



IN THE HIGH COURT

AT HOMA BAY

CIVIL APPEAL NO. 3 OF 2013

BETWEEN

ZABURI MUSA HAMISI.....1ST APPELLANT

FARAJ NYIKURI.....2ND APPELLANT

AMIIR ABUSO AURO.....3RD APPELLANT

THWAHIB ABDUL ODINDO.....4TH APPELLANT

AND

ISHMAEL HILLON.....1ST RESPONDENT

HASSAN KERRON.....2ND RESPONDENT

AHMED EDRIN BAGAYA.....3RD RESPONDENT

IBRAHIM JIRRO.....4TH RESPONDENT

ALI ABDULLAHI.....5TH RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. L. N. Waigera, SRM

in Homa Bay Senior Resident Magistrate's Court Civil Case No. 80 of 2011

dated 20th December 2012)

JUDGMENT

1. The suit filed in the subordinate court concerned the management and administration of Jamia Mosque situated within Homa Bay Town. The respondents, who are the members of the Homa Bay Jamia Mosque Committee (“the Committee”) running the mosque, sued the appellants for an, “*Order of injunction restraining the defendants from interfering with the plaintiffs either directly or indirectly as the duly elected Homa Bay Jamia Mosque Committee Members.*”

2. The grounds for relief were set out in the plaint dated 11th August 2011 as follows;

[10] *The plaintiffs claim against the defendants is for orders of injunction to restrain the*

defendants from harassing or in any way continuing to interfere with the plaintiffs as the duly elected Homa Bay Jamia Mosque Committee members.

[11] The plaintiffs have averred that on diverse dates in the year 2010 and 2011 the defendant engaged in various threats to the plaintiffs and their businesses that surround the mosque.

[12] Further and in a bid to frustrate and or cause annoyance to the plaintiffs, the defendants have and/or caused to be written letters that are meant to harass and/or cause annoyance and panic among the plaintiffs.

3. In their joint statement of defence dated 20th September 2011, the appellants denied the respondents' claim. They pleaded that claim was vague and devoid of any reasonable cause of action and that the issues raised involved the management of the mosque which could only be handled by the Islamic court or Islamic Council. They contended that the respondents could not be granted equitable relief and that they had no *locus standi* to sue the appellants.

4. After hearing the suit, the learned magistrate granted the injunction in favour of the respondents hence precipitating this appeal. The gravamen of the appellants case as summarised by Ms Nyarige, counsel for the appellants, is that the case before the court concerned the running of a mosque and the injunction granted by the court, being permanent in nature, would impede the smooth running of the mosque. She contended that all parties have a say in what the Committee members do and as such the injunction restrains the participation of members in the affairs of the mosque. Counsel submitted that there was no evidence of threats or interference but only correspondence concerning the construction of the mosque which could not be construed in such a manner as to entitle the respondents to an injunction.

5. Mr Nyauke, counsel for the respondents, urged that the learned magistrate appreciated the facts and the law in granting the injunction to restrain the appellants from interfering with the work of the Committee. He contended that the injunction did not restrain the appellants from participating in the affairs of the mosque as they were free to worship and attend other activities. In his view, quashing the injunction would result in chaos at the mosque.

6. As this is the first appeal, this court is cognisant of its duty as succinctly summarised by the East Africa Court of Appeal in ***Selle v Associated Motor Boat Company Ltd [1968] EA 123, 126*** as follows:

Briefly put they [the principles] are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

7. It is common ground that the appellants and respondents are worshippers at the Jamia Homa Bay Mosque and what emerges from the evidence of the witnesses is a dispute concerning certain structures around the property upon which the mosque is built. The key issue is whether the subordinate court could issue a permanent injunction to restrain the appellants from interfering with the Management Committee of the Mosque ("the Committee"). The witnesses on either side dwelt on the issue of divisions amongst the mosque attendants. The respondents called the following witnesses; Ishmael Hillon (PW 1), Ahmed Edin Bagaja (PW 2), Ali Abdullahi (PW 3), Charles Okinyi Olela (PW 4). On the behalf of the appellants; Zaburi Musa (DW 1), Faraj Nyikuri (DW 2), Charles Okinyi Olela (DW 3), Amir Abuso Auro (DW 4) and Violet Lamu (DW 5) testified.

8. There is no dispute that the genesis of the dispute between the appellants and the respondents is a series of correspondence which the 1st appellant wrote to the Town Clerk of the then Homa Bay Township ("the Town Clerk") complaining about the construction of unauthorised structures around the mosque. The respondents' relied on these complaints to argue that the correspondence constituted interference and

threats entitling them to an injunction.

9. The letters produced in evidence were as follows. By letter dated 7th May 2010, the 1st appellant wrote to the Town Clerk requesting him to demolish the structures around the mosque. He wrote another letter dated 12th July 2011 to the Town Clerk once again requesting his office demolish the structures and to allow Trustees to build permanent structures on the mosque premises. In a letter dated 8th September 2011 to the Town Clerk, the 1st appellant wrote to complain that roof of the mosque was not in conformity with the building code and should therefore be demolished. PW 4 confirmed that the Town Clerk received this correspondence. In addition to the letters addressed to the Town Clerk, the appellants wrote to the Chairman of the Committee a letter dated 1st August 2011 seeking dissolution of the Committee on account of lack of accountability and transparency. They also sought removal of hawkers from the mosque premises to pave way for the construction of an education centre within the mosque grounds. The appellants' case was that as trustees, they are entitled to raise issues about the mosque as members.

10. Naturally, this correspondence did not go well with the respondents who claimed that they were the elected to the Committee on 28th January 2008. According to Ismail Hillon (PW 1), the appellants were not present at the meeting and from 2010, the appellant were threatening them and inciting the other mosque members by dividing them along ethnic lines. The totality of the respondents' evidence was that the Committee was entitled to run the affairs of the mosque without interference from the appellants and the letters written to the Town Clerk constituted threats and harassment.

11. In dealing with such a matter between members of an association, religious or otherwise, the general principle that has emerged from our jurisprudence with regard to internal management of such associations is that the courts are very reluctant to interfere with their internal management unless the Constitution of the association is breached or there is contravention of the rules of natural justice (see ***Patel and Others v Dhanji and Others* [1975] EA 301 and *Gitao & 5 Others v Kenya National Chamber of Commerce & Industry* [1990] KLR 360**). In ***Tanui & 4 Others v Birech & 11 Others* [1991] KLR 510** the Court of Appeal summarised this principal as follows:

While it is not the business of the High Court or the Court of Appeal to involve itself in the day to day running of institutions such as the Church, colleges, clubs and so on, yet where it is shown that such an organization is conducting its affairs in a manner contrary to its constitution and to the detriment of its members, then the High Court and the Court of Appeal would not only be entitled to but is under a duty to compel it, either, by injunction or otherwise, to obey its constitution.

12. I therefore hold that in order for the respondents to succeed in obtaining a permanent injunction, they had to demonstrate that they had a right founded on a Constitution which entitled them to be in office and show that the appellants' were interfering with the running of the Committee in accordance with that Constitution. It is the Constitution that regulates the relationship of the members *inter se* and also that of the members and the Committee. The respondents' did not produce the Committee's Constitution in evidence hence it is difficult to see the basis upon which the appellants were interfering with the activities of the Committee. While the appellants' acknowledged the existence of the Committee, in a case such as this, the parameters of the injunction can only be determined by reference to the constitutive document regulating the relationship between the members of the Mosque. In the absence of the Constitution, the order restraining the appellants from, "[F]rom interfering with the plaintiffs either directly or indirectly as the duly elected Homa Bay Jamia Mosque Committee Members" becomes wide, amorphous, indeterminate and incapable of enforcement.

13. I have evaluated the correspondence complained of and I do not consider letters written to the Town Clerk a threat or a form of harassment. As a public officer, the Town Clerk receives complaints from members of the public including members of the mosque. The respondents' did not furnish any evidence to show that the Town Clerk acted in accordance with the complaints written to him to their detriment. Had the Town Clerk reacted, the Committee could have easily proffered an appropriate response or sought relief against him in relation to any adverse action. In the circumstances the permanent injunction

granted by the subordinate court had the effect of restraining appellants from participating in the activities of the mosque. I would also add that the respondents' fear that their businesses would be interfered with would only be justified if the Town Clerk took action based on the appellants' complaints. In such a case relief would have to be sought against the Town Clerk.

14. Before I conclude this decision, I would like to record before hearing the matter I directed the parties to seek arbitration before the Kadhi at Migori. My reason for directing the parties to seek alternative dispute resolution was two-fold. First, as I alluded to in the judgment, no Constitution was provided by the parties to show the manner in which the Mosque was being run hence I believed that this would be an opportunity for the parties to regularise the state of affairs at the Mosque. Second, although the appellants' claimed that they were the ***Trustees of the Homa-Bay Muslim Association***, the property upon which the mosque stands is registered in the in the name of the ***Registered Trustees Muslim Community*** which was granted a lease for a period of 33 years from 1st January 1968 which means that the lease expired in 2001 unless renewed. In my view the ***Trustees of the Homa-Bay Muslim Association*** is not the same as the ***Registered Trustees Muslim Community*** hence it is not even clear who the trustees entitled to run the Mosque are. It is therefore my hope that as members of the same religion, the parties will find an amicable way, outside the court corridors, to resolve the affairs of the Homa Bay Jamia Mosque.

15. I allow the appeal and set aside the injunction granted by the subordinate court. I substitute the same with an order dismissing the suit. There shall be no order as to costs in either case due to the nature of the case.

DATED and DELIVERED at HOMA BAY this 18th day of August 2015.

D.S. MAJANJA

JUDGE

Ms Nyarige instructed by G.S. Okoth and Company Advocates for the appellants.

Mr Nyauke instructed by Nyauke and Company Advocates for the respondents.