



REPUBLIC OF KENYA



**Baishe & 3 others v Madi (Constitutional Petition 20 of 2021)
[2025] KEELC 254 (KLR) (29 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 254 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION 20 OF 2021
EK MAKORI, J
JANUARY 29, 2025**

BETWEEN

**MOHAMED BAISHE 1ST PETITIONER
AISHA MOHAMED BAISHE 2ND PETITIONER
LALI MOHAMED BAISHE 3RD PETITIONER
FAIZA MOHAMED BAISHE 4TH PETITIONER**

AND

UMI FAMAU MADI RESPONDENT

JUDGMENT

1. The Petitioners filed this petition against the Respondent, seeking the following orders:
 - a. A declaration that the Petitioner's rights to property are being breached and have been so breached by the Kadhi's Court.
 - b. A declaration that the Petitioners are the lawful owners and proprietors of that parcel of land measuring approximately 6 hectares at Mtaani, Mnwajumwali Lamu East Sub-county, Lamu County.
 - c. A declaration that that parcel of land not being the property of an Estate of a deceased Muslim cannot be adjudged by the Kadhi's Court.
 - d. An order restraining the Respondent by herself, her agents, or anybody acting on her behalf from evicting the Petitioners from that parcel of land or in any manner whatsoever interfering with the Petitioner's quiet enjoyment.
 - e. Costs of this petition.



- f. Any other relief this Honourable Court deems fit to grant.
2. The petition is defended through a Replying Affidavit dated 16th September 2021 and filed in Court on 20th September 2021 by the Respondent herein – Umi Famau Madi.
 3. The Court directed that the petition be disposed of using the materials filed, which included affidavits and statements from the witnesses, and that parties file written submissions.
 4. From the materials placed before me, the issues I frame for the determination of this Court are whether this petition meets the threshold of a constitutional petition, whether the petition is an abuse of the Court process, whether the Kadhi's Court had jurisdiction to determine in a succession cause the ownership rights of the suit property which was not part of an estate of a deceased Muslim, whether this Court can issue the orders sought and who should bear the costs of the petition.
 5. The Petitioners summarise the background to this petition in the supporting affidavit and statements filed: The Petitioners are members of one family, the 1st Petitioner being the father of the 2nd, 3rd, and 4th Petitioners, respectively.
 6. That, by rights of a first occupier, the 1st Petitioner occupied and got into possession of a parcel of land which is unregistered at Mtaani, Mbwajumwali Lamu East Sub County, Lamu County, measuring approximately 6 hectares. The 1st Petitioner and all his family members are in actual occupation of farming activities and planting trees. The said parcel of land has a constructed boundary of wires and trees.
 7. Without any rights whatsoever, the Respondent has claimed that parcel of land as part of her father's estate, which is untrue. She has made such claims before various Kadhi's Courts in the Coast region, significantly Mombasa Succession Cause No. 180 of 2014.
 8. The Respondent's grandfather and/or father never laid any claims on the parcel of land occupied by the Petitioners.
 9. The Petitioners contend that the unregistered parcel of land belongs to them as a family, and the Respondent has no rights over it.
 10. The Petitioner further contends that the Respondent's activities, including filing cases in Kadhis Court, infringe on the Petitioner's rights to property as enshrined in Article 40 of the Constitution of Kenya.
 11. The parcel of land not forming part of the Estate of one Hassan Urema Hassan and Inyashe Kale Bwanaheri should not be adjudicated in any Succession Cause related to the Estate of the two deceased persons.
 12. That the involvement of the Kadhis Court is an infringement of the right to fair administrative action, and any determination arising therefrom is null and void in so far as the same is unconstitutional.
 13. Using an order from the Kadhi's Court, the Respondent has now evicted the Petitioners from the parcel of land. The 1st Petitioner was dragged to the Kadhi's Court as an "Interested Party" in a Succession Cause, a move that the Petitioners view as a grave injustice.
 14. As the land's first occupiers, the Petitioners enjoy absolute ownership rights that should not be interfered with by any person or institution.
 15. The Petitioners fervently pray that this court upholds their constitutionally guaranteed property rights, a plea that underscores the urgency and importance of their case.



16. The Respondents raised an issue that this petition represents an abuse of the Court process given the several suits before other Courts, significantly that a Preliminary Objection was raised before this Court (Odeny J.) over the same issue and the Court reserved the same for its final decision.
17. The Respondent believes that the issues raised herein have been ventilated in Mombasa Kadhi's Succession Cause No. 180 of 2014, which went on appeal in Mombasa Appeal No. 4 of 2018 and Appeal No. 5 of 2020 and Lamu Kadhi's Succession Cause No. 6 of 2011.
18. The Respondent firmly avers that the Kadhi's decision has long been executed, and this Court cannot purport to undo what has already been accomplished. The doctrine of estoppel, a legal principle that bars one from re-stating what has already been regularly adjudicated on, should apply here, a belief that underscores the Respondent's sense of inevitability.
19. In the ruling delivered by this Court on 19th of August 2022 on the Preliminary Objection by the Respondent dated 16th September 2021 reported as *Baishe & 3 others v Madi* [2022] KEELC 3772 (KLR), Odeny J. held as follows:

“On the issue as to whether the Applicant has met the threshold for grant of an order of stay of execution of the judgment and decree issued on 18th January 2018 by Chief Kadhi in Mombasa, the Applicants have not even attempted to explain the delay in filing this application. This is inordinate delay and the Respondent submitted that the decree has already been executed.

 30. In the case of *Gideon Sitelu Konchella v Daima Bank Ltd* [2013] eKLR citing *Mobil Kitale Service Station v Mobil Oil Kenya Limited & another* [2004] eKLR, it was held:

“It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder is to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act.”
 31. It is in the interest of all parties to a suit to ensure that matters are expeditiously brought to court and determined. If a party is aggrieved, then such party must follow strict timelines provided for filing applications or appeals, whichever is the case, unless otherwise prevented by excusable circumstances.
 32. I had earlier alluded to the issue that the court will deal with at a later stage, whether this Petition meets the threshold of a Petition. I find that the Applicants have not established that they will suffer any substantial loss if the order sought is not granted.”
20. The next question is whether the current petition is, in all four corners, a constitutional petition. The Petitioners allege that the Kadhi's Court in Mombasa Kadhi. Succ. No.180 of 2014 incorporated the suit property, which was private land, and purported to distribute it as forming part of the Estate of the late Hassan Urema Hassan and Inyasha Kale Bwanaheri.



21. Dissatisfied with the findings of the Kadhi's Court, an appeal was preferred in Mombasa Appeal No. 5 of 2018. Due to laches and delays in prosecuting the appeal, Thande J. dismissed it in an elaborate ruling dated 17th January 2020. An application was made for leave to Appeal to the Court of Appeal out of time. In another verdict dated 18th September 2020, Thande J. granted the 1st Petitioner a stay of execution and 30 days to file an appeal to the Court of Appeal, failure the orders to abate.
22. In a turn of events, the 1st Petitioner activated a similar appeal, Mombasa Appeal No. 4 of 2020, appealing the same decision by the Kadhi's Court. Onyiego J. dismissed the application on 11th June 2021 as representing abuse of the court process since Thande J. had already dealt with and rejected a similar appeal.
23. After all the foregoing, the 1st Petitioner and his family filed the current petition, which, when looked at, clearly shows that it seeks to overturn the findings of the Kadhi's Court in Mombasa Kadhi's Succession Cause No.180 of 2014. The petition offends the principles enunciated in Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272. To quote the Court (Trevelyan & Hancox JJ):

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”
24. What the Petitioners raise in this petition are not constitutional issues but rather represent an appeal reincarnate from the findings of the Kadhi's Court Mombasa in Mombasa Kadhi's Succession Cause No.180 of 2014. This Court has not been told what happened in the appeal to the Court of Appeal after Thande and Onyiego JJ—dismissed the appeal. This petition was activated as a conveyor belt to ventilate issues that should have been settled on appeal to the Family Division; It represents an abuse of the Court process.
25. An avenue was and is still open to the Petitioners to approach the Court of Appeal.
26. The upshot is that the current petition is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 29TH DAY OF JANUARY 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Magolo, for the Petitioners

Happy: Court Assistant

In the Absence of:

Mr. Gichana, for the Respondent

