



RS & 4 others (Suing as representatives and next friend of two hundred minors, students and religious scholars of Taqadum Muslim School) v Mohamedali & 5 others (Constitutional Petition 38 of 2020) [2022] KEELC 13825 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 38 OF 2020**

**M SILA, J
OCTOBER 19, 2022**

BETWEEN

**RS 1ST PETITIONER
KHK 2ND PETITIONER
AM 3RD PETITIONER
MJ I 4TH PETITIONER
IMA 5TH PETITIONER
SUING AS REPRESENTATIVES AND NEXT FRIEND OF TWO HUNDRED
MINORS, STUDENTS AND RELIGIOUS SCHOLARS OF TAQADUM MUSLIM
SCHOOL**

AND

**NATMUDDIN HASSANALI MOHAMEDALI 1ST RESPONDENT
WAKF COMMISSIONERS OF KENYA 2ND RESPONDENT
ATTORNEY GENERAL (SUED FOR AND ON BEHALF OF THE LAND
REGISTRAR, MOMBASA) 3RD RESPONDENT
MAHAD INABAH TRUST 4TH RESPONDENT
COUNTY COMMISSIONER OF MOMBASA COUNTY 5TH RESPONDENT
MOMBASA COUNTY GOVERNMENT 6TH RESPONDENT**



RULING

1. This suit was commenced by way of a constitutional petition which was filed on 3 November 2020. The petitioners are individuals who claim to sue on behalf of the students and scholars of [particulars withheld] School. They have pleaded that one Mohamed Ali Hassanali (deceased) was owner of the Plot No 251 Section XVI situated in Majengo, Mombasa Island and that prior to his death, he had on 28 February 1994, established a Wakf over the property in favour of Taqadum Muslim School. They claimed that there has now been created two overlapping titles, being Mombasa/Block XVI/488 in the name of the 4th respondent, and Mombasa/Block XVI/603A . In the petition, the following orders are sought :-
 - a. A declaration that Plot No 251 Section XVI Mombasais a consecrated Wakf belonging exclusively to the Taqadum Muslim School.
 - b. A permanent injunction restraining the 1st – 6th respondents from interfering with the quiet possession of the Plot No 251 Section XVI Mombasa.
 - c. An order directing revocation of the title Mombasa/Block XVI/488 in the name of Mahabi/ Inabah Trust for being a fraud.
 - d. Costs and incidentals.
 - e. Such further relief that the court may deem fit to grant.
2. The 4th respondent filed a replying affidavit to the petition and also filed a cross-petition. She averred that she is the proprietor of the land parcel Mombasa/Block XVI/488 having purchased it on 17 May 2004 from Najmuddin Hassanali, Hatimali Hassanali, and Tasneem Mohamedali for Kshs 3,000,000 and was subsequently issued with title. She sought a declaration that she is the rightful proprietor of the Plot Mombasa/Block XVI/488.
3. When I first went through this petition, I thought that the issues herein are matters that ought to be canvassed through an ordinary suit and not through a constitutional petition. I thus issued notice to the petitioner to show cause why the petition should not be struck out so that the matters herein can be addressed in a civil suit. The petitioner filed nothing to show cause. The 4th respondent filed submissions and was of opinion that the petition ought to be dismissed for failing to meet the constitutional threshold.
4. I am of the same view.
5. It will be discernible that the dispute herein revolves around the ownership of a private parcel of land. Whereas the petitioners claim that the land in issue is Plot No 251 Section XVI Mombasa, and contend that the same was consecrated as a Wakf, the 4th respondent asserts ownership of the same land but now with the title Mombasa/Block XVI/488, which she avers she purchased for valuable consideration. This is a dispute between two private individuals over private land. The dispute revolves over two titles and the court may need to determine which of the two titles is genuine and who is the rightful proprietor of the land where the titles sit. There are no constitutional issues here. All the court will determine is who holds the proper title and that does not require any interpretation of *the constitution* or any input from *the constitution*. The matters herein will need for evidence to be called and for the parties to testify on the two or three titles alleged to exist.



6. A constitutional petition should not be reverted to unless issues related to *the Constitution* are involved. As was said by the Court of Appeal in the case of *Gabriel Mutava & 2 others v Managing Director Kenya Ports Authority & another* [2016] eKLR :-

“...it has since emerged on the authorities that constitutional litigation is a serious matter that should not be sacrificed on the altar of all manner of frivolous litigation christened constitutional when they are not and would otherwise be adequately handled in other legally constituted forums. Constitutional Litigation is not a panacea for all manner of litigation, we reiterate that the first port of call should always be suitable statutory underpinned forums for the resolution of such disputes.”

7. In my opinion this is the kind of suit that should be heard through the ordinary civil litigation process. I am therefore not persuaded that the suit herein was properly filed in the first place. As I have mentioned earlier, despite being given notice to show cause as to why the suit herein should be continued, the petitioner has filed nothing to show cause. Not being persuaded that the case ought to have been commenced as a petition, I hereby proceed to strike it out with costs to the respondents.
8. Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF OCTOBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

MOMBASA

In the Presence of :-

Ms. Nafula h/b for Mr. Khalid Salim for the 4th respondent

Other parties – Absent

Court Assistant – Wilson Rabong'o.

