**Mwangi v Braeburn Ltd**

**Division:** Court of Appeal of Kenya at Nairobi

**Date of Judgment:** 9 July 2004

**Case Number:** 12/04

**Before:** O’Kubasu JA, Onyango Otieno and Ringera JJA

**Sourced by:** LawAfrica

**Summarised by:** A Mwanzia

*[1] Civil procedure – Injunction – Mandatory injunction – Principles for grant of interlocutory*

*mandatory injunctions – Order XXXIX, rule 1, 2 and 3 Civil Procedure Rules.*

*[2] Contract – Privity – Contract between school and parents for enrolment of minor – Whether minor*

*may sue on the contract.*

**JUDGMENT**

**O’KUBASU JA, ONYANGO OTIENO AND RINGERA JJA:** The appellant Dickson Mwangi (hereinafter referred to as “Dickson”) is a minor suing through his next friend and father Moses K Mwangi. The respondent, Braeburn Limited, is a limited liability company trading as Braeside School. (The school). In a plaint filed in the superior court and dated 21 March 2003, Dickson pleads that he enrolled in the school on or about September 1999 and completed his studies on or about June 2003; that during that period his school fees were duly and promptly paid and at the time of leaving the school he had no fees in arrears and owed the school no dues; that when he joined the school he was required under the regulations to deposit a refundable caution money in he sum of KShs 6 000 which became due for collection upon his completion and successful clearance with the school; that it was an express and/or implied term of enrolment and the contract pursuant thereto that upon his completion with the school he would be issued with a school leaving certificate, caution money would be refunded and the certificate of the final examination would be released to him once the results were released by the examining body; that he completed school in June 2002 and the final results were released on or about September 2002 but the school refused to release the leaving certificate, refund the caution money and release the final examination certificate; and that in consequence of the school’s breach of the above conditions, he has suffered loss and damages, mental anguish, and has lost several opportunities of being sponsored by his current school for several activities and openings. He accordingly prayed for (*a*) an order compelling the school, its servants’ agents, administrators and any or all the persons to release to him this school leaving certificate and the final examination certificate, (*b*) a declaration that the continued holding of the said certificates was illegal and unlawful and without justifiable cause, (*c*) KShs 6 000 being caution money, and (*d*) general damages for breach of contract In a statement of defence filed on 3 April 2003, the school denied the legality and the capacity of the next friend to file the suit. It also denied that Dickson enrolled in the school in the manner pleaded and stated that Dickson together with two other children namely; Angel Wanjiru Mwangi and Christopher Kitabu Mwangi, were admitted to the school upon the express application by their parents/guardians namely Moses K Mwangi and Elizabeth Wanjiru Mwangi by way of application forms dated 28 August 1999 which were accepted by the school. The school further stated that privity of contract was between itself and the parents and that the responsibility of paying school fees was upon the said parents. It denied the averments by Dickson and stated that he had no *locus standi* as against the school in respect of all claims raised; that even the sum of KShs 6 000 was not refundable at all to the parents as a sum of KShs 146 553 was due and owing from them in respect of one term’s fees charged in lieu of notice not issued by them upon the withdrawal of their children from the school and books to the value of KShs 10 250 issued to the said children for which books to the value of KShs 3 000 were held by Dickson) had not been returned to the school; that Dickson had not suffered any loss, and if he had, the school was not liable for the same, and that the caution money and the certificates could only be released to the parents or their nominees upon compliance with the terms and conditions of the contract and by specifically settling the sum of KShs 146 553, duly outstanding, returning all the books (or paying for their value) held by all the children and upon clearing with the school’s various departments. The school further stated that it has a lien over the caution money and certificates for as long as the parents have not met their obligations in accordance with the terms of the agreement, stipulations, customs and usage as are practised in the education sector. Last, but not necessarily the least, the school pleaded that Dickson’s suit was incurably defective, brought in bad faith; was vexatious, baseless in law, and an abuse of the Court process only aimed at assisting the parents to reap the benefits of a contractual arrangement without honouring their obligations to the school. It asked that Dickson’s suit should be dismissed or struck out with costs to be met by his advocates or his father Moses K Mwangi. In a reply to the defence, Dickson reiterated the contents of the plaint and denied the allegations contained in the defence save where the same consisted of admissions. He stated that he had capacity to sue the school through the next friend. He confirmed that he was admitted to the school in the year but denied that he was enrolled with Angel Wanjiru Mwangi and Christopher Kitabu Mwangi upon the express application of their parents by way of application forms dated 28 August 1999 which were accepted by the respondent. Dickson also denied the averment by the school that privity of contract was between his parents on the one hand and the school on the other and that the responsibility of payment of fees was upon the said parents. He further stated that he had a cause of action and a *locus standi* to protect his rights which rights could not be contracted away by the school and his parents. He averred that he could enforce a cause of action arising out of the pupil-school relationship and all the terms therein implied and it was those rights that he sought to enforce. He further denied that the school had a lien over the caution money and certificates as pleaded in the defence. And of course he denied that his suit was defective and unmeritorious. On 21 March 2003, Dickson applied to Court by way of chamber summons expressed to be under Order XXXIX, rules 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act and all other enabling provisions of the law for an order to compel the school to release to him his school leaving certificate and the final examination certificate unconditionally pending the hearing and determination of the suit. Although it was not so stated, the application was plainly for an interlocutory mandatory injunction. The application was heard and determined by the senior resident Magistrate (MA Murage (Mrs)) who allowed it. In a short ruling she stated as follows: “From the annexure of the respondent marked as B1 (the application for registration forms) it is quite clear that the parents signed individual contracts for each child. There are no fees owing in respect of the applicant (Dickson). The applicant is not a party to the contract and does not seek relief from the contract but seeks under his own rights to get the proceeds of his work. This has nothing to do with the contract between the parents and the school. If there is a breach of contract between parties then the right channel is to seek specific performance or damages thereof, applicant is a third party to those issues and no sufficient reason has been advanced to justify the continued retention of the certificate. Consequently, I find that the application is meritorious. I allow it as prayed”. On its part, the school had on 3 April 2003 moved the Court pursuant to the provisions of Order VI, rule 13(1)(*a*), (*b*), (*c*) and (*d*), Order XXXI, rules 1 and 2 of the Civil Procedure Rules, and section 3A of the Civil Procedure Act for orders that Dickson’s suit be dismissed or struck out and the costs of the suit and the application be borne by his father or his advocate. The application was made on the grounds that the filing of the suit contravened the mandatory provisions of law in that no written authority by the next friend was made and filed before or on the institution of the suit. Dickson had no *locus standi* against the school, and the whole suit was a sham, unmeritorious, vexatious, embarrassing, frivolous and an abuse of the Court process. That application was heard and a ruling delivered on 10 April 2003. It was dismissed by the same Senior Resident Magistrate on the grounds, firstly, that although no written consent by the next friend had been filed when the suit was filed, the omission was a curable defect which did not warrant the striking out of the suit; and secondly, the suit disclosed such triable issues as whether the minor could seek a declaration or his right without suing through the parents, whether the minor was a third part in the suit or there were direct issues between him and the school, whether the contract between the school and his parents barred him from seeking declarations of his rights and whether his parents had complied with the requirements of the specific contract between them and the school as concerns the minor and, in those premises, the suit deserved to go for a full hearing. In the record of proceedings it is clear that the application dated 3 April 2003 was heard and determined prior to the one of 21 March 2004. The school was dissatisfied with the ruling and orders of the subordinate court. It filed civil appeal number 230 of 2003 against the order refusing to dismiss or strike out the suit and civil appeal number 317 of 2003 against the order of mandatory injunction to release the certificates to Dickson. Both appeals consolidated and canvassed before Ransley J. After hearing arguments, the Learned Judge of the superior court on 28 November 2003 delivered a concise ruling in the following words: “In this suit, the minor is sent to school in pursuance of a contract between himself and the school. No privity of contract existed between the school and the child. If default occurs in the obligations imposed by the contract it is for the principal participants to enforce them individually. In my view the minor has no right in his own right to the certificate or exam results. These are matters, which must be dealt with by the parents and the school. Thus if the school unreasonably withholds a school certificate, it is the parent who has the property in the certificate and he is the person with the right to seek its return. In the result, I set aside the ruling of the Magistrate in the lower court with costs to the appellant. In view of my decision herein, the appeal against the ruling of the Magistrate in civil appeal number 230 of 2003 is academic as the suit should proceed to hearing as ordered by the Magistrate”. It was now the turn of Dickson to cry. He has appealed to this Court. In his memorandum of appeal he has listed the following eight grounds of appeal: “1. The Learned Judge erred in fact and in law in failing to decide on all the issues presented before the Court and making a decision against the weight of the arguments and the law thus causing a miscarriage of justice. The Judge made no conclusive decision on the matters presented. 2. T he Learned Judge erred in fact and in law in holding that the appellant cannot sue the respondent for the release of his certificates. 3. T he Learned Judge erred in fact and in law in purporting to hold that the respondent was entitled to hold the appellant’s certificate over the disputed withdrawal penalties in respect of his brother and sister when in fact the appellant responsibilities and obligations to the respondent had fully been complied with. The Learned Judge failed to appreciate the fact the appellant cleared school in June and the certificate was available in September 2002 and the purported breach the reason for which the respondent is withholding the certificate, arose in December 2002 long after the respondent became liable to release the certificate to the appellant. 4. T he Learned Judge erred in holding that the appellant had no right in his own right to the certificate and examination results from the appellant. 5. T he Judge erred in law in holding that it is the appellant’s parents who have property in the appellant’s certificate and the parent is the one with the right to seek its release. 6. T he Judge erred in finding that the issue of the appellants certificate was a subject of the contract entered into between his parents and the respondent when he ought to have found out that the release of certificate by the respondent was not provided for in the enrolment forms signed by the parent and respondent and the appellant’s right to his certificates was a separate right capable of being enforced by the appellant. 7. T he Learned Judge erred in law in failing to appreciate the law applicable in protecting minors rights and find the respondent and the appellant’s parent could not and cannot in law contract away the child’s rights. 8. T he Learned Judge erred in failing to find that the appellant’s right to his certificate is a fundamental right which affects his entire future career and livelihood and should not be inhibited by selfish and unilateral motives. The appellant had been denied his right to education and the withholding of the certificates was not only unlawful, illegal against the public policy but also immoral”. He prayed for the appeal to be allowed with costs and for the decision and order appealed from to be set aside in their entirety and the withheld certificate to be released. The school has in turn filed a notice of grounds for affirming the decision of the superior court in civil appeal number 317 of 2003. In the notice of grounds for affirming the decision upon grounds additional to those relied upon by the superior court, the school relies on the following additional ones: (1) That the Learned Judge erred in law and in fact by not finding that the plaintiff’s application dated 21 March 2003 in Chief Magistrate Court case number 2787 of 2003 was fatally defective and that the whole suit was incurably defective; (2) That the Learned Judge erred in law and in fact by not finding that the plaintiff/applicant (appellant) had not satisfied all the other principles covering issuance of mandatory injunctions and of prayers sought; and (3) That the Learned Judge erred in law and in fact in failing to conclusively find that the plaintiff and his parents had not satisfied their obligations with the defendant (respondent) and that the defendant was thus entitled to retain the suit certificates. And in the cross appeal in respect of KCCA Number 230 of 2003, the school contends that the said decision ought to be varied or reversed to the extent and in the manner and on the grounds: (1) That the Learned Judge erred in fact and in law in failing to allow the appeal and set aside the subordinate court’s ruling/decision delivered on 10 April 2003 and allow the defendant’s (respondent’s herein) application dated 3 April 2003 hence strike out the plaintiff’s (appellant’s herein) Chief Magistrate Court case number 2787 of 2003 with costs; (2) That the Learned Judge erred in fact and in law in ordering that Chief Magistrate Court case number 2787 of 2003 do proceed for full hearing whereas he had held/found that the plaintiff (appellant herein) has no *locus standi* against and privity of contract with the defendant (respondent herein), and (3) That the Learned Judge erred in law and in fact by failing to find that the plaintiff (appellant herein) had failed to comply with Order XXXI, rule 1 of the Civil Procedure Rule and that it was incurable in the circumstances. It asks the Court for orders that High Court civil appeal number 230 of 2003 be allowed, that the decision or order that Chief Magistrate Court case number 2787 of 2003 (Milimani Commercial Courts) do proceed to full hearing be set aside, and the suit be struck out with costs to itself. Having heard and considered the lengthy submissions by counsel for the parties, we think it is necessary to restate what the matter before this Court is all about. The pitch and marrow of it is whether the superior court was right to allow the school’s appeal against the order of mandatory injunction made by the subordinate court on 22 May 2003, and to decline to deal with the school’s appeal against the order of 10 April 2003 declining to strike out the suit. With regard to the appeal against the order of mandatory injunction, it is clear the Learned Judge found there was no contract for the provision of education services as between Dickson and the school: the contract was between his parents and the school and, accordingly, only the parents could sue for any alleged breach thereof. That being so, the order for mandatory injunction made in favour of Dickson could not stand. We entirely agree with the findings and conclusions of the Learned Judge of the superior court. Dickson’s suit was predicated on the plaint filed. From the said plaint and in particular paragraphs 6 and 7 thereof, it was clear that his cause of action was breach of contract for the provision of education services and associated benefits such as leaving and examination certificates upon successful completion of school. And yet from the material before us, it was clear that the contract for the provision of education services to him was constituted by the application for registration and its acceptance. That application was made by his parents and accepted by the school. The minor was not a party thereto even though it was made for his benefit. That being so, the finding by the superior court that Dickson was not privy to the contract and he could not therefore sue on it cannot be faulted. The Judge was right that the minor had no right of his own to the certificate or examination results independent of the contract between his parents and the school. It was fallacious to suggest, as was suggested by counsel for the appellant, that the minor had an independent contract or quasi-contract with the school and that the certificates were his own property. He could never have been in the respondent’s school for a start to earn the certificates without the enrolments contract between his parents and the school. If any authority were required for the above elementary propositions of law, we would refer to the following in *Halsbury’s Laws of England* (3 ed) Volume 8, Paragraph 110, where the learned editors posit the law as follows: “As a general rule a contract affects only the parties to it, and cannot be enforced by or against to it, and cannot be enforced by or against a person who is not a party, even it the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it”. And at paragraph 1241 it is posited that: “In schools which are not maintained by local education authorities the relations between the parents and the proprietor of the school are governed by the terms (express or implied) or the contract for the education of the child”. The equivalent of Britain’s non-maintained schools in Kenya would be private schools such as the one Dickson attended. Apart from want of privity of contract between Dickson and the school, we think his application for mandatory injunction ought not to have been allowed on any proper consideration of the principles governing the grant of mandatory injunctions. In the *Despina Pontikos* [1975] EA 38 at 57, the East African Court of Appeal (the predecessor of this Court) said: “. . . this Court has held more than once that interlocutory mandatory injunctions should only be granted with reluctance and only in very special circumstances”. And *in Kamau Mucoha v The Ripples Ltd* civil application number Nai 186 of 1992 (UR) this Court held that temporary mandatory injunctions will only be granted exceptionally and in the clearest cases. In England, in the case of *Locabail International Finance Ltd v Agroexport* [1986] 1 All ER 901, the Court of Appeal held that: “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 interlocutory 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 injunction”. Even on the Magistrate’s own conclusions with regard to the application to strike out the suit, that the said suit raised several triable issues which deserved to go for a full trial, it could not be said that Dickson’s case was a very clear one. On the contrary, it was a most contentious one. So whichever way we look at the matter we cannot but affirm the decision of the superior court to set aside the order of mandatory injunction granted to Dickson. With respect to the High Court appeal against the Magistrate’s order refusing to strike out the plaint, we think that the Learned Judge erred in finding the same to be academic and further ordering that the suit should proceed to hearing as ordered by the Magistrate. The Learned Judge having found that Dickson had no privity of contract with the school and that he could not therefore seek the reliefs he sought for breach of contract, it inexorably followed, in our view that the suit ought to have been struck out. It was therefore an error to find the appeal to be academic and to order that the suit to proceed to hearing. There was no point in ordering a suit which was in the circumstances frivolous and vexatious to proceed to trial. To summarise, although we are disturbed by the school’s withholding of Dickson’s certificates and do not encourage such a practice, we have come to the clear conclusion that in law, Dickson’s suit was unsustainable for want of privity of contract between him and the school. We also feel sad that the minor is the victim of the tussle between his parents and the school. The upshot of the matter is that we dismiss the appeal with costs and allow the cross appeal respecting High Court civil appeal number 230 of 2003. We accordingly set aside the order that Chief Magistrate Court case number 2797 of 2003 (Milimani Commercial Courts) do proceed to full hearing and substitute therefore an order striking out the appellant’s said suit with costs to the respondent. The costs of the appeal and of the superior court shall be paid by Dickson’s father and next friend.

Those, then, are the orders of the Court.

For the appellant:

*Information not available*

For the respondent:

*Information not*