



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA IN BUSIA**

**ENVIRONMENT AND LAND COURT**

**ELC NO. 18 OF 2018**

**CARE MISSION KENYA.....1<sup>ST</sup> APPLICANT**

**ODDVA STEN LINKAS .....2<sup>ND</sup> APPLICANT**

**RITA WAHLBERG ..... 3<sup>RD</sup> APPLICANT**

**WENCHE LUDVIGSEN.....4<sup>TH</sup> APPLICANT**

**HAKON BORGEN .....5<sup>TH</sup> APPLICANT**

**VERSUS**

**BENTA AKINYI OTIENO..... 1<sup>ST</sup> RESPONDENT**

**REVEREND PETER OGOLA.....2<sup>ND</sup> RESPONDENT**

**T/A DEITY ECD PRIMARY SCHOOL BUSIA(K)**

**AND EMMANUELA CHILDREN HOME BUSIA(K)**

**R U L I N G**

1. The application before me for determination is dated 15/8/2018 and was filed on 20/8/2018. It is a Notice of Motion expressed to be brought under Sections 1A, 1B, & 3A of Civil Procedure Act (cap 21), Articles 22(1), 73(2)(a), (b), (c), (d) and (e) of the Constitution of Kenya 2010, Section 100 of Civil Procedure Act, Order 20 Rules (1), (2), (3) and (4) of the Civil Procedure Rules and High Court Practice and Vacation Rules under the Judicature Act (cap 5, Laws of Kenya). The Applicants – **CARE MISSION KENYA, ODDVA STEN LINKAS, RITA WAHLBERG, WENCHE LUDVIGSEN and HAKON BORGEN** – brought it against the Respondents – **BENTA AKINYI OTIENO and REVEREND PETER OGOLA** – who are said to be trading in the name and style of **DEITY ECD PRIMARY SCHOOL, BUSIA(K)** and **EMMANUEL CHILDREN HOME, BUSIA(K)**. The Applicants are Plaintiffs in the suit herein filed initially on 16/3/2018 vide a plaint dated 15/3/2018. That plaint was later amended, redated 15/8/2018 and refiled on 20/8/2018. To be clear, even the application under consideration is an amended one, with the initial application having been contemporaneously filed with the initial plaint. The Respondents are Defendants in both the initial and amended plaints.

2. The court has had occasion to handle the application exparte and the prayers meant for consideration at this stage are moot now. The prayers for consideration at this stage are as follows:

Prayer (ii): That this honourable court be pleased to order for detailed annual accounts of DEITY ECD PRIMARY SCHOOL, BUSIA(K) and EMMANUEL CHILDREN'S HOME, BUSIA(K) being managed by 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein from 2008 todate forthwith.

Prayer (iii): That the Respondents be ordered forthwith to execute the lease agreement herein and pay rent from 2008 todate to the Plaintiff/Applicant/Landlord forthwith being the basis of their legal relationship.

Prayer (iv): That the County Police Commander, Busia, be ordered to supervise the orders of this court herein.

Prayer (v): That this honourable court grant orders in compliance with Section 27 of the Basic Education Act by dissolving the

current Management Boards of DEITY ECD PRIMARY SCHOOK, BUSIA(K) and EMMANUEL CHILDREN'S HOME BUSIA(K) being managed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents herein.

Prayer (vi): That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents, their relatives, associates, agents, or anybody acting on their behalf be hereby restrained from managing ECD Primary School, Busia(K) and Emmanuel Children's Home, Busia(K) or dealing in any manner whatsoever with the administration of the said institution until hearing and determination of the suit.

Prayer (vii): Spent

Prayer (viii): That costs of this application be provided for.

3. Several grounds were advanced in support of the prayers sought. The Applicants averred that the Respondents are tenants operating BUSIA ECD PRIMARY SCHOOL on L.R. BUKHAYO/MUNDIKA/9903 and EMMANUEL CHILDREN'S HOME on L.R. BUKHAYO/MUNDIKA/7812, 7813 and 10245 yet they have refused to sign a tenancy/lease agreement binding them to pay rent from year 2008 to date. The Applicants' said they are the absolute proprietors of the parcels of land.

4. The Respondents were accused of running the two institutions on the parcels of land in a manner said to lack integrity, competence, objectivity and impartiality. They have allegedly appointed personal friends and close family relatives to the Management Board. Further, the Applicants complained that they cannot access the two institutions accounts, with the Respondents violating previous agreements entered into from 2008 to date.

5. The 2<sup>nd</sup> Applicant – ODDVA STEIN LINKAS – swore a supporting affidavit on behalf of himself and other Applicants stating, *inter alia*, that the 1<sup>st</sup> Applicant – CARE MISSION KENYA – owns the parcels of land on which the two institutions stand. The Respondents were said to be lessees. But even as they are lessees, they have refused to sign the necessary lease agreement with the Applicants. The Respondents are accused of not having paid any rent from 2008 to date. The Applicants averred that they have suffered loss and prejudice and urged the court to intervene.

6. The two Respondents responded in two ways viz: vide grounds of opposition filed on 4/10/2018 and thereafter with a replying affidavit filed on 17/10/2018. According to the Respondents the title deeds were stolen by the Applicants who in any case lack locus to proper ownership rights. The orders sought were also said to be drastic and final in nature thus requiring hearing on merits before a decision can be made.

7. The 1<sup>st</sup> Respondent said she started her ministry – JESUS MERCY CENTRES – in 2001 and registered it sometimes in 2010. She founded the Deity Academy in the year 2002 and started running it as a project of her ministry. Then the 2<sup>nd</sup> Applicant – ODDVA STEN LINKAS – came along and offered to help find sponsors for the needy children in the institution. The 2<sup>nd</sup> Applicant got sponsors and was given money but only availed some of it to the ministry. The institutions are said to be registered under the Respondents ministry. The Applicants are said to be foreigners and being so, cannot run the institutions or even own the land the institutions stand on.

8. The position taken by the Respondents is that the Applicants can only be sponsors. They cannot be investors or owners of property. To the respondents, the Applicants committed fraud when they registered the parcels of land in their name. Crucial documents in the alleged fraud were said to be attested to by the advocate currently appearing for them and who, Respondents said, should be a witness in the matter.

9. The Respondents further averred that the Applicants only started treating them as tenants after fraudulently registering themselves as owners of the parcels of land in question.

10. The Respondents response elicited a further affidavit from the Applicants. That affidavit is dated 26/10/2018. The affidavit is largely a rebuttal of the replying affidavit filed by the Respondents.

11. The application was canvassed by way of written submissions. The Applicants submissions were filed on 22/10/2018. It was submitted that the Applicants own both the parcels of land and the institutions standing on them. They therefore enjoy protection afforded by Article 40 of the Constitution of Kenya and Article 65(1) which entitles Non-citizens to hold land as lessees. The Respondents are said to be on the land as trespassers.

12. The Respondents' submissions were filed on 2/11/2018. The submissions largely mimic the contents of the responses earlier made by the Respondents.

13. I have considered the application, the responses made, rival submissions, and the suit generally as filed. I will start by observing that even a cursory glance at both the application filed and the amended plaint would show that there is an exact or substantial similarity between the prayers sought. In more particular terms, prayer (a) in the amended plaint is similar to prayer (ii) in the application. Prayer (b) in the amended plaint is similar to prayer (v) in the application while prayer (c) in the amended plaint is also similar to prayer (iii) in the application.

14. The Respondents have made a pertinent point namely: the orders sought are of final nature and they require to be canvassed on merit during trial. I agree. When the Applicants made the prayers in the plaint, they obviously intended to avail evidence to prove them at the trial. When the same prayers are now brought forward and asked for in interlocutory proceedings, one is bound to wonder what will be left for determination at the trial of the main suit. The move to ask for the same prayers in the application is wrong. It appears to be a premature attempt to determine the suit. There is nothing left for the trial if the court grants the orders. Granting the orders would obviously compromise the suit. It is trite law that orders of a final nature should not be granted at the interlocutory stage.

15. In **RAJPUT Vs BARCLAY BANK OF KENYA LTD and 3 others: [2004] 2KLR 393**, the court dealt with many issues, one of them being similar to the one at hand. The Plaintiff in the suit sought various orders in the plaint. Simultaneously with the plaint, the Plaintiff filed an application seeking the same orders. The court, while addressing itself to the issue, held that the prayer could not be granted as it was in the nature of final orders.

16. But plain logic and common-sense would also militate against the grant of the orders. If I were to grant them at this stage, what would be left for consideration at the main trial? And which stage is better? This interlocutory stage where all evidence is not yet in or the trial stage where all evidence will have been availed? Obviously, it is at the trial stage.

17. It is clear now that the court is not willing to grant prayers (ii), (iii) and (v) in the application. These are prayers for consideration at the trial stage. I decline to grant them.

18. We are left then with the prayer for a temporary restraining order. That is prayer (vi). The *locus classicus* case of **Gielu Vs Cassman Brown & Co. Ltd [1973] EA 358** sets the threshold to be met for the orders to be granted. And the threshold involves demonstration of a *prima facie* case with a probability of success, showing the likelihood of suffering irreparable loss not compensable in damages, or opting for consideration of the balance of convenience where the court is in doubt as to the attainment of the first two requirements.

19. The first requirement would require the court to look at the case as filed and give a thought as to its possible merits. In this matter, the Applicants are said to be foreigners. Their claim is based on ownership. Infact titles to the parcels of land were shown. When one thinks about possible merits in the context of this case, the issue of the alleged ownership inevitably comes to mind.

20. The Applicants are said to be non-Kenyans. If they are the trustees of the 1<sup>st</sup> Applicant – CARE MISSION KENYA – then the 1<sup>st</sup> Applicant is an entity whose trustees are non-Kenyans. No Constitution or document containing rules and regulations governing operations of the 1<sup>st</sup> Applicant has been availed. If the Applicants are foreigners as alleged, one needs to consider the kind of property ownership interests they can enjoy in Kenya.

21. As proof of the Applicants ownership of the parcels of land they are claiming, title deeds have been availed. Title deeds are legal documents showing ownership of land under a freehold tenure. In Kenya, such ownership is commonly called absolute proprietorship. Being foreigners, and with trusteeship of 1<sup>st</sup> Applicant seemingly held by them, ownership of land by all or any of them cannot legally be under freehold tenure or absolute proprietorship. Ownership can only be under a leasehold tenure. And the Applicants and/or their counsel know this well as they made reference to Article 65 of the Constitution of Kenya, 2010, which deals with the issue.

22. For clarity, it is necessary to set out the relevant provisions of Article 65. It is as follows:

**“65(1) A person who is not a citizen may hold land on the basis of leasehold tenure only, and any such lease, however granted, shall not exceed ninety–nine years.**

**(2) If a provision of any agreement, deed, conveyance or document of whatever nature purports to confer on a person who is not a citizen an interest in land greater than a ninety-nine year lease, the provision shall be regard as conferring on the person a ninety-nine year leasehold interest, and no more.**

**(3) For purposes of this Article (a) a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one or more citizens; and**

**(b) property held in trust shall be regarded as being held by a citizen only if all the beneficial interest of the trust is held by persons who are citizens.**

**(4) .....**

23. From these provisions, it is clear that the Applicants can only hold land under a leasehold tenure. This is very clear from Article 65(1). And under Article 65(3) (b) it is clear that the 1<sup>st</sup> Applicant can only own land under a freehold tenure if its trustees are all citizens. And this arrangement is applicable even to ownership enjoyed by non-citizens before the new constitutional dispensation. This is clear from provisions of the 6<sup>th</sup> Schedule in the Constitution of Kenya, 2010, which provides as follows at Section 8:

**“8(1) On the effective date, any freehold interest in land in Kenya held by a person who is not a citizen shall revert to the Republic of Kenya to be held on behalf of the people of Kenya, and the State shall grant to the person a ninety-nine year lease at peppercorn rent.**

**(2) .....**

**(3) .....**

24. It is clear from all the foregoing that the Applicants, being foreigners, cannot validly and legally hold title deeds issued in Kenya as instruments of ownership. And such of the title deeds that they may hold are not documents of true or genuine ownership.

25. And for the land offices in Kenya, it comes as a surprise that in this day and age, and under the new constitutional dispensation, title

deeds can still be issued to people or entities of unproven citizenship. But sometimes funny things happen in some offices. In this particular case, the Respondents alleged fraud in the manner the ownership is shown or said to have change hands. The 2<sup>nd</sup> Applicant – ODDVA STEN – is shown to have been issued with a title deed though he is not a Kenyan. He is a holder of passport number 25480977. The title deed he held is for land parcel No. BUKHAYO/MUNDIKA/9903 issued to him on 5/5/2014. It is usual for the title documents to capture the identity card numbers of the Kenyan Citizens who are issued with them. In this particular instance, the title deed of the 2<sup>nd</sup> Applicant is shown as 25480977. This is the same number indicated as his passport number. One would wonder whether this same number would show the 2<sup>nd</sup> Applicant as the true identity card holder if one conducts a check with the data base held by the Registrar of persons in Kenya. And I bet he wouldn't be as he is a foreigner.

26. Why am I raising all these concerns? The answer is simple. We would wish to know whether the Applicants have a *prima facie* case. And given what I have observed so far, it is obvious that I am not persuaded that they have.

27. Giela's case (ante) also requires demonstration of irreparable loss. None has been shown in this case. If anything, the loss alleged seems clearly quantifiable in monetary terms and the Respondents are not shown as incapable of paying.

28. I will not consider the balance of convenience. And this is because I have no doubt at all regarding the position taken in connection with the first two requirements. The balance of convenience only comes for consideration where doubts arise as to the first two requirements.

29. In the context of this matter, it is also necessary to consider the operational effects of a temporary restraining order if granted. The Applicants seek to restrain the Respondents from managing the two institutions on the land. These are institutions that largely handle or house children. One is a school; the other is a children's home. The Applicants have not suggested an alternative or different kind of management team to be put in place if the current one is restrained? Question is: what will happen to the children if the current team is restrained? It is often said that when two elephants fight, it is the grass that suffers. As an analogy, the Applicants and the Respondents are the two elephants. The children in the two institutions are the grass that suffers.

30. The court must take care. The law enjoins that in circumstances such as these, the best interests of the children are paramount. Issuing a temporary restraining order as prayed without putting in place suitable measures to ensure continuity in the children's welfare is to act rashly and irresponsibly. The best interests of the children in these two institutions are better served by declining to issue an order that will interrupt or imperil their welfare.

31. Given what I have said so far, it is clear that the application herein is one for dismissal. Its merits have not been demonstrated. It is also not well thought through. I now hereby dismiss the entire application with costs.

**Dated, signed and delivered at Busia this 16<sup>th</sup> day of January, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

1<sup>st</sup> Applicant: Absent

2<sup>nd</sup> Applicant: Absent

3<sup>rd</sup> Applicant: Absent

4<sup>th</sup> Applicant: Absent

5<sup>th</sup> Applicant: Absent

1<sup>st</sup> Respondent: Absent

2<sup>nd</sup> Respondent: Absent

Counsel for Applicants: Present

Counsel for Respondents: Present

Court Assistant: Nelson Odame