

IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM MAIN REGISTRY

CIVIL CASE NO 119 2012

BETWEEN

1. MUHAMMAD RAFIK
2. MUHAMMAD OWAIS
3. MUHAMMAD WASIM
4. MUHAMMAD FAROUK
5. MUZAMIL KHAKI
6. MUHAMMAD IRFAN
7. MUHAMMAD SIKANDER
8. RAFIQ SATYA
9. IQBAL FULWALA
10. ABDUL AZIZ MAYA
11. HANIF FULWALA
12. HANIF AZIZ MAYA

PLAINTIFFS

AND

THE AD HOC
COMMITTEE, SUNNI MUSLIM
JAMAAT
DAR ES SALAAM

DEFENDANT

RULING

JUMA, J:

The Chamber Summons application and the Complaint were filed on 13th June 2012 by the Plaintiffs/Applicants under certificate of urgency.

This Court is being moved under Order XXXVII Rules 1 and 2 of the

Civil Procedure Code, Cap. 33. Dr. Lamwai had initially wanted this Court to make an *ex parte* order of interim injunction restraining the *Ad Hoc* Committee of the Sunni Muslim Jamaat Dar es Salaam from holding the extra ordinary meeting scheduled on 17th June 2012 pending the hearing and final determination of the application for temporary injunction *inter partes*. Dr. Masumbuko Lamwai also included a certification that the hearing of the application for injunctive orders is a matter of extreme urgency because if the proposed general meeting takes place as scheduled on 17th June 2012, there are real prospects of the breach of the peace at the meeting and in the future!

Muhammad Farouq and Muzamil Khaki (4th and 5th plaintiffs/applicants) affirmed a joint affidavit in their own behalf and on behalf of the rest of the Plaintiffs to support the application for restraining orders. Muhammad Farouq and Muzamil Khaki affirmed that the Defendant *Ad Hoc* Committee has not complied with the Terms of Reference which Justice Aboud of this Court issued in the case of the **Registered Trustees of Sunni Muslim Jamaat, DSM vs. Mohamed Zamaan Hassan, Civil Case No. 48 of 2012**. According to the Plaintiffs, this non-compliance of the Terms of Reference is reflected in a

NOTICE OF THE GENERAL MEETING which the *Ad Hoc* Committee issued through SUNDAY NEWS newspaper of 3rd June 2012.

Earlier, the Plaintiffs filed the suit subject of application for interim injunction on 13th June 2012 and the case file was placed for my action on 15th June 2012. I refused to hear the Plaintiffs' application for interim injunction *ex-parte* and ordered that the Registered Trustees of Sunni Muslim Jamaat and the Administrator-General should be served to appear and at least be aware of the prayers sought by the Plaintiffs. I similarly ordered that the application for interim injunction should be heard *inter-parte* from 3 p.m. on the same day, i.e. 15th June 2012. At the *inter parte* hearing, Dr. Lamwai, the learned Advocate represented the Plaintiffs/Applicants. Defendant/Respondent *Ad Hoc* Committee was represented by Mr. Mbugha, the learned Advocate. Mr. Mbugha qualified his appearance by insisting that he was only appearing for some of the members of the *Ad Hoc* Committee. Mr. Muhoza, the learned State Attorney represented the Administrator-General.

Dr. Lamwai prefaced his submission with background facts leading up to the application by the Plaintiffs for interim injunctive orders.

According to Dr. Lamwai, the Plaintiffs would like this Court to restrain the Defendant *Ad Hoc* Committee from convening a meeting designed to adopt a new Constitution of the Sunni Muslim Jamaat of Dar es Salaam and election of new office bearers. Both the adoption of a new constitution and subsequent election of office bearers is slated to take place on Sunday, 17th June 2012. Dr. Lamwai submitted that allowing the meeting to take place, will not only contravene the terms of reference which Aboud, J. issued under Civil Case Number 48 of 2012, but will also make the resulting constitution a product of a few members of the defendant Ad Hoc Committee. Dr. Lamwai expounded that it was Lady Justice Aboud who constituted the Defendant Ad Hoc Committee to update the constitution of Sunni Muslim Jamaat of Dar es Salaam. Instead of living up to the two terms of reference (i.e. to update the constitution and preparation of an election based on updated constitution), the defendant Ad Hoc Committee has been bogged down in internal disputes so much so that no constitution has been updated for purpose of adoption and guidance of elections.

In his submission Dr. Lamwai adopted the contents of the Plaint initiating Civil Case Number 119 of 2012 to illustrate the internal

conflict within the Ad Hoc Committee. The learned Advocate referred to paragraphs 8 to 11 of the Plaint wherein Plaintiffs accuse the defendant *Ad Hoc* Committee of being bogged down by resignations, conflicting Committee members, decision to allow membership of Baluchis as members of the Sunni Muslim Jamaat and wrongful assumption of powers to vet candidates.

Dr. Lamwai believes that this application for interim injunctive orders meets the guidelines for grant set down in **Atilio vs. Mbowe (1969) HCD n. 268**. This important decision issued three guiding principles to courts when determining application for interim injunctive orders. The first guiding principle is existence a serious question between the parties, which has to be tried with a probability that it would be decided in plaintiff's favour. In the second principle the courts would want to determine whether from the facts, the plaintiff is likely to suffer irreparable injury/loss which cannot be compensated. The third guiding principle revolves on balance of convenience, i.e. whether the plaintiff will suffer greater hardship if the prayer for injunctive orders is denied.

Applying guidelines for grant set down in **Atilio vs. Mbowe** to facts before this Court, Dr. Lamwai submitted that there is a serious question in the form of draft constitution and conduct of the *Ad Hoc* Committee which is to be tried, and this serious question shall be defeated if the meeting takes place as scheduled. On the scale of balance of convenience, Dr. Lamwai submitted that irreparable harm will befall the Plaintiffs if their prayer for injunctive orders is denied. That is, the more harm on the Plaintiffs will take the form of the approval of a new constitution that was prepared by a few members of the defendant *Ad Hoc* Committee and an election based on that constitution.

Replying on behalf of the defendant *Ad Hoc* Committee, Mr. Mbugha, submitted that the claims contained in the supporting affidavit is hearsay because not a single member of the *Ad Hoc* Committee has confirmed the allegations of conflicts within the *Ad Hoc* Committee. The learned Advocate further submitted that there is no evidence before this Court to indicate that the Plaintiffs are in fact members of the Sunni Muslim Jamaat. Mr. Mbugha believes that this being a Court of law, it should demand proof of the right of the Plaintiffs to sue as members of the Sunni Muslim Jamaat of Dar es Salaam. Further, Mr. Mbugha

referred to a copy of NOTICE OF THE GENERAL MEETING which was advertised in Sunday News of 3rd June 2012 stating:

**“SUNNI MUSLIM JAMAAT
DAR ES SALAAM
NOTICE OF THE GENERAL
MEETING**

All male members of the Sunni Muslim Jamaat Dar es Salaam are being notified of the General Meeting to be held on Sunday, June 17, 2012 at the SMJ Hall at 9:00 am. The main agenda will be presentation of revised SMJ Constitution and its approval. You are kindly invited.

**ABDUL MAJEED KHAN
SECRETARY AD HOC COMMITTEE
June 1, 2012”**

On this advertisement, Mr. Mbugha submitted that there is nothing suggesting that an election is also planned to take place on 17th June 2012. The key words used here are, to revise the constitution and to approve that constitution if members are in agreement. The learned Advocate invited the Plaintiffs as members of Sunni Muslim Jamaat, to participate in that meeting and present their respective points of view.

Mr. Muhoza, the learned State Attorney representing the Administrator-General explained that he honoured the summons to

come and wait for any directions which this Court may be pleased to provide through the Ruling.

From the broad perspective of the principles guiding the grant of injunctive orders, I propose to begin by the determination of the question whether there is a serious question between the Plaintiffs and the Defendant *Ad Hoc* Committee, which has to be tried with a probability that it would be decided in plaintiffs' favour. Dr. Lamwai contends that there is a serious question in the form of draft constitution and conduct of the *Ad Hoc* Committee which is to be tried. Dr. Lamwai similarly believes that contents of the Complaint and Affidavit proves that the defendant *Ad Hoc* Committee had failed to comply with the terms of reference issued by Aboud, J. in Civil Case No. 48 of 2012 creating a strong likelihood of success of the Plaintiffs in their Civil Case Number 119 of 2012. On his part, Mr. Mbugha insists that the defendant *Ad Hoc* Committee has fully complied with the orders issued by Aboud, J.

I should perhaps express my exasperation over the whereabouts of the **“Terms of Reference given by the court in Civil Case No. 48 of 2012”** and **“directions of the court in Civil Case No. 48 of 2012”** which the Plaintiffs have referred to in paragraph 3 of the supporting

affidavit and in paragraph 9 of the Plaint. The Plaintiffs did not attach to their pleadings any terms of reference or Order which Aboud, J. allegedly issued under **Civil Case No. 48 of 2012**. It is therefore not possible for me to determine when and how the “**Terms of Reference given by the court in Civil Case No. 48 of 2012**” and “**directions of the court in Civil Case No. 48 of 2012**” were infringed by the defendant *Ad Hoc* Committee. The current status of **Civil Case No. 48 of 2012** which is pending before Aboud, J. is similarly not clear to me.

With regard to existence of serious question to be tried between the Plaintiffs and the Defendant *Ad Hoc* Committee, I must also express my concern over the failure of the Plaintiffs to make a trustee a party to the suit as required by Rule 2 of ORDER XXX of the **CPC**. This Rule provides that where there are several trustees as they are in the **REGISTERED TRUSTEES SUNNI MUSLIM JAMAAT, DAR ES SALAAM**, the trustee shall all be made parties to a suit against one or more of them. The **Civil Case Number 119 of 2012** subject of the present injunctive prayers is between the twelve Plaintiffs and the *Ad Hoc* Committee of Sunni Muslim Jamaat Dar es Salaam (as defendant). The Plaintiffs did not bring specific Orders of Aboud J. specifying the

exact role of the *Ad Hoc Committee* and which would have assisted me to determine whether this Committee can be made Defendants in place of the Registered Trustee. I have no other option other than to conclude that Rule 2 of ORDER XXX of the **CPC** obliged the Plaintiffs to join the Registered Trustees of Sunni Muslim Jamaat as defendant. It is the Registered Trustees of Sunni Muslim Jamaat who have the legal capacity to sue or be sued following its incorporation as a body corporate. The members of the *Ad Hoc Committee* are not trustees within the meaning of that expression used in Order XXX, Rule 2. In an action founded upon an act or omission a Registered Trustee, it seems to me that that registered trustee should also have been joined in this **Civil Case Number 119 of 2012**. This Court cannot issue an injunctive order whose effect touches on the rights of a registered trustee which was not made a party to the proceedings seeking injunctive orders of this court.

There is another reason why I think that this present application for injunctive orders lacks serious question to be tried as between the Plaintiffs and the Defendant *Ad Hoc Committee* within the principle laid down in the case of **Atilio vs. Mbowe (supra)**. In my opinion, there are effective dispute resolution forums under the **Trustees' Incorporation**

Act, Cap. 318 RE 2002 which the Plaintiffs should have resorted to first before filing suits in courts of law. In Tanzania, it is the **Trustees' Incorporation Act** which provides the legal framework for free exercise of freedom of every person to freely and peaceably associate in furtherance of religious purposes and to practise religion. This law goes further by giving religious trustees legal capacity and the framework for these religious trustees to acquire and own property.

In so far as meetings and elections which forms the subject matter of this application is concerned, section 17 of the **Trustees' Incorporation Act** requires the Plaintiffs to first give the Administrator-General and BAKWATA space to resolve dispute facing an incorporated religious organisation. The Administrator-General and BAKWATA enjoy the initial statutory duty to monitor meetings and changes of leadership in Islamic organizations that have been incorporated as trustees. In my opinion, members of registered religious trustees cannot seek direct recourse to ordinary courts of law without first channelling their grievances, complaints or disputes to their respective relevant supreme authority (BAKWATA for Islamic trustees) and the Administrator-General. Sub section (2) recognizes the role of

BAKWATA as a supreme authority for Muslims in Tanzania entrusted with the monitoring how Islamic religious organizations operate within their establishing constitutions and charters. The relevant section 17 of the **Trustees' Incorporation Act**, states:

17.-(1) No changes of the names of a person who is or who were trustee or trustees of a body corporate or organisation incorporated under this Act shall be authorised by the Administrator-General unless he is satisfied that—

- (a) there were held a lawful meeting of the body corporate or organisation for the purposes of electing a person or persons as trustee of such a body corporate or organisation;
- (b) the meeting electing new leaders as trustees or any person to fill any vacancy was monitored by any of Government authorities.

(2) In the case of religious bodies corporate or organisations, they shall each be monitored by their respective relevant supreme authority in Tanzania in accordance with their statutes, charter or instrument of that body corporate or organization.

Reiterating the controlling power of the Administrator-General, section 14 of the **Trustees' Incorporation Act** deals with complaints or disputes arising from any alleged misuse of property vested in the trustee.

These complaints or disputes must first be referred not to the courts of law but to the Administrator-General. The relevant section 14 states:

14.-(1) Where the Administrator General is of the opinion that a trustee incorporated under this Act uses or misuses any property vested in the trustee, he may investigate or authorise any fit and proper person to investigate on his behalf into the trustee.

(2) If as the result of investigation carried out in pursuance of subsection (1), the Administrator General is of the opinion that the trust property has been used, or misused in circumstances which are prejudicial to the interests of members of the body corporate or organisation in respect of which the trustee has been incorporated, he may—

- (a) suspend or remove the trustee and any person found in use or misuse of such property;
- (b) appoint a receiver and manager or the Public Trustee to take care of such property and run the day to day affairs of the body corporate or organisation for a period pending appointment of the new trustee or trustees;
- (c) freeze the bank account of that body corporate or organisation;
- (d) stop further action by the trustee or trustees in dealing with the property of the body corporate or organisation;
- (e) refer the matter to a police officer of the rank of Inspector or above for further investigations with a view to taking further legal action in a court of law;

- (f) pursue trustee or trustees who have committed breach of trust and to recover trust property or seek damages.

It seems to me that freedom of members of Registered Trustees Sunni Muslim Jamaat to freely and peaceably associate under their trustee in furtherance of religious purposes and to practise their religion is best attained where religious disputes are resolved by established religious organs and interference by state organs (which include the courts) should be kept at very bare minimal for purposes of public peace, morality and good order. It is very unfortunate that it is the same religious organizations which have on occasions invited state interferences by failing to first use internal democratic forums provided by their own constitutions and also using dispute resolution forums provided for under the **Trustees' Incorporation Act**. To my knowledge, the following cases involving the Registered Trustees of Sunni Muslim Jamaat, Dar es Salaam are still pending in this Court:

- i) 1. **Eqbal Ebrahim Halday**, 2. **Abdallah Abdulkarim**,
3. **Mussa Osman vs. The Trustees Of Sunni Muslim Jamaat Civil Case Number 97 of 2010** (is pending before Juma, J.);

ii) **Mohammed Rafik Haji Mohamed & 12 Others vs.**

Mohamed Jalaludin H. Hasham & 10 Others Civil

Case Number 23 of 2012 (was filed on 28th

February 2012 and is before Juma, J.);

iii) **Registered Trustees of Sunni Muslim Jamaat, DSM**

vs. Mohamed Zamaan Hassan, Civil Case No. 48

of 2012 (is pending before my sister Aboud, J.)

iv) **Muhammad Rafik and 11 Others vs. The Ad Hoc**

Committee, Sunni Muslim Jamaat Dar es Salaam,

Civil Case Number 119 of 2012 (was filed on 13th

June 2012 and is before Juma, J.).

Some litigants appear in several cases. For example Muhammad Rafik and Muzamil Khaki are plaintiffs in both **Civil Case Number 23 of 2012** and **Civil Case Number 119 of 2012**.

The filing of so many cases in courts of law; suing over the same subject matter (e.g. affairs of the Trustees of Sunni Muslim Jamat), constitute improper use of court processes. As I have suggested above, the **Trustees' Incorporation Act** has vested in the Administrator-General and BAKWATA (for Islamic

Trustees) sufficient statutory power to regulate and bring order in the affairs of Registered Trustees in Tanzania before these disputes reach courts of law.

This Court holds in a very high regard the rights of association of persons who in an incorporated trust, have agreed to be bound together by custom, religion, kinship or nationality, or established for any religious, educational, literary, scientific, social or charitable purpose. Amongst the rights of an incorporated trust which this Court recognizes is their right to freely hold their meetings even elections in accordance with their own constitutions. A person asking this Court to interfere with rights of a Registered Trustee to hold its scheduled meeting must bring compelling reasons and needless to say, the Administrator-General, Registered Trustee and BAKWATA must all be duly informed of the intention to stop any such meeting.

Article 20 of the Constitution of Tanzania recognizes the freedom of every person to freely and peaceably associate and cooperate with other persons, for purposes of preserving or

furthering his religious beliefs. The relevant Article 20 of the Constitution states:

20.-(1) Every person has a freedom, to freely and peaceably assemble, associate and cooperate with other persons, and for that purpose, express views publicly and to form and join with associations or organizations formed for purposes of preserving or furthering his beliefs or interests or any other interests.

As was stated by the Court of Appeal of Tanzania in the case **HAMISI RAJABU DIBAGULA vs. R., Court of Appeal of Tanzania at Dar Es Salaam** (SAMATTA, C.J., MROSO, J.A., and MUNUO, J.A.), the freedom of every person to freely and peaceably associate in furtherance of religious purposes, like other freedoms, is not an absolute freedom. The exercise of this freedom, just as the exercise of other freedoms, is subject to the requirements of public peace, morality and good order, which are requisites of the common good of society. I agree with Mr. Mbugha that the Plaintiffs rather than rushing to courts, they should first exercise their right of membership by attending the meeting and question any acts or conduct of the defendant *Ad Hoc* Committee.

Most of what has been submitted upon by Dr. Lamwai regarding for example the question whether Baluchis should be members can best be addressed not by courts of law, but by members of the Sunni Muslim Jamaat in their meetings convened in accordance with their constitution as supervised and monitored by the Administrator-General and BAKWATA.

From the foregoing, the present application for injunctive orders lacks serious question to be tried as between the Plaintiffs and the Defendant *Ad Hoc* Committee. My finding is sufficient to dispose of this present application. This Court shall not therefore exercise its judicial discretion to interfere with the rights of a Registered Trustee to hold a meeting in an application where that Trustee was not made a party.

The prayers in the Chamber Summons application seeking interim injunction to restrain the defendant/respondent AD HOC COMMITTEE, SUNNI MUSLIM JAMAAT DAR ES SALAAM are hereby dismissed with costs.

DATED at DAR ES SALAAM this 16th day of June, 2012


I.H. Juma
JUDGE

Delivered in presence of Mr. Alex Mwita, Advocate (for the Plaintiffs), Mr. Tesha, Advocate holding Mr. Mbugha's brief (for the Defendant Ad Hoc Committee) and Mr. Muhoza, State Attorney (for the Administrator-General).



I.H. Juma

JUDGE

16-06-2012

