



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 133 OF 2016

JOSEPH MAINA KARIUKI.....1ST PLAINTIFF
MARTIN MUTIGA.....2ND PLAINTIFF
BOSCO NDALANA.....3RD PLAINTIFF
BERNARD MATHEKA.....4TH PLAINTIFF
GEOFFREY ARASA.....5TH PLAINTIFF
CHARLES MARU.....6TH PLAINTIFF
RAPHAEL KIMEU.....7TH PLAINTIFF
SIMON KABAYA.....8TH PLAINTIFF
ALEXANDER MBOGO.....9TH PLAINTIFF
CHARLES MARU.....10TH PLAINTIFF
JOHN MUTUNGI.....11TH PLAINTIFF
JANE MWONGELA.....12TH PLAINTIFF
JANIFFER MULI.....13TH PLAINTIFF
MWANGI MUNUHE.....14TH PLAINTIFF
MARIN MBOLOI.....15TH PLAINTIFF
ANDREW NZOMO.....16TH PLAINTIFF
THOMAS MUTIE.....17TH PLAINTIFF
ROGERS MUTIE.....18TH PLAINTIFF
JOHN MUSILA.....19TH PLAINTIFF
SAMUEL MUCHERU.....20TH PLAINTIFF
GEORGE OMONDI.....21ST PLAINTIFF

VERSUS

AKWANA HOUSING CO-OPERATIVE SOCIETY.....1ST DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....2ND DEFENDANT

JUDGMENT

1. In the Plaint dated 2nd August, 2016, the Plaintiffs averred that they were the registered proprietors of land known as Keekrock Court situated in Sabaki within Machakos County; that the 1st Defendant is the registered owner of parcel of land known as L.R. No. 20604/88 situate in the same area and that in the year 2014, the 1st Defendant applied to the 2nd Defendant for change of user of its land with the intention of building a mosque on the land which is a residential area.
2. The Plaintiffs further averred that without involving them, the 2nd Defendant approved the said change of user of L.R. No. 20604/88 and that the construction of a mosque on the suit land will infringe on their right to quiet and peaceful possession of their property; that the construction of the mosque on the suit land will be a public nuisance and that a permanent injunction should issue restraining the 1st Defendant from constructing a mosque on L.R. No. 20604/88. The Plaintiffs also sought for an order of mandatory injunction directing the 1st Defendant to pull down the structures making up the mosque from L.R. No. 20604/88.
3. In its Defence and Counter-claim, the 1st Defendant averred that it sought all the pre-requisite approvals for construction of the mosque; that within the area, there are more than five (5) existing churches and that the Plaintiffs' claim infringes on the rights of the Muslim residents in the area on their freedom of worship and their right to property.
4. In the Counter-claim, the 1st Defendant is seeking for a declaration that the change of user over L.R. No. 20604/88 where the mosque is built is valid; a declaration that the intended demolition of the mosque amounts to infringement on the right to freedom of worship by Muslims and for a declaration that all religions are equal in Kenya.
5. When the matter came up for hearing on 31st July, 2018, neither the Plaintiffs nor their advocate were in court. Consequently, the court dismissed their Plaint. The 1st Defendant's Counter-claim proceeded for hearing.
6. The 1st Defendant's Secretary, DW1, informed the court that a mosque has already been constructed on the suit land; that the change of user where the mosque is situated was duly approved by all the relevant authorities and that under the Constitution, every citizen has the freedom of worship and association.
7. According to DW1, the area where the Plaintiffs reside has over five (5) churches and that all due process having been followed by the 1st Defendant, the Counter-claim should be allowed. The evidence by one of the residents of Keekrock Estate, Sabaki, DW2, was similar to the evidence of DW1 which I have already summarized above.
8. The 1st Defendant's advocate submitted that the 1st Defendant built a mosque on L.R No. 20604/88 Sabaki after all the requisite authorization had been granted; that the Application for the change of user was advertised in the newspaper and that the Defendants cannot be denied their freedom to worship.
9. The evidence before me shows that on 5th April, 2016 the 1st Defendant was granted an approval for "proposed extension of user from residential to religious (mosque) on L.R. No. 20604/88 situated in Sabaki. Indeed, before the said approval for the change of user was given, the 1st Defendant submitted a detailed "short term advisory plan report" to the County Government of Machakos. The proposed change of user was also duly advertised in the Standard Newspaper of 7th March, 2016.
10. The Plaintiffs did not object to the said change of user or to the construction of the mosque. Indeed, the construction of the mosque was subject to public participation before a licence by National Environmental Management Authority (NEMA) was issued. The 1st Defendant produced in evidence the Environmental Impact Assessment Report which was received by National Environmental Management Authority (NEMA) on 8th July, 2016, together with a licence that was granted by National Environmental Management Authority (NEMA).
11. The Plaintiffs did not call any evidence to show how the mosque will be a nuisance to them. Indeed, the Plaintiffs did not deny the averment by the Defendants that there are five (5) churches in the area which are being used by Christians without any hindrance from the Muslims. Consequently, the Plaintiffs averment in their pleadings that the use of the mosque by the Muslims in the area is a nuisance is not only discriminatory, but also an infringement of their freedom of worship, which is enshrined under Article 32 of the Constitution.
12. For the reasons I have given above, I find that the 1st Defendant has proved its Counter-claim dated 5th September, 2016. The Counter-claim is therefore allowed as follows:
 - a. ***A declaration be and is hereby issued that the change of user over L.R. No. 20604/88 where the masjid is built is valid.***
 - b. ***A declaration be and is hereby issued that the intended demolition of a masjid because it is in a highly Christian dominated area amounts to infringement on the right to freedom of worship by Muslims within Sabaki area and the right to protection of private property and is therefore contrary to Article 40 of the Constitution of Kenya.***
 - c. ***A declaration be and is hereby issued that the intended demolition of a masjid because it is in a highly Christian dominated area amounts to infringement of the right to freedom of worship by Muslims within Sabaki area and is therefore contrary to***

Article 32 of the Constitution of Kenya.

d. The Plaintiffs to pay the costs of the Counter-claim.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 10TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE