



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 168 OF 2013

ORDER OF ST. AUGUSTINE KENYA

REGISTERED TRUSTEES.....PLAINTIFF

VERSUS

ALFRED OTIENO..... 1ST DEFENDANT

GEORGE OUMA OCHIENG'.....2ND DEFENDANT

RECILA NEKESA PAMBA..... 3RD DEFENDANT

MARGARET ONGOMA ANDENJE.....4TH DEFENDANT

BENSON NYANG'OR JUMA.....5TH DEFENDANT

WYCLIFFE OCHIENG'.....6TH DEFENDANT

(BEING THE OFFICIALS OF SUPPORT

AFRICAN CHILD NETWORK)

RULING

Coming up before me for determination is the Notice of Motion dated 15th October 2013 in which the Defendants/Applicants seek for the following orders:

1. Spent.
2. That pending the hearing and determination of this Application a mandatory injunction do issue compelling Br. Nobert O. Okumu the mandatory signatory of the Defendants/ account Blessed Teresa of Calcutta High School Account No. 0700938000 Bank of Africa Limited Ruaraka Branch (hereinafter referred to as the "Account") to sign the cheques as may be drawn by the Defendants/Applicants.
3. That in the alternative to prayer (2) above, Br. Nobert O. Okumu be removed as mandatory signatory

of the Account.

4. That time for filing the Defence and Counterclaim herein be enlarged and the same filed on 4th April 2013 be deemed as duly filed.

5. That costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Defendant/Applicant, Alfred Otieno Onyango, sworn on 15th October 2013 in which he averred that he is the Chairman of Support African Child Network (SACNET) which established the Blessed Teresa of Calcutta High School (hereinafter referred to as the "School"). He averred that the Plaintiff only granted its certificate of registration to assist the Defendants to register the School and stated in their letter dated 1st September 2007 as follows:

"this means that we only lend our name to the school as sponsors of the same and will not be in any way responsible for the administration or financial support for the school."

He further averred that the Defendants invited the Plaintiff to be a mandatory signatory to the Account. He further stated that pursuant to the change of management of the Plaintiff, the current overseers thereof have attempted to take over the School by refusing to sign cheques drawn by the Defendants with the sole intent of paralyzing the School so as to take over its management through the back door. He further added that the Defendants opened the Account pursuant to the resolution of the Board of Management vide Board Meeting held on 26th March 2010 and that it is the Defendants who have from time to time introduced the Plaintiff's mandatory signatories to the said bank. He prayed that the mandatory signatory of the Plaintiff who has withheld over Kshs. 2 million sent by various donors to the School for the education and welfare of the students be removed.

The Application is contested by the Plaintiff/Respondent through its Grounds of Opposition dated 30th October 2013. Further to that, the Plaintiff/Respondent filed the Replying Affidavit of Father Dominic Kipkosgei sworn on 14th November 2013 in which he averred that it is the Plaintiff who is the registered owner of the School and not the Defendants. To prove that, he annexed a copy of the certificate of registration of the School which attested to that fact. He further averred that the land on which the School is constructed belongs to the Plaintiff and annexed a copy of the Deed of Assignment attesting to that fact. He further averred that the Defendants handed over the management of the School to the Plaintiff way back in 2010 and annexed a copy of a letter attesting to that fact. He further averred that it is pursuant to the handing over of the School to the Plaintiff that the Plaintiff became a mandatory signatory to the Account to ensure a smooth hand over of operations and that it is not true that it is the Defendants who introduced the Plaintiff's mandatory signatories to the bank. He added that despite the Defendants voluntarily handing over the School, they have thereafter failed to complete the surrender of management and the assets of the School and have proceeded to mismanage any funds received from parents resulting in the Account being overdrawn. He further averred that since the handover, the School has been wholly managed and sponsored by the Plaintiff which has continuously ensured smooth operations and timely payment of salaries and expenses and that it is untrue that the Plaintiff paralyzed the operations of the School. He added that to the contrary, it is the persistent interference of the Defendants in the running of the School and arbitrary withdrawal and diverting funds into their personal accounts that resulted in the Account being overdrawn and threatened to paralyze operations in the School. He concluded by stating that in the circumstances, the Defendants have no *locus standi* to demand for the mandatory signatory to be removed from the Account and further that they did not seek leave to file their Defence and Counterclaim out of time.

In response to that, the 1st Defendant/Applicant, Alfred Otieno Onyango, filed his Further Affidavit sworn on 27th November 2013 in which he averred that the Defendants do have *locus standi* to respond to this Application and to defend this suit. He further intimated that the issues of ownership of the School and the right to manage the School are *res judicata* vide this court's ruling on the Plaintiff's Application dated 4th February 2013. He further reiterated his previous assertion that it is the Defendants who

introduced the Plaintiff to the bank as a mandatory signatory to the Account pursuant to their Board's resolution. He decried the Plaintiff's actions to take over the School from the Defendants in the name of sponsorship.

Both the Plaintiff and the Defendants filed their respective written submissions.

The principles governing the issuance of mandatory injunctions were well encapsulated in the English case of **LOCABAIL INTERNATIONAL FINANCE LTD- VS- AGRO EXPORT AND ANOTHER (1986) ALL ER 901** as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the Defendant had attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory order.”

Going by this precedent, I am directed to consider whether there are special circumstances warranting the grant of the mandatory injunction and to ensure that it is a clear case where the court thinks that the matter ought to be decided at once. At the heart of this suit is a dispute regarding the ownership of the School and the resultant right to control the Account. The Defendants have claimed that they are the ones who established the School. The Plaintiff however asserts that the Defendants subsequently handed over both the School and the land on which it stands to them to manage the same. In support of their assertion, the Plaintiff annexed the registration certificate of the School which bears its name as the Manager as well as a Deed of Assignment by which the Defendants purportedly transferred the 4 plots on which the School stands to the Plaintiff. Much correspondence between the two warring parties has been annexed to this Application. I also note that I had earlier considered an injunction application filed by the Plaintiff which I dismissed. At this juncture, I am required to consider whether to issue the mandatory injunction sought by the Defendants compelling the Plaintiff's agent to sign cheques or removing him as a mandatory signatory to the Account. Determining who is entitled to operate the Account runs to the core of the dispute herein and is an issue that lies for determination at the main hearing of this suit. It cannot therefore be addressed at this interlocutory stage of these proceedings. I consider it prudent to put off my determination of that issue until the main suit is heard. I do not find any special circumstances warranting me to issue a mandatory injunction at this juncture as sought by the Defendants.

I will admit the Defence and Counterclaim filed by the Defendants out of time as well as the Plaintiff's Reply to Defence and direct the parties to set this suit down for hearing at the earliest possible date. Accordingly, this Application is dismissed in terms of prayers no. 2 and 3 and prayer no. 4 is allowed. Costs shall be in the cause.

DELIVERED AND DATED AT NAIROBI THIS 23RD DAY OF JANUARY 2015.

MARY M. GITUMBI

JUDGE