



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC NO.68 OF 2017

GODFREY OCHIENG JUMA.....PLAINTIFF/RESPONDENT

VERSUS

MAKARIUS MAKWATA.....DEFENDANT/APPLICANT

RULING

1. The application under consideration is a Summons in Chambers dated 8/9/2017 and filed here on 11/9/2017. It is brought under Sections 1A, 1B, 3, 3A, and 63 (e) of Civil Procedure Act (Cap 21) and Order 20 Rules 1,2 and (4) of Civil Procedure Rules, 2010. In the Summons, the Defendant/Applicant – **MAKARIUS MAKWATA** – (simply “applicant” hereinafter) prays for various Order against the plaintiff/respondent - **GODFREY OCHIENG JUMA** (simply “respondent”). The Orders are as follows:

- a) That the Plaintiff/Respondent produces to this honourable Court a detailed statement of account as from the year 2011 to date.
- b) That this honourable Court appoints an independent person to manage and run the school, being the subject matter herein, pending the hearing and determination of the application and suit.
- c) That the costs of this application be provided for.

2. The applicant premised the application on grounds, inter alia, that he is a co-owner of subject in dispute; that he has not been involved in the management of the subject since 2011; that he has also not received any proceeds for that period; that it is in the best interests of the parties to take accounts to ascertain each party’s dues; and that it is important to appoint an independent person to run the subject pending hearing and determination of the suit. The subject severally mentioned herein is a school run in the name and style of “The Immaculate Heart School – Bumala”. The dispute herein relates to its ownership and operation.

3. According to the applicant, he is a co-owner of the school with the respondent. He co-founded it with the respondent but at some point, there was a disagreement leading to a fall-out. And owing to the fall-out the respondent has been running the subject alone since 2011. During that period running from 2011 to date, the respondent has not accounted to him for anything and neither has he received any proceeds. The respondent is said to have appointed relatives to run the subject with him and the applicant has been kept in the dark. That is why he desires that accounts be taken. That is why he desires too that an independent person be appointed to run the subject.

4. The respondent opposed the application vide grounds of opposition dated 7/11/2017 filed here on the same date. He said, *inter alia*, that the orders sought pertain to substantial issue in dispute which can only be determined at full trial and that the applicant has already ceased to be a co-owner.

5. The application did not go for oral hearing; written submissions were filed instead. The applicant’s submissions were filed on 15/1/2018 while those of the respondents were filed on 30/1/2018.

6. The applicant submitted, *inter alia*, that the respondent has been running the subject to the exclusion of the applicant since the year 2011. All that time, the applicant has not received any benefits. The applicant therefore wants detailed accounts as the prayers he has made in his counter-claim can only be effectively adjudicated if such accounts are availed. He also wants an independent manager appointed as he owns the subject with the respondent. Yet the respondent is the one solely in control of the subject. The new arrangement, he submitted, is meant to protect the subject.

7. The applicant availed three (3) decided matters to persuade the Court to grant his prayers. The first one is **RAFIKI MICRO-FINANCE BANK LTD VS ZENITH PHARMACEUTICAL LTD**: HCC Mis Application No 607/2014, NAIROBI. In the matter the applicant required that some document and/or statement of accounts be availed before the case was heard. The Court considered the facts manifest in the pleadings filed. It particularly considered the necessity and relevance of what had been asked for during trial and determination of the

case. It granted the prayers.

8. The second case was that of **CHRISTOPHER NDOLO MUTUKU & ANOTHER Vs CFC STANBIC BANK LIMITED**: HCC No 71 of 2011, MILIMANI, NAIROBI. This one again required that some accounts be taken. The Court again considered the circumstances prevailing then and granted the prayer.

9. There was the third case – **GEETA MAGON VS ASHISH MAGON & 5 OTHERS: HCC No.53 of 2009, MILIMANI, NAIROBI**. This one relates to appointment of a person to run or manage affairs of some named companies, which were defendants in the suit. The 1st defendant was running the companies to the exclusion of the plaintiff, who was the applicant. The Court noted that both the plaintiff and the 1st defendant, who were directors of the companies, had fallen out and could not make decisions. It was found necessary to appoint an independent person to manage or run the companies.

10. The respondent submissions faulted the applicant for making a prayer for taking accounts at the interlocutory stage yet, according to respondent, it's a prayer for determination after full trial. It was pointed out that the applicant had already ceased being a co-owner of the subject with the respondent. According to the respondent too, the prayer for taking accounts is vague as it fails to clarify whether the accounts to be taken are those of the respondent personally or those of the subject.

11. As regards the appointment of an independent person to run the subject, the respondent submitted that the applicant has already ceased to be part of the business. By his prayer that an independent person be appointed, it was submitted that he was attempting to become a co-owner again through the backdoor. The Court was ultimately asked to dismiss the application.

12. I have considered the application, the response made, rival submissions and the pleadings on record generally. In the applicants counter-claim, a prayer (prayer e) is made that the defendant (applicant) be paid proceeds from the subject owing to him from 2012 todate. In simple terms, the applicant wants a share of all or any profits made. He is also asking for general damages for loss of income starting from 2012 todate (see prayer (f)). It would appear to me that taking accounts becomes necessary for effective adjudication of the counter-claim generally and for these two prayers in particular.

13. The law is clear. The taking of accounts becomes necessary where the pleadings filed make it necessary and relevant to do so. I have already pointed out that the counter-claim as filed make this exercise a logical necessity. I don't agree with the respondent that this should be done during or after trial. True, there is prayer (d) in the counter-claim which seem to ask for taking of accounts. In my view, it is that prayer itself that may be misplaced, not the prayer in the application. The taking of accounts in the interlocutory state where circumstances so require makes it possible to bring out a clearer picture of what the Court is handling. And I also consider that the respondent has not shown that the prayer prejudices him in any way. And the prayer is not vague. The context of the application makes it very clear. The account targeted is that of the school.

14. Then there is the prayer for appointment of an independent person to run the subject. On this, I don't agree with the applicant. The case availed by the applicant in support of the prayer related to companies that are totally different from what we are dealing with here. The subject here is a school. In the case availed, the companies were involved in totally different business. In this case here, the applicant has intimated willingness to eventually exit from the business provided only that what is due to him is given. In the case that was availed, the applicant wanted the respondent to cease exclusion of her from the business. There was nothing like quitting.

15. A school is different. It requires the personal touch of those running it to improve performance. There is no telling whether the person to be appointed will have that kind of touch. The respondent is obviously interested in seeing the subject succeed because he has invested in it. That kind of interest makes him desire to see performance improve. I doubt that any independent person appointed would have this kind of interest. Let us not forget that good performance impacts positively on the future of the children in the school. I fear that an independent person running the school without its future interests at heart can easily lower its performance. Besides, it's clear that, subject to adequate arrangements for the exit of the applicant, it is the respondent who will be running the school. Why then should there be interruption? I therefore reject this prayer. It might affect innocent children negatively.

16. The upshot is that the prayer for taking accounts is hereby granted while that of appointing an independent person to run the school is rejected. Cost of the application will be in the cause.

A.K. KANIARU

J U D G E

Dated, Signed and Delivered at Busia this 18th Day of April, 2018.

In the Presence of:

Plaintiff:

Defendant:

Counsel of Plaintiff:

Counsel of Defendant: