



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO.73 OF 2001**

**MOHAMED ABOUD ..... 1ST PLAINTIFF**

**MOHAMED LALI ..... 2ND PLAINTIFF**

**MOHAMED ABDALLA ..... 3RD PLAINTIFF**

**ANISA ABDULRAHIM ..... 4TH PLAINTIFF**

**FATMA SULEIMAN ..... 5TH PLAINTIFF**

**MKUU MAHMUD ..... 6TH PLAINTIFF**

**VERSUS**

**SHEIKH ALI AL-AMIN ..... 1ST DEFENDANT**

**OMAR LALI ..... 2ND DEFENDANT**

**SALIM SAID SHERMAN ..... 3RD DEFENDANT**

**FAIZ AMAR ..... 4TH DEFENDANT**

**AHMED ALI ..... 5TH DEFENDANT**

**OMAR ASHUR ..... 6TH DEFENDANT**

**ALI NUREIN ..... 7TH DEFENDANT**

**ZAHRAKHAN..... 8TH DEFENDANT**

**JUDGMENT**

On 15/2/2001 six plaintiffs filed suit 73 of 2001 against eight defendants. The Plaintiffs are described as parents of pupils attend Bahwan Muslim School and Madrassa (Nursery Section).

The first 3 defendants are described as officials of National Union of Kenya Muslims (NUKEM) who are owners of Bahwan Muslim School and Madrassa Complex. The relief claimed by the Plaintiffs against the Defendants is for mandatory injunction to compel the defendants, their servants and Agents to re-open the three nursery school classrooms at Bahwan School Complex so that the children can continue with their education.

By Chamber Summons Plaintiffs sought interlocutory orders and on the day the matters came up for

hearing on 19.2.2001 before this court, it was agreed by consent that the order for mandatory injunction be granted and that the Defendants representing NUKEM were willing to open up the classrooms for the pupils to attend to their education. The orders granted were complied with and it is now agreed by all parties that the Plaintiffs claim against the Defendants is settled satisfactorily.

On 28/2/2001 some of the defendants namely 4th, 5th, 7th, and 8th, (hereinafter referred to "claimants") filed a Notice of claim against the other defendants namely 1st, 2nd and 3rd (Nukem Officials) claiming mandatory injunction to compel Nukem to reopen 3 classrooms at the primary block which houses the Madrassa pupils to enable the pupils to attend maddrassa classes in good environment and not in the open corridors. This notice filed in pursuant to Order 1 rule 21 (1) (b) and (c) C.P.C.

After obtaining necessary leave and orders Mr. Mogaka counsel for the claiming defendants filed an interim application seeking the re-opening of 3 classrooms for use by Madrassa pupils.

When this application came up for hearing the advocates Mogaka, Nyogesa and Khatib, made a visit to the Bahwan Muslim Complex to survey the scene. No settlement was reached at this meeting and the parties requested the court to proceed with the trial of the claim between the defendants to determine this dispute once and for all. All interim applications were abandoned. The trial took place on 9/4/2001 and 10/4/2001.

There are some matters that are not disputed. The total number of the pupils attending Madrassa, Moslem religious classes are 257. This figure is given by the fifth defendant who says he is the headmaster of the Madrassa. The number is also confirmed by the Representative of Nukem Mr. Salim Said Sherman in his evidence. Secondly that NUKEM has established the Bahwan Muslim Complex with Nursery section and primary section in secular teaching and Madrassa for Moslem religious teachings.

The Nukem supervises the administration of the complex although there is Headmaster in the secular section and Headmaster (Mudir) in Madrassa Section. NUKEM employs and pays the teachers on both sections.

NUKEM also has an education board which is responsible for the admission of pupils although there is evidence that the headmaster and his deputy may admit pupils on instructions of the board. No financial issues are involved in this dispute, except that the claimants allege that fees are charged at Madrassa unless a pupil is sponsored but NUKEM says that no fees are charge d for Madrassa and if any fees are charged no money is surrendered to the association by the Mudir.

The NUKEM is a society registered with trustees who hold the property on which Bahwani complex is erected.

From the above my observations are that the children now admitted to undertake Madrassa teachings at the school are admitted with authority of the NUKEM and their number is known namely 257. The NUKEM must then provide for classes for them indoors and not in the open corridors exposed to hot sun, wind and rain which conditions are not conducive to learning by young children aged between 3 and 6 years.

I understand the claimants to state that extra space is required only during weekends and during school holidays. The reason given is that during these periods there are more children attending Madrassa than at other times.

It is also said that before (I read it to mean before disputes arose) there were 3 classrooms available for Madrassa which have now been converted to other uses - Headmasters office, bursars office and female staff room. But NUKEM says that the rooms made available for Madrassa are eight and not twelve as claimed by the Mudir. Form 1 – 3 Madrassa does not exist.

Listening to the evidence on both sides I got the impression that the Mudir's view is that the Madrassa should be extended to Form 3 or what he calls Std. 7, 8 and 9 which he describes as stages in Muslim

learning known as (1) Awal Mutanasit – Form 1, (2) Thani Mutanasit – Form 2, (3) Thabth Mutanasit – Form 3.

To this the NUKEM seem not to have made provisions and have only provided for learning for stages

:- (1) Rawadha Jim - Nursery

(2) Rawadha BEO - Nursery

(3) Rawadha AGF - Nursery

(4) Fasul Awal - Std. 1 (

5) Fasul Thani - Std. 2 (

6) Fasul Thabth - Std. 3

(7) Fasul Rabin - Std. 4

(8) Fasul Khamis - Std. 5 (

9) Fasul Sadis - Std. 6.

It is the duty therefore for the NUKEM to provide classrooms at all times for the children enrolled to attend Madrassa instructions. This number is now agreed at 257. The Mudir of Madrassa is an employee of NUKEM and must act within the set up without trying to impose extra demands upon the administration of the complex. He must not try to bring changes which will affect the established administration systems in the complex to be over burdened. He can only arrange for the teaching of the children admitted by the board if the NUKEM does not charge for Madrassa instructions then the Mudir is not to charge any fees. Now looking at the relevant provisions of law invoked Order 1 rule 21 (1) b and c provides –

***“21(1) where a dependant desires to claim against another person who is already a party to the suit – 21(1)(b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action which is subject matter of the action which is substantially the same as some relief or remedy claimed by the plaintiff; or © that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should be properly be determined not only between the plaintiff and defendant but as between the plaintiff and the defendant and such other persons or between any or either of them.***

***The defendant may without leave issue and serve on such other person a notice making such claim or specifying such claims or issue.”***

The claimants who are described in the plaint as “officials of Bahwan Muslim School Parent/Teachers Association” state in their defence that “the plot upon which Bahwan Muslim Complex is erected is held in trust for Moslem Community at large to which these defendants belong” And “that by mutual understanding between Nukem and these Defendants have been utilizing three classrooms on madrassa block for nursery classes while at the same time the madrassa pupils have been utilizing three classrooms on the Primary School block for Madrassa lessons.”

Further they say that the NUKEN have threatened and indicated their intention to close down the Madrassa section and have prevented Madrassa pupils from utilizing the 3 classroom thus forcing some Madrassa classes to be conducted in the open and thereby subjecting the Madrassa pupils to congestion, anguish, and irreparable suffering while attending these open air classes.

It is on these grounds that these defendants lodged a claim for mandatory injunction to compel the NUKEN to reopen the 3 classrooms or exchange the 3 Madrassa classrooms with the 3 nursery school classrooms.

In these circumstances the legal issue to be considered is whether these defendants are entitled to orders they seek. They admit the complex is established by NUKEM and held in Trust for all Muslims. But can each and every Muslim enforce any rights against the property held in trust. Such property is held by named registered trustees and it is such the trustees who have the legal right to enforce any rights as the community, at large, may desire through proper discussions reached by the community in the association. Injunctions are issued to protect or enforce any right legal or equitable. In the present case what right do the claimants seek to protect? There is no evidence that they have acquired any proprietary or other rights in the Bahwan Complex. They did not show how their rights, if any, have been breached. No evidence was led to show that any of their children was exposed to the outdoor classes or that there was any damage suffered. Only allegations were made that some children were studying outside the classrooms. I do not see any evidence to convince me that the claimants had any right to manage the madrassa section of the Bahwan Complex.

I find that the claimants have not established any entitlement to a mandatory injunction against NUKEM. The claim between the defendants is hereby dismissed. Since the parties were not fighting for monetary gain I will make no orders as to costs.

Dated this 6th Day of September 2001.

I apologize for the long delay in delivering this ruling due to time I spent away when ill.

**J. KHAMINWA**

**COMMISSIONER OF ASSIZE**

Read before Mr. Nyongesa Nyagaka for Omwenga Advocates.

**J.KHAMINWA**

**COMMISSIONER OF ASSIZE**