



**Omar & another v Gulicha & 4 others (Petition E004 of 2023) [2023] KEHC 1726 (KLR)  
(Constitutional and Human Rights) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1726 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION E004 OF 2023**

**HI ONG'UDI, J**

**MARCH 15, 2023**

**BETWEEN**

**MOHAMMED OSMAN OMAR ..... 1<sup>ST</sup> PETITIONER**

**AHMED MOHAMED ABDULLAHI ..... 2<sup>ND</sup> PETITIONER**

**AND**

**ALI GULICHA ..... 1<sup>ST</sup> RESPONDENT**

**SUPREME COUNCIL OF KENYA MUSLIMS ..... 2<sup>ND</sup> RESPONDENT**

**OFFICER COMMANDING POLICE DIVISION – KAYOLE .. 3<sup>RD</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE ..... 4<sup>TH</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The petition dated 9<sup>th</sup> January 2023 was filed under Articles 3(1), 22(1), 23(1), 23(3), 165 and 258 of *the Constitution* for the alleged contravention of the rights and freedoms under Articles 10, 19, 24, 32, 43(1) (d) and 47 of *the Constitution*. Accordingly the petition seeks the following orders that:
  - a. An order of certiorari bringing into this Court and quashing the decision of the respondents of 1<sup>st</sup> November 2022 to close Al-Taqwa mosque in Njiru Estate, Kayole Area in Nairobi City County.
  - b. An order of mandatory injunction do issue, compelling the respondents to immediately and unconditionally re-open Al-Taqwa mosque in Njiru Estate, Kayole Area, Nairobi City County.



- c. A permanent injunction restraining the respondents from closing or interfering with the worship activities and the management and affairs of Al-Taqwa mosque, Njiru Estate in Kayole Area, Nairobi City County.
- d. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated the petitioners right to worship as provided for under Article 32 of Constitution.
- e. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated the petitioner's right to clean and safe water as provided for under Article 43(1)(d) of *the Constitution*.
- f. A declaration that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents violated the petitioner's right to fair administrative action as provided for under Article 47 of *the Constitution*.
- g. A declaration that the decision by the respondents to close the mosque was unconstitutional, illegal, null and void.
- h. Compensation for breach of constitutional rights.
- i. Respondents be condemned to bear the cost of the petition.
- j. Any other reliefs this honourable Court may deem fit to grant.

### **The Petitioners' case**

2. The petition was supported by the averments in the 1<sup>st</sup> and 2<sup>nd</sup> petitioners' affidavits in support dated 9<sup>th</sup> January 2023. The 2<sup>nd</sup> petitioner's affidavit reiterated the averments as stated by the 1<sup>st</sup> petitioner. The 1<sup>st</sup> petitioner averred that he is the Chairman of the Al – Taqwa Mosque Committee which represents the various ethnicities in the mosque. Its his averment that on or about October 2022, a new group of persons namely Mohamednur Ali, Khadar Ibrahim Adow, Ahmed Mohamednur, Noordin Ibrahim Adow and others disrupted the co-existence of the various ethnicities' in the mosque with an aim of taking over the mosque. He noted that the new group sells water to the residents of Njiru Estate and the wider Kayole Area.
3. In this regard, he informed that due to the water shortage in Njiru estate, the mosque sought for and received aid from organizations for construction of a borehole at the mosque which was successful, and residents have enjoyed access to the same with no limitation. He is apprehensive that if the new group takes over the leadership of the mosque, free access to the borehole water at the mosque will cease. It's for this reason that the new group instigated conflict at the mosque and on or about 1<sup>st</sup> November 2022, the 1<sup>st</sup> and 2<sup>nd</sup> respondents directed the 3<sup>rd</sup> respondent to close the mosque due to management squabbles. He deposed that this was done without hearing the Committee, the worshippers and residents who use the mosque. He contended that this action was prejudicial to the worshippers who could not do their prayers as usual yet the nearest mosque is kilometers away.
4. He deposed that efforts to resolve the issues amicably had failed. He deposed that in the meeting held on 29<sup>th</sup> December 2022, the 2<sup>nd</sup> respondent forced the management of the mosque to sign a settlement agreement with terms they had not discussed nor considered before. For this reason the management refused to sign the settlement agreement. It is on this premise that the petitioners brought the instant petition to Court citing various violations of constitutional rights.
5. They filed a further affidavit dated 23<sup>rd</sup> February 2023 sworn by the 1<sup>st</sup> petitioner in opposition to the respondents' responses vide their replying affidavits.



## The Respondents' case

### The 1<sup>st</sup> and 2<sup>nd</sup> Respondents case

6. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed a replying affidavit dated 17<sup>th</sup> February 2023 sworn by the 1<sup>st</sup> respondent, the Regional Coordinator of the 2<sup>nd</sup> respondent. He challenged this Court's jurisdiction on the basis that the core issue of the petition is the closure of the mosque due to the borehole water which is a domain of the Water Tribunal under Section 121(1) of the Water Act. Furthermore, that the mandate to order the intervention of the Al-Taqwa Mosque to meet water needs as per Section 140(1)(b) of Water Act lies with the Nairobi Sewerage and Water Authority. Further that by virtue of Section 9(4) of the Fair Administrative Action Act the petitioners had not exhausted the existing mechanisms before invoking this Court's jurisdiction and similarly no constitutional issues had been raised. Additionally he deposed that the issues of water, its distribution and use are a preserve of the Environment and Land Court.
7. He further deposed that the petitioners were guilty of material non-disclosure and had approached the Court with unclean hands, as they were the aggressors in the violent acts that threatened public security. He noted that the petitioners claim that the worshippers of the mosque were not consulted was false since prior to the closure of the mosque there were public meetings held on 16<sup>th</sup> February 2022, 22<sup>nd</sup> February 2022, 30<sup>th</sup> October 2022, 31<sup>st</sup> October 2022, and 29<sup>th</sup> December 2022 after issuance of a public notice on 4<sup>th</sup> November 2022. He added that the petitioners had concealed the fact that an agreement had been reached but that they refused to sign the same. He noted similarly that contrary to the petitioners' allegations the 1<sup>st</sup> petitioner was not one of the elected officials of the Al-Taqwa Mosque committee.
8. He further deposed that him and the Arbitration committee that was set up to listen to the conflicts on 20<sup>th</sup> January 2022, called for a meeting that was attended by the Muslims in the Njiru Area. At the conclusion of the meeting, the committee wrote a report to the Chief of Njiru Area on what formed the basis of the conflict. Primarily the Chief was informed that the conflict was over the borehole that generated an income of Ksh.160,000 which is not accounted for.
9. A further meeting was held on 16<sup>th</sup> February 2022 with the Al-Taqwa mosque officials, government security agents, plus the Petitioners. The said meeting resolved that the existing committee of the mosque be dissolved and an interim committee be constituted, to oversee activities of the committee for one (1) year. However following the escalation of violence at the mosque on 1<sup>st</sup> November 2022, the 2<sup>nd</sup> respondent wrote to the 3<sup>rd</sup> respondent detailing the issues at the mosque while seeking urgent intervention of security officers. He noted that this conflict escalated on 27<sup>th</sup> December 2022 when bloodshed was also witnessed.
10. He averred that he was summoned on 29<sup>th</sup> December 2022 by the 4<sup>th</sup> respondent's security and intelligence committee to shed light on the conflict. He informed that owing to the factors that prevailed in the conflict, the committee resolved that the mosque should be closed until a resolution was reached and the imam investigated over the allegations that he is not Kenyan and that the 1<sup>st</sup> respondent records a statement with the Directorate of Criminal Investigations. More meetings were held on 6<sup>th</sup> January 2023 and 10<sup>th</sup> January 2023 in a further attempt to resolve the conflict. A similar meeting had been slated for 17<sup>th</sup> January 2023 in which the petitioners had been invited to attend.
11. To this end, he argued that the petition was an abuse of the Court process. He pointed out that the manner in which the right of worship was being sought by the petitioners was abusive as it is the petitioners who had instigated the violence. He as such deposed that grant of the sought orders would



be against the interests of the Njiru Muslim Community and curtail the imperatives set out for the interim committee.

### **The 3<sup>rd</sup> 4<sup>th</sup> and 5<sup>th</sup> Respondents' case**

12. In response they filed their replying affidavit dated 1<sup>st</sup> February 2023 sworn by Paul M. Wambugu, the sub County Police Commander. He deposed that there had been persistent conflicts at the Masjid Taqwa Mosque due to the rivalry of its members who are divided into two groups namely Ogaden clan led by Siyad Bare and Garre clan led by Mohammed Noor. He stated that in view of this it was resolved by the Special Njiiru sub county security and intelligence committee that the mosque should be closed temporarily to prevent further escalation of the conflict.
13. It is his disposition that efforts by the special security and intelligence committee to foster dialogue to end the conflict failed. It was then that the committee resolved to dissolve the committee and appoint a new interim committee, comprising of members of the warring clans and 2 Sheikhs to oversee the activities of the committee for one year. Further, the committee directed that a deputy Imam be appointed from the Noor faction to assist the current Imam, Mohamed Muktar. Additionally, that the mosque as run by the interim committee be opened for prayers, with the area Chief ensuring compliance of the decision. He annexed a copy of the minutes of the meeting (PW-1 a & b).
14. He deposed that despite these efforts, criminal acts were perpetrated in relation to this conflict and accordingly reported to the police. There were also threats by Mohamed Noor to Mohammed Ibrahim, followed by an invasion of the mosque on 30<sup>th</sup> October 2022 by a group of 20 youths which led to several people sustaining injuries. The culprits were arrested and arraigned in Court, (O.B reports – PW-2 a, b, c & d). He averred that when the Chairman of the 2<sup>nd</sup> respondent was called for a meeting over the matter, he reported that the genesis of the conflict was control of the income generated from sale of the borehole water and the madrasa classes offered at the mosque.
15. He added that the conflict was further fueled by a claim of ownership of the piece of land the mosque sits on by multiple persons. This is despite the property being communal land. He stated that the 2<sup>nd</sup> respondent's attempts to resolve the conflict had been unfruitful. In the end, the recommended directive was closure of the mosque. He further deposed that the Imam is not a Kenyan citizen and that other members of mosque who are foreigners of Somali origin want to enforce Somali Regulations in the mosque. On this premise a unilateral decision to close the mosque was done in the interest of the public and security of the mosque.

### **The Petitioner's submissions**

16. The petitioners through the firm of Mohammed Abdirahman and Company Advocates filed written submissions and a list of authorities dated 23<sup>rd</sup> February 2023. Counsel identified the issues for consideration as follows:
  - i. Whether this Court has jurisdiction to entertain the petition.
  - ii. Whether the resolutions passed in the alternative dispute resolution proceedings are binding on the petitioners.
  - iii. Whether the petitioners are entitled to the prayers sought.
17. On the first issue, Counsel answered in the affirmative while relying on Articles 22, 23 and 165 of *the Constitution*. Opposing the 1<sup>st</sup> and 2<sup>nd</sup> respondents' allegation that the water issue was under the Water Tribunal docket as established under the *Water Act*, Counsel while citing Section 121 of the Act submitted that there existed no business contract between the petitioners and the respondents



to invoke the Tribunal’s mandate. On the violation of the right to safe and clean water, Counsel noted that the Courts had issued such declarations before and so nothing would bar this Court from issuing the same. In support reliance was placed on the case of *Erick Otieno Ogumo & 2 others v Chigwell Holdings Limited; County Government of Nairobi & another (Interested parties)* [2022] eKLR. Considering this, he argued that this Court is vested with the requisite jurisdiction to hear this matter.

18. On the second issue, Counsel submitted that the petitioners had attended the disputes meetings in which they were categorized as “Party B”. The petitioners viewed this as derogatory since they were labelled as criminals and refugees from Ethiopia. He noted that the petitioners had attended the meetings and were categorized as “Party B”. The petitioners these as derogatory since labelled them as criminals and refugees from Ethiopia. He noted that the petitioners ought to have been involved in selection of the Arbitrators and this made them raise concerns of impartiality. It’s their argument that when this came up the panel should to have adjourned the meeting in the interest of justice.
19. Counsel argued that Rule 31 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 states that a Court can refer a matter for hearing by way of alternative dispute resolution. He contended this was not the case in this matter and that the petitioners did not agree to the same. Reliance was placed on Section 59C of the *Civil Procedure Act*. In the end, Counsel argued that the petitioners were condemned unheard and right to fair hearing violated. Furthermore, he argued that the dispute resolution mechanism held by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was not authorized by the Court.
20. On the final issue, Counsel submitted that the decision to close the mosque was not anchored on any provision in law and that the respondents had not demonstrated why their rights were limited contrary to Article 24 of *the Constitution*. For this reason he stated that the petitioners’ rights were violated and hence entitled to the reliefs sought.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Respondent’s submissions**

21. The 1<sup>st</sup> and 2<sup>nd</sup> respondents filed written submissions dated 27<sup>th</sup> February 2023 through the firm of J. Harrison Kinyanjui and Company Advocates. Counsel identified the issues for determination as:
  - i. Whether the petitioners claim is justiciable.
  - ii. Whether the petitioners have exhausted the dispute resolution mechanisms on their issues.
  - iii. Whether the petitioners have a valid constitutional claim.
  - iv. Whether the petitioners have suffered any injury or are likely to suffer any harm if the court does not grant the reliefs sought.
22. Counsel submitted that the 3<sup>rd</sup> and 4<sup>th</sup> respondents had stated that there were pending criminal investigations for those involved in the mosque’s conflicts. Further that the 2<sup>nd</sup> respondent invited the two clans for a settlement of the dispute. Counsel thus submitted that the petitioners’ presentation of facts on the violation of the right to worship was aimed at misleading the Court as the real issue was water supply. He pointed out that the petitioners had not demonstrated their compliance with the provisions of the *Water Act* in view of exhaustion of the available mechanism process before lodging this complaint. He argued therefore that the *Water Act* informs that the jurisdiction of this Court is appellate in nature in view of such disputes. He added that the petitioners had failed to prove that their right to clean water had been infringed by the respondents.



23. Counsel additionally submitted that extraction of water via a borehole from the suit property is an act concerning the use of land which is in the domain of the Environment and Land Court under Article 162(2)(b) of *the Constitution*. He further contended that the main issue was a claim of ownership of property as seen in the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents' replying affidavit. In light of these arguments Counsel submitted that the petitioners claim for use, control and administration of the borehole as intertwined with allegations of interference with worship must fail as this Court lacks jurisdiction to entertain the matters.
24. On the issue of exhaustion of the available dispute resolution mechanisms, Counsel submitted that the petitioners had failed to abide by the agreement reached between them, to the effect that the Interim committee which constitutes members from both clans, would run the mosque for one year.
- In support of this position, Counsel cited the case of William Charles Fryda v Lance P. Nadeau & another (2015) eKLR where it was held that it is apparent that the applicants have not exhausted the procedure provided for by the church constitution, and so could not have the luxury to choose which forum to approach in their quest to call the respondents to account regarding the church matters. Similar reliance was placed on the case of Geoffrey Asanyo & another v John Ngunyi & 13 others (2015) eKLR.
25. On violation of constitutional rights, Counsel noted that Article 24 of *the Constitution* allows limitation of rights as long as there is justification for it. In this case he noted that the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents stated that they had closed the mosque due to the escalated conflicts in the interest of public safety. He finally submitted that the petitioners were not entitled to the reliefs sought. To buttress this position reliance was placed on the case of Lucy Njuguna and another v Town Clerk Municipal Council and Mombasa & 2 others (2011) eKLR where it was held that the far reaching effects of judicial orders dictate that the orders are to rest on a solid foundation of law and or evidence, neither of which has been shown in the petitioners' case. Similar reliance was placed on the cases of: (i) Muema Ndungi and another v Raphael Kituva and 7 others (2020)eKLR, (ii) East African Cables v Public Procurement Complaints, Review and Appeals Board and another (2007) eKLR.

### **The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents submissions**

26. Principal State Counsel, Thande Kuria on behalf of the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents filed written submissions dated 1<sup>st</sup> March 2023. Citing Article 32 of *the Constitution* he submitted that Courts in Kenya do not interfere in matters of religion and conscience. Further that Courts will not interfere with matters of dogma or ritual and other internal matters within the competence of a church or religious establishment as held in the case of Lalji Meghji Patel v Karsan Premji (1976) eKLR. Also see (i) Nyakamba Gekara v Attorney General and 2 others (2013) eKLR and SDA v Minister of Education (2014) eKLR (ii) Seventh Day Adventist Church(East Africa) Limited v Minister of Education and 3 others (2017) eKLR.
27. While relying on Section 24 of the *National Police Service Act* Counsel submitted that the work of police is to maintain law and order and where the exercise of the freedom of worship is a threat to the society and its own members it is necessary to intervene. He submitted that the right of worship contrary to the petitioners' claims is not an absolute right owing to Article 24 of *the Constitution*.
28. He lastly submitted that in the circumstances of this case, the respondents had demonstrated that due to the volatile manner in which the petitioners and community of worshippers at Al-Taqwa mosque have been conducting their affairs there is hostility and violence which is a security concern. Counsel noted further that the closure of the mosque was done after a lot of consultation and persuasion of the warring groups to resolve their difference.



## Analysis and determination

29. Upon consideration of the pleadings, affidavits, annexures, submissions and cited authorities I find that the key contention herein is the closure of the Al-Taqwa Mosque, in Njiru Estate, Kayole Area in Nairobi City County. In turn, this closure as stated has led to the alleged violations of the petitioners' rights to worship under Article 32 of Constitution, their right to clean and safe water under Article 43(1) (d) of *the Constitution* and the right to fair administrative action under Article 47 of *the Constitution*. I therefore find the issues falling for determination to be as follows:
- i. Whether this Court has the requisite jurisdiction to entertain this matter.
  - ii. Whether the petitioners' constitutional rights were violated.
  - iii. Whether the petitioners are entitled to the reliefs sought.

### Issue No. (i) Whether this Court has the requisite jurisdiction to entertain this matter

30. The jurisdiction of this Court to entertain this matter was challenged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in light of the doctrine of exhaustion. They argued that this suit was premised on the closure of the mosque due to use of the use borehole. According to them the use, control and regulation of the borehole is a preserve of the Water Tribunal under Section 121(1) of the *Water Act*. In view of this, they argued that pursuant to Section 9(4) of the *Fair Administrative Action Act* the petitioners had failed to exhaust the existing mechanisms before invoking this Court's jurisdiction over the matter. It was additionally argued that the issues of water, its distribution and use are a preserve of the Environment and Land Court. The petitioners disputed this assertion arguing that according to Section 121 of the *Water Act* there existed no business contract between them and the respondents to invoke the Tribunal's mandate.
31. The Supreme Court has on a number of occasions addressed its mind the issue of jurisdiction. In the Matter of Interim Independent Electoral Commission [2011]eKLR the Court opined as follows;
- “(29) Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent....
- [30] ...jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”
32. Once the jurisdiction of a Court is challenged in a suit the Court of Appeal in the case of Owners and Masters of Motor vessel “Joey” v Owners and Masters of Motor Tugs “Barbara” and Steve “B” (2007) eKLR offers guidance on the steps to be taken thereafter as follows:

“..the underlying principle is contained in the two previous decisions of this Court in the cases of THE OWNERS OF THE MOTOR VESSEL “LILIAN S” V. CLATEX OIL (KENYA) LTD [1989] KLR 1, and ROY SHIPPING SA & ALL OTHER PERSONS INTERESTED IN THE SHIP “MAMA OTAN” VS. DODOMA FISHING COMPANY LTD, Civil Appeal No. 238 of 1997 (unreported). In the LILIAN S, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and



Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as *The River Rima* [1987] 3 ALL E.R 1, *The I Congreso del Partido* [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties.”

33. It is clear that the matter before this Court revolves around three main issues namely;
- i. Use of the borehole which is a water issue
  - ii. Closure of the Mosque which has interfered with the right of worship, is constitutional issue.
  - iii. Violation of the right to be heard and/or fair hearing, which is a constitutional issue.
34. I agree that under the [Water Act](#), 2016, consumers like the petitioners among others are a protected lot. Section 70(1) of the Act provides as follows:

“There is established the Water Services Regulatory Board whose principal object is to protect the interests and rights of consumers in the provision of water services.”

35. It is further noted that water service providers cannot operate as such unless they have been licensed by the Regulatory Body under Section 74 of the Act. In the event of a dispute, Part IV of the Act provides that the Water Tribunal established under Section 119 has the jurisdiction to determine matters as follows:

Section 121

1. The Tribunal shall exercise the powers and functions set out in this Act and in particular shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, the Authority and Regulatory Board or of any person acting under the authority of the Cabinet Secretary, the Authority and Regulatory Board.
  2. In addition to the powers set out in subsection (1), the Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.
36. Palpably, the petitioners did not exhaust the existing procedure in the [Water Act](#) before instigating a claim for violation of their right to clean and safe water under Article 43(1)(d) of [the Constitution](#). For this reason this Court lacks the requisite jurisdiction at first instance save in special circumstances to exercise its jurisdiction over the claim that their right under Article 43(1)(d) of [the Constitution](#) was violated.
37. I take note that contrary to the 1<sup>st</sup> and 2<sup>nd</sup> respondents allegation, the Environment and Land Court is not vested with the jurisdiction to entertain a claim for violation of the economic and social constitutional rights, that is the right to clean and safe water under Article 43(1)(d) of [the Constitution](#). I say so because that Court’s jurisdiction does not cover the provision and use of water resources as asserted. I am guided by the [Environment and Land Court Act](#), 2011 that indicates the Court’s jurisdiction to be as follows under Section 12(2):
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;



- b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e. Any other dispute relating to environment and land.
38. Had the borehole contention been the only one before this Court it would have downed its tools for lack of jurisdiction. Fortunately for the petitioners the other issues of constitutional violations related to worship and hearing and/or fair hearing fall squarely under this Court's Jurisdiction. I will therefore address them accordingly.

**Issue No. (ii). Whether the petitioners' constitutional rights were violated**

39. The petitioners case as captured challenges the legality of the closure of the mosque specifically, the manner in which it was closed. They argued that the closure was not legal and hence unwarranted. They further stated that the 2<sup>nd</sup> respondent did not hear their views and instead engaged them to sign a settlement agreement whose terms they had not been given a chance to consider. In view of this, they stated that their rights under Article 32 and 47 of *the Constitution* were violated.
40. These assertions were strongly opposed by the respondents who indicated that the petitioners had deliberately misrepresented the facts and further failed to disclose all the relevant facts. The 2<sup>nd</sup> respondent informed that it had attempted to settle the dispute between the two warring clans in various meetings with the parties. In the end, a resolution to form an interim committee to run the mosque for an interim period of 1 year was made on 16<sup>th</sup> February 2022. The Committee comprised of 4 members from the two warring clans and 2 Sheikhs. However due to the persistent violence that posed a security threat, the 2<sup>nd</sup> respondent wrote to the 3<sup>rd</sup> respondent for assistance and intervention on 1<sup>st</sup> November 2022. Further resolution of the dispute was sought by the 4<sup>th</sup> respondent's security and intelligence committee when the issue escalated to the stage of violence. In the end the said committee resolved that the mosque would remain closed until a resolution was reached.
41. In constitutional petitions, a party that alleges violation of his or her rights must demonstrate with reasonable precision the manner in which the right/rights have been violated. This was appreciated by the Court in the case of *Husus Mugiri v Music Copy Right Society of Kenya & another* [2018] eKLR where it noted that:
- “ 18. ... the applicant must specify which specific provisions of *the Constitution* that declare the rights, the specific rights and freedoms that have been or are threatened to be infringed or violated and the manner in which the respondent has infringed the subject rights.”
42. The petitioners' case is that the closure of the mosque was not legal and so violated their constitutional rights. On the face of it, it would seem that indeed the petitioners' rights under Articles 32 and 47 of *the Constitution* were violated. However, prudence requires an interrogation and analysis of the facts and circumstances of the case. From the material and evidence placed before this Court the circumstances show that the factors that led to the closure of the mosque were necessitated by great public interest. While constitutional rights are guaranteed to each person the same are not enjoyed by an individual to the exclusion of the rest of the community. Moreover, constitutional rights are subject to justifiable limitation under Article 24 of *the Constitution*.



43. The facts of this case undoubtedly show that the issue herein was subjected to dispute resolution mechanisms. The 1<sup>st</sup> and 2<sup>nd</sup> respondents tried their best to resolve the conflict between the warring clans in the various meetings held by the members. This was followed by the 4<sup>th</sup> respondent's security and intelligence committee's intervention. When the instant suit was filed, it is noted that the resolution mechanism was still on going in an effort to resolve the issues.
44. With reference to alternative dispute resolution mechanisms *the Constitution* under Article 159 states as follows:
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3).
45. Speaking on alternative dispute resolution mechanisms the Court of Appeal in the case of Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others (2015)eKLR observed as follows:
- “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accord with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”
46. Taking all these pronouncements into consideration, I find myself rejecting the petitioners' assertion that they were not bound by the dispute resolution efforts carried out by the respondents. In this case, the petitioners cannot turn around and require this Court to address their grievance when they failed to abide by the dictates of the resolutions in which they too were parties.
47. It is noted that the mechanism process as indicated by the 1<sup>st</sup> and 2<sup>nd</sup> respondents was to be governed by the interim committee for a period of 1 year and that further meetings following the security and intelligence committee's resolve were still in motion. The petitioners in framing this petition did not indicate that the alternative dispute resolution process had failed hence the need for this Court's intervention, since they claim that the closure of the mosque violated their constitutional rights. Considering the facts of this case it is clear that the petitioners have failed to demonstrate how the respondents in carrying out their obligation and mandate in resolving the conflict violated their rights under Articles 32 and 47 of Constitution.
48. The two warring factions including the petitioners have a duty to foster good working relationships and fellowship in order to maintain their religious worship, their borehole and live in harmony to maintain safe security in Njiru Estate, Kayole Area in Nairobi City County. The ball is in their Court, and the earlier they resolve the issue the better for all of them.

The upshot is that the petitioners have failed to prove any violation of their rights by the closure of the mosque, which was done as a security measure. I hereby dismiss the petition. By the nature of the claim I order each party to bear his own costs.

Orders accordingly.



**DELIVERED VIRTUALLY, DATED AND SIGNED THIS 15<sup>TH</sup> DAY OF MARCH, 2023 IN OPEN COURT AT MILIMANI, NAIROBI.**

**H. I. ONG'UDI**

**JUDGE OF THE HIGH**

