



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
HCCC NO.241 OF 2010

ISLAMIC COLLEGE (ATHI RIVER) LTD.....PLAINTIFFS

VERSUS

1. **RASHID MBULIKA**
2. **AMED ONYANGO**
3. **SULEIMAN IRUNGU MAINA**
4. **ABUBAKAR KARIUKI**
5. **ABDULLAH MUSA KALEVE**
6. **KALIF ABDI OGLE**
7. **HASSAN MOHAMMED BABU**
8. **ISSA DAUDI.....DEFENDANTS/RESPONDENTS**
9. **SUDI ALI**
10. **OMAR HASSAN**
11. **ROBERT ONG'ESO MAGELO**
12. **ALI DABASO**
13. **NASSIR MOHAMED**
14. **ROBERT MUSTAFA**

RULING

(1) Islamic college (Athi River) Limited (the Plaintiff) filed this suit on the 12th November, 2010 seeking (inter alia) an order of permanent injunction to restrain the Defendants or any persons acting under the authority of Kitengela Muslim Association from entering Plot No. L.R. 337/612, Athi River Town. It is the Plaintiff's case that it is the registered proprietor of the suit land on which it has developed a private school and mosque; that the Defendants either by themselves or acting under Kitengela Muslim Association entered the suit property without the Plaintiff's authority and caused damage to the buildings and trees thereon, took away property belonging to the Plaintiff and even went to the extent of bringing violence and beat representatives of the Plaintiff.

(2) The Plaintiff has also taken out a Chamber Summons dated the 11th November, 201 seeking similar orders as prayed in the Plaintiff pending the hearing and determination of the suit. The supporting affidavit was sworn by Sheikh Fathudin, a director of the Plaintiff on the 11th November, 2010. He reiterated the averments made in the Plaintiff and in paragraphs 5, 6 and 7 states as follows:-

"5. That the said parcel of land containing the schools has a mosque in it called Al Fathu Al Islam Mosque for the use by the school and also management committee of the schools and the land and also may host functions and management committee by company marked "ICL 4"

6. That sometimes in September, 2010 the respondents herein, by themselves and also representing a group by the name Kitengela Muslim Association entered the above named parcel of land, into the mosque and started bringing wrangles, stole mosque property, started cutting down trees on the suit land and started beating the management committee members of the said Plaintiff's school and also brought tension into the schools among the students and even the worshippers.

7. That following the above, a report was laid with Athi-river police and some defendants were arrested and charged of assaulting the management committee members herein named per annexure “ICL 4” and other members too and a criminal case was instituted being Machakos Criminal Case No.1961 of 2010, 2041 of 2010, 1952 of 2010 (attached see copies of three distinct charge sheets marked “ICL 5a-5c”)

Mr. Fathudin goes on to say that he is certain that unless the court intervenes, there is likely to be a breach of peace as the Defendants have evinced an intention not to stop entering the suit property and that it is necessary that the local police station be mandated to observe compliance with law and order.

(3) In a short replying affidavit made on the 6th December, 2010 on his own behalf and on behalf of the third, sixth and eighth Defendants respectively, Sudi Ali, the ninth Defendant, says that he and the other said Defendants are strangers to the suit and also denies his or their membership to Kitengela Muslim Association. He prays that his and the names of the other said Defendants be struck out as they have been improperly enjoined in these proceedings.

(4) The first Defendant also filed a replying affidavit on the 7th December, 2010 on his own behalf as well as on behalf of the second Defendant. He denies cutting down any trees alleging that they were cut down by the employees of the Plaintiff but admits that he and the second Defendants worship at the mosque on the suit property. He says that but for one case which is still pending the criminal cases referred to by the Plaintiff were all dismissed for lack of evidence. In paragraph 6 of his affidavit Mr. Mbulika states as follows:

“6. That in a further response to paragraph 8 of the supporting affidavit it is not true that the said parcel of land is private land as there is a mosque therein where individuals who profess the Muslim faith attend for purposes of worship and in fact the said institution has received Constituency Development Funds to develop the amenities therein as it serves the members residents who worship at the mosque and that the plaintiffs had also organized a funds drive for construction of a new mosque. [Annexed is the Constituency Development Report Card marked RM 1 and Fund raising brochure marked RM 1(A)]

(5) Mr. Fathudin in a supplementary affidavit dated the 14th January, 2011 makes me mention whatsoever of the replying affidavit made by Ali on 6th December, 2010 and referred to in paragraph 3 hereinabove. In the answer to some of the averments made in the first defendant’s said affidavit, dated the 6th December, 2010, Mr. Fathudin states as follows in paragraphs 5, 6, 7 and 8:

“5. That in response to paragraph 5, the said cases are still subsisting and have pending dates and the other one was withdrawn under section 87A of the Criminal Procedure code and in any event the merits or demerits of the case are not directly in issue herein as it’s a fact that some of the respondents were arrested for assault.

6. That the suit property which has the mosque built in it is private property and we have attached copies of documents proving the same is owned by Plaintiff but not public property and the same is solely intended for use by the school built in suit land and directors and managers of the said school but not public. (see a copy marked “S F 1” stating it is our property)

7. Annexure RM1 is a purported CDF document for Islamic Technical School but not the suit land neither the mosque nor our school as such we ask the court to disregard the same.

8. That Annexure RM1A is a fundraiser document and no law says that a private school or organization cannot seek for funds or support and in any event it is not our document and does not concern the respondent anywhere in the said annexure”.

(6) I have considered this evidence in conjunction with the Plaintiff’s submissions dated and filed on the 16th March, 2011 and those of first and second Defendants dated the 25th March, 2011 and filed on the 30th March, 2011 which were also adopted in entirety by the third, sixth, eighth and ninth Defendants respectively.

Firstly, and having noted that a Notice of Withdrawal of Suit dated the 10th November, 2010 was duly filed on the 12th November, 2010 (being the date on which these proceedings were also instituted) in Machakos Chief Magistrate’s Court Criminal Suit No.1224 of 2010. I do not find it necessary to deal with the first and second Defendants Preliminary Objection dated the 2nd March, 2011 because any prejudice which may have been occasioned to the Defendants in that suit can be compensated by an award of costs therein.

(7) The Plaintiff alleges in its Complaint and supporting affidavits that the Defendants have unlawfully entered into the suit land and, inter alia, caused damage thereon as well as taken away the Plaintiff’s property. No evidence has been adduced to show what property was damaged and or taken away and the Defendants have denied causing any damage or taking away any of the Plaintiff’s property. The criminal proceedings instituted against some of the Defendants all relate to charges of the offence of assault and, show the material before the court, may or may not be still subsisting.

Other than the first and second Defendants who would appear to be the Chairman and Treasurer respectively of Kitengela Muslim Association (KIMA) (but would appear in any event to have been sued in their private capacities), the Plaintiff has not shown that any of the other Defendants are members of the said Association. Indeed, the third, sixth, eighth and ninth Defendants say they are strangers to the suit and the Plaintiff has not showed why they have been brought to court.

(8) The main bone of contention in this suit would appear to be the mosque known as Al Fathu Ai Islam Mosque being on the suit property which the Plaintiff contents in paragraph 5 of the supporting affidavit is:

“for the use by the school and also management committee of the schools and the board and also may host functions and ceremonies and unite selected persons.” By the letter dated the 11th August, 2010, the Plaintiff appointed the fourteen (14) persons named therein as the members of a Management Committee of the old mosque. The Defendants do not appear to be members thereof nor has any evidence been produced to demonstrate in which manner the Defendants have breached the directions or instructions of the Board of Governors referred to in the letter. The first and second Defendants, on the other hand, admit to worshipping at the mosque where individuals who profess the Muslim faith attend for purposes of worship (see paragraph 6 of the replying affidavit of Mr. Mbulika).

(9) For the reasons I have stated, I am not satisfied that the Plaintiff has established that it has a prima facie case with a probability of success nor that it will suffer irreparable damage by the continued worship at the mosque of the first and second Defendants (or indeed the other Defendants). The application in the Chamber Summons dated the 11th November, 2010 accordingly, fails and is dismissed with costs to the first, second, third, sixth, eighth and ninth Defendants respectively. It follows that the orders made by Waweru, J. on the 18th November, 2010 shall remain in force until the hearing and final determination of the suit.

So ordered.

Dated and delivered at Machakos this 12th day of July, 2011

P. Kihara Kariuki
Judge