



**REPUBLIC OF KENYA**

**IN THE KADHI'S COURT AT BUNGOMA**

**CIVIL SUIT 10 OF 2017.**

**RAMADHAN OKANYA.....PLAINTIFF**

**(SUING AS REPRESENTATIVE OF BUYOFU MUSLIM COMMUNITY)**

**VERSUS**

**ISSA WESONGA.....1<sup>ST</sup> DEFENDANT**

**SULEIMAN MUKHOBE.....2<sup>ND</sup> DEFENDANT**

**SAID BIGAMBO.....3<sup>RD</sup> DEFENDANT**

**HASSAN K. MATSEKHE.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff herein suing as the chairman and representative of Buyofu Muslim community filed a civil suit against the 1<sup>st</sup>, 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants herein on 3<sup>rd</sup> August 2017 for; a declaration that the current committee is the only committee allowed to run and manage the activities of the Mosque, an order compelling the defendant to hand over the documents and all assets of the mosque to the current committee, costs and other reliefs.

The Plaintiff and his current committee were duly elected on 24<sup>th</sup> March, 2017 to run the activities of the mosque but the defendants herein who were part of the former committee have refused to fully hand over thus necessating this suit.

**Plaintiff's Case**

2. The Plaintiff in his case said that the committee was elected on 24<sup>th</sup> March, 2017 to manage Buyofu Jamia Mosque, its properties and the welfare of imam. He avered that despite elections of the current committee, the former committee refused to vacate office and or hand over documents etc. to the current committee to enable a smooth transition. He accused the defendants of inciting worshippers, frustrating the Imam, abstracting reconciliation, accusing them before local administration, failing to recognize them and purporting to run the activities of the mosque.

3. On 5<sup>th</sup> September, 2015 the Plaintiff stated that; the elections of Buyofu Jamia Mosque were conducted on 24<sup>th</sup> March, 2017 in which he was elected the chairman. The following Friday after elections he requested for handing over which was promised in vain, with the defendants absenting themselves one after the other.

4. The Plaintiff disclosed that, the Mosque solely depended on the proceeds of slaughter slabs submitted by the three slaughter men who were members of the former committee and also 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> defendants herein. He said, the slaughter men were expected to submit Ksh. 600/= weekly to the Mosque as agreed; 400/= for Imam and Ksh. 200/= savings to run the Mosque. He lamented that the said amount was only submitted for two consecutive weeks after the elections and stopped since 12<sup>th</sup> May, 2017 making it difficult to run the Mosque and or pay the Imam. He further challenged the former committee to produce an account of the 200/= weekly savings for the mosque for the last ten (10) years of their mosque management. He however requested for a humane handing over of documents and Mosque properties, account balance and a title deed.

5. In cross-examination the Plaintiff said; was elected in absence of the former chairman on coming back requested for teamwork and co-operation, there was no handing over, Imam presided over elections, former committee left behind accumulated electricity bill of Ksh. 14,000/=. Elections were announced but some of former committee members absented themselves, current committee have nothing to pay

the Imam and or run activities of the Mosque, was elected to run for one year, that 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants as members of the former committee awarded themselves the work of slaughter men and have never received slaughter payments since 12<sup>th</sup> May, 2017.

6. PW3 told court that the tussle was about handing over and the submission of slaughter proceeds to the current committee to enable them run activities of the Mosque and pay the Imam. He disclosed that though, he was invited for a reconciliation meeting, the matter had already reached court after the failed to reconcile at the local administration.

7. It was the narration of PW4 that, the area Muslims demanded for an election in January 2017 leading to the disbandment of the former committee in February 2017 and elections held on 24<sup>th</sup> March, 2017 after a notification. He said that as an Imam of Buyofu, presided over a very peaceful election and later requested for the handing over in which Mats, Islamic Literature and water tank were handed over pending saved slaughter account proceeds and land title deed for the Mosque. PW4 further disclosed that, the Mosque activities depended on slaughter slab proceeds. Both committees agreed that 600/= weekly be submitted to the Mosque by the three slaughter men who are also members of the former committee but only complied for two to three weeks thus making this suit necessary. PW4 also said, the former committee paid him as Imam through one Mzee Rashid Oluo who was ready to sabotage Jummah (Friday) prayers by asking Imam not to attend on selected Fridays if he did not wish to pay.

8. In cross-examination PW4 told court that, this was the first election where the Muslim community participated, he received payment from the former committee but do not submit 200/= weekly to the Mosque as required, reconciliation was no longer an option and other people be appointed as slaughter men to submit to the Mosque as expected and agreed.

9. PW6, the Imam of Mukhweya Mosque stated that, he was an Imam of Buyofu Jamia Mosque between November 2015 and October 2016. He described the former committee as selfish and tribal, they made own decisions and imposed on faithful's without consultation. PW6 also cited an occasion where one Hamisi Ali requested for ballast from the Mosque for a later refund and the former committee refused but later on taken by the former chairman for his own use. He said that Mosque waters was used by outsiders but any when faithful used it, they demanded electricity payment. He described the 2<sup>nd</sup> and 4<sup>th</sup> defendants as people who liked beer and witchcraft respectively and requested court to facilitate a smooth handing over, change of slaughter men and the mosque land title deed be given to new current committee.

In cross-examination PW6 disclosed that reconciliation failed, and apart from faithfuls who were allowed to use water during prayer times, anybody who used mosque water should contribute to electricity bill.

10. It was the testimony of PW7 that area Muslims complained about leadership of the Mosque on 17<sup>th</sup> February, 2017 prompting the then Mosque advisor one Shaban Wamukoya to disband the Committee on 3<sup>rd</sup> March 2017 and a new election held within 21 days on 24<sup>th</sup> March, 2017 presided over by Imam Abdi Juma. After the elections, handing over proved difficult until 20<sup>th</sup> April, 2017 when the former secretary (2<sup>nd</sup> defendant) handed over five mats, stamps, Quran chat, wall watch, few Islamic literature, three small Sufuria's one Plastic cup, one gascate, cooking stick and Lanten lamp. It was during that time, that former secretary disclosed a pending electricity bill of Ksh. 14,000. PW7 told court that the 4<sup>th</sup> defendant on his motion cut down an indigenous tree on the mosque compound, converted it to charcoal for his own use and declared that he will never hand over the Mosque land title deed to the current committee. PW7 further accused the 3<sup>rd</sup> defendant of sale of steel doors and windows of the old Mosque and claimed to have used the proceeds during the opening ceremony of the new mosque knowing exactly that the donor who constructed the new Mosque sent funds for the opening ceremony. He also disclosed that some of the items were sold to Ramadhan Wekulo and Suleiman Wakhu. In cross-examination, he said five mats were handed over, the three that was cut produced five sacks of charcoal, reconciliation proved difficult, slaughter proceeds are important for activities of the Mosque and requested for refund of proceeds of sold doors and windows of the old Mosque.

## **Response**

11. The defendants herein in their joint reply avered that no elections were held and therefore still bona-fide officials of Buyofu Jamia Mosque, denied an illegality, bad faith and Malice attributed to them, denied having been involved in reconciliation, no demand to sue was made and therefore prayed for dismissal of suit with costs.

12. On 5<sup>th</sup> September 2017, the 1<sup>st</sup> defendant and former chairman of Buyofu Jamia Mosque stated that he made efforts for registration of the Mosque land until a title deed was issued and put in custody of one Hassan Matsekhe – the fourth (4<sup>th</sup>) defendant herein. He said he availed a donor who replaced a dilapidated Mosque the new current one, installed electricity, provided a bore hole, an electric pump and mats for the Mosque. He disclosed that before the construction of the current Mosque another donor had donated two (2) trips of rough stones that disappeared thereafter and told court since the title deed was not in his custody, he only handed over what was in his possession.

13. In cross-examination, the 1<sup>st</sup> defendant said that the 200/= weekly savings by the committee were in hands of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who were former secretary and treasurer respectively and were best placed to explain the whereabouts of the money. He confirmed that the proceeds of the Mosque doors and Windows sold were given to the 3<sup>rd</sup> defendant, the tree referred to was cut to provide space for construction of Imam house and converted to firewood by the 4<sup>th</sup> Defendant and used in Mosque during the month of Ramadhan.

The 1<sup>st</sup> defendant however disclosed that the Mosque land title deed was not handed over to the current committee and slaughter proceeds saved by the former committee and addressed by slaughter men who are the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants herein.

14. The 2<sup>nd</sup> defendant also former secretary testified that as a committee they convened no formal meetings and therefore no minutes were ever taken. He said that out of the 200/= weekly savings by the committee a total of Ksh. 11, 300/= had been saved as at end of 2016 which the 3<sup>rd</sup> defendant, also the treasurer should disclose its expenditure/ electricity bill of Ksh. 14,000/= as at February 2017 when they in fact paid promptly 200/= weekly savings and 400/= for the Imam through the 3<sup>rd</sup> defendant.

In cross-examination the 2<sup>nd</sup> defendant disclosed that he had no minute file, his record book for slaughter funds got lost and funds for weekly savings be addressed by the 3<sup>rd</sup> defendant herein who was also former treasurer and is a slaughter man.

15. The 3<sup>rd</sup> defendant also former treasurer told court that the former committee handed over everything to the current committee pending the Mosque land title deed and saved proceeds from slaughter slab. He however disclosed that the title deed had been handed over to Bungoma Supkem Chairman who was expected to hand over to the court for further directions. He further said that the 200/= weekly savings was spent in full though denied having submitted 2400/= for the proceeding three months from 12<sup>th</sup> May 2017 which was promised in 30 days' time.

The 3<sup>rd</sup> defendant also narrated that one Hamisi Ali (current vice chairman) took the donations of the 2 trips of rough stones, one trip sand and ten (10) wheelbarrows ballast that should be refunded to assist the Mosque. He said that excessive use of Mosque water by one Hamisi Ali and his tenants contributed to an increased electricity bill which he should take responsibility.

16. In cross-examination 3<sup>rd</sup> defendant said that owing to the 200/= weekly savings and from a total of Ksh.11,300/= saved as at end of 2016; Ksh. 4,000/= was used for processing the Mosque land title deed, purchased poles for the construction of the Mosque, Ksh.7,000/= was used by Imam in funeral, Ksh. 400/= paid electricity bill, Ksh.1,000/= paid to Imam to attend a Seminar, Ksh. 1,000/= given to Imam to purchase his shaving machine and lost his record book on the above. He said that one Hamisi Ali promised to refund construction materials he took away in vain.

17. It was the testimony of the 4<sup>th</sup> defendant that, he was elected as a messenger in both the former and the current committees but has since resigned from the current committee. He said the former committee handed over everything except the Mosque land title deed and saved slaughter funds, he further disclosed that the title deed had been under his custody for the last seven (7) years and handed it over to Supkem Chairman – Bungoma to in turn surrender it to court for direction.

He however said that the issue of slaughter savings should be addressed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants who are his fellow slaughter men and were also officials of the former committee.

He narrated that the tree he cut was to provide space for construction of Imam's house, it was made into firewood used for the Mosque function and what remained was converted to charcoal. He later gave Hamisi Ali's wife, an argument the 1<sup>st</sup> defendant dismissed.

18. It was the submission of the 3<sup>rd</sup> defendant on his behalf and on behalf of the 2<sup>nd</sup> and 4<sup>th</sup> defendants that they be allowed to continue with slaughter work, promised to submit as expected to the Mosque and were aged to earn a living elsewhere.

19. Having given attention to documents filed and considering evidence adduced by both parties and witnesses, I believe the court is duty bound to determine:

- a) Whether the elections were held on 24<sup>th</sup> March, 2017 to change the management of Buyofu Jamia Mosque.
- b) Whether there was a hand over of all assets and documents of the Mosque to the current elected committee.
- c) Other reliefs of the parties.

### **Determination**

20. This being a matter of personal status on the welfare of the Muslim community, the issues herein demand reading of article 170(5) constitution of Kenya 2010 together with section (5) and (6) of the Kadhi's court Act Cap II along with other provisions of applicable law.

**(i) Art. 170(5):** "The Jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to Personal status, Marriage, divorce and inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's court."

**(ii) Kadhi's court Act Cap II Section (5) and (6):**

**Sec. (5):** "The Kadhi's court has been given jurisdiction to determine questions of Muslim law relating to personal Status, marriage, divorce and inheritance in proceedings in which all parties profess the Muslim Religion."

**Sec. (6):** "The law and the rules of evidence to be applied in a Kadhi's court shall be those applicable under Muslim Law."

**(a) Whether the elections were held on 24<sup>th</sup> March 2017 to change the Management of Buyofu Jamia Mosque.**

21. The defendants in their joint reply to the plaint avered that no elections were held on 24<sup>th</sup> March, 2017 as claimed and therefore still bona-fide officials of Buyofu Jamia Mosque on 5<sup>th</sup> September, 2017. The 1<sup>st</sup> defendant said that he handed over all assets of the Mosque to the current committee except the Mosque land title deed and slaughter savings that were not in his custody. He wanted the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants to address the court on the two items. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants on the same date confirmed that indeed they handed over everything to the committee except the two items, with the 4<sup>th</sup> defendant disclosing that, he was among those elected on the material day as a messenger but has since resigned verbally from the current committee.

Though there existed no other procedural evidence on how the elections were conducted, the defendants in their evidence herein confirmed that there were elections and indeed, the 4<sup>th</sup> defendant who was one of their own was re-elected as a messenger. This court believes and which I so hold that elections were held and there existed a current elected committee that needed to be recognized and allowed to manage the affairs of Buyofu Jamia Mosque.

**(b) Whether there was a hand over of all assets and documents of the Mosque to the Current Elected committee.**

22. Though the Plaintiff asserted that the handing over was promised in vain, PW4 who presided over the elections disclosed that indeed mats, Islamic literature, and water tank were handed over to the current committee. It was clear from the evidence that only two items; the Mosque land title deed and the Slaughter savings were not handed over to the current committee and ought to be handed over to avoid unrest. If the 4<sup>th</sup> defendant was a custodian of the title deed for last seven (7) years, I do not understand why he should not hand over to current committee.

**(c) Other reliefs of the parties**

23. It was worth noting that the activities of the Mosque depended on the proceeds of slaughter submitted by the three slaughter men who were officials of the former committee appearing herein as 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

The three were expected to submit 600/= weekly to the Mosque through the treasurer; 400/= for services of the Imam and 200/= savings for other activities. Though no agreement on the same was produced in court, the argument was not denied by the defendants herein. The prophet (PBUH) said: "Muslims (people) on their conditions (abide) except conditions that prohibited the lawful or allowed the prohibited." I do believe, this was for the best interest of the Muslim community of Buyofu.

24. It was clear that, the former committee, now defendants herein used slaughter proceeds to run the affairs of the Mosque since there was no other income whatsoever, but for about **2½ months** after elections they denied the submissions making it difficult for the current committee to run the activities of the Mosque. The 3<sup>rd</sup> defendant promised to refund in 30days' time which the court had no objection. The 1<sup>st</sup> defendant being chairman of the former committee distanced himself from the issues of funds saying be addressed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

According to the 2<sup>nd</sup> defendant, the former committee had saved a total of 11,300/= as at end of 2016 through the 3<sup>rd</sup> defendant (then treasurer) and continue to submit to him to date but was surprised to learn of a pending electricity bill of 14,000/= as at February 2017.

The 3<sup>rd</sup> defendant outlined how he spent the funds without knowledge of other committee members. The 3<sup>rd</sup> defendant also said that the proceeds of sold steel doors and windows of the old Mosque were used during the official opening of the current Mosque, when he exactly knew that the donor who constructed the current Mosque sent funds for the opening ceremony. The 4<sup>th</sup> defendant said that the tree he cut from the Mosque compound was to provide space for construction of the Imam house and made it into firewood. He said that the remaining branch and or another tree converted to charcoal that he gave out with consent of committee members an argument the 1<sup>st</sup> defendant dismissed.

25. It should be understood that the former committee worked individually for own interests and not as a team to serve the Muslim community. They convened no organized meetings and never recorded anything they did. When the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were asked to produce records of slaughter proceeds, they said they lost their record books. Note that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants being officials of the former committee awarded themselves the work of slaughter men and have since curtailed the activities of the Mosque. Though the Plaintiff, PW4, PW6 and PW7 termed them selfish, I do believe they were also keen to sabotage the activities of the Mosque and do away with the interests and welfare of the Muslim community in the area. The cry to have them replaced was justified, though the 3<sup>rd</sup> defendant apologized and requested the court to allow them continue as slaughter men and abide by the Mosque needs.

26. All other issues raised by both parties and witnesses had no evidence adduced and therefore dismissed.

**27. Orders**

1. A declaration that the current committee is the only committee allowed to run and manage the activities of the Mosque hereby issued forthwith.
2. Defendants to hand over the Mosque title deed and any other asset in their possession to current committee immediately.
3. The current committee is hereby mandated to organize for replacement of slaughter men within the next sixty (60) days.
4. Current slaughter men allowed to continue with their work and submissions until replaced.
5. The defendants and or their agents etc. hereby restrained from inciting or abstracting others as far as this matter is concerned.
6. Slaughter slab managers hereby ordered to abide by orders herein
7. Current committee to engage expert to assist draft a sound constitution in consultation with Muslim community.

8. Peace be observed and no orders to costs.

**Delivered and signed this 3<sup>rd</sup> day of October 2017**

**D. S. Ratori – Principle Kadhi**

**CA – Okwaro**

**All parties present.**

- Title deed issued before court to current committee chairman for custody.