



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC CASE NO. 133 OF 2016**

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

SAMUEL MUCHERU .....20<sup>TH</sup> PLAINTIFF

GEORGE OMONDI .....21<sup>ST</sup> PLAINTIFF

VERSUS

AKWANA HOUSING COOPERATIVE SOCIETY.....1<sup>ST</sup> DEFENDANT

COUNTY GOVERNMENT OF MACHAKOS.....2<sup>ND</sup> DEFENDANT

**RULING**

1. The two Applications before me are dated 2<sup>nd</sup> August, 2016 and 20<sup>th</sup> September, 2016.

2. In the Application dated 2<sup>nd</sup> August, 2016, the Plaintiff is seeking for the following orders:

***a. That this Honourable Court be pleased to issue restraining orders barring the 1<sup>st</sup>Defendant, its agents, servants or those claiming under them from erecting a mosque on L.R. No. 20606/88 pending the hearing and determination of this Application, and of the main suit.***

***b. That a mandatory injunction do issue directing the 1<sup>st</sup>Defendant to pull down, remove and clear from L.R. No. 20604/88 herein referred to as the suit land all those structures making up the mosque, within fourteen(14) days of the order.***

***c. That costs of this Application be in the cause.***

3. The Application is premised on the grounds that the 1<sup>st</sup>Defendant has commenced construction of a mosque on the suit land; that the Plaintiffs are the registered proprietors of the adjoining land known as KEEKROCK COURT and that the construction of the mosque on the said land infringes on the Plaintiffs right to property because the area in question is a residential area.

4. The Application is supported by the Affidavit of the 1<sup>st</sup> Plaintiff who has deponed that he is the registered owner of the land known as L.R. No. 20604/260 situate in MavokoSub-County; that the 1<sup>st</sup>Defendant is the owner of the neighbouring land being L.R. No. 20604/88 and that the otherPlaintiffs also own land in the same residential estate.

5. According to the Plaintiffs, the 1<sup>st</sup>Defendant illegally sought approval for change of user of L.R. No. 20604/88 from residential to religious purposes; that neither the 1<sup>st</sup>Defendant nor the 2<sup>nd</sup> Defendant informed them about the proposed change of user and that they stand to suffer irreparably if the mosque is constructed in their area which is predominantly non-Muslim.

6. It is the Plaintiffs' case that the construction of the mosque will interfere with theirconstitutional right to quiet and peaceful possession of their properties.

7. In theApplicationdated 20<sup>th</sup>September, 2016, the Plaintiffs are seeking for an order restraining the 1<sup>st</sup>Defendant from using and worshipping in the mosque erected on L.R. No. 20606/88 pending the hearing of the suit.

8. The Plaintiffs are also seeking for a mandatory injunction directing the 1<sup>st</sup>Defendant to pull down, remove and clear from L.R. No. 20604/88 all those structures making up the mosque.

9. According to the Plaintiffs, as at 20<sup>th</sup> September, 2016, the mosque had already been completed; that unless the Defendant is restrained, he is likely to start using the mosque to the detriment of the Applicants

and that the orders should be issued so as not to render the suit nugatory.

10. In response, the 1<sup>st</sup> Defendant's Secretary deponed that the said mosque has already been constructed; that the change of user for the land where the mosque is located was duly sought and that after the Environmental Impact Assessment was conducted, the 1<sup>st</sup> Defendant was allowed to build the mosque.

11. In its response, the 2<sup>nd</sup> Defendant's Sub-County administrator deponed that before the construction of the mosque, the 2<sup>nd</sup> Defendant received an Application for change of user of L.R. No. 20604/88 from residential to religious use; that the members of the public were duly notified of the intended change of user via an advertisement in the local media and that the Applicants did not object.

12. The 1<sup>st</sup> Defendant's Secretary deponed that every citizen is entitled to freedom of worship and association; that the said area has more than five (5) churches and that the residents of Sabaki should not be restrained from worshipping in the mosque.

13. In his submissions, the Plaintiffs' advocate submitted that the 1<sup>st</sup> Defendant's change of user was illegal; that the notice that was published in the newspaper was not adequate because not all Kenyans read newspaper and that Section 4(3) of the Fair Administrative Act was not complied with.

14. Counsel submitted that NEMA has never approved the construction of the mosque in the area and the Applications should be allowed.

15. The 1<sup>st</sup> Defendant's advocate submitted that the Defendant has exhibited the notice of change of user, the E.I.A Report, the licence and the approved building plans; that the orders being sought have been overtaken by events and that the order of mandatory injunction is the final prayer which has been sought in the Plaintiff.

16. In the Application dated 2<sup>nd</sup> August, 2016, the Plaintiffs sought for an order restraining the Defendants from erecting a mosque on L.R. No. 20606/88 pending the hearing of the suit.

17. In the subsequent Application, the Plaintiffs are seeking for a mandatory injunction directing the Defendants to pull down the mosque which has been constructed on L.R. No. 20606/88.

18. In the Application dated 20<sup>th</sup> September, 2016, the Plaintiffs admitted that the impugned mosque has since been constructed to completion.

19. It is trite that a prohibitory injunction cannot be granted in a situation where the act complained of has already occurred.

20. In the instant case, the mosque which is standing on L.R. No. 20604/88 has already been constructed. Consequently, a prohibitory injunction cannot issue.

21. In any event, I am not convinced that the Plaintiffs have a *prima facie* case with chances of success considering that the only reason they are opposed to the construction of the mosque is because they are Christians.

22. Indeed, the Plaintiffs have not denied that there are more than five churches in their neighbourhood.

23. If that is so, and considering that the 1<sup>st</sup> Defendant has exhibited the notice which was published in the daily newspaper for the change of user of L.R.No. 20604/88 from residential purposes to religious purposes, the Plaintiffs should have raised their objections then.

24. Having obtained the change of user for L.R. No. 20606/88, I find that the orders being sought by the Plaintiffs in the two Applications cannot issue at this stage.

25. The issue of whether NEMA granted to the 1<sup>st</sup>Defendant a licence before it commenced the construction of the mosque can only be determined after trial. Suffice to say that there is an E.I.A Report that was approved by NEMA before the construction of the mosque commenced.

26. In the meantime, the 1<sup>st</sup>Defendant and its members should be allowed to continue using the mosque for prayers in pursuit of their constitutional right of worshipping.

27. For those reasons, I dismiss the Applications dated 2<sup>nd</sup> August, 2016 and 20<sup>th</sup> September, 2016 with costs to the 1<sup>st</sup> Defendant.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12<sup>TH</sup> DAY OF MAY, 2017.**

**O. A. ANGOTE**

**JUDGE**