



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT**  
**AT KAKAMEGA**  
**Civil Case 38 of 2012**

**MBARUKU**  
**CHIBOLE**  
**HASSAN**  
**ALI SALEH**  
**YAHYA JUMA**  
**ABULRAHAMAN**  
**KHATETE (Suing on behalf of the**

members of **JAMIA MOSQUE – KAKAMEGA** and on their behalf).....**PLAINTIFFS/APPLICANTS**

**VERSUS**

**THE**  
**COMMITTEE JAMIA MOSQUE -**  
**KAKAMEGA**

**WERE**  
**MUTITI**  
**SALIM SALAH**  
**DR. HASSAN**  
**MOHAMMED**  
**RASHID NASOOR**

**IBRAHIM SADALA (Board of Trustees Jamia Mosque –**  
**Kakamega).....DEFENDANTS/RESPONDENTS**

## R U L I N G

The Notice of Motion dated 16<sup>th</sup> February, 2012 seeks for orders that a temporary injunction be issued against the Defendants restraining them from running the accounts of Jamia Mosque Kakamega, effecting a new Constitution and tempering with the properties of Jamia Mosque Kakamega either by themselves, their agents and/or servants pending the hearing and determination of the suit herein.

Secondly, the applicants seek an order that an interim body made up of representatives of both the plaintiffs and the defendants be constituted to run the affairs of the Kakamega Jamia Mosque pending the election of a Committee to run the Mosque.

The application is based on the grounds stated in the body of the application and is supported by the affidavit of HASSAN MUSAMBAYI MBARUKU.

The applicants are worshipers at Kakamega Jamia Mosque while the 1<sup>st</sup> defendant is a Committee in-charge of the running of the same Mosque. The 2<sup>nd</sup> defendant is a board of trustees of the Mosque.

According to the affidavit in support, although the old Constitution of the Mosque provided for elections to be held once every three years, no elections have been held since the year 2000. That the mandate of the Committee therefore expired in the year 2003.

The applicants contended that any accounts undertaken by the present Committee are therefore *ultra vires* the Constitution. The applicants accuse the Committee of constituting itself into a constitutional Committee and purportedly came up with a New Constitution in order to validate their member's actions and to perpetuate their stay in power. That the Committee purported to carry out interviews and appointed a board of Trustees of the Mosque without any Constitution.

The application is opposed. A replying affidavit was sworn by the Chairman of the Jamia Mosque Committee, KASSIM SABWA SHITIABI on 18.4.2012. In the said affidavit, it is contended that the Respondents assumed office on the 7<sup>th</sup> October, 2009 when the Jamia Mosque Committee was registered by the Ministry of Gender, Children and Social Development. That the Respondents are therefore validly in office until their term expires on 6<sup>th</sup> October, 2012. That the old Constitution which had no clear commencement date became effective on 7<sup>th</sup> October 2009 when the Jamia Mosque Committee was registered. It is also averred that the vacant position of Trustees was advertised and several applicants were interviewed, among them the 1<sup>st</sup> applicant HASSAN MBARUKU. That the 1<sup>st</sup> applicant was unsuccessful hence his venting out his frustrations by way of this application. It is ascertained that the new Constitution was adopted in a meeting held on the 8<sup>th</sup> February 2012 became effective on 6<sup>th</sup> February, 2012.

The gist of the application is whether the defendants are legally in office and whether actions undertaken by the Committee including coming up with a new Constitution and appointing a new board of trustees was done without any mandate.

I have considered the application, the reply to the same and the rest of the pleadings herein. I have also considered the submissions made by Mr. Kiveu for the applicants and by Mr. Aburili for the respondents.

The defendant's term of office is dependent on the date they assumed office. According to the applicants, the elections are supposed to be held every three years under the "old" Constitution of the Mosque. The affidavit in support states that no elections have been held since the year 2000.

The affidavit in support does not reflect whether it is the same Committee members who have been in office throughout. It is contended in the replying affidavit that the respondents assumed office on 7<sup>th</sup> October, 2009 when the JAMIA MOSQUE COMMITTEE was registered. A certificate of registration

dated 7<sup>th</sup> October, 2009 was exhibited (annexture KSS1). This according to the respondents the committee expires on 6<sup>th</sup> October 2012.

These averments by the respondents have not been rebutted by any further affidavit evidence. This court therefore takes the registration date given by the respondents as correct. The date of the commencement of the old Constitution is not reflected in any of the documents tabled before the court. Whether the members are legally still in office and whether the board of trustees is legally constituted is a question that will possibly be answered during the hearing of the main suit.

No prima facie case has been made out to warrant the grant of an injunction.

The application therefore fails with costs.

*Delivered, dated and signed in open court at Kakamega this 14<sup>th</sup> day of June, 2012*

**B. THURANIRA JADEN**  
**J U D G**