



**Baishe & 3 others v Madi (Constitutional Petition 20 of 2021)
[2022] KEELC 3772 (KLR) (19 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3772 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
CONSTITUTIONAL PETITION 20 OF 2021**

MAO ODENY, J

AUGUST 19, 2022

**IN THE MATTER OF: ARTICLE 22 (1) AND 2 ENFORCEMENT OF BILL OF
RIGHTS OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ARTICLE 40 (1) & (3) PROTECTION OF RIGHT TO
PROERTY OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: ARTICLE 47 (1-3) ON FAIR ADMINISTRATIVE ACTION
AND ARTICLE 73 (2) A-E, 75 (1-3) ON THE INTEGRITY
AND CONDUCT OF STATE OFFICERS OF THE
CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: UNREGISTERED PARCEL OF LAND AT MTAANI
MBWAJUMWALI LAMU EAST SUB COUNTY, LAMU
COUNTY OWNED BY MOHAMED BAISHE AND HIS**

FAMILY

BETWEEN

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

AND



RULING

1. This ruling is in respect of a Notice of Motion dated 30th August 2021 by the Petitioners seeking the following orders; -
 1. spent
 2. The court be pleased to order stay of execution of judgment and resultant decree passed on the 16th January 2018 by the Honourable Sheikh Al Muhdhar AS Hussein Chief Kadhi, Mombasa pending the hearing and determination of this application.
 3. The court be pleased to order stay of execution of judgment and resultant decree passed on the 16th January 2018 by the Honourable Sheikh Al Muhdhar AS Hussein Chief Kadhi, Mombasa pending the hearing and determination of this petition
 4. That costs of the application be provided for.
2. The Respondent replied to the application by filing a Notice of a Preliminary Objection dated 16th September, 2021 of the grounds that: -
 - a. The petition is *res judicata*
 - b. The Petition is *sub judice*
 - c. The petitioner is on an excursion of the abuse of the court process
3. The court gave directions that the application be heard together with the preliminary objection vide written submissions which were duly filed. I will therefore determine the preliminary objection first.

Respondent's Submissions on the Preliminary Objection

4. Counsel gave a background to the case and stated that the subject matter herein begun at the Kadhi's Court at Lamu being the KCCC Succession Cause No. 6 of 2011 (in the matter of the Estate of Hassan Urema Hassan and Inyashee Kale Bwanaheri) who left behind 4 daughters and 2 sons.
5. Counsel further stated that Mohamed Baishe (the Petitioner joined the proceedings after judgement had been delivered) and testified whereby the court made a ruling excluding the property known as No.5 Shamba Kwaiju Mbujumwali which is un-adjudicated and un-surveyed. That the Petitioners were aggrieved with the ruling of the Kadhis Court and preferred an Appeal at the High Court at Malindi. High Court Civil Appeal No. 28 of 2012(*Tima Hassan Urema & 2 others v Mwanamina Hassan Urema & 2 others*) which appeal was not determined on merit as the parties filed a consent to have the matter heard *de-novo* at the Kadhi's Court at Mombasa.
6. Counsel submitted that Kadhi delivered a judgment dated 16th January 2018 where he orders and decreed that: -
 - a. Mwanapambo Hassan and Mwanamina Hassan and their descendants will not benefit from the 5 Shambas, they should only enjoy what they have taken from the two houses, Gold and Six doors as their inheritance from the Estate of the late Hassan Urema and Inyashee Kale.



- b. Tima Hassan, Abdalla Hassan, Mohamed Hassan and Urema Hassan or their descendants to take over the five Shambas in Mbwajumwali as their inheritance in equal basis.
 - c. Mwanapambo Hassan and Mwanamina Hassan or their descendants to handover any of the Shambas if any to their four siblings mentioned above.
 - d. No orders as to costs.
7. Counsel submitted that Mohamed Baishe, the Petitioner herein was a party to the proceedings at the Kadhis Court at Mombasa and being aggrieved with the judgment applied for stay of the proceedings pending hearing and determination of the appeal which was granted.
 8. Mr. Gichana counsel for the Respondents submitted that the appeal in High Court Appeal No. 5 of 2018 at the family Division (*Mohamed Baishe –vs- Tima Urema & others*) was dismissed for want of prosecution 17th January, 2020. That the Petitioner sought for leave to Appeal out of time against the dismissal to the Court of Appeal which application was allowed on 18th September, 2020, whereby the court ordered that: -
 - a. Leave to Appeal is hereby granted.
 - b. Stay of execution of the order of 17th January, 2020 is granted on terms that the appeal shall be filed within 30 days from today’s date. In default, the stay granted shall automatically lapse.
 - c. The Applicant shall bear the costs of this Application.
 9. Counsel also stated that the Respondent filed an Appeal being Appeal No. E004 of 2020 which was dismissed *vide* a ruling dated 11th June, 2021. It was counsel’s further submission that the Respondent filed an Application dated 7th July, 2021, pending ruling and another Application dated 27th September, 2021, seeking to declare the Petitioner a vexatious litigant.
 10. On the issue that this matter is *res judicata*, counsel submitted that the Petitioner Mohamed Baishe, is the same Litigant who approached the Kadhis Court and sought to exclude the property in issue from the list of the property of the Estate, filed an Appeal No. 28 of 2012, at Malindi was a party to the proceedings in the Kadhis Court at Mombasa KCCC No.180 of 2014 and Appeals at the High Court at Mombasa hence he is estopped from filing further cases in respect of the same subject matter. Further that the Petitioner/Applicant has just added his daughters to the case which in effect does not change the fact that the matter is *res judicata*.
 11. Counsel therefore urged the court to uphold the Preliminary Objection and dismiss the Petition with costs.

Petitioners’s Submissions

12. Counsel submitted that there is no matter pending before the court in respect of the subject matter and that there has never been a suit regarding the Property which the Petitioners claim and which the Respondent is evicting them from.
13. Mr. Magolo submitted that this Court is under duty to protect Constitutional rights as they arise and it does not matter whether related issues have been canvassed in other Court. further that the Petition herein will enable the parties to properly litigate their rights over the subject matter herein.
14. It was counsel’s submission that what has been before the Kadhi and the High Court is a Succession matter and Appeals therefrom and no decree has ever been issued capable of being executed by the



- Respondent and that if the Respondent was claiming the property she would have filed a suit claiming that land.
15. On the Preliminary Objection that this matter is *res judicata*, counsel submitted that this is a Constitutional Petition and no other Constitutional Petition has been heard with respect to the subject matter herein. That the matters which were filed in the Kadhi's Court and Appeal from the High Courts were with respect to the succession under the Kadhi's Court Act and they were not constitutional Petitions.
 16. In respect of the matter being *sub judice* counsel submitted that there is no matter pending in Court other than this Petition and therefore the issue of *sub judice* cannot arise.
 17. Counsel therefore urged the court to allow the application and set down the Petition for hearing and determination.

Analysis and Determination

18. The reason I elaborated on the history of this case as provided for by the Respondent was to have a clear picture of what had transpired to enable me determine the Preliminary Objection by the Respondent that this Petition is *res judicata*, *sub judice* and an abuse of court process.
19. Section 7 of the [Civil Procedure Act](#) Cap 21 is the substantive law on *res judicata* which provides that: -

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."
20. The doctrine of *res judicata* serves an important purpose in administration of justice which is to prevent multiplicity of suits which clogs the court system, reduce unnecessary costs on the parties to litigate and defend same suits and subject matters which have been determined and finally to prevent litigants from camouflaging already decided cases by adding or subtracting parties to disguise them as new parties.
21. A Preliminary Objection can only be raised on a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit as was held in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696.
22. Counsel for the Respondent has elaborately given a background of the cases that have been in court which are allegedly in respect of the subject matter. The cases were before the Kadhi's court and on Appeal in the High Court which appeals were dismissed for want of prosecution.
23. Counsel for the Petitioner submitted that this is a Constitutional Petition and that there is no other pending Petition in respect the same subject matter or one that has been determined.
24. In the case of *Bernard Mugo Ndegwa v James Nderitu Gitbae and 2 Others* (2010) eKLR, the test of whether a matter is *res judicata* was summarized as follows: -
 - i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;



- iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
25. The matters alluded to have not determined the issue that the Petitioner is seeking to be addressed in the Petition with finality. The issue that the court will be dealing with at a later stage is whether the petition as filed is a Constitutional Petition properly so called or whether there are other avenues of dispute resolution that can be used to resolve this case.
26. In the case of *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97 the Court held that: -
- "Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by *res judicata* when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. *Res Judicata* bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of *res judicata*. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that *res judicata* does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".
27. The appeals were dismissed for want of prosecution and the Judgment by the Kadhi's court did not determine the issue of ownership as the Kadhi does not have jurisdiction to adjudicate upon land matters that are not part of a Succession cause under Islamic law.
28. Having said that, I find that the Preliminary Objection lacks merit and is therefore dismissed.
29. 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.



33. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs. The interim orders earlier granted are hereby vacated. Parties are at liberty to fast track the hearing of the Petition.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 19TH DAY OF AUGUST, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

