**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NO. 4421 OF 1992**

**1. SHAABAN SALIM**

**2. JUMA YUSUF**

**3. ATHMAN BAKARI**

**4. HASSAN KARIUKI**

**5. ABDUL AZIZ JUMA.....PLAINTIFFS**

**VERSUS**

**1. ALI OMAR**

**2. JUMA NJENGA**

**3. EBRAHIM SALIM**

**4. AHMED KIARIE ABDALLA**

**5. ALI ABDALLA**

**6. MOHAMMED SWALEH**

**7. AHMED IBRAHIM KIHANYA**

**8. ABDALLA GATHIAKA**

**9. ATHUMAN BAKARI.....DEFENDANTS**

**RULING**

Mr Kitonga learned counsel for the plaintiffs has applied that I disqualify myself from hearing the application before the Court. No authority is cited in support of the application. The learned counsel for the defendant Mr Khalwale vehemently opposes the application. He cites a number of decisions in support of his submissions. He terms the application, *inter alia*, baseless and frivolous as it is not based on facts and sound legal basis.

This dispute (basically) – in essence relates to the Riruta Muslim Community which is the registered owner of Dagoretti/Riruta/908, Dagoretti/Riruta/909 and Dagoretti/Riruta 901 where a mosque school and other communal amenities also exist.

It is common ground that plaintiff and defendant are members of a close knit community. In their own words the dispute is described as between «sons and fathers». Briefly the defendants (fathers) claim they have been responsible for the existence of the mosques and the other amenities. The plaintiffs (sons) claim they are the registered trustees and were duly elected as new trustees. This claim is contested by the defendants, who depone, *inter alia*, (replying affidavit 25.9.1992 Ali Abdalla), that registered trustees do not enjoy the mandate of the majority, and their election was marred by massive irregularities.

As a result of this litigation the losers are the entire community of Riruta who desire nothing better than peaceful existence and economic and educational opportunity to better their prospects (lot). They are anxiously awaiting the time when they will be able to receive their individual title deeds, for the respective plots which have already been identified and allocated to them.

The vibrant educated plaintiffs were able to obtain orders for the committal to civil jail of the elderly rather conservative and less sophisticated defendants.

The order for the stay of the application (*supra*) was listed for hearing before the Court. A status quo was being maintained.

The High Court it is observed is in-undaunted with a flood of cases in which trustees and other officers of the churches, mosques, temples and other organizations professing to be of social charitable and religious nature are engaged in lengthy sometime violent and ferocious disputes to seek absolute control and sway over the entire organizations not-withstanding the basic rights and dissenting opinions of such members.

All this is done where religion is involved; in the name and love of religion. Unfortunately for the litigants, it is often visible to the Courts that the motive in those matters sometime is other than charity and love of religion which is proclaimed by all concerned. With some genuine exceptions it is the love of power, the prestige and the control over movable and immovable which wields the profit, power and personal ego which is indeed the motive and the target of the claimants.

In our country we do not have ecclesiastical Courts. These were also abolished in Europe hence the flood gates for litigants are open where religion is a slave!

This Court has held in a number of decisions that in church matters the Courts very reluctantly would intervene and assume jurisdiction not withstanding that the ecclesiasticals jurisdiction has been much reduced in particular by the Ecclesiastical Jurisdiction Measure 1963.

The Courts are reluctant to intervene in matters involving churches, mosques, social clubs, etc as internal domestic machinery exist to deal with such eventualities.

In *Asha Karanja Solomon v Presbyterian Church of East Africa and 4 others* HCC Suit No 2859/1977 it was observed «if every dispute as to marking of examinations, every award thereon, every injustice, real or imagined, in short every petty squabble which a person has with the body of which he is or seeks to become a member, were to be adjudicated by the Courts, not only would the Courts be forever dealing with the minutiae to which there exists perfectly adequate disciplinary and regulating machinery, but the efficient and smooth working of those bodies would become hopelessly impaired. There are always cranks and troublemakers in every organization who will go to any lengths to satisfy their mania. The Courts are not for such matters. There have always been recognized causes of action within which a litigant must bring himself to seek the redress or the working of which the complains and it is necessary that this should be so. Neither will the Courts permit matters to be brought before them

where there is no real or recognised cause of action or justiciable dispute, and the supposed remedy sought is in the guise of a declaratory suit.»

The learned judge in this case (*supra*) struck out the plaint and concluded his judgment thus «however the PCEA is a church set up and formed by its own constitution. They make rules for their own governance. To my mind the church is the appropriate body to determine disputes such as this. I do not think it a matter for the ordinary Courts of law. For the reasons which I have given I propose to strike out the plaint as disclosing no reasonable cause of action.» «I stand the matter of costs over for argument at a later date.»

However, there are exceptions to this where Rules of Natural Justice are not observed and no adequate machinery exist for the hearing and the determination of disputes amongst members or congregation.

After having perused the application before the Court and the interim orders made and having heard the counsel and having visited the Riruta Muslim Centre it was the assessment of the Court that the interest of the parties, their community, the Riruta Muslim Centre would only be adequately served with justice if a long term peace, tranquility and progress in dialogue by all concerned with the help and assistance of prominent members of their community is commenced.

The objects of the association are *inter alia,* spelled out in clause 7 which reads:-

«To foster the Islamic religion and promote education amongst its members, and to enhance the social status of them generally.»

The subsequent attitude and conduct of the litigants were nothing but hatred and contempt for each other. Counsel also perhaps could not remain immune from these feelings they were also swayed and were carried away by these unfortunate emotions. They forgot that they were the officers of the court and owed a duty to the Court as well as their clients.

To foster Islamic religion must also mean to respect and tolerate honest and constructive dissent.

What is Islam? Peace it is declared, and every Muslim is a brother to the other and pain and suffering of the one is also for the other – a house, a component whole. This cardinal principal is accepted by all sects and schools of Islam.

An application filed in Court on 15th July 1993 was heard or mentioned in various Courts and on 19.8.93 it was ordered to be stood over for hearing on 26.8.93 by Hon Mr Justice O'Kubasu. It was then listed before this Court for hearing. The Court then heard the counsel for the applicant/defendant and the counsel for the respondent/plaintiff.

As the matter could not be concluded on that date it was subsequently heard on 16th September 1993 the Court also held a session at Riruta, the subject of the dispute visited the mosque and the school and the adjacent amenities to acquaint itself with the issues involved. This cause of action was necessary in view of the violent nature of the dispute.

On 7th October 1993 after having heard the parties the Court observed that the dispute related to a small community of Riruta – «in the interest of justice and to prevent the abuse of the process of court» the following order was made:-

«Upon reading the application presented to this Court on the 15th day of July, 1993 by the counsel for the defendant/applicants under order XLI rule 3 and 32 of the Civil Procedure Rules, and upon reading the affidavit of Njoroge Kibatia, an advocate, sworn on 9th June, 1993 together with the annexture thereto, in support of the said application and upon reading the grounds of opposition filed on 17th August 1993 supported by a replying affidavit of Abdulaziz Juma sworn on 16th August 1993 and upon hearing the counsel for the defendants /applicants and the counsel for the plaintiff/respondents, it is ordered by consent;

1. That all the applications filed by the defendant/applicants be and are hereby stayed.

2. That all the applications filed by plaintiffs/respondents also be and are hereby stayed.

3. That access to all the Muslims of area be and hereby provided, unlimited for prayers at the mosque and to enjoy other amenities at the *Madras* and other related property.

4. That the Court further appoints the following persons to assist in the re-conciliation of all the residents and for the peaceful enjoyment of all concerned.

1. Al-haj Shaikh Alishee - Imam Jamia Masjid, Nairobi

2. The Hon Malim Mohamed (or his nominee) – Minister of Culture and Social Services

3. Mr Ahmad Abdallah - Former Deputy Governor Central Bank of Kenya

4. Dr Yusufali Eraj - Past Chairman Kenya Medical Association

5. Mr Jaffar - An advocate, Nairobi

5. That in the event of any conflict in this matter this be referred to. This five men committee prior to further proceedings before this Court.

6. That parties be at liberty to apply.

7. That this matter be mentioned in 6 weeks before the Honourable Justice, Pall, duty judge on 29th November, 1993.

Given under my hand and the seal of this Court this 7th day of October, 1993.

Issued at Nairobi this 14th day of October 1993

Deputy Registrar

High Court of Kenya at Nairobi»

The five persons appointed by the Court are in the Court's view well known distinguished Kenyans of good repute and credibility Al Haj – Sheikh Alishee Imam of the Premier Muslim Mosque in the country is the Imam that leads the prayers on Fridays which are attended by Muslims of all sects and denominations.

The Honourable Malim Mohamed is the Minister of Culture and Social service, a department of State relevant to the issue in question.

Mr Ahmed Abdallah is renowned banker who distinguished himself as Kenya's representative at the International Monetary Fund and as executive Chairman Kenya Commercial Bank. He is a former Central Bank D/Governor.

Dr Yusufali Eraj is a former Chairman of Kenya Medical Association and is an internationally renowned expert in medical as well as educational social and culture matters.

Mr Mutaza Jaffar is a vibrant lawyer who was appointed not withstanding

that, he was the counsel for the plaintiff. It was, at the time, perceived and expected that for his legal and religious training and acumen he would be able to act fairly and impartially as an expert and assist in resolving the dispute.

The above order was made with the full knowledge and consent of all concerned. Liberty was granted to

the parties to apply in case of their objection(s). None did. A period of six weeks was allowed.

As Mr Kitonga the counsel for the plaintiff in support of his present application relies upon Mr Mutaza Jaffer's letter of 31st March 1994 addressed to the Registrar of this Court and the letter of the plaintiffs written by the plaintiff addressed to all the member of the reconciliation committee (without prejudice) and dated 18.3.1994 – filed on 23.3.94 as well as the letter dated 24.3.1994 addressed to the Honourable Chief Justice by four of the five plaintiffs/respondents.

In this correspondence it is submitted, *inter alia*, that I am a Sunni Muslim, and was seen at Friday prayers led by Imam Ali Shee. It is also contended that I am a friend of some of the reconciliation committee members.

This is a most absurd application tainted with *male fide* and maldiction and which is a complete distortion of the reality of the situation. The implications of this sort of application are indeed grave, for the next time around it could be a male objecting to a female tribunal and vice versa. There is a tremedious scope for abuse.

The fact is that the attempted reconciliation had been at the behest of the Court which was consented to. It was therefore, necessary to appoint persons of impeccable standing who would be representatives of all shades of opinion.

It is conveniently forgotten that Dr Yusuf Ali Eraj whom the plaintiffs admire saw me and also spent a considerable time in Court to assist the reconciliation. The Court is appreciative of all these gentlemen who considered it their duty and an act of service and therefore devoted their valuable time and energy without promise of a wordly reward.

It is unfortunate that Dr Eraj did not find more time to devote to the reconciliation as he was out of the country. Sad and inexpliciable is the attitude of Mr Jaffer an advocate of this Court who not only absented himself for the reconciliation meetings but made spurious remarks about the Court which are an affront to its dignity and authority.

These serious remarks I do not intend to deal with at this stage, lest the Court be diverted from its sacred task of dispensing justice. This enormous duty is rendered always being conscious of limitation of human endeavour and intellect.

«The contempt of the court is a matter which is not to be taken lightly. This principle was restated in the recent decision in CA Application No NAI 4 of 1994 *Republic v Makali & 3 others*.

The law applicable in Kenya in matters of contempt is the law for the time being applied by the High Court of Justice in England – Section 5 (1) Judicature Act. In England, they have a head of contempt known as «Scandalising the Court». This is defined in *Halsbury Laws of England*, Vol 9, 4th edition at pg 21 paragraph 27 as

«Any act done or writing published which is calculated to bring a Court or a judge into contempt, or to lower his authority, or to interfere with due course of justice or the lawful process of the court. Thus scurrilous abuse of a judge or Court, or attacks on the personal character of judge, are punishable as contempt……»

It seems that once an act is done, or a writing is published with any of the intentions stated, then it is irrelevant whether it be done when the judicial proceedings are still in progress or after the proceedings have been terminated. In the *Queen v Gray* [1900] 2 QB 36 it was held that:-

«The punishment is inflicted, not for the purpose of protecting either the court as a whole or the individual judges of the Court from a repetition of the attack, but of protecting the public, and especially, those who either voluntarily or by compulsion are subject to the jurisdiction of the court, from mischief they will incur if the authority of the tribunal is undermined or impaired. In consequence the Court has

regarded with particular seriousness allegations of partiality or bias on the part of a judge or Court.»

Thus in our own jurisdiction Professor Mathai was punished not for the purpose of protecting either Mr Justice Chesoni, as he then was, who she called corrupt or incompetent member, from a repetition of her attack but to protect the administration of justice. If the public were to be made to believe that judges were corrupt and incompetent, then their confidence in the administration of justice would be greatly undermined or impaired

and those who come to Courts or are compelled to come to the Courts will have little or no faith at all that they could ever get justice from the system. The result would be each man for himself and God for us all.»

For the purpose of this application it must be stated that I do not sit as a Muslim, or a Christian or whatever.

The Court sits under the provisions of the Constitution of the Republic of Kenya and the Judicature Act.

However as the human beings have to man these institutions the persons who sit as for necessity had to belong to different strata of society.

As a Muslim I attend Friday prayers at the Jamia mosque in company of thousands of worshippers of all sects of Islam from 1 to 2 pm on Fridays which includes Muslim from Iran to Saudi Arabia and worshippers from Mandera to Zanzibar. My attendance is consequentional.

The only substantial steps which the Court took at the proceedings before it, was the appointment of the reconciliation committee. This action could hardly be termed as biased.

In the recent decision of the Court of Appeal in England The Master of Rolls presiding in *Arab Monetary Fund v Hashim and other* The Times May 1993 No 8 is applicable to the present application. The principle enunciated are:

«A client's instructions were never themselves sufficient to justify an application for the removal of a judge on the ground of bias or apparent bias. Such an application should only be made where counsel was satisfied that there was material on which it could properly be brought.

A judge should not fear that his professional conduct would be impugned because management decisions, taken individually and made in the running of a trial with reasons given and no eye on the scorecard of the parties' respective success or failure, were felt by one party to be unreasonably favourable to the other.»

This was stated when an application for leave to appeal by Dr Hashim and Mrs Hashim from Mr Justice Chadwick who had dismissed their application that he discharge himself on the grounds of apparent bias.

It further observed that:-

«Cases might unhappily arise in which evidence of bias or apparent bias was so clear that an application for the discharge of the judge was justified. But such an application was never justified simply by the instructions of the client.»

Counsel's duty to the Court and to the wider interests of justice required that he should not lend himself to making such an application unless he was conscientiously satisfied that there was material on which he could properly do so.

Above all he had to try to press firmly but fairly to a conclusion, conscious that one man's six months in Court might be the next man's denial of justice. The judges task was eased where the parties cooperated in the conduct of litigation but that prospect was remote – if the attention was distracted by interlocutory

skirmishes where one party had a long purse and the other legally aided the onus on the judge to ensure reasonable expedition was particularly strong.

«Judges were constantly urged to be robust and interventionist to mitigate the blemish on the legal system which protracted trials, civil as well as criminal had become. In responding to that call judges had to be true to their judicial oaths – but they were not to fear that their professional conduct would be impugned-

The Court considered these and concluded that whether treated singly or cumulatively the incidents were of trivial significance and did not begin to justify the very serious charge founded in part on them. The Court felt bound to say that the application should never have been made».

As the application before me is based on similar triviality it should never have been brought before the Court.

This Court had only one interest in this matter and that was to provide justice which the situation demanded at the cheapest and earliest opportunity.

Speaking recently at Birmingham University, the Master of the Rolls Sir Thomas Bingham said the cost of resolving civil disputes was «a cancer

eating at the heart of the administration of justice. It is no use offering high quality goods in the shop window if the hungry cannot afford to buy.»

The «quite unacceptable» costs would not come down while judges continued to get case papers only a day before trial, Sir Thomas said.

He suggested that meetings should be used to explore the possibility of an out-of-Court settlement or other means of resolving the dispute rather than go to trial. The judge would help define the issues of the case, and limit disclosure of documents to those which were relevant. A continental-style independent expert could be appointed to assist the Court. Instead of each side appointing its own expert witnesses.

Does Mr Kitonga himself believe in his application? He does not say so. Opportunity was provided to Mr Jaffar to appear in person and personally state contents of the letter to the Court. He did not exhibit the courtesy or the courage to face upto his duty.

The spectacle provided in this case, by the intolerance of the litigants not only to each other but also towards the Court, when reckless and baseless allegations are made to secure a different forum, it obliges the Court to sadly conclude that in respect of such adherents of Islam – as it is said with some reason:

«That true Islam is preserved in books and Muslims in graves»

I do not find any merit in the application, this application is not only misconceived but I find it also mischievous.

The application that I disqualify myself is dismissed with costs as this Court is competent to dispense justice as by law provided.

There is however a doubt created by the counsel in the minds of their clients that they might not receive a fair hearing and perhaps justice in these proceedings. This is a sad and disdainful state of affairs.

The applicant wishes this case to be hard by the named judges. It truly would be a sad day when parties or advocates would be permitted to appoint a bench to suit perhaps their taste or convenience. It would be a dangerous precedent if this application is acceded to.

All judges of the Court are of equal and parallel jurisdiction in discharge of their onerous function and ardous duty to dispense justice.

As all judges of High court are competent to hear any matter listed before them in conformity with their jurisdiction, inherent and appellate. In the unusual circumstances pertaining to this case I stay the interlocutory applications before me and I have decided to transfer this suit for hearing and determination before any other honourable judge of the court except this Court so as to remove any doubt as to the desire and duty of the Court with all humility not only to do justice, as by law provided, but also that justice be manifestly seen to be done.

It is further ordered that the status quo is to be maintained till the hearing and final determination of this declaratory suit.

It is ordered that this suit be heard on priority basis.

Orders accordingly.

**Dated and Delivered at Nairobi this 12th day of July 1994**

**S.M.AMIN**

**JUDGE**