



**Salim (Suing in his Capacity as a Duly Constituted Attorney of Naswaha Said Mohammed Lemky)  
v Al-Ahmed t/a Hajarul Aswad Children Center, Hajarul Aswad Muslim School and Nurul  
Hudaa Academy (Civil Suit 32 of 2022) [2024] KEELC 7345 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7345 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
CIVIL SUIT 32 OF 2022  
FM NJOROGE, J  
NOVEMBER 7, 2024**

**BETWEEN**

**MAHMOUD SALIM ..... PLAINTIFF**

**SUING IN HIS CAPACITY AS A DULY CONSTITUTED ATTORNEY OF  
NASWHA SAID MOHAMMED LEMKY**

**AND**

**FATUMA SHARIFF AL-AHMED T/A HAJARUL ASWAD CHILDREN  
CENTER, HAJARUL ASWAD MUSLIM SCHOOL AND NURUL HUDAA  
ACADEMY ..... DEFENDANT**

**RULING**

1. For determination is the application dated 11<sup>th</sup> June, 2024 brought under article 159 (2)(d) of *the Constitution* of Kenya order 8 rules 3, 5 and 8 and order 40 of the *Civil Procedure Rules* seeking the following orders:
  1. That the Plaintiff/ Applicant be granted leave to amend the Plaint as set out in the draft Amended Plaint herewith annexed;
  2. That the Draft Amended plaint be deemed as duly filed and served;
  3. That upon amendment of the Plaint this Honourable Court may be pleased to grant an order of mandatory injunction compelling the Defendant/ Respondent to demolish a section of the perimeter wall within ALL that piece of land and development thereon known as Title Number: CR. 67354, being Subdivision number 10548 (Orig. No. 7631/1) Section 111 Mainland North, measuring approximately 0.8149 Ha and situated in Mtwapa (hereinafter referred to as the 'suit land') to allow the Muslim community living around the premises unrestricted access to the Mosque on the suit land for their daily prayers (Salat);



4. That upon amendment of the Plaint this Honourable Court may be pleased to grant an order of mandatory injunction compelling the Respondent to immediately close the illegal/unauthorized entity known as Nurul Hudaa Intergrated Academy, a non-charity entity, being run within the suit land in breach of the terms of the charitable donation;
  5. That upon amendment of the Plaint this Honourable Court may be pleased to grant an order of mandatory injunction compelling the Respondent to cease from conducting unlawful/unauthorized commercial activities within the suit land and to forthwith close the operation of the branded business stalls illegally constructed along the frontal wall of the suit land;
  6. That the costs of this application be provided for.
2. The application was supported by the grounds on the face of the application and the supporting affidavit sworn by Abdalla Mahmoud Salim on even date. He deponed that he filed this suit on 19<sup>th</sup> May, 2022 on behalf of the Plaintiff claiming breach of the terms of a charitable donation made to the Defendant/ Respondent sometime in November 2016, and that he seeks an amendment to include more prayers in the suit through the Amended Plaint a copy of which is annexed to his affidavit.
  3. He also deponed that the Respondent has lately registered a new business name Hajarul Aswad Muslim School in which she is the sole proprietor and which the applicant suspects that she intends to use for her illegal activities on the suit land. According to him, the charitable donation was made to an alleged charitable entity known as “Hajarul Aswad Children Centre” and was in respect of all that piece of land and developments thereon known as Title Number: CR. 67354, being Subdivision No 10548 (Orig. No. 763/1) Section 111 Mainland North, measuring approximately 0.8149 Ha and situated in Mtwapa and was conditional to provision by the Respondent, who represented herself as an official of the Entity, of the Trust Deed and other registration documentation regarding the same for verification; that the Respondent requested the applicant to allow her take immediate possession and occupation of the premises and in the process of constructing the perimeter wall, he noted that the wall went too high blocking the view of the minarets of an already existing mosque on the suit land. That the Muslim community has suffered and continues to suffer from denial of access to the mosque.
  4. According to him, the prayer for mandatory injunction compelling the Respondent to demolish a section of the perimeter wall is justified as it will allow the Muslim Community living around the suit premises unrestricted access to the mosque built on the suit land. In addition, the Respondent has contrary to the wishes and terms of the donation, constructed and branded a business stall along the frontal wall on the premises with intent to lease and or rent the same profit; he also contended that the Respondent is conducting an illegal educational business vide an entity known as Nurul Hudaa Integrated Academy in breach of the purpose and intention of the charitable donation and as such, a mandatory injunction is necessary.
  5. In response to the application, the Defendant/ Respondent filed Grounds of opposition dated 16<sup>th</sup> September, 2024. She relied on the following grounds: that the application is abated and the intended amendments do not cure the latent defects in the suit as one cause of action cannot be substituted for another by way of amendment; that this court cannot grant the orders sought in the application at the interlocutory stage as the said orders are final orders; further, that the applicant has failed to establish a prima facie case, demonstrate the balance of convenience and irreparable injury needed for this Honourable Court to grant final orders at the interlocutory stage; that the application does not meet the evidentiary threshold of the orders sought and the applicant has not disclosed any plausible reasons why the court should exercise its discretion in his favour.



## Submissions.

### Plaintiff/ Applicant's Submission.

6. The Plaintiff/ Applicant through the firm of Lumatete Muchai & Co. Advocates filed submissions dated 2<sup>nd</sup> October, 2024. Counsel identified three issues for determination; whether or not the applicant is entitled to leave to amend the Plaint, whether or not the Applicant has met the principles for amendment of pleadings and whether or not the applicant is entitled to a mandatory injunction.
7. On the 1<sup>st</sup> issue for determination, counsel relied on order 8 rule 3 (1) & order 8 rule 5 (1) of the Civil Procedure Rules submitting that the applicant has appointed the firm of M/S Swaleh Mwangi & Company Advocates as Co- Counsel in his case and seeks to introduce additional prayers through the draft Amended Plaint that were inadvertently omitted from the original Plaint. He also submitted that the provisions of section 100 of the Civil Procedure Act further empower the court to correct any defect or error in any proceedings for the purpose of determining the real matter in dispute; that the application to amend pleadings can be made at any stage of the proceedings including during the hearing.
8. On whether or not the applicant has met the principles for amendment of pleadings, he relied on the cases of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported) as cited with approval in *St. Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* (2018) eKLR and that of *Emerge Development Limited v Chestnut Uganda Limited & another* (2020) eKLR stating that the Applicant's proposed amendments do not give rise to new cause of action.
9. Regarding whether the applicant is entitled to a mandatory injunction, counsel submitted that mandatory injunctions do not conform to the principles of prohibitory injunctions as envisaged in the case of *Giella v Cassman Brown*. He submitted that the distinction was discussed in *Shepard Homes v Sandham* (1970) 3 WLR Pg. 356 where the court was of the opinion that a prohibitory injunction merely requires abstention from acting while a mandatory injunction requires taking positive steps and may require the dismantling or destruction of something already erected or constructed. Further, that in the case of *Locabail International Finance Limited v Agro Export and Others* (1986) All ER 906 the Court opined that a mandatory injunction can be granted on an interlocutory application in the presence of a special circumstance.
10. He submitted that the Respondent has in breach of the charitable donation constructed a perimeter wall around land Title Number: CR. 67354, being subdivision number 10548 (Orig. No. 763/1) Section 111 Mainland North, measuring approximately 0.8149 situated in Mtwapa, thus denying the Muslim community living around access to the Mosque situated on the suit property for their daily prayers. Further, the Respondent admitted that after she abandoned the donee entity she registered another entity called 'Hajarul Aswad Muslim School' in 2018 and subsequently changed the name of the school to 'Nuru Huda Integrated Academy'. In the end, he submitted that if the injunction is not granted, the Respondent will continue to undertake illegal activities on the suit property to the detriment of the community and the less fortunate.

### Respondent's Submissions.

11. The Respondents on the other hand filed submissions through the firm of Mulinge & Ochieng Co. Advocates dated 9<sup>th</sup> October, 2024. Counsel identified two issues for determination; whether the applicant has met the threshold required for granting a mandatory injunction and whether the applicant should be granted leave to amend the Plaint.



12. On the first issue, counsel submitted that a mandatory injunction is an extraordinary remedial process which is granted not as a matter of right but in exercise of sound judicial discretion. He relied on the case of *Malindi Air Services & Another v Hakima Abdinoor Hassan, Civil Application No. 202 of 1998* and that of *Locabail International Finance Ltd v Agroexport and others* (1986) 1 All ER 901 where the court held that for a mandatory injunction to be granted, a clear case coupled with a special circumstance ought to be present. He submitted that no special circumstances have been proved by the Applicant to warrant the demolition of a wall that has been in existence for the past 8 years and further, that the applicant has not demonstrated any danger of the suit property being transferred or interfered with in a way that cannot be reversed. He also relied on the case of *Lucy Wangari Gachana v Minudi Okemba Love* (2015) eKLR.
13. On whether the applicant should be granted leave to amend the Complaint, he submitted that the proposed amendments by the applicant have not been made timeously as the application has been lodged when the hearing has already taken off and in fact, the proposed amendment will also alter and be a substitute of the cause of action on the basis of which the original issue was raised.
14. It was his submission that this is a dispute that has to be determined at the main trial and there is nothing to justify the issuance of final orders at interlocutory stage in view of the claim of ownership by both parties; that mandatory injunctions of such magnitude would also not only be prejudicial to students awaiting their national examinations and the employees impacted by the resultant termination of various contracts but will be premature as various issues remain unresolved.

### **Analysis and Findings.**

15. I have considered the instant application, the responses thereto and the submissions by counsels and in my opinion the issues that are for determination are whether the applicant ought to be granted leave to amend his complaint and whether the applicant is entitled to orders of mandatory injunction.
16. On the 1<sup>st</sup> issue for determination, the applicant contends that he desires to introduce additional prayers through the draft Amended Complaint; that they were inadvertently omitted from the original Complaint and that the proposed amendments were timeously brought, that they do not give rise to a new cause of action and in fact, the application is brought in good faith.
17. The Respondent on the other hand contends that the proposed amendments by the applicant have not been made timeously as it is made when the case has already taken off and in fact, the proposed amendment will also alter and be a substitute of the cause of action on the basis of which the original issue was raised.
18. The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other party can be compensated by costs. In the case of *Joshua Kimani v. Kiso Enterprises Ltd & 3 others* [2020] e KLR, the Court held as follows: -

6. The Learned Authors of Halsbury's Laws of England, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion....The person applying for amendment must be acting in good faith. Amendment will not be



allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

19. I have perused the record and I note that the hearing of this matter has not commenced. I do not see how the Respondent will be prejudiced by allowing the Plaintiff leave to amend his Plaint. The Defendant will have a chance to even further amend her own pleadings if necessary. For the purpose of determining the real questions in controversy between the parties herein, this court ought to allow the Plaintiff's Application to amend the Plaint.
20. On whether this court ought to grant the order for a mandatory injunction, it is significant to appreciate the distinction between the prohibitory injunction as envisaged in the case of *Giella – Versus – Cassman Brown*, 1973 E.A. Page 358 and a mandatory injunction. The first authority on making this distinction was “*Shepard Homes – Versus – Sandham* (1970) 3 WLR Pg. 356 Case” in which Megarry, J as he then was stated follows: -

“Whereas a Prohibitory Injunction merely requires abstention from acting, a Mandatory Injunction requires the taking of positive steps, and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials. If it is ultimately established that the Defendant was entitled to retain the erection”.
21. Having considered the proposed amendments to the plaint, I find that the amendments sought do not alter the cause of action and that they can be allowed. However, the other orders of mandatory injunction added to the draft amended plaint, are the ones sought to be obtained in the application at hand. It is quite perplexing that the applicant seems fervently of the hope that the application can be granted in the circumstances. It is a rule that no party ought to be condemned unheard. How then can a court of law even countenance the granting of such orders of mandatory injunction when the amendments, even if allowed in the present application, have not been served on the defendant/respondent who by law is entitled to respond thereto before a decision can be made? That would be an unjust course of action to adopt. Besides that, lack of an opportunity to respond, perchance the orders sought are granted, they are final in nature and may lay to waste a lot of property before the suit is concluded yet the outcome of the suit can not be foretold. I find that these are matters that are fit to be determined at the main trial and that there is nothing to justify the issuance of such final orders at interlocutory stage in view of the claim of ownership by both parties.
22. In my view, the applicant has not demonstrated any special circumstances to warrant the grant of the orders of mandatory injunction sought at this stage and the prayers related thereto are therefore dismissed. However, for clarity, I hereby grant the application only in terms of prayer no 1 only while the rest of the prayers are hereby dismissed. The applicant shall file and serve an original, customarily colour coded copy of the amended plaint within 7 days of this order in default of which the orders sought herein will lapse and the main suit shall be set down for hearing. In addition, the plaintiff shall ensure that he has prepared himself for the hearing within 21 days from today and the defendant within 42 days from today, and this suit shall be mentioned on 23/1/2025 for confirmation of compliance and the issuance of a hearing date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

**MWANGI NJOROGE**



**JUDGE, ELC, MALINDI**

