



**Abdalla & 3 others v Shiraz & 4 others (Civil Case 106 of 2018)  
[2022] KEHC 13186 (KLR) (23 August 2022) (Judgment)**

Neutral citation: [2022] KEHC 13186 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 106 OF 2018  
DO CHEPKWONY, J  
AUGUST 23, 2022**

**BETWEEN**

**BILAL JAFFER KASSAM ABDALLA ..... 1<sup>ST</sup> APPLICANT  
SHAKIL ALI MOHAMED HASSAN ..... 2<sup>ND</sup> APPLICANT  
ABDULNAWAZ HAROON MOHAMED ..... 3<sup>RD</sup> APPLICANT  
IMTIAZ ALI KASSAM ..... 4<sup>TH</sup> APPLICANT**

**AND**

**SHIRAZ MOHAMED THAIM ..... 1<sup>ST</sup> RESPONDENT  
OMAR HUSSAIN DOSANI ..... 2<sup>ND</sup> RESPONDENT  
AHMED ABDULATIF KANA ..... 3<sup>RD</sup> RESPONDENT  
HASSAN ABDUL KEKLA ..... 4<sup>TH</sup> RESPONDENT  
TARMOHAMED ABBAS KANA ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This is a Ruling on Originating Summons filed by four members of the, The Muslim Bhadala Jamat Mombasa, namely Bilal Jaffer Kassam Abdalla, Shakil Ali Mohamed Hassan, Abdulnawaz Haroon Mohamed and Imtiaz Ali Kassam sought a raft of orders namely:-
  1. That the application be certified urgent and be heard *ex-parte* in the first instance (spent).
  2. That a declaration do issue that the respondents and each of them hold constructive trust for and on behalf of the applicants and all the members of the Muslim Bhadala Jamat Mombasa.
  3. That declaration do issue that the applicants are entitled to full, fair and frail disclosure of all financial activities engaged in by the management committee or any subset thereof including,



but not limited to the management books of accounts and source documents of the Muslim Bhala Jamat Mombasa.

4. That pending the hearing and determination of this suit, the respondents members of the management committee, members of the Board of Trustees, employees, servants and/or agents or otherwise howsoever, be restrained from:-
  - i. Conducting, holding and otherwise transacting the proposed special General Meeting scheduled for November 24, 2018.
  - ii. Making payments to third parties, transacting any withdrawals howsoever from any of the bank accounts of the Muslim Bhadala Jamat Mombasa maintained at the Gulf African Bank Limited, Diamond Trust Bank Ltd, and/or any other bank or financial institution howsoever and/or;
  - iii. Restrain any cash receipts or funds received for and on behalf of the Muslim Bhadala Jamat Mombasa.
  - iv. Disposing of any of the assets of the Muslim Bhadala Jamat Mombasa.
5. That in the alternative, and without prejudice to prayer no 4 above, that any business purportedly conducted on November 25, 2018 be declared to be contrary to the Constitution and by-laws of the Muslim Bhadala Jamat Mombasa and the Constitution of Kenya.
6. That the respondents and each of them be compelled to provide the following documents to the applicants and to allow them and any concerned members of the Muslim Bhadala Jamat Mombasa an opportunity to inspect the same and undertake an inspection of and/or audit:-
  - a. Audited financial statements for the period 2013 – 2017.
  - b. Hard copies of the books of accounts for the period 2013-2017 including purchase ledgers, bank books.
  - c. Original source of documents in support of amounts derived in the books of accounts including invoices and duly authorized/approved petty cash vouchers.
  - d. Original bank statements for Muslim Bhadala Jamat Nursery School, Muslim Bhadala Primary School and Muslim Bhadala Secondary School.
  - e. Fixed assets register.
  - f. Hall hire booking registers in respect of Jamat members and third party communities.
  - g. Serially numbered receipt books.
  - h. Stock records
  - i. Debtors and creditors listings
  - j. Payrolls
  - k. Loan agreements and repayment schedules.
  - l. Register of students enrolled in three levers.
  - m. Tender documents for various projects carried out by the Jamat.
  - n. Flow diagrams detailing the accounting and internal control systems.



- o. Minutes of the management committee and/or board of trustees for the period 2013 to date.
  - p. Any other documents that may be necessary for the proposed audit.
7. Such other or further relief as this honourable court may deem appropriate to make.
2. The same is supported by the grounds on the face in summary they are broken down as follows: the first, second and third grounds give a history of the society and its objects; the fourth, fifth, sixth and seventh grounds accuse the chairman, the hon secretary and the treasurer of poor management and impropriety, which they are protecting by colluding to exclude the applicants from participating in the affairs of the society. Lastly, they are alleged to have failed to circulate any financial statements as per the constitution of the society, a result of which they have exposed the applicants and other poor members to immense suffering.
  3. The applicants simultaneously filed a Notice of Motion dated November 22, 2018 seeking the same orders in the Originating Summons while citing the same grounds, save that they introduced limited documents through the affidavit sworn by Bilal Jaffer Kassam Abdalla on the same date. In the Motion, they sought to restrain the Respondents from carrying out their normal functions pending the hearing and determination of the Originating Summons.
  4. The honourable court heard the Motion *ex-parte* and granted orders restraining the respondents from conducting the scheduled meeting for November 25, 2018.
  5. To defeat the court order, the respondents issued another Notice seeking to conduct a meeting on December 7, 2018 which action triggered the Notice of Motion application dated December 5, 2018 under certificate of urgency. The honourable court certified and heard the Motion whereby it ordered service within 3 days and fixed the hearing on December 11, 2018.
  6. The respondents opposed the Originating Summons and the Motion by a Replying Affidavit of Shiraz Mohamed Thaim, the chairman of the respondents dated December 3, 2018 and January 28, 2019 challenging the jurisdiction of the court. They and asserted that the applicants were misconducting themselves as they had attended December 7, 2018 special general meeting and that they were no longer members.
  7. The parties were directed to dispose of the application by way of written submissions on January 19, 2019. The applicants filed their written submissions dated March 5, 2019 and April 15, 2019. The respondents filed their written submissions on March 19, 2019.
  8. In the intervening period, on August 2, 2019, the court referred the matter for mediation. The matter was taken for mediation on September 9, 2019 and allocated MFN/291/2019. The mediation report dated August 21, 2020 was filed in court the same day. The mediation returned a report that the parties had not reached a settlement. The mediator reported that parties rigidly held onto their respective positions and elected that the court resolves the dispute. The deputy registrar on August 24, 2020 officially closed mediation and referred the file to the registry for the fixing before the trial court.
  9. Parties appeared before court on December 15, 2020 and agreed to dispose of the Originating Motion based on the material already on the court file. The applicants chose to rely on the following:-
    1. Two Notices of Motion dated November 22, 2018 and December 5, 2018.
    2. Supplementary Affidavit dated December 11, 2018.
    3. Written submissions dated March 5, 2019 and April 15, 2019.



4. List of authorities dated December 11, 2018.
10. On the part of the respondents, they elected to rely on the Replying Affidavit dated December 3, 2018 filed on December 4, 2018, Replying Affidavit dated January 28, 2020 and written submissions dated March 19, 2019.
11. I have gone through all material on record and in particular what parties wish to rely on in support of their respective positions. I have also perused their written submissions and the authorities being relied upon.
12. The prayers sought in the two Notices of Motion dated November 22, 2018 and December 5, 2018 were fashioned on the basis of the Originating Summons dated November 22, 2018. It is the reason the applicants have decided to rely on the material supporting the Motions. The respondents on their part have chosen to similarly rely on material they used to reply to the Motions.
13. The issues I will consider are as follows:
  - a. Whether the applicants have *locus standi* to prosecute this suit.
  - b. Whether the suit should be dismissed for want of form.
  - c. Whether the respondents are acting in breach of the society's constitution.
  - d. What orders should be made by court.
  - e. Who is to bear the costs of the suit.

**a. Whether the applicants have *locus standi* to prosecute the suit.**

14. The respondents have submitted that the applicants were expelled on December 7, 2018 in a special general meeting called pursuant to clause 9 of the Constitution of the society. They attended and were procedurally expelled. The defence that the attendees were minors was not substantiated hence they are non-members. The applicants have submitted that the suit was filed on November 22, 2018 and the meeting in which it is alleged they were expelled was held on December 7, 2018, whilst there were orders in place.
15. Membership of the society is acquired as set out at clause 3 which states as follows:-  
Membership

“[a] Any person over the age of 18 years shall be eligible for the membership of the Jamat.

[b] The application for membership of Jamat shall be submitted to the Managing Committee of the Jamat on a prescribed form and shall be accompanied by an annual subscription of Kshs 500 per annum per person.

[c] The Managing Committee of the Jamat shall have the absolute power to either approve or reject any application for membership without assigning any reasons thereto.

Once membership is acquired, Clause 4 lists privileges a membership provides for instance (to be notified to attend General Meetings, of all Clauses and widows and dependants under the age of 18 years of deceased's members are entitled to the assistance of the Jamat). One ceases to be a member by virtue of Clause 5 of the Jamat Constitution when he delays the subscription and is given 15 days Notice to pay and continues. However, once he pays all the arrears, he is re-admitted into membership. Clause 6(b) gives two instances when a member can be expelled, through a recommendation by the Managing Committee and at an Extra-



Ordinary General Meeting of the Jamat by a Resolution of 2/3 majority, when a member is guilty of conduct adversely affecting the dignity of the Jamat or prejudices its object, general interests and welfare of the Jamat or when one has contravened any of the Constitution of Jamat.

16. In in all, the above provisions of the Constitution have to be satisfied before a member is expelled. A member cannot be expelled because he is seeking to know how the society's finances and general affairs are being managed and conducted.
17. In addition, there were orders made by the court stopping a meeting that was to be held by the Jamat which were in force and served upon the Jamat officials. I find and hold that the special extra-ordinary meeting of December 7, 2018 was held in violation of the court orders which were still in force. Hence, anything that was done in that meeting was therefore a nullity.
18. In the end, I find the applicants have *locus standi* to institute the current suit as the Originating Summons were instituted before the alleged meeting held on December 7, 2018, whilst the applicants were bonafide members.

**b. Whether the suit should be dismissed for want of form.**

19. The new jurisprudence on technicalities has developed around article 159(2)(d) of the Constitution 2010. The provision encourages parties and courts to lean more on substantive justice so as to accord do parties justice, which means courts should lean more on substance, but not form. It is believed that the court will not be resolving the matter with finality if the arguments to strike out the summons are upheld as an applicant could come back to court in a different form seeking the same remedies. It is for this very reason that the courts have been given latitude by the Constitution to do justice and save on precious judicial time. I thus find and hold that the suit is properly before court.

**c. Whether the respondents are acting in breach of the Constitution.**

20. Clause 23 relates to inspection of accounts and list of members. It provides as follows:-

“The books of accounts and all documents relating thereto and a list of members of the Jamat shall be available for inspection at the registered office of the Jamat by an officer or member of the Jamat on giving not less than 14 days notice in writing to the Jamat”.
21. At paragraphs 26 and 27 of the Replying Affidavit, the respondents have stated that the inspection of accounts and books is as per the Constitution and they deny that they have denied access of the same to the applicant. The function of courts is not to interfere in private affairs of Society's management, save where it is demonstrated that the offices are acting in violation of their own Constitution.
22. The Constitution gives the officials tools to own the affairs of the society. Clause 16 spells out the powers and functions of the management committee. It has the mandate to oversee the day to day activities of the society. Clause 15 gives the officials duties and powers to run the affairs of their offices. For a court to interfere with such affairs of the society, one has to demonstrate that these two bodies have failed in discharging their mandates. For instance, the members have a right to raise claims of audit at annual general meetings, thus one has to demonstrate that at such a meeting, they were denied the chance to do so and/or that the meetings are not being held by the Society.
23. Clause 7 of the society constitution states as follows:-



## MEETINGS

“Annual general meetings shall be convened not later than March 31 of each year to transact the following business;

a. To discuss and decide any questions of which fifteen days’ Notice in writing may have been given by a member prior to the date of the meeting”.

The above provisions empower a member to raise any questions on a matter where there is a dispute and after giving 15 days Notice as required by Clause (b), disputes on audited accounts can be questioned at this stage before they are adopted.

24. Under clause 8(b) a quorum of 50 fully paid up members can requisition an extra ordinary general meeting whereby the secretary shall convene such a meeting to discuss the matter. Where the secretary fails to convene the meeting, then the requisitionist shall be entitled to call such a meeting by giving 30 days notice to the members, by virtue of clause (8)(b). Clause 9 gives the managing committee power to call special general meeting by giving 7 days notice to members.
25. The above exposition command itself to the fact that members are given a wide latitude to ventilate their concerns soberly, orderly and in a civilized manner according to their constitution, hence a court of law should be a place of last resort.
26. I have perused the Supporting Affidavit sworn by Bilal Jaffer Kassam Abdalla on November 22, 2018 and the annexures. BK-1 being a letter requesting the applicants audit team to enter into accounts of the society. In my view, the request does not conform to provisions of clauses 7 and 8. Financial matters are sensitive and they cannot be exposed in the manner proposed in that letter dated August 24, 2018.
27. I therefore find and hold that the applicants are not entitled to the prayers sought in the Originating Summons dated November 22, 2018. I make the following orders:-
  1. Prayers 1, 2, 3, 4, and 6 are dismissed.
  2. The officials and members are directed to call for an annual general meeting in accordance with the Constitution of the society if no meeting has been called to date.
  3. Each party to bears its own costs.

**JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23<sup>RD</sup> DAY OF AUGUST, 2022**

**D O CHEPKWONY**

**JUDGE**

**In the presence of:**

**Mr Gitahi counsel holding brief for M/S Waihenya counsel for respondent**

**2<sup>nd</sup> applicant present**

**Court assistant - Sakina**

