REPUBLIC OF KENYA

IN THE Environment And Land Court Of Kenya

At Nakuru

ELC NO 34 OF 2015

REV. CAROL ALOIS OSOS

REV. DANIEL WANJAU NYAMBURA (SUING AS OFFICIALS OF NAKURU UNITED METHODIST CHURCH…….**PLAINITFF**

VERSUS

DIANE QUATTLEBAUM HAMRICK..…1ST DEFENDANT

PARTNERS IN CHILDREN AND FAMILY SUPPORT ORGANIZATION….2ND DEFENDANT

RULING

(Application seeking punishment for disobedience of an order of injunction; court having issued an order of status quo; argument that no leave was sought before filing the application; no leave required before filing an application under Order 40 Rule 3 for disobedience of an order of injunction; evidence showing disobedience of the order; application allowed; defendants ordered to restore premises to the position that it was before and punished for disobedience)

1. This ruling is in respect of an application dated 21 September 2016 filed by the plaintiffs. It seeks the following principal orders which are prayers (2) and (3) of the application.

> *(a) That the court be pleased to order the defendant to restore the name of the applicant's schools erected on 6295/15 and L.R No. 11739/R to United Methodist Mission Schools and delete the new name The Betty Mavity Roberts Education Centre from the buildings of the school and in all other documents relating to the school the subject of this suit until the suit herein is heard and determined.*
>
> *(b) That the court be pleased to find the respondent to be in contempt of the orders issued on 15 July 2015 and proceed to punish the defendant/respondent accordingly.*

2. The application is supported by the affidavit of Rev. Daniel Wanjau Nyambura and is based on various grounds. The application is opposed by the defendants who have filed a Notice of Preliminary Objection and a Replying Affidavit sworn by the 2nd defendant/respondent. Before I delve into these, I feel that is prudent that I give a little background to this suit.

3. The plaintiff is the Nakuru United Methodist Church suing through its two named officials. The suit was commenced by way of plaint filed on 11 February 2015. The 1st defendant has residence in Kenya

and in the United States of America. The 2nd defendant is a Non-Governmental Organization conducting its affairs within Nakuru County. In the plaint, the plaintiff has pleaded that it owns various parcels of land being Nakuru L.R No. 62295/15; 7 acres to be excised from L.R No. 11739/R ; Dundori/Lanet Block 5/2090 (New Gakoe) ; Dundori/Lanet Block 5/2084 (New Gakoe) and Residential Plot No. 7 at Ngecha 'A' Trading Centre. In May 2006, the plaintiff entered into an agreement with Wesley Memorial United Methodist Church, USA in which the latter was to fund the plaintiff's projects in Kenya. It is the plaintiff's position that the 1st defendant was sent by the Church as a Volunteer Missionary to help the plaintiff manage its projects. The plaintiff has averred that the properties to be purchased by funding from the USA would remain the plaintiff's properties. On one of the properties, L.R No. 11739/R, of which the plaintiff church claims 3 acres, was developed a school which was named the United Methodist Mission Schools, which the plaintiff avers are registered in its name. In the year 2012, the 1st defendant was appointed to be the chairperson of the Board of Management of the Schools but was removed on 18 July 2014. The plaintiff later discovered that the 3 acres comprised in L.R No. 11739/R were transferred to the defendants and so too the properties Dundori/Lanet Block 5/2090 and Dundori/Lanet Block 5/2084. It is the case of the plaintiff that these transfers are fraudulent and illegal. In the suit, the plaintiff has asked for orders inter alia that the titles of the defendants be cancelled and the same be issued in the name of the plaintiff.

4. Together with the suit, the plaintiff filed an application for injunction, seeking to restrain the defendants from occupying the suit properties. In the application, the plaintiff averred inter alia that in the land parcel L.R No. 11739/R, it has erected a one storey building used as the United Methodist Mission Schools owned and managed by the plaintiff. In her replying affidavit, the 1st respondent inter alia averred that the school was constructed by herself with funds raised from donors in the USA. She also stated that she never intended that the name of the school should reflect the name of the United Methodist Church but the name of the major donor, one Betty Mavity Roberts.

5. On 15 July 2015, the parties compromised the application for injunction by agreeing that status quo be maintained.

6. In this application, the plaintiff now contends that despite the above order of status quo being agreed, the respondents have changed the name of the school from United Methodist Mission Schools to "The Betty Mavity Roberts Education Centre". It is the position of the plaintiff that the change of name of the schools is in contempt of the order of 15 July 2015 and the respondents should be punished for disobeying the order of status quo.

7. In the supporting affidavit, Rev. Daniel Wanjau Nyambura has annexed a copy of the calendar for the year 2015; a copy of the registration of the school; a copy of application for registration of the school; and copies of bank statements to prove the existence of the school with the previous name. He has deposed that he came to know of the change of name through the calendar of the year 2016; copy of newsletter dated 5 August 2016; copy of printed academic progress book; copy of an invitation card; and change in the painted name at the Administration Block of the school. He has deposed that on getting to know of the change of name, the plaintiff wrote a letter dated 23 August 2016 to the respondents through its advocates on record, to restore the original name within 7 days, but this has not been done.

8. In her replying affidavit, Ms. Hamrick has deposed inter alia that on 3 March 2015, the Board of Directors of the 2nd defendant/respondent met and agreed that the name of the school should be changed and she was authorized to take all necessary action to effectuate the change of name. She has deposed that on 4 March 2015, she completed the application for registration of the school under the new name. She has also pointed out that the title, where the school sits, is in the name of the 2nd respondent. In the month of February 2015, she has averred that the major donor insisted that the name of the school be changed. She has also raised various issues about the school being mismanaged by the plaintiff and misappropriation of funds. She has deposed that she has never seen or been presented with any status quo order of the court and does not recall any discussion in court on 15 July 2015 concerning an order of status quo. She has stated that she had trouble hearing the interchanges between the advocates and the court on the said date due to being in the back of the courtroom. She has continued to depose that assuming an order of status quo was made, the respondents have done nothing to violate that order, since

the name change process had already been filed and the new name authorized. It is her position that the act of changing the name of the school occurred prior to 15 July 2015. She has stated that the respondents were in actual possession of the school property prior to the filing of the lawsuit and have continued to carry out teaching activities.

9. In the Preliminary Objection, it is raised inter alia that no leave has been sought before filing this application and that the respondents were never served with any court order. It is also stated that the order stated to have been violated was issued after the change of the schools name had been effected.

10. I have considered the material filed by the parties and the submissions of Mr. Waiganjo for the applicant. There was no appearance on the part of counsel for the respondents on the day the application was argued. I take the following view of the matter.

11. I think four issues have been raised and I will tackle them as follows :-

(i) Whether this application is incompetent for want of leave.

(ii) Whether the respondents were aware of the order of 15 July 2015.

(iii) Whether the respondents disobeyed the order of 15 July 2015.

(iv) If so, what is the appropriate order to make ?

(i) Whether this application is incompetent for want of leave.

12. The respondents have raised a preliminary objection that this application is incompetent for want of leave. I do observe that this application is filed pursuant to the provisions of Order 40 Rule 3 which provides as follows :-

Consequence of breach [Order 40, rule 3.]

(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

(3) An application under this rule shall be made by notice of motion in the same suit.

13. The whole of Order 40 relates to issuance of orders of injunction and Rule 3 provides the consequences of breach of an order of injunction. The order of status quo of 15 July 2015 arose out of an application for injunction filed by the applicants and I am of the opinion that Order 40 Rule 3 has been properly cited. I have not seen any provision in Order 40 which requires that leave be given before one may file an application under Rule 3 and counsel for the respondents has not provided any to me. My finding is that no leave is required by an applicant before filing an application under Order 40 Rule 3. That to me resolves that preliminary points raised, for the other points tabled, are subsumed in the replying affidavit filed by the respondents.

(ii) Were the respondents aware of the order of 15 July 2015 ?

14. I do not think it can be contested that on 15 July 2015, an order of status quo was issued. The 1st respondent admits to have been present in court but attempts to argue that she did not hear what

proceeded because she was at the back of the court room.

15. To me, this is not an excuse. The order of status quo was made in her presence and in the presence of her advocate. It was in fact an order that was agreed by the parties. The respondents cannot therefore be heard to be unaware of the order of status quo.

16. My finding on it is that the respondents were aware of the order, and indeed they cannot claim to have been unaware of an order which they themselves asked the court to make, given that the order was by consent.

(iii) Whether the respondents disobeyed the order of 15 July 2015.

17. The respondents have contended that they are not in breach of the status quo order of 15 July 2015 because the process of change of name had already taken off by the time the order of status quo was made.

18. I have carefully gone through the documents tabled by both applicant and respondents. There is certainly no contention that the school in issue bore the name *"United Methodist Mission Schools"*. In her own replying affidavit, the 1st respondent has annexed an affidavit of change of name sworn on 4 March 2015 which acknowledges that the school in issue is named *"United Methodist Mission Schools"* and she wanted the name changed to *"The Betty Mavity Roberts Education Centre."* The name *"The Betty Mavity Roberts Education Centre"* was registered on 13 April 2015, pursuant to an application made by the respondents to the Ministry of Education on 4 March 2015. That application was approved on 12 April 2016. It follows that by the time the order of status quo was made, the change of name had not yet been approved by the Ministry of Education.

19. The position therefore is that when the order of status quo was made on 15 July 2015, the name of the school was *"United Methodist Mission Schools"*. The respondents ought to have taken upon themselves to halt any further procedures which may result in alteration of the status quo. They indeed had the obligation of writing to the Ministry of Education to inform them of the order of status quo but it appears that they did not. They cannot now claim the benefit of a decision that was made in violation of the status quo, when they themselves had the power to advise the decision makers that there is an ongoing case in court, where there has been issued an order which affects their own application for change of name. When the respondents proceeded to act on the change of name directive, they were in my view, in violation of the order of court made on 15 July 2015. If the respondents were uncertain of what to do given that the Ministry of Education has allowed the change of name application, the correct thing was for them to come back to court and seek the court's directions. Acting on the directive of the Ministry of Education would have resulted in a change in the status quo as it was on 15 July 2015 and the respondents must have been aware of this. In my view their conduct was aimed at stealing a march on the applicant and they cannot now be allowed to benefit from such conduct.

20. My holding is that the respondents violated the order of status quo issued on 15 July 2015 by changing the name of the school from *"United Mission Schools"* to *"The Betty Mavity Roberts Education Centre."*

(iv) What is the appropriate order to make ?

21. There has been violation, and even before I go to any punishment, I must first ensure that the order as issued on 15 July 2015 is obeyed. I first suspend the directive issued on 12 April 2016 by the Ministry of Education recommending the change of name. I direct that the school in issue do continue with the use of the name *"United Mission Schools"* until the conclusion of this suit or further orders of the court.

22. Secondly, I order the respondents to immediately restore the use of the name *"United Mission Schools"* and to forthwith have the administration block re-painted to reflect the name that was originally painted therein. This must be done within 14 days from today, and if not done, the applicants may proceed to do so and pass on the cost to the respondents to make good, and such costs must be made good

before expiry of 14 days upon being informed.

23. Should I punish the respondents ? I think some form of penalty ought to be visited upon them. In my discretion I order the respondents to pay a fine of Kshs. 50,000/= within 7 days of this ruling and in default, the 1st respondent and the Board of the 2nd respondent will suffer a jail sentence of 30 days.

24. The applicants shall also have the costs of this application.

25. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 8th day of February 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :

Mr. Waiganjo present for the applicants

Mr. Kabita present for the respondents

Court Assistant: Nelima

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU