



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION NO. 24 OF 2016

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 50, 165 & 170 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19, 20, 21, 22, 23 & 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

BETWEEN

ALI KASSIM KAMAU.....PETITIONER

VERSUS

MAHMED ADAMS KIMANI.....1ST RESPONDENT

SALEH CHEPKEITANY.....2ND RESPONDENT

ISMAIL ABDUL ASIZ ALIAS COLLINS ANDREW KOECH.....3RD RESPONDENT

(sued on their own behalf and on behalf of 51 others, all members of the Alfarouq Mosque, Burnt Forest)

RULING

[1] The Notice of Motion dated **15 December 2016** was filed herein pursuant to **Articles 19, 20, 21, 22, 23, 50, 165 and 170** of the **Constitution of Kenya** and **Section 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; for orders that:

[a] Spent

[b] Pending the *inter partes* hearing of the application, the Court be pleased to stay all the proceedings and orders relating in any manner whatsoever to the Petitioner issued by the Kadhi, Eldoret Law Courts, in **Eldoret CMCC No. 41 of 2016**; and particularly the enforcement of the said order;

[c] Pending the hearing of this Petition, the Court be pleased to stay all the proceedings relating in any manner whatsoever to the Petitioner issued by the Kadhi, Eldoret Law Courts, in **Eldoret CMCC No. 41 of 2016**; and particularly the enforcement of the said order;

[d] The Respondents by themselves, their servants and/or agents be restrained by means of a temporary injunction from trespassing upon, entering Alfarouq Mosque premises with the aim of evicting the Petitioner from the said mosque premises and/or interfering with normal operation of the Alfarouq Mosque in Burnt Forest pending the hearing and determination of the application and thereafter the Petition;

[e] The Respondents be restrained by way of a temporary injunction from issuing threats of physical harm to the Petitioner pending the hearing and determination of the application and thereafter pending the hearing and determination of the Petition.

[f] That the OCS Burnt Forest Police Station be directed to oversee compliance with the court order;

[g] That the costs of the suit be awarded to the Petitioner.

[2] The application was premised on the grounds that the Petitioner is a qualified Imam; and is the Imam in charge of Alfarouq Mosque in Burnt Forest. It was his contention that on **29 November 2016**, the Kadhi in Eldoret issued an order in **Eldoret CMCC No. 41 of 2016** directing him to stop presiding over prayers and/or any other functions at Alfarouq Mosque; and to vacate the said Mosque pending the hearing and determination of the Respondent's application in that matter. The Petitioner contends that that order is illegal and unconstitutional, not only because **Article 170** does not give the Kadhi such powers, but also because it amounts to an infringement of his rights and freedoms as enshrined in the Constitution of Kenya.

[3] In his Supporting Affidavit sworn on **15 December 2016**, the Petitioner averred that the Respondents, through an application dated **29 November 2016** unlawfully obtained *ex parte* orders directing him to cease presiding over the prayers at Alfarouq Mosque; and that upon receipt of the order, the OCS Burn Forest gave him an ultimatum to vacate the mosque premises or else he would be evicted by force; yet the mosque had been his place of abode for a long time; and that he had no other place to go to. He further averred that he will suffer irreparable damage unless the orders sought are granted. He annexed to his affidavit supporting documents to buttress his averments.

[4] The Respondents opposed the application vide their Replying Affidavit, sworn by **Saleh Chepkeitany**, the 2nd Respondent. According to them, the Applicant was only a caretaker at the Alfarouq Mosque and therefore not an Imam as alleged. According to them, although the Petitioner has been presiding over prayers at the mosque, a dispute arose as to the manner in which he was handling the affairs of the mosque; and further, that they noted that he had started drifting away from the Muslim teaching in favour of another sect known as Sufism.

[5] Thus, it was the contention of the Respondents that, because of the conflict introduced by the Petitioner, they opted to file **Eldoret CMCC No. 41 of 2016** along with an interlocutory application for temporary injunction pending hearing and determination of the suit. According to the Respondents, the Kadhi had the jurisdiction to issue the orders he made and therefore this Petition lacks merit and ought to be dismissed.

[6] The application was canvassed by way of written submissions; and having given the same my careful consideration, it is manifest from the written submissions of the Petitioner that the Kadhi has since recused himself from the conduct of **Eldoret CMCC No. 41 of 2016**. Accordingly, the prayer for stay of those proceedings has been overtaken by events. Likewise, the question of jurisdiction has been rendered moot. Accordingly, the application dated **15 December 2016** having been overtaken by events, is hereby struck out with an order that each party shall bear own costs of the proceedings.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE