



REPUBLIC OF KENYA



**Mohamed & 13 others v Sugat & 2 others (Petition E018 of 2024)
[2025] KEHC 2510 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2510 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA**

PETITION E018 OF 2024

JN ONYIEGO, J

FEBRUARY 17, 2025

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES
2,3,4,5,6,10,19,20(2), 21, 22,27, 28 AND 118 OF THE CONSTITUTION**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION
OF ARTICLES 238(1), OF THE CONSTITUTION**

BETWEEN

SAHAL MOHAMED 1ST PETITIONER
ADAN ABDI ISSA 2ND PETITIONER
YUSSUF ABDI DIRIYE 3RD PETITIONER
YUSSUF D IBRAHIM 4TH PETITIONER
HASSAN SHEIKH ABDI 5TH PETITIONER
MOHAMED SIRAT SORAH 6TH PETITIONER
ALI BARUT GEDI 7TH PETITIONER
SADIQ HASSAN AHMED 8TH PETITIONER
JAFFAR HASSAN GURE 9TH PETITIONER
ADAN ABDI SHEIKH IBRAHIM MAHAT AHMED 10TH PETITIONER
HASSAN FARAH MOHAMED 11TH PETITIONER
QUREISHA AHMED HIRE 12TH PETITIONER
MARIAM MOHAMED 13TH PETITIONER
ALI HASSAN HAJI 14TH PETITIONER

AND



ABDI MOHAMED SUGAT 1ST RESPONDENT
AHMED IBRAHIM ABDULLAHI 2ND RESPONDENT
MOHAMED IBRAHIM ABDI 3RD RESPONDENT

RULING

1. The petitioners herein moved to this court vide a petition dated 18.10.2024 brought pursuant to Articles 2,3,4,5,6,19,20(2),22,23,27,28 and 118 of *the constitution* of Kenya seeking the following orders:
 - i. A declaration that the respondents' have violated the petitioners' rights to equality and freedom from discrimination and human dignity as protected in *the constitution*.
 - ii. A prohibitory injunction restraining the respondents from continuing with the construction of the mosque until proper community consultation is conducted in accordance with article 10 of *the constitution* which emphasizes the importance of national values and principles including democracy and public participation.
 - iii. An order compelling the respondents to engage the community in a transparent and meaningful manner regarding the mosque construction.
 - iv. The cost consequent upon this petition be borne by the respondents.
 - v. The court do make such other or further orders as it may deem just and expedient in the circumstances.
2. The Petitioners' case is based on the grounds espoused in the affidavit in support deponed on the 18th October 2024 by one Sahal Mohamed Olat (1st petitioner) on his own behalf and that of the rest of the petitioners. The petitioners who claim to be elders and Imams, within Dadaab region averred that, sometime in August 2024, the respondents herein, unilaterally and without engaging the affected community decided to construct a mosque in Dadaab without any public participation.
3. They went further to state that the respondents' aim is to introduce controversial religious practices that could incite clashes and compromise security in the area. That the construction of the said facility for worship without any agreement with the local community undermined the community's right to participate in decisions affecting their lives.
4. It was further averred that the ongoing construction of the mosque has raised significant security concerns within the community as lack of trust between the mosque's builders and the local residents could lead to heightened tensions, thus potentially threatening safety in the area. It was further averred that the community believes that open communication and involvement in the planning process are crucial for maintaining security and fostering a safe environment.
5. It was deposed that the community elders and the Supreme Council of Kenya Muslims (SUPKEM) have made genuine attempts to initiate dialogue with the respondents regarding the mosque's construction to no avail. This court was therefore urged to find the petition herein merited and issue the prayers sought.
6. In response to the petition, the respondents filed a preliminary objection dated 04.11.2024 citing the following grounds:



- i. That the Honourable court lacks jurisdiction to entertain the matter herein as the same is sub judice.
 - ii. That there exists a prior suit, being Daadab MCELC E006 of 2024 filed by the respondents where the subject matter, being the construction of a mosque on an unregistered plot measuring 300 square metres in Bulla Dayday within Dadaab constituency and the issues regarding lack of public participation and insecurity were being raised as substantive issues for determination.
 - iii. That the current petition is an abuse of the court process intended to circumvent and undermine the existing suit which is pending determination before a competent court.
 - iv. That allowing this case to proceed would result in duplicative litigation, risk of conflicting judgments and interference with the administration of justice.
 - v. That the petitioners' attempt to re-litigate issues currently before the court not Daadab is vexatious, frivolous and waste of judicial time.
7. Reasons wherefore, this court was urged to dismiss the petition with costs to the respondents.
 8. The petitioners filed grounds of opposition as a response to the preliminary objection stating that the same did not raise pure point of law and that the same required fact finding. That there was no overlap in the subject matter of the two suits and further, the parties in the two suits were different.
 9. The court gave directions that parties file and exchange their respective written submissions in respect to the preliminary objection.
 10. The respondents submitted that section 6 of the *Civil Procedure Act* expressly bars a court from proceeding with a suit where there is a previously instituted suit involving the same issues and the same parties. To that end, it was urged that in Daadab MCELC/006/2024, the petitioners sought relief on issues relating to construction of a mosque on an unregistered plot measuring 300 square metres in Bulla Dayday, Daadab constituency. That the matters in contention in both the prior suit and the petition herein include public participation and security concerns. Reliance was placed on the case of Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 Others [2020] eKLR where the court stated that the purpose of sub judice is to stop the filing of multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process.
 11. It was argued that filing the petition herein is evidently intended to circumvent and undermine the prior suit pending before a competent court. That allowing this suit to proceed poses a risk of conflicting judgments which would undermine the administration of justice. To that end, the respondents relied on the case of Republic vs Chief Magistrates Court Nairobi & 2 Others ex parte Peter Odhiambo Ogango & 4 Others [2023] eKLR where it was held that duplication of proceedings could lead to conflicting orders which could be detrimental to the proper functioning of the judicial system.
 12. On the other hand, the petitioners submitted that the preliminary objection did not raise or meet the criteria for a valid preliminary objection. Reliance was placed on the case of Cyrus Mucebiu Irungu vs Martha Wanjiru Irungu & Jiangxi Transport Engineering Group Ltd, ELC Case No. E037 of 2021 where the court observed that the issue of sub judice requires the ascertainment of facts from the earlier suits and that the same cannot be done through a preliminary objection. As a reflection in the instant case, the petitioners argued that the preliminary objection as raised would require this court to ascertain the facts of the suit herein vis a vis that of Daadab.



13. It was also urged that the suit herein and that of Daadab are not similar for the reason that the same have different parties and different stakes involved. That the instant petition, involves the 14th applicant and various community stakeholders, none of whom are mentioned in Daadab MCELC/2024.
14. It was contended that the issue of violation of constitutional rights, as raised in this petition, is a matter of public interest litigation, where the applicants represent a broad range of community stakeholders. That in contrast, the previously instituted suit focused on land ownership and the parties involved are not the same as those currently in this suit. It was therefore urged that the preliminary objection be dismissed in its entirety.
15. I have considered the preliminary objection herein and the response thereof. I have also taken into account rival submissions by both parties. The main contention by the petitioners is that sometime in the month of August, 2024, the respondents made a unilateral decision to construct a mosque in Daadab without any public participation. That there are genuine fears that the construction and subsequent operation of the mosque may lead to disturbances, including potential congregation related conflicts which could disrupt the peaceful co-existence of residents in the area.
16. In the same breadth, the respondents urged that there exists a suit, Daadab MCELC E006/2024 pending hearing and determination at the Daadab Law Courts. It was urged that the gist of the suit revolves around the suit mosque being constructed on an unregistered land measuring 300 square metres in Bulla Dayday. It was averred that the issue of public participation and insecurity are directly and substantially in issue and therefore, the suit herein is meant to circumvent the suit before the lower court at Daadab.
17. In the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR the Supreme Court stated that:

“A preliminary objection consists of 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”
18. It is trite that if a preliminary objection is allowed, the same may dispose of the entire suit without giving parties the opportunity to be heard. Therefore, this has to be done with caution given that the court has a duty to hear all parties and determine the case on merit. In addition, this court has a duty to safeguard itself against abuse of its process/es.
19. A number of superior Courts have held that jurisdiction is everything and without it, the court must down its tools. [See the case of Owners of Motor Vessel “Lilian S” vs Caltex Oil Kenya Ltd (1989) KLR1].
20. The concept of sub judice is one that bars a court from trying a matter that is in one way or another before another court of competent jurisdiction by way of a previously instituted suit as long as it is between the same parties canvassing it under the same title.
21. In essence, if both courts were to proceed with the matters on merit and determine them, without deference to the former, they would arrive at similar or different results on the same rights claimed by the same parties and there would be a duplication of the reliefs or a conflict of them, which would be a recipe for confusion and chaos in the legal system. In the alternative of the scenario immediately above, where one of the Courts determined the matter before it the one still pending would be res judicata.



22. Further, Section 6 of the *Civil Procedure Act* bars any court from engaging in matters sub judice before them. It provides as follows:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
23. The import of the concept of subjudice is that as soon as the court finds a matter sub judice it stays immediately the proceedings until the prior one is heard and determined. [See the Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)].
24. In the instant case, the 1st respondent urged that the petition seeks to re-litigate various issues and matters pending determination before the Honourable court at Daadab in MCELC E006/2024.
25. It is apparent that none of the parties attached certified copies of the pleadings pending before the Magistrate’s court Dadaab. There seems to be a disagreement on the real issues in controversy. Save for the issue of land ownership dispute which has been admitted by both parties as pending before the lower court, the rest of the issues are disputed. This a matter of fact that should have easily been resolved by adduction of pleadings filed before the Dadaab court through an affidavit.
26. Assuming the only issue pending before the lower court is land ownership dispute, will that stop the high court from considering the rest of the alleged constitutional violations? I do not think so. Nobody has raised the issue of land ownership before this court. It is not an issue nor does it form part of the reliefs sought. In the absence of any pleadings from the lower court being tendered as proof of the issues in controversy before the Dadaab court, this court is left with no choice but to infer that the issues pending before the lower court are dissimilar to those pending before this court.
27. If the lower court were to determine the issue of ownership, it will not affect the outcome of this court. Further, the construction of the mosque can continue or not continue depending on the reasons cited by each court. Land ownership has nothing to do with public participation and security. If the issue of public participation is the subject in controversy before the lower court, then, this court could automatically down its tools. Viewing the facts as presented before me, the issue of land ownership is a distinct issue which can run independently before the lower court without affecting the high court matter.
28. For the above reasons stated, and considering that the issue of land has not been raised before me, I have no reason to uphold the preliminary objection as the objectors have not sufficiently established that the petition herein is subjudice. Further, parties in this case are different raising completely different issues from those of land ownership. As to whether the petition herein meets the threshold of a constitutional petition though not raised, is a different matter altogether.
29. The upshot of the above finding is that, the preliminary objection herein has not met the threshold of a preliminary objection as underscored under the Mukisa Biscuit Manufacturing Co. LMT v West End Distributors LTD (1969EA 696. To that extent, the preliminary objection herein is dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 17TH DAY OF FEBRUARY 2025

J. N. ONYIEGO



JUDGE

