



REPUBLIC OF KENYA

IN THE KADHI COURT OF KENYA

AT KISUMU

CIVIL SUIT NO. 03 OF 2018

- 1. MOHAMED ALI ELM I**
- 2. ABDULRAHMAN OKONGO**
- 3. ABDULRAHMAN ALI**
- 4. OSMAN HASSN ABDILLE.....PLAINTIFFS**

VERSUS

- 1. SULEIMAN OGOLA MUNDHWE.....DEFENDANT**

JUDGEMENT

INTRODUCTION:

1. The four Plaintiffs filed a Complaint on their own behalf and as pioneers of Masjid Nuur. The 1st plaintiff identified himself as the Trustee /or donor of the mosque. He was responsible for the finances at the Mosque. That is the payment of Imam Salary, electricity and water bills. The 2nd, 3rd and 4th are worshippers of the mosque.

2. In the Complaint, the 1st Plaintiff stated that Siaya mosque is built on a parcel of land whose lease he got from the government on **26th August, 1979**. The lease is in his possession.

3. The Plaintiffs' have further averred that it has come to their realization that the defendant Suleiman Ogola Mundhwe is misusing his position as the Imam of the mosque and he is not willing to be advised. The Defendant who is an Imam has started a car wash business at the said Mosque without consulting the worshippers.

4. It is the Plaintiffs' averment that, the Defendant has employed non-Muslims who misuse the mosque toilets. He has failed to convene a meeting for the election of the committee to run the affairs of the mosque he has turned it to his own home. Madrasa has been changed to stores. He took some madrasa children to police without notifying the parents. He damaged the taps to reduce overflow of water in a rude and without explanations to the members of the Mosque.

4.1. That the Imam cut down trees without consultation from the worshippers or the trustee or donor.

4.2. The Imam has neglected the mosque, he does not clean it. That effort to talk to him on this matter has turned futile because he claims the mosque belongs to an Individual and not for the community. He has refused to disclose the individual. The 1st plaintiff is in the possession of the lease document.

5. The Plaintiffs' are seeking for;

1. **Step** down of the Imam to pave way for the investigations as
2. The court to set date for the election of the committee.
3. The defendant to disclose the grabber of the Mosque land so that any fraudulent transfer be revoked.

4. Any other relief the court may deem fit and just to grant.

6. In his Defence, the Defendant averred that the alleged accusations are false and untrue.

a. The Defendant has further averred in his Defence that the Plaintiffs aim is to deny him his freedom of worship and that the Plaintiffs have no right over the suit property.

b. In his defense, the defendant averred that the alleged dispute being civil in nature, Kadhi lacks jurisdiction to entertain the same and the defendant shall pray for this dismissal with costs on account of forum-non convenience.

c. There is also a notice of preliminary objection dated 3rd day of April on the following grounds;

d. That the alleged dispute being civil in nature, Honorable Kadhi's court lacks jurisdiction to entertain the proceedings.

i. That consequently, the proceedings are fatally defective and the defendant shall pay for their dismissal with cost on the account of forum.

e. It was further averred by the defendant that none of the allegations in the plaint discloses any or any reasonable cause of action known in law and that the plaintiffs with the Honorable court. The plaintiffs are invited to strict proof of any allegations or to the contrary.

f. The first plaintiff, admittedly being resident of port Victoria in Busia County is a non-resident of Siaya township within the locality of Masjid Nuur mosque, the subject of these proceedings and therefore a busy body bent on intermeddling with the affairs of the masjid Nuur with a concealed personal agenda, personally or on behalf of other intermeddlers.

g. The defendant avers that the property upon which the mosque stands is under allotment letter issued by the then Siaya County council in the name of Abdul Malik Obama who was the inception care taker of the mosque. The plaintiffs are invited to any allegations to the contrary.

h. On paragraph 7, 8, 10, 11-The defendant operates a car wash within the precincts of the mosque. The same is for the benefit of the mosque and in fact income generated to pay electricity, maintain and clean the mosque, take care of the orphans under the care of the defendant.

i. Non-Muslims engaging in the carwash have converted to Islam-benefits of the venture. In any event, it would be an act of discrimination and a violation of the bill of rights for the defendant to purport to employ any Muslims in the car wash was business. Madrassa class is ongoing and active. The defendant have restricted himself to one room for his residential use and surrendering the extra rooms for mosque purpose including Madrassa.

7. The jurisdiction of the Honorable court is denied. He avers that the plaintiffs have side stepped the religious organs with the jurisdiction and mandate to handle the alleged dispute-namely Siaya Masjid Mosque Committee, Siaya County Muslim Association, Siaya supreme council, The county council of Imam and preachers of Kenya.

Plaintiffs Case

8. The 1st plaintiff (PW1) informed the court that he was a resident of port Victoria but prior to his movement, he was a resident of Siaya town in Siaya County. That he resided at Siaya for 36 years commencing June 1977. He recalls that he employed the defendant as an Imam in the year 2008.

I. It was the evidence of PW1 that in the year 1977 August, he applied to the government for a place for Muslims to worship which was granted in 1981. At the time of application, they were four in number. One person of Luo speaking and three of Somali origin.

II. The first plaintiff further informs this court that there was demand from the county council to pay Ksh.1, 473 which were to be paid not in Siaya or Kisumu but in Nairobi. He went to Nairobi and paid the said money.

III. The 1st plaintiff further states and contends that at that moment, there were few Muslims. But after the acquisition of the allotment, he looked for donors to build the mosque. Many came but he gave the contract to African Muslim Agency through Inspector Kassim Kawango.

IV. That he also further states and give his evidence that he employed Imams who were unable to stay for long due to personal problems.

V. That he gave authority to Abdulqadr Okoth Yalopumba to take care of the mosque.

VI. After migration, he frequented the mosque weekly after relocating to port Victoria.

VII. When Abdulqadir left, he identified Suleiman as the one able to be the Imam of the mosque.

VIII. He was able to pay him monthly salary until after his operation he stopped paying but Suleiman worked because of Allah (sabilillah).

IX. That owing to this, any complaints from the residents reached him written or verbal. He decided to visit the place to address the issue but found tough resistance from the Imam.

X. The claim of the defendant that the mosque was built by Malik Obama was false.

XI. He also stated that he had the lease of the plot marked P EXT1.

XII. **2ND** Plaintiff states that he is the neighbor to the mosque. They saw the defendant give him mandate to lead prayers but later on changed. He could leave the mosque to Nakuru without notice. He is disrespectful and does not observe prayer times. He doesn't take advice or consult anybody on the affairs of the mosque. He put a carwash and disrupts the activities of the mosque. Mr. Owiso also stated that there is no madrassa and it has been occupied by him He does things autarchic, e.g. cutting down trees, cutting taps, etc. Mr Abdulrahman Owiso-The vehicles coming at the car wash carry corpse and pigs which is against the Islamic law and Muslims. PW2 said that he had advised the defendant to get out but he didn't heed the advice.

9. He said that the madrassa was not there, he changed the classes for his personal use. He cut taps contributed by the community. He unilaterally cut down trees without notice to the worshippers. The mosque is dirty. There is no committee to the mosque. He declared that the mosque was under protection of Malik Obama. On cross examination the plaintiff stated that he was chosen by people but he later changed behavior and started chest thumping.

10. PW3:- Identified as Abdulrahman Ali Oduor. He contends the Imam is leading the mosque in un-Islamic way .He cuts trees without consultation. He talked of reporting madrassa students .He is the judge and insults people during meetings. He started carwash without consulting anyone .He claimed that the allotment letter was in the name of Malik Obama .He collects contributions which are not genuine.He stated that they have no confidence in him .he does not pray five times consecutively in the mosque. He is always out.

11. PW 4: -Osman Abdi-A resident of Port Victoria frequented Siaya .That he accompanied the 1st plaintiff to address the numerous complaints being miss-management of the mosque. It had leaking roof and dirty. He also informed the court that it was about the car wash that had brought all the problems. The efforts to address the issue amicably proved futile as the respondent was harsh and uncooperative and chest thumping. He acknowledged that the Imam had led the mosque well but slide from the right path, 65% off the track. The mosque is a public entity and the way he was running it was not correct

12. The plaintiff called 6 witnesses who reiterated the plaintiff's case calling the defendant as using tribal remarks that he was the resident of Siaya no one can chase him away. They all agreed that if the Imam steps down and let the committee decide then the peace needed will be achieved. That on the account of all that has been said, Suleiman is not fit to be Imam. The other plaintiffs also narrated the same statures and maintain the peacefulness of the mosque

Defendant's case;

13. The defendant on his part denied all the allegations filed in court. He particularly denied all the issues to do with land transfer and grabbing that the same happened before he became a Muslim, and produced letters of allotment done before him. He also produced other letters of correspondences between the committee and the land registrar Siaya.

a. The allegation of not praying consecutively was admitted saying he was a leader of many organizations and serves Siaya County on various levels therefore he left his deputy to lead prayers. He produced invitation letters to attend meetings.

b. The defendant states that he was chosen Imam at the time dispute and quarrels could not end. The claims and accusations on Imam are rampant and started long time ago. They were treated badly and inhumanely. He claimed that so many had been chased away to say the least.

c. He informed the court that he united the 2 committees he found and formed one chaired by Abubakar Achoka. He worked without pay save for onetime payment of Ksh.3000/=from Abdulmalik Obama.He was forced to work as a bicycle repair. Then worked as a Bodaboda after getting a motorbike.

d. He explains that he cut off tees with the authority of the County council and Nema to cure flooding. .He agreed that he is not always found in the mosque due to commitments. He also agrees that after many challenges, he started the car wash which benefits the Muslim community.

e. He endeavored in explaining all the allegations that he did it in good faith. The defendant called 14 witnesses to his case. All the witnesses in their testimonies tried as much as possible to vindicate, exonerate the defendant of any wrong doing stating he had managed and led the mosque very well and had helped many people to convert to Islam. Save for DW2 One **Rashid Obat Ongweny** who narrated the history of the mosque of Siaya and the struggle it went through to be built. He stated that he together with the 1st plaintiff had fought for the acquisition of the plot and later on building which took more than 10 years. The land rates and initial allocation was solely paid by the 1st plaintiff and also sourced for the builders.

The issues for the court's determination are:-

- i. Whether this court has jurisdiction to hear and determine the issues sought for in this plaint.*
- ii. Whether the Plaintiffs have capacity to bring the current suit and/or application"*
- iii. Whether the plaintiffs have made up a case for being granted the orders sought"*
- iv. What are the qualities of an Imam and what are the reasons for the removal of Imam from leading the congregation.*
- v. What Orders should the court make"*

JURISDICTION.

To end this matter first we have to revisit the whole issue of the jurisdiction of this court in relation to the case before we proceed. It is prudent to summarize the question of jurisdiction as it was the main issue and as it stated, Jurisdiction is everything without which no step can be made in solving the dispute before a court.

14. The respondent denied this court's jurisdiction and contended that the court is only seized to handle marriages, divorce and inheritance. The plaintiffs in one voice wondered and contended that a Kadhi's court is a Muslim law application court and the subject matter involves a mosque which is squarely on the learned scholar of the same court. The defendant averred that the plaintiff had matters touching on land and hence this is out of the armpits of the Kadhi's court and that it lacks forum convenes.

15. The defendant believes that the matter could amicably be settled by; - Siaya masjid Mosque committee, -Siaya county Muslim Association,-Siaya Supreme council and County council of Imam and preachers of Kenya.

16. I may have equally agreed with him only that after full hearing, it was established from my findings that there is no functional committee at the mosque. The other named religious organizations are not aware of the dispute and some are not known since they were formed recently. Further they lack machinery and mechanism of solving this dispute. Further, the defendant is the official of all the said organizations and it would be difficult and illogical for the accused to be the judge in his own cause. That is why I found it judicious to hear the case. Add on that in the initial stage I did appoint leaders of the said organ but they were not able to reconcile and solve the matter amicably as expressed.

17. Before I answer the questions of this cause I would like to recap matter on jurisdiction. Therefore do Kadhi's courts as constituted and by the provisions of law have the jurisdiction on mosques related matters/disputes?

18. The objection is based on two main grounds; that the court lacks jurisdiction to hear and determine the issues raised in the plaint. He said that the court can only deal with issues related to marriage, divorce and inheritance. This forum was not convenient. The matter would have been well dealt with by the above organs.

19. The defendant might have wanted to quote the jurisdiction of Kadhi's court as drawn from Article 170(5) of the Laws of Kenya which undeniably states that;-

20. "The jurisdiction of Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of Kadhi's court.

21. The jurisdiction of Kadhi's court is also drawn from section 5 of the Kadhi's Act **Cap 11** laws of Kenya, as follows;

22. "A Kadhi's court shall have and exercise jurisdiction, namely personal status. Marriages, divorce or inheritance in proceedings which all parties profess the Muslim religion, but nothing in the section shall limit the jurisdiction of the High court or of any subordinate court in any proceedings that come before it."

23. The plaintiffs objection to the P.O is that they opposed that the Kadhi's court is for every Muslim and mosques fall under Muslim law, They wondered how an Imam could refuse to be heard by Kadhi, it was saddening to hear a Muslim oppose the court, more so the Imam And further asked the court to consider the public interest of Siaya faithful not an individual.

24. It is not in dispute that all parties involved are Muslims. The matter was not about the land or the mosque itself as captured in the defense of the defendant but it was all about the leadership, the running of the mosque and its management in general.

25. Both the constitution and the Kadhi's court Act cap 11 of the laws of Kenya state as personal status as one of the areas where the Kadhi's court has jurisdiction to arbitrate. But what consists of **PERSONAL STATUS** has not been defined in our laws. I have not found any case laws defining the said expression as contained in the constitution or in Kadhi's court Act.

26. To give effect and well understanding of the law, one need to examine original source of Muslim laws as many of the judges who attempt to define and understand the jurisdiction of Kadhi's court. In the case of Justice **Edward .M. Mureithi** in **R.B & R.G.D VRS H.S.B.& A.S.B.(2014)ELKR** on his part, the judge had the view that the issue of profession of Muslim faith is distinct from the necessary ingredients of submission to the jurisdiction of the court, to deal with personal law matter of marriage, divorce and inheritance of Muslims. This statement of the judge puts the understanding that personal status as part of marriage, divorce and inheritance.

27. In the view of original sources of Islamic law, personal status have a wider scope as expressed by the deputy chief Kadhi's ruling dated 21/5/2018 as reported in **divorce cause 44 of 2018 S.M.A.K VRS R.A.K.** states at paragraph 10”**The legal concept of personal law under Islamic legal system as elucidated in the jurisprudential works of eminent jurists.** DO1 in Shariah; Islamic law (1984) and Zuhaylis Fiqhul Al Islam Wa Adillatuhu (2007) (Islamic Jurisprudence an evidence)Zakiyudinis Ahkam Ash-shariyyah Lil Ahwaal Ash-shakhsiyya (1993) Sharia Rules on personal status indicates that personal status is conceptualized in a broader category of jurisprudential question pertaining to status of the person in relation to rights, duties and liabilities or he owes family rights from the founding of a family to distribution of estate upon death. In another ruling of the deputy Chief Kadhi in Matrimonial case No.154 of 2017.A.(A).W.M.-VRS-Y.A.K- Un reported on the issue of personal status at paragraph 48 states that “According to the applied analytical category of the Islamic Jurisprudence elements of personal status are demarcated as ‘suits related status and capacity of a person, legal relation between family members, legitimization ,recognition or repudiation of paternity, issues on ascendants and descendants, support by consanguinity and affinity, collateral relationships of family members, custody, maintenance , Kafala, guardianship, gifts, a bequeath, religious status of a person in dispute, burial related issued and Wakf among others. Sec *Doi A .Shariah*; The Islamic law(2) Zuheyli A.(2007) Islamic jurisprudence and rule of evidence.Al.ghanduri .A.(1982).Personal status in Islamic law (4)Zakiyudin M (1993) Sharia rule on personal status. In relation, other sources and legislations of the Islamic jurisdiction. In Zanzibar which have Kadhi's court with similar jurisdiction as this ,the practice based on personal status covers Waqf (endowment).Ethiopia also have similar practice and their Kadhi's court having powers to adjudicate matters and personal status also determine Waqfs (endowment) related cases .

28. In the **Waqfs Commission Act Cap 109 law of Kenya** defines Waqfs to mean the religious charitable benevolent endowment or dedication of any property with Muslim laws (5.2) **waqf commission Act**. There is no doubt that a mosque is a Muslim religious institution and established by either individuals or groups or public is a waqf by itself. In **section 2(8) of the Muslim personal law sharia application Act 1937** of India provides “**Application of personal law of Muslim not withstanding any custom or usage to the contrary, in all questions, save questions to Agricultural land regarding intestate succession, special property of females including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage including Talaq, ulla, zihar, lian, khula and mubaaraat, maintenance, dower, guardianship, gifts, trusts, and trust properties and Waqfs (other than charities and charitable institutions and charitable religious endowments).The rule of decisions in case where parties are Muslims shall be the Muslim personal law(Shariat)”**

29. The above provision explains that personal law is not only restricted to marriage, divorce and inheritance but is contrary to the imaginations of many including the defendant. Many of the parties even the plaintiffs do not know. This is for their knowledge. The above authorities give the Kadhi's court window to arbitrate the issues of waqf which include mosques and its management. The institutions like mosques are juristic person. It can own property accept donations, employ personnel, sue or be sued and go into any contract. Of course all of these acts will be carried out by us legally constitutional management committee or any other body so established for that purpose.

30. The issues of the mosque are purely religious hence disputes related to it are best to be handled by a court which is established for such religious purpose. As to my above analysis, mosques would be under personal status and which is in its implied jurisdiction.

The sentiments above are backed by Judge Kimaru in R.D & RGO-VRS-H.S.B & A.S.B.(2014)EKLR. He opines the reason why the Kadhi's court was established was to meet the needs of Muslims to resolve their religious disputes according to Muslim law And in regard to the constitution under Article 170(5) requires a Kadhi should be learned in Muslim law, this means a Kadhi is person who understands all cases of Islamic Nature hence be so to arbitrate such suits. The constitution did not establish Kadhi's court in vain. It should also dawn on us that the historical context in enactment of Kadhi's court in Kenya premised on **Kenyatta/Shamte agreement** which enjoys constitutional see Art 2(6) which was to this extend.

31. The issue of submission and denial of the jurisdiction of a court. First of all, the phase only came in the Laws of Kenya 2010.Judges have also differed on it. Judge Muriithi also points out that it is a right to choose and any party has the right under the constitution. May be the defendant may also know this. Though as established, this court has a purpose. If the clause of submission is taken literally and any party allowed to challenge the jurisdiction of this court will be rendered useless. Surely, this was not the purpose of the legislation and no legal thought will agree to that.

32. To properly understand the clause of submission, we must ask who is to submit. We have already said that if the parties agree not to submit it becomes a right. But if we allow any party not to submit, then whose justice and interest is this court safeguarding? If opposing application is allowed without legally valid grounds, obviously the court would not have considered the right of the party which is appropriately before the court by virtue of being Muslims and the court has requisite jurisdiction of the issues in dispute. Jurisdiction and submission is always objected by defending party. This is due to the experience and cases I have come across. This is part of the scheme to delay, frustrate the case of justice to the complainants.

33. What is graver is the effect to deny being subjected to the Sharia Law when you have an opportunity. The consequences of denial or refusal to submit to the application of Islamic law amounts to blasphemy. Let it be known that the origin of judging all Muslim issues by shariah in all spheres of life is the origin of religion and basis of doctrine of monotheism.(Aqidah Attawhiid)

34. The first point of retreat and despise of the Islamic law in the Islamic house was in the end of Ottoman caliphate. It was the passing of Trade/Commercial law in 1850 from the French law. This was again followed by allowing legislation rather than the shariah which gradually removed its application and practice.

35. Honest Muslims in the Islamic and non-Islamic dwellings would like to be arbitrated by Islamic law because;-

I. They believe that ruling by what Allah has revealed is the source of two testimonies, which are the title of this religion, and the origin of the monotheism on which the entire religion is based. I wonder that Allah has favored us in Kenya and given us a window to be judged by what he revealed and many groups and voices are heard bashing and denying themselves this opportunity.

II. Allah (s.w.t) has made ruling/arbitrating on what Allah has not revealed as worship of tyrants (**twaghut**).He says Allah (s.w.t)

(Q4; 60) "Have you not seen those who claim to have believed in what was revealed to you (o Muhammad) and what was revealed before you?, they wish to refer legislation to twaghut while they were commanded to reject it, and Satan wishes to lead them far astray.

III. That ruling in that which is not Shariah and Islamic is shirk. Allah says **"And do not involve in his rule any one"**.

IV. Allah has made denial and prevention of rule and judging by shariah/Muslim law special characteristics as of the hypocrites as he said **"And when it is said to them come to what ALLAH has revealed and to the messenger, you see the hypocrites turning away from you in a version."**

V. That it is denied for them faith/iman. One who does not judge by what the prophet came with in everything? Allah has said ;(Q 4: 65) **"But no, by your Lord, they will not (truly) believe until they make you Oh (Mohammad) concerning that over which they dispute among themselves and then within themselves no discomfort from what you have judged and submit in (full willing) submission."**

VI. And lastly Allah has called that who rules with that which was not revealed to the prophet as disbelievers, oppressors (Q 6;44) **"And whoever does not judge by what Allah has revealed, then it is those who are wrong doers-the unjust" "And whoever does not judge by what Allah has revealed, then it is those who are disbelievers"**

36. In the interpretation of the constitution should not only on the provisions but look as stated before. Historical developments and similar jurisdiction in common law coupled with the other sources of the substantive laws. I therefore wish to conclude that most mosques are endowments by Muslims and groups. It is meant to be conducted using the substantive Muslim law with all parties being Muslims and falling under the personal status. There is a feeling from some parties that it is not expressly mentioned in the constitution or in the statutes but its characteristics are features under Muslim law of the personal status. I therefore have a feeling and view that Kadhi's court should adjudicate the matter now that the question do not relate to land ownership or between non-Muslims.

ANALYSIS AND DETERMINATION

37. This dispute (basically) – in essence relates to the Siaya Muslim Community. This parcel of land is where a mosque, a house, and a madrasa are situated. The defendant has put onto it a car wash.

38. It is common ground that plaintiffs and defendant are members of the community. In their own words the dispute is described as between Imam and the worshippers. Briefly the plaintiffs claim they have been responsible for the existence of the mosque and the 1st plaintiff is the trustee. The defendant claims he was selected as new Imam in 2008 by the outgoing Imam of the Somali origin. This claim is contested by the plaintiffs, who depone, *inter alia*, the defendant was employed by the plaintiffs, that he the trustee does not enjoy the mandate of the majority he described him as a busy body.

39. As a result of this litigation the losers are the entire community of Siaya who desire nothing better than peaceful existence and economic and educational opportunity to better their prospects. They are anxiously waiting the time when they will be able to have peaceful prayers.

40. I have observed in the recent past cases in which trustees and other officers of the mosques, 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 notwithstanding the basic rights and dissenting opinions of such members.

41. 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 yields the profit, power and personal ego which to some extent is the motive and the target of the litigants.

42. This Court is becoming reluctant to intervene in matters involving mosques, Imams and Waqfs, etc. which is supposed to be dealt with by internal committee machinery that exist to deal with such eventualities.

43. There are always cranks and troublemakers in every organization who will go to any lengths to satisfy their passion. 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 complaints and it is necessary that this should be so.

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

45. After having perused the pleadings before the Court and the interim orders I made on several times during the hearing and having heard the parties and having visited the Siaya Mosque it was the assessment of the Court that the interest of the parties, their community, the Siaya Muslim Community 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 done.

46. I selected a committee and sent it to the Mosque for a fact finding and conciliation. The committee came up with the following conclusions; firstly, they identified Car wash, Committee, water, cutting of trees children taken to police , slaughter fee and cash from the car wash, water and felled trees as the major contentious issues. They recommended that it was their view that a properly constituted committee will solve the issues amicably.

47. When I visited the place the same issues emerged. 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.

48. On the issue of the capacity of the plaintiffs by the virtue that they are not residents of Siaya. It is not in dispute that the Plaintiffs' mosque was built sometimes ago by the effort of the plaintiffs. Indeed, the Defendant and his witnesses informed the court that they were members in the same mosque. Since the year 2008 when the Imam came all was not well. When he took over at first it was perfect. Both the Plaintiffs and the Defendant, together with his witnesses are in agreement that the land on which the Plaintiffs' mosque and madrasa were constructed was acquired through the efforts of Muslims and the 1st plaintiff, by this and by the fact that a mosque is a public entity for all any person whether a resident or not can seek to correct anything for the purpose of the community. They have the authority and capacity. I find that they have the capacity on their behalf and on the behalf of the Ummah to bring any issue for the betterment of the mosque and Islam in general.

49. The issue of the plaintiff's case is as stated before. The response has been scrutinized. It emerged that the car wash was put at mosque without full consultation of the members. There was no committee as expressed by the defendant. When I visited the place, I had the opportunity to query the said members and they denied vehemently being in the committee. I also heard the sentiments of the Imam in an emotional, anger packed voice called the plaintiff names and exhibited statements of tribal insinuations not befitting an Imam of his caliber. It exposed the commotion and notion of disunity and the reason of dislike by the certain members of the Siaya Muslim community. To this extend I am indeed satisfied and for these reasons, I find and hold that the Plaintiffs have proved their case on a balance of probabilities.

50. I am persuaded to enlist some of the qualities of leadership in Islam that should be followed as per the Islamic law.

Personal attributes required for leadership/Imam: Islam

Personal qualities or characters are given a great importance in Islam. Specially, at the time of the appointment of someone to a responsible position it has been carefully observed. He must have an excellent character so that he may influence his followers. Imam Ragib Ispahani says- "He is not totally eligible for leadership who has not possessed a purified soul. Because, without embodying the good character, he cannot purify his speech and deed." Here we mention some personal features for the leadership according to Islam.

50.1. **Taqwa: It means humility; being conscious of Allah's presence and fearing Him at all times.** This quality is the only criterion by which people are judged in Islam as Allah says- "O mankind! Lo! We have created you from male and female, and have made you nations and tribes that ye may know one another. Lo! The noblest of you, in the sight of Allah, is the best in conduct. Lo! Allah is Knower, Aware." Taqwa makes a leader humble and more sincere at his work. The prophet of Islam (s) set the perfect example of Taqwa by his deeds. After that four noble righteous caliphs also practice modesty, humility and taqwa in their conducts. Being the caliph and supreme authority of the contemporary super power, Abu Bakr delivered his first speech full of modesty and humbleness. He said without any kind of arrogance- "I have been appointed as ruler over you although I am not the best among you. I have never sought this position nor has there ever been a desire in my heart to have this in preference to anyone else... If I do right, you must help and obey me; if I go astray, set me aright... Obey me so long as I obey Allah and His Messenger. If I disobey them, then you have no obligation to follow me."

50.2. **`Adl (Justice), therefore, a fundamental percept of Islam and an essential characteristic a leader must possess.** Islam always urges for doing justice to all. Allah Ordered- "O ye who believe! Be steadfast witnesses for Allah in equity, and let not hatred of any people seduce you that ye deal not justly. Deal justly, that is nearer to your duty. Observe your duty to Allah. Lo! Allah is informed of what ye do." Even in the circumstances where verdict goes against own interest Islam commands Muslim to be fair and just. Allah says-

"O! You, who believe,! Stand out firmly for justice, as witness to Allah, even as against yourselves or your parents or your kin and whether it be against rich or poor, for Allah protects both." A leader must keep this quality at any means in order to govern the society peacefully. Prophet (s) put a lot of example of justice in his administration. In Madinah, the Prophet (s) ordered the hand of a thief to be cut. Some of his Sahaba thought the punishment would not be carried out because the person came from a noble family. When he heard this, the Prophet (s) assured them that if his daughter Fatimah had been guilty, even she would not have been spared. **Sabr (patience and tolerance): this is also an essential quality for a leader. It helps a person to do something with great care.** Criticism of opposition, failure in desired success, debate on decision making etc may be properly overcome with the quality of Sabr. Allah likes the virtue and admires-"And when they became steadfast and believed firmly in our revelations, we appointed from among them leaders who guided by our command." We see a great number of instances of Sabr in the life of Prophets like Yakub, Aiyub, Yusuf (s). Our Prophet Muhammad (s) also showed mentionable patience and tolerance in the event of His Taif tour, triumph of Makka.

50.3. **Amanah (Trust or trusteeship), an important concept of Islamic leadership. It is a psychological contract between the leader and his followers in which the former will try his best to guide, protect and to treat the later with justice.** A leader must enjoy this trust with highest degree of responsibility. Allah says- "Lo! Allah commandeth you that ye restore deposits (amanah) to their owners, and, if ye judge between mankind, that ye judge justly. Lo! Comely is this which Allah admonisheth you. Lo! Allah is ever Hearer, Seer."

50.4. **Tawakkul (dependence on Allah), this virtue means complete surrender to Allah. A leader must got his plan, policy and strategy in order to achieve any lawful objectives, And then it is his sacred duty to depend on Allah for the successful result of his works.** If he does so, then any kind of failure does not make him frustrated. Besides this, Tawakkul gives him courage and helps him to take proper decision in facing any problem. Allah says- "..... When you have made a decision, put your trust in Allah, certainly, Allah loves those who put their trust (in Him)."

51. These are the core attributes for a good leader. Besides these, honesty, kindness, forgiveness, modesty, courage and bravery, mercy,

discipline and punctuality, humane, confidence etc must add a new dimension to the leadership.

Qualities of a Muslim leader.

52. To perform the duty and responsibility of a leader, a person must have some extraordinary qualities that guide him to take proper decision and help him to utilize his time. These functional attributes make him a successful leader of his time. Among these some important qualities are mentioned below-

1. Shura (Consultation): It means the quality to share the views and exchange of opinions in any vital matter. A complete leader possesses this quality of discussion. Islam gives more concentration in this regard. For mutual consultation of statecraft Islam regulates a formal body of authority. That is called Majlish-as Shura. As we see in the history of early Islamic leadership that not a single decision was made without consulting the followers. Even prophet (s) was also ordered to consult with his companions- "And those who have answered the call of their lord and establish prayer and who conduct their affairs by consultation and spend out what we bestow on them for sustenance." In another verse Allah says- "and ask for His forgiveness for them; and consult with them in affairs. Then when you made a decision, put trust in Allah."

2. Ihtisab (Accountability), a vital component for the leadership process. According to Islam, every single person is responsible for all of his works and he has to be accountable for this. Allah says- "... Whosoever does good equal to the weight of an atom shall see it. And whosoever does evil equal to the weight of an atom shall see it." A leader is mostly responsible for his deeds and he is bound to be accountable to his followers and Allah the Almighty. Prophet (s) clearly said- "Each of you is a shepherd and each of you is responsible of his flock. The Amir (ruler) who is over the people is a shepherd and is responsible for his flock."

3. 'Ilm wa Hikmah (Knowledge and wisdom): To achieve proper knowledge and wisdom is an obligatory requirement for a good leader. In Islamic point of view, Hikmah does not mean the wisdom and special knowledge merely, it is such a divine gift that comes only through an inner enlightenment and by seeking sincere guidance from Allah; it is the ability to apply knowledge to a particular situation to bring about the most desirable outcome. Allah mentions this quality for leadership in the holy Qura'an-

"Their Prophet said unto them: Lo! Allah hath raised up Saul to be a king for you. They said: How can he have kingdom over us when we are more deserving of the kingdom than he is, since he hath not been given wealth enough? He said: Lo! Allah hath chosen him above you, and hath increased him abundantly in wisdom and stature. Allah bestoweth His Sovereignty on whom He will. Allah is All-Embracing, All-Knowing."

4. A leader has to embody himself with this quality to get success for his direction. He has to know about the principles of Islamic Fiqh and Shariah, the current political situation, contemporary trends of international politics, proper utilization of limited resources, demands and psychological needs of his followers etc. Imam Ragib Ispahani said- "you will not be able to lead (the nation), until you attain a deeper knowledge on Islamic laws and the international politics."

5. Spirit of sacrifice is another noble virtue that makes a leader popular and flourishing. It is natural that if a leader become selfish and always decides for his own interest rather than his followers welfare, the organization must not developed and the followers will not obey his order. Instead of discipline there exists the chaos and disorder. Islam stress on this very point to set up example by own works and sacrifice, so that the people can rely on him and make even greater sacrifice for their betterment. Allah says- "O you who are divinely committed! Why do you say that which you do not practice yourself? The worst of you in the sight of Allah is he who says that which he does not practice."

53. Not only the above mentioned qualities are unavoidable to be a good leader, but an excellent leader has to achieve other virtues. Sincerity to works, respect to the suggestion of followers, friendly relation with the subordinates, giving dignity according to merit and works, Neutrality in giving privileges, confidence to defend the criticism etc. should be exercised to operate the leadership. Regarding the function of leadership Zafar Bangash, a modern Islamic scholar, mentions some operational tasks. According to him a leader must have the technical quality to do those tasks accurately. These are;

I. Articulate the goal or vision clearly and demonstrate his personal conviction for it;

II. Inspire a group of people to follow it;

III. Evaluate the prevailing situation accurately and devise appropriate strategies for dealing with it, including surmounting problems, difficulties, etc.

IV. Initiate, guide, direct and control change towards the desired goal;

V. Ensure continuous cooperation of the movement;

VI. Continually expand the movement to strengthen it;

VII. Inspire members of the movement to such a degree that they are prepared to fight and even die for the cause

VIII. Provide satisfaction so that the members feel their mission has a noble purpose.

54. Removal of Imam.

The last question on which we can now dispose of this matter is whether any leader including Imam can be asked to step down or rather removed. The majority of the scholars agree that it is **Not permissible**; they agree that if the Imam or the leader is responsibly doing his work, the work on his shoulders and has the power to do so i.e. he is not debilitated. He should not be removed and it's a must for all the Muslims to follow him in prayer and all other commands. But there are very important issues in the lives of the Muslims in the hereafter and on earth which can compel the removal of an Imam. These reasons include;

I. Denouncing Islam- (Kufr wa ridda) after being a Muslim. If the Imam commits a great sin, he cannot be a leader/waliy/Guardian of the Muslims (Q 4; 141) - "And never will Allah grant to the unbelievers a way (to triumphs) over the believers."

II. Neglecting prayer and propagation of Islam. He disagrees with it and leaves it as not compulsory. IF an Imam cannot pray consecutively in the mosque he can be asked to vacate the position.

III. He abrogates to rule by what Allah has revealed. He does not rule by Shariah

IV. Corruption, transgression, oppression and innovations this and many others can lead to the expulsions of the imam.

Conclusion

55. Leadership is an important part of Islamic society more so as an Imam. Islam emphasize on the unity of man in every sphere of life. Every aspects of human life such as social, political, financial, national or international should not be directed by itself. It should be led with a friendly relationship of whole Ummah. In this regard, Islam originates the idea of leadership in everywhere, even in a journey of three persons, it has been ordered to put one of them as a leader. We firmly believe, if we can implement the condition of Islamic leadership properly, humanity must get a new dimension of prosperity and success in our Madrasa Mosques and all other religious based charitable organizations everywhere. And the ultimate destination of limitless happiness and peace also can be achieved by this process. This is not what the Imam in the instance case has done. He is harsh and tries to get things done alone. He doesn't put first the community and hence he is not fit to remain in the position. His conviction of Somalis taking over the Mosque is misplaced as stated above.

The following is the deposition of the court.

a. That the defendant is hereby ordered within one month to relocate the car wash to another place of his convenience and vacate the mosque premises to allow well and peaceful formation of the organ(committee) to run the mosque which will have the mandate to employ or choose an Imam for the Siaya Masjid.

b. That all the perceived committee named in court and the one elected before the end of this case are hereby dissolved and all the plaintiffs together with the defendants participate in the formation of the committee to manage the affairs of Siaya mosque as many mosques do. The Siaya county Muslim Association is not the committee of the Masjid Nuur and it only have to assist noting that the defendant is also an official it can't render justice with the defendant as secretary general.

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

d. That the Court further appoints the following persons;

i. The chairman SUPKEM Nyanza assisted by county chairs.

ii. The chairman CIPK Nyanza assisted by county chairs.

iii. The chairman Siaya Muslim Association,

To assist in the re-reconciliation/ interim committee to convene and have an elected committee to manage the mosque matters including aligning any projects at place in full liaison, consultation and consensus of all the residents and for the peaceful enjoyment of all concerned. This should be accomplished within three months.

e. The issue relating to the parcel of land on which the Mosque stand should be addressed after the formation of a committee in which every person will have to contribute. The same can be addressed to the lands registrar. Quick and urgent steps to resolve the issue be undertaken and will be assisted by the court where necessary.

f. No order as to costs.

Orders accordingly.

.Dated, signed and Delivered at KISUMU this 15th day of October 2018

Parties present in persons

Court assistant Rose Migwalla.

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R.K.OTUNDO

S.R. KADHI