



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT GARISSA**

**CIVIL APPEAL NO. 7 OF 2016**

**SHEIKH MOHAMED NUNOW.....APPELLANT**

**VERSUS**

**ALI IBRAHIM HASSAN.....RESPONDENT**

**JUDGEMENT**

1. By a plaint lodged on 23/4/2015 the appellant is Sheikh Mohamed Nunow/Appellant herein seeking relief that the respondent/respondent be restrained from interfering with running of Masjid Nur *inter alia*.

2. Defence and counter-claim was filed in which the Respondent denied appellant claim and also sought relief that an injunction be issued restraining the appellant *inter alia* from interfering with the management and smooth running of Wajir Masjid Nur Mosque.

3. After a ruling on absence of authority to sue on behalf of the mosque members, the plaint was amended as directed by the court to rectify the situation vide amended plaint dated 13/9/2015.

4. In the ruling of 19/8/2015 the court directed that the appellant to amend plaint on issue of authority which had been absent in the plaint to comply with Order 4 Rule 1 Civil Procedure Rules *inter alia*.

5. The suit proceeded into full hearing and the court made the verdict that the appellant's suit and claim was incompetent for want of the authority. On counter-claim, the court issued an injunction against appellant as prayed in counter-claim.

6. Being aggrieved by the aforesaid verdict the appellant lodged instant appeal and set out 9 grounds of appeal which can be compressed into 3 grounds/issues namely:

**a. Whether appellant suit was incompetent for want of authority?**

**b. Whether counter-claim had merit?**

**c. Whether cross-appeal has merit?**

**d. What is the order as to costs?**

7. On 26/2/2019 the court directed that submissions be filed. However to date of preparing this judgment after 20/5/2019, the appellant have not filed their submissions. The Respondent filed submissions on 25/4/2019. However it is worth noting that there was cross appeal on issue of costs not being awarded to Respondent in Lower Court.

**RESPONDENT'S SUBMIMSSIONS:**

8. The respondent submitted that, grounds 1, 5 and 7 are all based on the interpretation and import of Order 4 rule (1) sub rule 3 which provides;

**“Where there are several appellants one of them with written authority filed with a verifying affidavit on behalf of the others....”**

9. This issue was indeed dealt with at a preliminary stage. The court using its discretion ordered the appellant to comply with the mandatory

requirements of Order 4 rule 1 sub rule 3.

10. The appellant never complied. Page 141 of the record of appeal. The trial court directed that:

**“7) Pursuant to section 100 of the Civil Procedure Act, I hereby grant the appellant/respondent time to amend the plaint on the issue of the authority by the alleged co-appellants. The same to be filed and served within 15 days from today.”**

11. It is submitted that, the appellant chose not to comply with afore said directive of the court. The requirement under Order 4 (1) (3) is mandatory, the court could have proceeded and dismissed the suit as being incompetent but gave a window for amendment which the appellant declined to use.

12. It is submitted that, on grounds 2, 3, 4 and 8; the trial court did not error in law and fact as it is only the respondent who tendered evidence proving that he was elected and registered by SUPKEM and even the local community. The elections were done in open and well documented. The appellant did not produce any evidence, documentary or otherwise to prove he was elected as a leader of the Masjid Nur Committee.

13. The SUPKEM and Council of Imam and preachers do not recognize him as having any role in the leadership of the Masjid. The testimony of the appellant is disjointed, unfounded and without any basis. The lower court did not have otherwise other than holding the respondent was the bona fide Chairman of Masjid Nur.

14. It was further argued that, the running of the affairs of religious organizations is best left to the organizations unless there is a clear breach of the said organizations constitution. Nothing was demonstrated by the appellant to show that there was a breach of any constitution. He cites the case of *(Tanui and 4 Others vs Birech and 11 Others [1991] KLR 510)*.

15. It is submitted that, on grounds 6 and 9, the trial magistrate did evaluate the evidence and found for the respondent. In page 198 of the record of appeal, line 11, the learned magistrate stated, **“from the evaluation of the evidence adduced by both appellant and the respondent”** and pages 190 to 197 the learned magistrate went through all the testimonies of the witnesses and finalised by evaluating the same.

16. The decision was therefore based on the courts evaluation of all testimonies and evidence presented to court.

#### **ON CROSS APPEAL;**

17. The respondent submits that, the trial court erred in law and fact by failing to award costs for the counter claim despite the counter-claim succeeding.

18. Costs follow the event; the event in this case was the counter-claim. Unless there are good reasons, which must be stated, the winner must be awarded cost.

19. In this regards, the respondent was declared winner in the counter-claim and it was expected that the costs would be awarded to him. It was not.

#### **ANALYSIS AND DETERMINATION:**

20. After analysing evidence the trial court concluded that –in the amended plaint dated 3<sup>rd</sup> September 2015, the appellant in the heading had stated that he was suing on his own behalf and on behalf of the members of the Masjid Nur Mosque.

21. As a representative suit, it was incumbent upon the appellant to list the members of whose behalf he is instituting this suit. In paragraph 3 thereof the appellant had given the names of fifteen (15) members elected as officials of Masjid Nur Mosque.

22. Those fifteen 15 members ought to have been listed in the heading of the suit as representing Masjid Nur Mosque. The fifteen members should also have appended their signatures in a paper which should be filed together as part of the pleadings as a proof of such authority to the filing of this suit.

23. That is a requirement under Order 4 rule 1 sub-rule 3 which reads as follows;-

**“.....where there are several appellants one of them with written authority filed with a verifying affidavit on behalf of the others.....”**

24. See also the case of *Kenya Agricultural Research Institute (K.A.R.I.) vs Farah Ali, Chairman Ishahakia Self Help Group and Another (2011) eKLR Wendo J* (as she then was) held thus:

**“In my view, the appellant has to demonstrate that this suit is properly filed and not just brought by a busy body or an officer who has no authority. Such authority should be exhibited.....”**

**Failure to annex a list of names of officials and their signatures duly filed with the verifying affidavit is a serious mistake that**

goes into the very substance of this suit. Such a mistake in my view is not of a technical nature that can be cured by the provisions of Article 159 of the Constitution of Kenya 2010. A suit that is filed without authority becomes incompetent and ought to be struck out. I have also noted that the subject of this suit is a mosque which is a religious organization and that where there are internal issues of management arising in such an organization, the principal overtime has been that the courts are reluctant to interfere with such internal management issues unless the Constitution of such association is such that there has been a clear contravention of rules of natural justice.

25. See also the case of **Tanui and 4 Others vs Birech & 11 Others (1991) KLR** at page 510, the Court of Appeal stated 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....”***

26. The respondent and his witnesses produced exhibits showing that he registered Masjid Nur as an Association under the Societies Act. The certificate of registration No. SOC/65587 dated 13/11/2013 was produced as an exhibit in this case.

27. The respondent also produced minutes of a meeting held on 18/10/2011 in which he was elected as chairman of the Masjid Nur Committee.

28. The other members of the committee elected included Musa Dima as the vice chairman, Ahmed Abdi Sabdow secretary, Majid Hassan Salim treasurer, Mohamed Abulla Awad vice treasurer, Bare Mohamed Mumin member, Jimale Issack member, Ali Abdi Ali member, Yasin Arte member, Maalim Mohamed Noor Jimale member and Jelle Hassan member.

29. The appellant did not produce any such minutes showing that he was elected together with his group. The respondent has stated that they are signatories to the bank accounts of Masjid Nur Mosque.

30. From evaluation of the evidence adduced by both the appellant and the respondent, it is clear in my mind that the appellant’s suit and claim was incompetent for want of authority and as well lacked merit as held by the trial court. Thus the court finds no merit in the appeal.

31. On cross-appeal, the court notes that whereas the court awarded costs on the dismissal of the suits, the court remained silent on issue of costs on success of the counter-claim.

32. Of course under section 27 of CPA Cap 21 the court is obliged to state reasons if it denies a successful party costs.

33. Section 27 of CPA Laws of Kenya on Costs states;

**(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers:**

**Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.**

**(2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.**

34. It would appear the court did not deny respondent costs. Costs follows event unless otherwise denied under the cited provisions. The court thus finds merit in counter- claim and same succeeds.

35. Thus the court makes the following orders;

**(i) The appeal is dismissed.**

**(ii) The cross-appeal is allowed.**

**(iii) Costs to the respondent.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT GARISSA THIS 22<sup>ND</sup> DAY OF MAY, 2019.**

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**CHARLES KARIUKI**

**JUDGE**