



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Appeal 62 of 1995

AHMED ABUBAR & OTHERS APPELLANTS

VERSUS

BAKARI BARAKA & 5 OTHERSRESPONDENTS

From Original Civil Suit No. 78 of 1995 of the Senior Resident Magistrate's Court at Kitui: G.M. Nzilu Esq. - DMI of 10th July 1995)

Coram: J.W. Mwera J.

Mr. Kibanga Advocate for Appellants

Mr. Kilonzi Advocate for Respondents

Court Clerk Muli

RULING

The dispute which originated from the lower court at Kitui (SPM.CC. 102/95) has arrived here on appeal. The litigants belong to the Kitui Muslim community.

The files of both the lower court and here appear muddled due to filing of papers but it seems that the Appellants/Plaintiffs sued the Respondents on 26th June 1995 claiming that one of the Defendants Ahmed Abukar was holding himself out as the trustee of Noor Mosque at Kitui - a position nobody had mandated to him. That acting *in* that capacity his actions if unchecked by a permanent injunction could expose the mosque property to risk of alienation secretly.

A defence followed on 6th July 1995 averring that the Plaintiffs with a political inclination had once through the 1st Plaintiff/Respondent Bakari Baraka filed a suit similar to that in the lower court (KIT.RMCC.78/95) claiming that he too was a trustee of the Jamia mosque - which mosque the current Appellants/Defendants had themselves built.

This case No. 78/95 was not placed before this court for reasons the Appellants know but no. 102/95 is. So proceeding from that point of default, the Appellants lodged this appeal. It is against the ruling of DMI Kitui dated 10th July 1995 in Civil Case No, 78/94. Unless it is a typographical error, this is another confusing feature perpetrated by the Appellants because reference of the ruling appealed against is in SPMCC.78/95. Anyway that ruling extended interim orders of 9th May 1995. The appeal attacks this

extension on the grounds that the Learned DMI extended it on a telephone by the lawyer for the Respondents. That ruling of 9th May 1995 was not part of the record of appeal (see 041 r 8B(4) - the saga continues.

On 17th July 1997 parties appeared in court. They were inclined to resolve their running dispute over the 2 mosques for the benefit of all the muslims in Kitui, So rather than go on with the court wranglings to polarise and create confusion and enmity in the whole religious body the following consent was recorded:

"By consent each side files 3 names of intended arbitrators from which SUPKEM shall appoint three to look into and finally resolve the dispute herein. The deputy registrar to communicate this to the SUPKEM forthwith. (Names at B..E..D. of file). Mention on 23.10.97 for the arbitrators to file findings and end result."

Under the Supreme Counsel of Kenya Muslims (SUPKEM) three persons were appointed to look into the dispute affecting the litigants herein and by necessary extension the whole muslim community at Kitui. They were Sheikh Mohamed Musa. Sheikh Abdillahi Kintanui and Sheikh Abraham Lethome. They were looking into what was headed on the SUPKEM letter dated 3rd December 1997: "DISPUTE - KITUI MUSLIMS." On 17th October 1997 the two groups represented by 4 people from the Appellant's side, Led by Ahmed Abubakar and 7 people from the respondent's led by Bakari Baraka were heard at Kitui. It appears each group mentioned other groups forming part of the Kitui Muslims. And so the arbitrators took the course:

"However we felt that it was important to meet another group of Kitui Muslims who were seemingly not part of the dispute but were mentioned by both groups. This is the Kitui Muslim Youth." (Further reference to this extract follows below)

This group was met at the SUPKEM offices at Nairobi on 30th November 1997. After long deliberations the chosen arbitrators had 16 findings to which they appended their course of resolution. Of particular interest is finding No, 16 which read in pari:

"16. We strongly advise Muslims of Kitui that in case of any dispute in future the proposed joint Mosque Committee and the Trustees should sit down and solve it. If they cannot resolve it then they should call in Muslim scholars from another place to help them resolve their differences for that is in line with the teachings of the Holy Quran."

That recommendation or advice was then capped up with a verse of the Quran on what it enjoins its followers to do in case of a dispute.

The award was read to the parties on 22nd January 1998 and the court laid emphasis on the need to resolve their differences by concensus and dialogue. The essence of finding 16 (Supra) was equally stressed, But. while by 16th December 1998, the Appellants had by notice of motion applied to this court to confirm the SUPKEM award as its judgement, the Plaintiffs had by an earlier chamber summons of 1st April 1998 which was withdrawn and replaced with one dated 29th January 1999 sought this court's orders to set aside the said award on the grounds Mr, Kilonzi argued that the arbitrators had misconducted themselves in the proceedings by interviewing groups other than those who had brought the dispute - namely the Kitui Muslim Youth (see quotation above from award).

Both applications were heard together with a view to give a composite ruling. Mr. Kibanga began by telling the court why the SUPKEM award signed on 3rd December 1997 and forwarded on the same date should be confirmed and made a judgement of this court. He told the court that the Respondents had filed their application to set aside the award in issue long past the lime allowed by 045 r 6 which requires that if a party wants an award set aside under 045 r r. 12,13,14 and 15 that party should do so within 30 days after it has been notified that the award has been filed or in the same 30 days after its reading. It was not in doubt or disputed that when the Respondents filed their first application to set aside the award on or about 1st April 1998 30 days had long expired after the award was read on 22nd January 1998, The fresh

application of 29th January 1999 was still further outside the 30 days as required by the law because that application was brought under 045 r. 15 which 045 r 16 does not allow to be brought unless it is within 30 days.

But Mr. Kibanga had a broader and more substantive argument when he told the court that the 3 no doubt learned Sheikhs who arbitrated in this matter took in regard a wider view of the job they had. They knew that the vexing problems putting the two litigants here at loggerheads encompassed all the muslims at Kitui and so the arbitrators took into account views of the youth at Kitui to no detriment of anybody except advantage for all.

Mr. Kilonzi had taken the point that listening to the Kitui Moslem Youth and at Nairobi included a stranger to the proceedings and also deprived his clients of an opportunity to hear and possibly respond to the views of those youths.

All the arguments presented were valid. But this court takes a broad view of the matters facing the whole Kitui Muslim community and says this. The two groups who came to court no doubt represented views of many others who did not join them as litigants in the suit. It can be assumed and to a great degree that there were the faithfuls at Kitui who took this side of the Noor and Jamia mosques affair and those who were on the opposite side, As the issues remained unresolved it can be expected that emotions could rise and real danger would face the worshippers at Kitui. Sometimes disagreements of this type have spilt over beyond the mosque precincts and flooded the neighbourhoods that is the streets, residential and commercial areas often with destructive effect, now that ought not to be allowed, Whether the Appellants Applicants in the application dated 16th December 1998) were right to say that the Respondents (Applicants in the application dated 29th January 1999) were late in seeking to set aside the award of 3rd December 1997 and therefore not competent to set it aside or that when the arbitrators heard the Kitui Muslim Youth, these were not party to the dispute, this court is still of the considered opinion that the ultimate award by the learned and respected 3 Sheikhs should remain as the basis on which the litigants and indeed the Kitui Muslim community should approach their disputes facing them over both the Noor and Jamia mosques. The award was undertaken with much trouble and care. It addressed the matters the parties are feuding about and came to a conclusion which intended to reconcile the community in issue so that they focus on the religious, social and other challenges that face them. This court is not minded to think that any section of the Kitui Muslims stands to be prejudiced by the execution of this award. It should be used as the basis it was meant to be. For indeed the wise Sheikhs added a rider to their findings: whoever discerned a problem in future in connection with these 2 mosques, he has recourse to place it before joint mosque committee and trustees. Should these fail to resolve the problem then independent scholars from outside the Kitui Muslim community should be invited to address it. The Sheikhs could not and this court does not see a better way of approach to problems in a given community. Litigation ought to come to an end so that those affected move on with other affairs in peace and tranquility. In this court's view the 3 arbitrators proceeded in that direction and their award need only remain in place.

20. Accordingly it is made a judgement of this court. This should bring to an end the cases at Kitui and this appeal. With such ending, each party to meet its costs.

Orders accordingly,

Delivered on 17th February 1999.

J.W. MWERA JUDGE