



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 97 of 1998

1 BEATRICE MBURIREH

2 ELIZABETH TARO.....PLAINTIFFS

VERSUS

1. RACHEL DAWAI

2. ELIZABETH MWANDOTO.....DEFENDANTS

RULING

By consent of the parties on "22/4/98 two cases were consolidated. These cases are HCCC. No.95 of 1998 in which case

Mrs. Rachael Dawai sues Mrs, Beatrice K Mburire and Elizabeth Taro and the one on which the consolidation was done in HCCC. No.97 of 1996 where the defendants in the first suit are suing the plaintiff therein and another Elizabeth Mwandoto. In both cases. there are interlocutory applications for injunction against either party.

In the second case the prayers' are:-

1 That the second defendant Elizabeth Mwandoto be restrained from handling financial or any affairs of the firm," to wit signing the cheques to the joint account or any other account having the proceeds of the firm,, and that the said accounts be run solely by Beatrice Mburireh and Rachael Dawai for the

In the other case. HCCC. No, 95 of 1998 where Rachael Dawai is the Plaintiff the prayers are:-

1. That a temporary injunction be issued restraining the defendants, their agents servant or *any* other reasons from preventing, stopping the plaintiff from dealing in any other way with the partnership business known as RATRIZA JUNIOR SCHOOL at Plot No. B15/XVII/MN Tsavo Street. Mombassa .

2, That a temporary injunction be issuedrestraining their agents servants or any otherpersons from stopping or preventing theplaintiff from withdrawing the money fromAccount No. 15-1.037542- and 1175740 held atBarclays Bank Ltd., Moi Avenue, Mombasa.

3, That an order be issued to the Manager, Barclays Bank Ltd., Moi Avenue, Mombasa to honour cheques issued by the Plaintiff and to allow the [plaintiff](#) to withdraw money from the said, account for use to the partnership business known as RATRIZA JUNIOR SCHOOL.

There are several affidavits in mutual support and in opposition to these applications. On one hand are affidavits by Elizabeth Taro sworn on 14/4/98 of Beatrice Mburire sworn on 25/3/98 and another in reply dated 3/4/98 and on the other hand, there are three affidavits by Rachael Dawai sworn successively on 23/3/98; 14/4/98; and 17/4/98 respectively and that of Elizabeth Mwandoto of 11.4/4/98. Purposes of the affairs of the firm.

2. That accountant acceptable to all parties be appointed to audit and write the accounts of all the firms as a growing concern to determine the share contributions, Each shareholder in whole and that the said accounts be part of the proceedings in this suit,

3. That the first defendant be restrained from removing the Title Deed of plot subdivision No. 4561 Section II MN currently held by Barclays Bank, Moi Avenue Account No. 1037577 in the name of the first defendant Rachael Dawai and is already realised from charging the said title for own use or from disposing off the said property and that there be a caveat registered against the said title in the interest of the firm with the Registrar of Titles Land Office, Mombasa,

4. That there be an appointed accountant to run the financial affairs of the firms at the moment, to write, receive payments, do banking and make statutory returns with total control during the transitional period awaiting further orders of this court without interference of the defendant at all except for the defendant's duty to give the information and disclosure to the said accounts to facilitate the writing of the account and easy management of the firm.

b. Costs.

The case for Beatrice Mburire and Elizabeth Taro is that they were partners with Rachael Dawai in running the school called Ratriza Junior School, Mburire says that under the auspices of a women's organisation called Imara Women Group they started a school whose name they registered as Ratriza [Junior](#) School. The name Ratriza was extracted from the first names of the three first registered proprietors of the school being "RA" from Rachael Dawai, "TBI" from Beatrice Mburire and "ZA" from Elizabeth [Mwandoto](#),

The school was registered as a business concern under the registration of Business Names Act, Cap. 499 on 5/12/96 with the three as the joint proprietors. There are three other schools they have started called Ganjoni, Red Birds, and Raha Academy, but it is Ratriza Junior School that featured most particularly in these applications.

On 33/8/96, Elizabeth Mwandoto ceased to be in the business. Around 1995, Elizabeth Taro was persuaded by Rachel Dawai and Beatrice to resign her job as a teacher at Ganjoni Primary School and to join them in Ratriza Academy, She had taught with Mrs. Dawai and had jointly run a school canteen. She disbanded this, resigned from TSC and joined the two. She transferred all the assets to Ratriza Junior School premises out of which assets she gave 6 iron sheets, 17 chairs, 2 tables, 2 benches, 2 nursery tables and 1 cupboard as her contribution and her share of Kshs, 18,750/-. She now runs the Raha Academy. She collects fees from students therein and banks it in the account No. 6092310 where herself and Rachael Dawai are signatories. Before January 1998, the account was 1175740 whose signatories were Beatrice Mburire and Rachael Dawai.

Their complaint is that Rachael Dawai is acting against the partnership and they cited many incidents. They say Rachael Dawai has opened a new rival school called Ratriza Junior Academy for herself, has sacked and employed employees on her own without advertising to them, In paragraph 16 of her affidavit, Beatrice Mburire enlists 10 acts by Mrs. Dawai that undermine the existence of the partnership and these include the re-introduction of the retired Mrs. Mwandoto into the business by making her a signatory again to one of the accounts and thereby effecting withdrawal of Kshs 237,243/-, trying to transfer the

land bought by money from the business into her own property.

The defendants Mrs. Rachael Dawai and Elizabeth Mwandoto in their several affidavits have admitted that Ratriza Junior School was started as a partnership by Elizabeth Mwandoto, Beatrice Mburire and Dawai, and Mrs. Dawai in her affidavit says that the removal of Elizabeth Mburire from being a bank signatory was done by the partnership after a meeting. Both Dawai and Mwandoto say There is no partnership because Burire has not paid Kshs 50,000/- to buy a share and that Elizabeth Taro was just, an employee and not a partner- so the business now remains for the original owners only.

The dispute has become very grave and it appears the parties cannot work together. But they were the authors of their own problems for failing to have a deed of agreement of a kind. The Prayers here are for mandatory and prohibitive injunctions.

Although the applicants' have not indicated so and one has to read the application to discover it the two injunctions although analogous are distinct, and their applications are considered under different concepts, like Megarry J., said in the case of SHEPHERD HOMES LTD =VS= SANDHAM, (1970) WLR 365) 12 :

"As it seems to me there are important differences between prohibitory and mandatory injunction. By granting prohibitory injunction the court does no more than prevent for future the continuance or repetition of the conduct of which plaintiff complains. The injunction does not attempt to deal with what has happened in the past that is left for the trial to be dealt with by damages or otherwise. On the other hand, a mandatory [injunction](#) tends at least in part to look to the past in that it is often a means of undoing what has already been done, so far as that is possible. Furthermore whereas a prohibitory injunction merely requires abstention from acting a mandatory injunction requires the taking of positive steps and may (as in the present case) require the dismantling or destruction of something already erected or constructed. This will result in a consequent waste of time, money and materials if it is ultimately established that the defendant was entitled to retain the erection as Kindsley V-C said in Gale -vs- Abbot. (1862) 10 W.R. 748, 750 an. interlocutory application for a mandatory .injunction was one of the rarest cases that occurred for the court would not compel a man to do so serious a thing as to undo what he had done except at the hearing. Even if today the degree of rarity of such applications is not quite so profound the seriousness of such an order remains as an important factor. Another aspect of the point is that if a mandatory injunction is granted on motion there will normally be no question of granting a further mandatory injunction, at the trial what is done is done and the plaintiff has on motion obtained. once and for all the [demolition](#) or destruction that he seeks where the injunctions prohibitory. However, there will often still be a question at the trial whether the injunction should be dissolved or continued."

These were quoted with approval by Gicheru J.A. in the case as stated•

There- is no procedural Rules under which mandatory injunction is granted. The courts use Section 3A of the Civil Procedure, Act being the inherent jurisdiction of the court, as is observed by Megarry J., above, it is a drastic remedy and in our jurisdiction, the court of Appeal has declared that it should only be granted sparingly in AHONIA ~vs- MUTIKANGO (1970) E.A. 358, when Spry V-P said that it ought to be granted with reluctance and only in very special circumstances but on the other hand, the granting of [mandatory](#) injunction is discretionary and the court would only exercise this discretion on settled, principles and sound law.

Some of these were cited by the Court of Appeal per Gicheru J.A. in East African Fine Spinners Ltd. (In Receivership) & 2 Others =vs= Bedi Investments Ltd. C.A. Civil Application No. NAI 72 of 1994 with approval from Megarry J., in SHEPHERD HOMES case-

"That the court will although it is a drastic measure grant mandatory injunction as the justice of the case requires but the case has to be unusually strong and clear before a mandatory [injunction](#) can be granted.

"That there is no bar for the court granting mandatory injunction on grounds that in effect it constitutes the sole relief claimed".

"The court has to consider whether in the circumstances as they exist after the, breach if a mandatory order and if so what, kind of a mandatory will produce a fair result."

Megarry J, had this to say:-

"In this connection the court must take into consideration amongst other relevant circumstances the benefit which the order will confer on the plaintiff and the detriment which it will cause the defendant."

I shall rely on these principles when I consider the prayers for mandatory injunction

There is second specy of injunction prayed in the application and that is prohibitory injunction. The principle applicable in the granting of -interlocutory prohibitory injunction is now well settled under the case of GIEILA =vs= CASSMAN BROWN CO. LTD. (1978) K.A. 358, They are that an applicant must show a prima facie case with a probability of success.

Secondly, he must show that if the injunction is not awarded he will suffer injury that may not be adequately compensated by award of damages.

Thirdly, if the court is in doubt, then to grant the application on a balance of [convenience](#).

Looking at the applications from both sides. The facts that are common. to both sides are that there is a business registered in the name of Ratriza Junior School and that it was a partnership started by Elizabeth Mwandoto,, Rachael Dawai and Beatrice Mburire. it is also admitted impliedly if not expressly that there was no written deed of partnership. But although partnership is admitted. Mr Gikandi for Mrs. Rachael Dawai and Elizabeth Mwandoto argued that there was no partnership infact, first because Mrs. Mburire had not subscribed her share and also that Mrs. Elizabeth Taro was never a partner but was merely employed by Mrs. Dawai. This may well be so but Mrs, Taro left her employment as a teacher and wound up her canteen or restaurant business at Ganjoni Primary School to join, the firm. She sold building materials and furniture to the firm and there is no evidence that she was paid for it separately, the inference is obvious that she traded them in to acquire a share in the business. I find it hard to believe that she left her teaching job with TSC for merely another employment implicitor ,, There must have been more attraction to persuade her to take such a step. Some security of job, some higher pay and. in this sense none has been offered by Mrs. Dawai or Mrs. Mwandoto and the only logical inference I can draw is that what attracted Mrs. Elizabeth Taro to relinquish her job was offer of partnership. I accept that there was a partnership first started by the first three and later joined by Mrs. Elizabeth Taro. Even if there was a partnership But not expressed that does not derogate from the fact as a partnership can even be implied from the conduct of the parties and the parties would be regulated by the application of the Provisions of the Partnership Act, Cap.29 of the Laws of Kenya. in that Act, Section 3 defines partnership as a relationship which exist between persons carrying on business in common with a view to profit, Here there was a business that is a commercial enterprise carried in common by these litigants with a view to making profit. I think Mrs Beatrice Mburire's non payment of share may just be a debt to the firm.

In a partnership therefore, there must be proper conduct as between the parties in their relationship to one another and under the Partnership Act, Chapter IV duties of partners to one another

1.1 are set out, Some of them are that, every partner is entitled to take part in the management of the firm's business; every partner is entitled to oppose the introduction of a new partner; every partner is entitled to have access to the partnership books; and all partners are entitled to share in capital and profits of the business and to contribute equally towards losses of the firm.

It may not therefore, be correct as Mrs. Dawai says that she hired Mrs Taro because no partner alone without the consent of the firm would have employed an employee in a partnership. Each partner is supposed to be just and faithful to others in all [transactions](#) relating to the partnership and should give a true account of it to the other partners.

The seemingly perpetual injunction, asked for by Mrs. Dawai in or suit against Beatrice Mburire and

Elizabeth Taro in my view cannot have probability of success for how can a court shut out some partners from affairs and of their firm to the advantage and in support of the others. In those circumstances the court would instead act to dissolve the partnership. The interlocutory order of injunction asked for by Mrs. Dawai cannot in my view be sustainable as there is not a prima facie case with probability of success. Can award, of damages compensate Mrs. Dawai? I think so, damages maybe applicable but even if I am wrong in the two the balance of" convenience favours refusing this injunction asked for by Mrs. Dawai because it would be a perpetual injunction in effect.

As for prayers by Mrs. Taro and Mrs. Mburire, I think their claim that all other school that seem to be partnership schools be so declared may be a prima facie case with probability of success.

So is their claim for indemnity and as to their claim as to the property registered as No. Sub-division 450 1 s 11 Mainland North or any other property. It is not so much the evidence of ownership of property that is crucial as the source of the purchase money. Section 25 of Partnership Act, Cap,29 says that:-

".....unless the contrary intention appears property bought with money belonging to the firm is deemed to have been bought on account of the firm,"

So more relevant is the evidence of the source of money used to purchase the property in dispute.

In all this i think it is clear that the applicants in HCCC. No, 97 of 1998, Beatrice Mburire and Elizabeth Taro have established a prima facie case with probability of success.

The award of damages as adequate compensation is not feasible at the dissolution of partnership and may not compensate adequately.

The balance of convenience lies on the subject matter of these proceedings as it is a school or are schools into which several young children are enrolled. It is in the first instance regrettable that these litigants were allowed to start these schools without verification as to their legal commitment to the nature of the business, their firm was engaged in and as to their

1.3 responsibility and liability in it and evidence of order and systematic management, required. Here is a partnership whose rules were honoured .in breach than, in due observance.

"Although it is not necessary that a contract of partnership should be entered into by deed or in writing. It is always advisable that upon entering into such a contract the parties should have a written agreement as to the conditions of the partnership and the terms.

Upon which it. Is to be conducted. In the first place this puts on record the intention of the parties to create a partnership and prevents a merely verbal agreement being subsequently repudiated ..."

Mercantile law by Bigg & Beattle, '9th Edition pp. 312).

Find that the balance of convenience lies in favour of the Plaintiffs in HCCC No, 97 of 1.998 having the order granted it would cause grater inconvenience to the two plaintiffs if the order is refused than the inconvenience to which the defendants will be put, furthermore, the court has to appreciate that disturbing the normal education of the children who now number over 418 or more in the subject schools would almost disorganize the Mombasa community. It is law that the, court while applying the principle of the balance of convenience can also take into consideration the convenience not only of the parties to the suit but also of the public at large. (see Commentary on the Code of Civil Procedure by RD Aggarwal pp.4251 A.I.R 1955 ALL 414

To this end, I would grant prayers in the application made under HCCC. No. 97 of 1998 as follows-

would grant first part of Prayer 1, first part and Prayer 3 therein and with regard to the principle of mandatory injunction I explained above herein I. would grant second part of prayer 1 that the firm

accounts involved herein be owned solely by BEATRICE Mburire and RACHAEL DAWAT for the purposes of the affairs of the firm Prayers 2 and 3 can conveniently be made if only at the dissolution, of the partnership but this should be after or at the bearing if not agreed by parties.

Because of the public nature of the case. It being a school or schools I would direct that the main suit herein be set down for hearing within the earliest possible time agreeable to the parties and that its hearing date be fixed as a matter of urgency and if possible not outside 60 days from today's date. Although Mrs. Adogo argued very persuasively that the court can make those other Orders under Order 39 of the Civil Procedure Rules I do not think so.

I think the orders would come in handy in the event of dissolution and to grant such orders as are prayed in prayers 2 & 4 in the application by Beatrice Mburire and Elizabeth Taro on one hand would be to pre-empt what the court would do under Section 39 of the Partnership Act. Cap.29

On the other hand. prayer 3 of the application in HCCC. No.95 of 1998 is not possible as the-Barclays Bank Limited is not a party to the suit.

For those reasons i decide that orders do issue in the terms discussed and pronounced above.

Cost of these two applications be to the plaintiffs in HCCC. NO, 97 OF 1998 but be charged on the partnership account.

Delivered this 28th day of May 1998.

A.J HAYANGA

JUDGE