants against the defendant/Respondent – those orders had been sought by REGINA PACIS UNIVERSITY COLLEGE and ASSUMPTION SISTERS OF NAIROBI in relation to Plot LR No.27229. The bases of the orders were that the Respondents activities interfered with the management of the plaintiff's institutions and posed imminent danger in the operations of the 1st plaintiff. The court's view was that the Respondent was trespassing on the parcels. On 23/3/2011, the same court delivered a ruling clarifying the earlier orders of 23/2/2011 because an application had been sought to stay those orders. The court stated as follows:

“The ruling of 23/2/2011 should be read and understood to relate to the University (1st plaintiff) situate on LR No.27229 Nairobi with its activities thread any and not beyond.”

These orders lapsed and counsel has attempted to explain that the lapse was due to his being overwhelmed with a host of activities involving legal work related to other matters incidental to the disputes between the parties. It is also apparent that the moment the orders lapsed, the Respondent immediately swung into action, and effected steps which adversely affected the applicants and the operations of the institution – which is precisely what Justice Mwera in his ruling had noted that the Respondent should not interfere with the applicant's operations, but with regard to the Nairobi premises.

Apparently the affected developments in dispute comprise a hospital, a High School and a place to be used as a University College. Although the 1st plaintiff holds Title, the Respondent insists on right of control saying he has contributed to the developments – these were factors presented to Hon. Justice Mwera when the application was made before him – he considered them and found merit in granting injunction orders regarding the Nairobi property. The link between the University College and the hospital in Nairobi is that medical & Nursing students from the University use the Hospital as a learning facility.

Meanwhile the Respondent had filed suit **No.224 of 2010** against 2nd applicant and St. Mary's Mission Hospital and on **4/03/2011** orders were issued restraining 2nd applicant and the hospital from entering, remaining or in any other manner interfering with **LR 277228, 18590/11** both in Nairobi and **LR No.9361/10** at **Nakuru** and **Kiine/Rukanga/2846 Sagana**.

The result was that both parties now had restraining orders, and in fact the Respondent begun using the orders in 224/2010 to evict the plaintiffs and terminate the services of those who worked as nurses and teachers in the various institutions. When the orders were issued by Hon. Mwera J, no one was dispossessed of the property at the time and the sole intention was to preserve the then existing status quo pending hearing – the Respondent has now acted in a manner that alters that status and in so doing defeats the purpose of this suit. Whether the Respondent has a right to take over and determine how the premises are used is an issue which should be heard and determined at the main suit.

In response, the Respondent's counsel argues that the orders given in the Nakuru case have not lapsed as an application was made for extension, a week before it lapsed, it was argued and parties are waiting for a ruling. Counsel contends that once the orders by Justice Mwera lapsed, there is nothing to extend or review and the only thing the applicants can seek is for reinstatement of the orders and show reasons why he didn't apply for extension before they lapsed. He also argues that Nambuye J did not order transfer of the suit to Nakuru, the directions were that the file should be mentioned before the Resident Judge, Nakuru to decide on disposal of the file. It is pointed out that parties are behaving as though the file never reached Nakuru, and now the separation of the files seems to carry on.

It is also argued that by reinstating Mwera J's orders, the court will be contradicting the orders by Emukule J in HCCC No.224 of 2010. Yet didn't these orders exist side by side at one time? Under the provisions of Order 40 Rule 6:

“Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the date of the grant, the injunction shall lapse, unless for any sufficient reason the court orders otherwise.”

Certainly once the order lapsed – it died as it were and cannot be extended. The only way to bring it to life would be by seeking to reinstate it – not to review it. However I am alive to the fact that the situation on the ground has been volatile and created confusion because the Respondent took advantage of that lapse, to effect the orders made on 4th March 2011 – these orders were obtained after the ones of 23rd February 2011 and the prudent way to go about this matter and stem the chaos is to direct that:

- (1) The status quo that currently exists be maintained as this is the only way the suit property will be preserved; especially in view of the speed with which the Respondent is acting to effect changes which are adverse to the applicants. No further adverse activity should be undertaken by either party.
- (2) The orders of Nambuye J required that this file be placed before the Resident Judge Nakuru for directions – so it will be placed before her alongside HCCC No.224 of 2010, so as to give appropriate directions as had been contemplated by the Judge – this should be done on 19/09/2012.
- (3) Costs shall be in cause.

Delivered and dated this 11th day of September, 2012 at Nakuru.

**H.A. OMONDI
JUDGE**