



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 23 OF 2014

1. MOHAMED GOLO NDOGO

2. KUNO GALANO

3. BAKARI HINDADA

*suing as chairman, secretary of Noor Bandi mosque.....***PLAINTIFFS**

=VERSUS=

MOHAMED NDOGE.....**DEFENDANT**

J U D G M E N T

Introduction:

1. The three Plaintiffs filed a Plaintiff on their own behalf and as officials of Bandi mosque.
2. In the Plaintiff, the Plaintiffs averred that Bandi mosque is built on an unregistered parcel of land measuring approximately two (2) acres. The said mosque also owns a Muslim school known as Madrasa Tul Noor and that the mosque and the school is owned by the Plaintiffs and other Muslims of the Sunni sect.
3. The Plaintiffs' have further averred that during the construction of the mosque on the suit property in 1992, the Defendant was an Imam and an adherent of the Sunni Sect. However, in the year 2006, the Defendant quit the Sunni Sect and joined the Wahabi Sect.
4. It is the Plaintiffs' averment that in the year 2009, the Defendant was allowed to use the Madrasa as a temporary mosque for the Wahabi Sect; that in February 2014, the Defendant brought a surveyor on the Plaintiffs' portion of land and started sub-dividing it and that the Defendant has commenced building a mosque next to the Plaintiffs' mosque.
5. The Plaintiffs' are seeking for vacant possession of the unregistered portion of land measuring approximately 2 acres and for a permanent injunction.
6. In his Defence, the Defendant averred that it is not the Plaintiffs who constructed the mosque and that the suit property is owned by a company known as TARDA; that the property is vast and is not limited to two (2) acres as alleged and that it is the Plaintiffs who have interfered with the conduct of the prayers of the Defendant.
7. 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.

The Plaintiffs' case:

8. The 1st Plaintiff, PW1, informed the court that he was the chairman of Bandi mosque. The 1st Plaintiff relied on his statement dated 14th February 2014.
9. It was the evidence of PW1 that in the year 1992, they constructed the Bandi mosque together with a Muslim school known as Madrasa Tul Noor. By that time, the Defendant was an Imam in the mosque and subscribed to the Sunni Sect until the year 2006 when he found another sect of Islam known as Wahabi.
10. It was the evidence of PW1 that the members of the Sunni Sect resolved that the Defendant should cease conducting prayers in their mosque and he was allowed to temporarily use the madrasa school.
11. According to PW1, the Defendant brought a surveyor on the suit property in the year 2014 with a view of excising off the portion of land on which the Plaintiffs have built their Muslim school.
12. It was the evidence of PW1 that the Defendant is now constructing a mosque on their land which construction will not only deprive them of the land but will also interfere with the prayers, summons and public addresses since the prayers and sermons are conducted with the aid of loud speakers.
13. PW1 produced in evidence a letter dated 5th May 2006 which was a complaint addressed to the then District Officer over the Defendant's interference with their prayers.
14. PW1 also produced letters dated 15th and 25th August 2011 addressed to the County Government of Tana River complaining about the invasion of their land by the Defendant. According to PW1, the then County Government of Tana River never resolved the issue.
15. PW1 showed the court the pictures annexed on the Defendant's Replying Affidavit. The said pictures show the ongoing construction by the Defendant on the disputed piece of land.
16. According to PW1, although the land is owned by Tarda, the company allowed them to put up the mosque and the madrasa on the suit property.
17. PW2 informed the court that he was a Muslim teacher and an Imam in the Plaintiff's mosque.
18. It was the evidence of PW2 that all people in Bandi village used to worship at the Plaintiffs' mosque until when the Defendant left the Suni Sect and became an adherent of the Wahabi Sect in a different location.
19. It was the evidence of PW2 that the Defendant is now constructing another mosque next to the Bandi mosque.
20. In cross-examination, PW2 informed the court that the Plaintiffs were allowed to construct the mosque by Tarda, the proprietor of the suit property.
21. PW3 reiterated the evidence of PW1 and PW2.
22. According to PW3, Tarda gave them the land to construct the mosque when they were moved from their original village due to floods.

The Defendant's case:

23. The Defendant, DW1, informed the court that he is an Imam at a mosque called Masjid Noor in Garsen and that he has been leading prayers for the past 14 years.
24. It was the evidence of DW1 that he stopped conducting prayers in the Plaintiff's mosque after he was told so by the OCS, Garsen police station and that is when he decided to build a mud house which was 76 meters away from Masjid Noor mosque which he has been using for the past seven(7) years.
25. According to DW1, the community decided to raise funds to build a permanent mosque and that Tarda has no objection to the said construction.
26. DW2 informed the court that after the Defendant and his members were moved out of the Plaintiff's mosque, they build their own Madrasa and started worshiping from there.
27. It was the evidence of DW2 that although they went to seek the consent of Tarda to put up a second mosque, the said consent was not given.
28. The evidence of DW3 was similar to the evidence of DW1 and DW2.
29. According to DW3, they were all worshipers in the Plaintiffs' mosque since 1994 until 2004 when they moved to the madrasa and started worshiping from there.
30. It was the evidence of DW3 that they want to put up a second mosque on the suit property because of its proximity to the village and that the two mosques will be 300 meters apart.

Submissions:

31. The Plaintiffs' advocate reiterated the evidence of PW1, PW2 and PW3
32. The Plaintiffs' counsel submitted that the photographs attached on the Defendant's affidavit shows that the Defendant is building a mosque close to the Plaintiffs Muslim School and that the Defendant's sect have their own land far away from the Plaintiffs' mosque.
33. The Defendant's counsel submitted that the suit property does not belong to the Plaintiffs. Counsel submitted that from the evidence adduced, the suit property belongs to Tarda who are not a party to the proceedings. Consequently, it was submitted, the Plaintiffs do not have locus standi to institute this suit.
34. The Defendant's counsel further submitted that there was no evidence to show that PW1 is the chairperson of Noor Bandi mosque:
35. The Defendant's counsel submitted that the dispute herein was not a land issue but purely a religious tussle; that the Defendant and his followers have been greatly prejudiced and they may loose funding from donors and that mosques have been built close to each other in various towns of this country.

Analysis and findings:

36. It is not in dispute that the Plaintiffs' mosque was built sometimes in the year 1994. indeed, the Defendant and his witnesses informed the court that they were members in the same mosque until the year 2004 when they differed with other members whereafter they moved to the madrasa next to the mosque.
37. Having used the madrasa as their temporary place of worship, it was the evidence of the Defendant and his witnesses that they obtained funding from a donor with a view of putting up a permanent mosque.
38. It was the evidence of DW3 that the main reason why they decided to put up the second mosque in the disputed piece of land was because that is where many people are living.
39. 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 donated to them by Tarda. However, the same consent has not been given to the Defendant to put up a second permanent mosque on the land.
40. According to the evidence of DW3, when they went to seek the consent of Tarda to put up a second mosque on its land, the consent was denied.
41. The denial by Tarda to give to the Defendant the consent to construct a mosque on the disputed land must have been due to the realisation that it had already given to the village land on which it put up the Plaintiffs' mosque.
42. According to the minutes of the meeting that was held on 13th February, 2014 between the two warring groups and Tarda, Tarda declined to approve the construction of the second mosque on its land.
43. In the circumstances, I do not see on whose authority the Defendant and his members intend to put up a second mosque on the land belonging to Tarda, the distance between the two mosques notwithstanding.
44. The evidence before me clearly shows that the Plaintiffs' mosque, in which the Defendant was initially a member, was built with the consent of Tarda, the legitimate owner of the land.
45. The permission to build a second mosque by the Defendant on the same piece of land has not been obtained from Tarda. This court, in the interest of keeping peace and tranquility in that area, cannot allow the Defendant to construct a second mosque on land belonging to Tarda without its authority.
46. For these reasons, I find and hold that the Plaintiffs have proved their case on a balance of probabilities. I therefore allow the Plaint dated 14th February 2014 as prayed.

Dated and delivered in Malindi this 13th day of February, 2015.

O. A. Angote

Judge