



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL CASE NO. 161 OF 2019**

**ADAN ABDI ALI & 20 OTHERS.....PLAINTIFF**

**-VERSUS-**

**CAHIRMAN KWA NJENGA AL –HUDA MOSQUE COMMITTEE.....1<sup>ST</sup> DEFENDANT**

**KWA NJENGA AL –HUDA MOSQUE COMMITTEE.....2<sup>ND</sup> DEFENDANT**

**AND**

**SUPREME COUNCIL OF KENYA MUSLIMS.....INTERESTED PARTY**

**RULING**

1) The plaintiffs suing in their capacities as members of Kwa Njenga Al-huda Mosque took out the motion dated 26<sup>th</sup> July 2019 in which they sought for:

*i) THAT this application be certified as urgent and fit to be heard forthwith, and be granted ex-parte, and in priority to any other matter herein.*

*ii) THAT pending the inter-parties hearing and determination of this application and the suit herein the Honourable Court be pleased to issue an interim order restraining the Defendants from dealing with, disposing, alienating or in any manner appropriating the assets of Kwa Njenga Al- Huda Mosque.*

*iii) THAT the costs of this application be provided for.*

2) The motion is supported by the affidavit of Abdi Isaack Godana, the 19<sup>th</sup> plaintiff herein. When served with the motion, the defendants filed the replying affidavit of Ali Gollo, the 1<sup>st</sup> Defendant and chairman of the 2<sup>nd</sup> Defendant herein to oppose the application.

3) When the motion came up for inter-partes hearing, learned counsels recorded a consent order to have the motion disposed of by written submissions. I have considered the grounds stated on the face of the motion and the facts deponed in the affidavit filed in support and against the motion. I have also considered the rival written submissions plus the authorities cited by the parties. It is the submission of the plaintiffs/applicants that there has never been any election of leaders for the position of chairman and member of Al-huda Mosque committee since 1992 and that the current leadership has been under the discretion and whims of un-elected and self declared chairman against the wishes of the Al-huda Muslims community members.

4) The applicants further accused the Mosque leadership for lack of transparency, accountability and members' participation with all the decisions on crucial and fundamental issues. It is alleged that the chairman and committee members of the mosque have not called for any general meeting to deliberate on the affairs of the Mosque and its members for over two decades.

5) It is also alleged that there is rampant misapplication and misappropriation of the Mosque revenues from parking facilities and rental rooms by the defendants. The applicants aver that in early 2018 the Defendants chased away the congregants from the Mosque and ordered them to pray at their homes and that they have turned down their request to call for and hold meetings with the mosque congregants and have used the police to silence members by having them arrested and arraigned before courts for criminal offenses.

6) The plaintiffs have further claimed that they sought for the intervention of the Supreme Council of Kenya Muslims, the Interested Party herein but the Defendants have failed to follow the Interested Party's call to upon them conduct elections.

7) The plaintiffs have further averred that there is a bitter rivalry between the plaintiffs and the Defendants over the leadership and running of Kwa Njenga Al-huda Mosque and that the Defendants are hell-bent to hang on the helm at the expense of the Welfare. It is further argued that the actions of the Defendants has subjected the Mosque and Muslim community to indignity and disrepute. For the above reasons they beseeched this court to grant them the orders sought.

8) In his replying affidavit, Ali Gollo, gave a detailed history of how the Al-huda Mosque was established in 1991 and the progress of its development upto date. The 1<sup>st</sup> Defendant stated that the Al-huda Mosque Muslim community was initiated as an informal self-help group in 1991 under the chairmanship of Mohammed Oshow around Mukuru Kwa Njenga. It is said Mohamed Oshow resigned in 2000 and thereafter elections were conducted and one Ibrahim Kalla was elected Chairman and the self – help group continued to bring development to the community around the mosque.

9) It is the averment of the 1<sup>st</sup> Defendant that in the year 2010, the Muslim community of Mukuru Kwa Njenga conducted a transparent and fair elections whereof he was elected Chairman.

10) He said that the self –help group was officially registered on 16<sup>th</sup> October 2018 under the **Ministry of East Africa Community, Labour and Social Protection**. A copy of the registration certificate together with the organization’s constitution were annexed to the replying affidavit of AliIsaac Gollo.

11) The 1<sup>st</sup> Defendant, enumerated the development projects of the Al-huda Mosque Muslim community based organization have undertaken since its registration using donor funding and income from the Mosque properties.

12) The 1<sup>st</sup> Defendant denied the allegations of the plaintiffs that they were threatened with expulsion from Al-huda Mosque and averred that the plaintiffs are not members of Al-huda Mosque Muslim community based organization. The 1<sup>st</sup> Defendant attached a letter written by the Interested Party dated 30<sup>th</sup> September, 2019 absolving the Defendants of any wrong doing. It is the argument of the 1<sup>st</sup> Defendant that the activities he has outlined done by his committee were achieved through the cooperation of the members of the community voluntary contribution and emergency subscriptions.

13) He also pointed out that the plaintiffs owe the Mosque monies for rent and that they have failed to pay or remit the same to the mosque despite numerous requests and demands.

14) The 1<sup>st</sup> Defendants pointed out that the monies collected from the mosque parking and rooms are used to pay for the maintenance costs of the mosque workers salary and security services.

15) The Defendant also tendered documentary evidence showing the developments projects undertaken by the 2<sup>nd</sup> defendant for the benefit of Muslim community and the orphans around Mukuru Kwa Njenga. The Defendants urged this court to find the plaintiff’s suit to be frivolous and is meant to serve selfish interest.

16) The 1<sup>st</sup> Defendant pointed out that the assets managed by the committee are the mosque, the rooms, water tanks for the mosque and Madarassa, therefore if the orders sought are granted, then the community and the public of Kwa Njenga Mosque will be gravely prejudiced.

17) The Defendants have also argued that the application does not meet the threshold required in such applications.

18) It is not disputed that the main order being sought is that of an interim order of injunction to restrain the Defendants from dealing with disposing, alienating or appropriating the assets of Kwa Njenga Al-huda Mosque pending the hearing and determination of this suit.

19) The plaintiffs are required to show that their application meets the principles of injunction set out in the case of **Giella vs Casman Brwon & Co. Ltd [1973] E.A 358**.

**First**, they must show that they have a *Prima facie* case with a probability of success.

**Secondly**, they must show that if the order for injunction is refused they will suffer irreparable loss..

**Thirdly** that where the count is in doubt, the application should be decided on a balance of convenience. It is the submission of the plaintiffs that they have shown they have tribal issues hence they have a prima facie case with high chances of success. They pointed out that they have been cased from carrying out prayers in Kwa Njenga Mosque. They also stated that the Defendants have never conducted elections to elect new officials to manage the affairs of Al- huda Mosque. The plaintiffs also alleged that the Defendants are likely to dispose of the assets of the Mosque to the utter detriment of the members.

20) The Defendants are of the submission that the plaintiff’s motion does not meet the threshold set by the **Giella case (supra)**. They aver that the activities and projects of the 2<sup>nd</sup> Respondent have been done through cooperation of the members of the community, voluntary contributions by the members of the committee and emergency subscriptions. The Defendants have also pointed out that the plaintiffs are not members of the 2<sup>nd</sup> Defendant nor have they paid therein subscription fees therefore they have no locus standi. The Defendants are stating that the plaintiffs have no locus standi.

21) There is no doubt in my mind that the plaintiffs and the Defendants are fighting over the control and management of Kwa Njenga Al-huda Mosque. The question as to whether or not the plaintiffs are members of the aforesaid mosque cannot be determined at this stage but can only be dealt with in a trial. The other issue which arose as to whether the plaintiffs are members of the community who merely pray at

Al-huda Mosque or whether they members of Al –huda Mosque Community Based Organization are matters which can only be determined in a trial. The question as to whether elections have been conducted to elect officials to run the Kwa Njenga Al-huda Mosque is also another matter which has to be interrogated in a trial. In my humble view I am satisfied the plaintiffs have shown they have a prima facie case with trial issues and with some chances of success.

22) The second principle is whether the plaintiffs have shown the irreparable loss they would suffer if the order for injunction is not granted. The plaintiffs have averred that they are likely to suffer as a congregation and worshippers if the Mosque properties, assets as well as records are interfered with before this suit is heard and concluded. It is argued that the damage which may be visited upon them cannot be compensated in monetary terms.

23) The Defendants are of the contrary view that the plaintiffs will not suffer any irreparable loss if the order for injunction is denied. In my humble view, and after considering the plaintiff’s averments and submissions I am convinced that the plaintiffs have not shown that if the order is denied they will suffer irreparable loss which cannot be monetary compensated. There is no credible affidavit evidence to show that the Defendants are disposing or are in the process of disposing of the assets of the mosque in question. Even if such an allegation was shown to exist, I doubt whether an award of damages would not suffice.

24) The Third principle is the balance of convenience. This principle is only be applied by the court to determine the application where the court is in doubt. In the matter before me this court is not in doubt. The court has come to the conclusion that the plaintiffs have failed to show that if the order for injunction is denied they would suffer irreparable loss. I therefore find no need to apply the principle of convenience to this application.

25) In the end the plaintiff’s motion dated 26<sup>th</sup> July 2019 is found to be without merit. The same is dismissed with costs abiding the outcome of the suit.

**Dated, signed and delivered at Nairobi this 10<sup>th</sup> of December, 2019.**

**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Plaintiff

..... for the 1<sup>st</sup> Defendant

..... for the 2<sup>nd</sup> Defendant

..... for the Interested Party