



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 299 OF 2015

MARTIN MWANGI GICHUKI T/A IVORY MOUNT SENIOR SCHOOL..... PLAINTIFF

- V E R S U S -

GLADINGA (K) LIMITED.....DEFENDANT

RULING

1. The court is considering the Notice of Motion Application dated 11th November 2015 in which the Plaintiff seeks the following orders:
 - i. Spent
 - ii. This Honourable Court do grant a temporary injunction restraining the Defendant, its agents and/or servants or any other person acting under its authority from evicting the Plaintiff and his students from the suit premises and or interfering with the normal learning at the school built on all that piece of land being **Plot/L.R No. 3113** situate in Taita Taveta County, Mwatate pending hearing and determination of this application *interpartes*.
 - iii. This Honourable Court do grant a temporary injunction restraining the Defendant, its agents and/or servants or any other person acting under its authority from evicting the Plaintiff and his students from the suit premises and or interfering with the normal learning at the school built on all that piece of land being **Plot/L.R No. 3113** situate in Taita Taveta County, Mwatate pending hearing and determination of this application and suit.
 - iv. Costs be provided for.
2. The Application is supported by the Affidavit of MARTIN GICHUKI sworn and filed with the Application on 11th November 2015. The gist of the Plaintiff's case is that on or about the 3rd of June 2014, he entered into a Lease Agreement with the Defendant in respect of property known as **Plot/L.R No. 3113** where he operates a secondary school in the name and style of Ivory Mount Senior School. The Plaintiff stated that he has been operating the school since June, 2014 uninterrupted and has been paying the rent dutifully and without fail until June 2015 when the Defendant started threatening him with eviction before the expiry of the lease.
3. The Defendant filed a replying affidavit sworn by GLADNESS MRUNDE MGANGA on 20th November 2015. It is deposed for the Defendant that Gladinga Kenya Limited is not a party to the agreement sought to be enforced by this action as the said company never signed or sealed the lease agreement, instead Taita Academy Primary endorsed its wet stamp on the document. That the same is not sufficient to bind the Defendant or satisfy the requirements of the Law of Contract Act.
4. The Defendant avers that the execution of the subject lease agreement was not done before the directors of Galdinga Kenya Limited nor was it attested to by such directors, or supported by a resolution of the company. That the execution of the agreement was legally ineffectual and cannot found a cause of action. According to the Defendant, there was no consensus *ad idem* to create a

tenancy as Taita Academy Primary School does not own the land or the infrastructure the subject of the agreement. Thus, the Defendant states that the subject lease agreement is legally ineffectual, null and void for it was entered into by parties who had no capacity to contract and affect the land in issue.

5. The Defendant also averred that the proposed tenant and his teachers never secured registration with the Teachers Service Commission before entering into the impugned agreement as required by section 23 (2) of the Teachers Service Commission Act No. 20 of 2012 and section 50 (2) (b) of the Basic Education Act No. 14 of 2013. The Defendant further averred that the Plaintiff is in breach of the law for having established a private school yet he is not qualified to run or manage a private school and has irregularly obtained a provisional registration yet he has engaged teaching staff who are registered by Teachers Service Commission. That the Plaintiff's application seeks to benefit him from an illegality. Finally, it is the Defendant's case that it does not desire to have the Plaintiff in its premises as the Plaintiff has breached the law by failing to enter into a contract with it and instead entered into a contract with Taita Academy.
6. I have considered the submissions filed by both parties and the case law relied on. The cases referred to by the Defendant were decisions reached on merit of the case. In this instant, the matter is still at an interlocutory stage therefore the authorities are distinguishable. From the pleadings and the submissions, it is clear that the Applicant came into possession of the suit premises by dint of a lease agreement signed on 3rd June 2014. The lease was signed between the Director of the Defendant and Martin Gichuki, the Applicant. The Defendant submits that the lease is illegal as there was no company resolution to enter such agreement neither was it properly executed as required under the Companies Act.
7. The Defendant other than alluding to the illegalities of the agreement and failure of the Applicant to secure registration under the Basic Education Act and compliance with TSC regulations as regards the qualification of teachers employed by the Applicant, it has not accused the Applicant of being in arrears of rent. No rent is pleaded in the replying affidavit as outstanding. For an order of temporary injunction to be granted, the Applicant must satisfy the court that he has a prima facie case with a probability of succeeding; that he stands to suffer irreparable loss and if in doubt; the balance of convenience tilts in his favour.
8. The Defendant has served the Applicant with notice to terminate the contract which required the Applicant to vacate the suit premises by 15th November 2015. In the notice dated 6th November 2015 and annexed as *MG4* the Defendant set out the reasons for seeking the termination. The notice was addressed using the letter head of the Defendant and signed by Gladness Mganga (Mrs) who also signed the lease agreement as a director. In the lease, it sets out conditions when it will be automatically discontinued as follows;
 - Failure to pay rents as agreed
 - On detrimental behavior of the students which may affect the primary pupils and physical facilities of the institution
 - Should there be riots of any kind.
9. In the grounds of opposition and replying affidavit filed, the Defendant has not alluded to a breach of any of the special conditions set out above. Instead it alleges breach of the law and the agreement being ineffectual because it was not properly executed. The lease on the face of it shows it was entered into between the Defendant and the Applicant. It was also signed by a director of the defendant but the rubber stamp used is for Taita Academy primary. The Applicant avers the lease is valid and binding while the defendant is raising issues on the lease i.e. the effect of the lack of Defendant's resolution and sealing of the document. Whether the lease is valid or not in my view can only be answered during and after a full trial.
10. The other aspect raised is whether the Applicant has breached the sections of the law cited by the Defendant for instance section **23** of the **TSC Act** and section **50** of the **BEA no 14 of 2013** can only be established by adduction of oral and documentary evidence since the Applicant deposed that the school is registered. Further, the question to be answered is whether such breach if established can be a ground for terminating the lease. By virtue of these issues created by the pleadings for determination, I find that the Applicant has put forth a prima facie case with a probability of succeeding.

11. Both parties did not address me on the principle of irreparable loss. I will not delve into it. On the principle of balance of convenience, the Applicant is in occupation of the suit premises since June 2014. He runs a high school making it obvious that the balance of convenience tilts in his favour. On account of this and on account of prima facie case established, I find merit in the application and therefore allow it in terms of prayer 3 with costs to the abide the outcome of the main suit.
12. The parties agreed that the outcome in this application would apply to the application dated 11th November 2015 in file no ELC 298 of 2015. Consequently that application is also granted in terms of prayer 3 & 4 of the motion.

Ruling Dated and Delivered in Mombasa this 13th day of April 2016

A. OMOLLO

JUDGE