



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**CONSTITUTIONAL PETITION NO. 72 OF 2011**

**KOMBO MIKDADI & 204 OTHERS.....PETITIONERS**

**VERSUS**

**JAMIL IYATU TAAMIL QURAN (JTQ) & OTHERS.....RESPONDENTS**

**JUDGMENT**

***(Claim by the Petitioners that they are entitled to claim the suit land through adverse possession; further claim that the land was set aside in the 1800's as a Mosque thus community land; allegations that their constitutional right to worship has been curtailed; land being private land held under a lease; lessees having permitted petitioners to worship in the Mosque; no right of adverse possession to a worshiper; land being private and not community land; clash in religious practice not a violation of the right to freedom of worship; petition dismissed.)***

1. This suit was commenced through a petition filed on 19 December 2011. There are 205 petitioners who state that they reside in Likoni who profess the Muslim faith and describe themselves as the Likoni Muslim Community. They aver that they have filed this suit “on behalf of themselves, their families, parents, children and all inhabitants of Likoni who profess the Muslim faith, and for their ancestors, forefathers, and descendants of one Hamisi Zumbe” who it is stated in the early 1800 consecrated the land parcel Mombasa South/Block 1/15 (the suit land) as a Mosque and prayer ground. The 1<sup>st</sup> respondent, Jami Iyatu Taamil Quran (JTQ) is described in the petition as a Non-Governmental Organisation (NGO). The 2<sup>nd</sup> respondent is the Commissioner of Lands and the 3<sup>rd</sup> respondent is the Attorney General.

2. The petitioners aver in their petition that in pursuit of their constitutional right to freedom of conscience, religion, thought, belief and opinion either individually or in community with others have utilised the suit land openly, exclusively, and uninterrupted for over 200 years. They aver that they have perfected their constitutional right of prayer and worship in the suit land by adverse and continuous possession as of right for more than the period of time for limitation by way of prescription. They aver that the suit land has been used as a mosque and prayer ground and allied religious purposes for over 200 years. They state that it is estimated that the first mosque built on the land existed before the year 1815. It is contended that the respondents and their predecessor in title have at no time since the year 1932 ever attempted to gain possession or exercise any proprietary rights over the land. It is stated that there is in existence an original borehole dug around the year 1815 and an original Madrassa building constructed in the mid-1850s for imparting religious knowledge.

3. The Petitioners plead that the 1<sup>st</sup> respondent purports to own the mosque, madrassa and all religious facilities on this parcel of land and that the respondents have frequently interfered with the Petitioners’ religious activities on the suit property for over 20 years to the date of the petition. It is averred that the 1<sup>st</sup> respondent has attempted to compel the Petitioners and worshippers at Riyadhwa mosque to engage in alien actions not allowed by the Islamic religion. It is said that they have forcefully tried to hold and perform religious festivities like Maulid inside the Mosque building which in turn has led to religious strife, confrontations, antagonisms, and fracas between the Petitioners and the respondents and other worshippers in the Mosque.

4. The land is described as originally having had a mud and wattle tree, mosque, madrassa and borehole which have been refurbished over the years and presently hosts a modern concrete structured mosque, a madrassa school and a secular secondary school known as Darul Ulum. It is said that the name of the mosque for over 200 years was Masjid Riyadhwa and not Sakina Jamia Mosque which the Petitioners say was changed illegally and arbitrarily by the respondents. It is averred that the refurbishment of the Masjid Riyadhwa Mosque and other facilities was by donations, grants, gifts and sponsors locally and externally and the same was completed in the late 1990s. It is mentioned that the respondents sought donations from international organizations to provide religious services to the lesser fortunate members of the society which is done through projects like Darul Ulum School without any accountability, involvement and consent of the Petitioners.

5. It is pleaded that over the years, the respondents have grossly interfered with the Petitioners’ rights under Article 32 (1), (2), (3) and (4) of the Constitution by seeking to control the Petitioners’ divine and religious destiny and rights to worship and manifest their religion on the suit land and various grounds of interference have been listed including the claim that on 17 April and 17 September 2017, the respondents locked out the petitioners from the mosque, and the allegation that they have engaged incompetent teachers unschooled in Islamic law to act as Madrassa teachers. It is also contended that they have leased out the Madrassa to proprietors of St. Kevin Secondary School for profit and

private purposes contrary to the tenets of the Islamic religion; that the petitioners have been locked out of management of the Madrassa and Darul Ulum School; that the respondents have outlawed the Parents Teachers Association (PTA) and Board of Governors (BOG), and the local Muslim community; that the respondents have been arbitrarily increasing school fees; and conversion of Wakf property into private property. It is averred that contrary to the tenets of Islam, the 1<sup>st</sup> respondent purports to control ingress and egress to the said Mosque. It is pleaded that the Wakf land is sacred to the petitioners and that it was fraudulently acquired without their knowledge and secretly changed hands on paper.

6. It is pleaded that one Abdulla Kaderdina purportedly acquired the land in the year 1959 and that he purported to rededicate it as a Wakf for religious purposes. This it is contended was an illegal act and amounted to a nullity. It is pleaded that the Abdulla Kaderdina family together with the petitioners refurbished the mosque but the Kaderdina family unlawfully changed the name to Sakina Jamia Mosque.

7. It is pleaded that the aggressive attempt to take over the mosque and the unlawful change of name is an affront to the Petitioners' constitutional rights in view of Articles 28, 32 and 40 of the Constitution. It is averred that the aim of the 1<sup>st</sup> respondent is to efface and obliterate the historical significance of the Mosque's name; conceal the real identity of the Mosque; to tout it as a charitable act from the Kaderdina family; to conceal the long immemorial user for religious purposes; to hoodwink the religious cruelty to the Petitioners by losing their religious identity by the act of changing the name. It is said that the name Sakina is associated with the sister of Abdulla Kaderdina who never worshipped in Likoni and it amounts to hijacking the Petitioners' Constitutional rights to respect for their inherent dignity for personal aggrandisement.

8. It is claimed that the land was allocated in 1932 without any proper land adjudication process to establish the rights of the petitioners and other inhabitants of the area. It is contended that the issuance of title to Abdulrehman and Company in 1932 was illegal and unlawful and no valid title passed. It is urged that the State illegally conferred an illegal and unlawful title of public or community land to a private entity and the Petitioners' were unconstitutionally divested of all interest in the land. It is argued inter alia that being a public Mosque in use for over 100 years before 1932, it could not legally be available for acquisition as private property and the root of title is tainted with fraud. It is pleaded that Hamisi Zumbe dedicated the property in perpetuity for use as a Mosque and religious prayer ground and such pious purposes. By this, it is stated, he placed the land in the ownership of God and insulated it from any form of acquisition as private property.

9. The Petitioners aver that they have a constitutional right to worship in the suit land and resist attempts to fetter their right to worship and have a duty to apply the income of the Wakf property for the purposes of endowment. They plead that where a valid Wakf was consecrated over the suit land, this could not be revoked by a second Wakf for it is in the power of nobody to divest God of his ownership of the property.

10. The Petitioners aver that the 1<sup>st</sup> respondent has no beneficial interest in the Wakf property or income and the appointment of the 1<sup>st</sup> respondent to hold and perform spiritual duties is prohibited. They aver that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents erred in law by purporting to convert Wakf property into private property.

11. They seek the following orders :-

a. A declaration that pursuant to Article 32(1)(2)(3)(4) of the Constitution of Kenya the 1<sup>st</sup> respondent cannot control or direct the Petitioners on how to manifest their Islamic Religion, belief, faith in the Mosque and other religious institutions on Plot No. Mombasa South Block /15 whether it regards worship, practice, teaching or observance of set times of worship by regulating user of the Mosque and the said facilities.

b. A declaration that Plot No. Mombasa south Block 1/15 by virtue of the long and immemorial user as a Mosque, prayer ground and teaching centre and other allied Islamic Religious purposes for over 200 years long before 1815 through express consecration of a Wakf by the original owner Mr. Hamisi Zumbe a Wakf by long and immemorial user was consecrated for the benefit of Likoni Muslim Community and the public at large. By virtue of similar community of interests pursuant to Article 63(1) the said property was not capable of alienation by the Government in 1932 as private property without following the Constitutional procedures as the same is community land as defined by the Constitution.

c. (i) A declaration that the said land having been consecrated as Public Wakf property and its user for Islamic Religious purposes by the Petitioners for over 200 years, alienation of rights, title and interest thereon and the eventual registration of the title in 1932 as Private Property was fraudulent, against public interest, public policy and therefore unlawfully acquired and as such the Title Mombasa South Block 1/15 is incapable of protection by provision of Article 40 of the Constitution and should be cancelled and the register appropriate rectified.

(ii) A declaration that Section 28 of the Registered Land Act in so far as it purports sanctify a first registration of title which was unlawfully acquired contravenes Article 40(6) of the Constitution and thus to that extend title no. Mombasa South Block 1/15 be declared null and void ab initio and unconstitutional.

(iii) A declaration that the 1<sup>st</sup> Respondent's Title to Mombasa South Block 1/15 was unlawfully acquired, without any proper adjudication of any claims to the land by the inhabitants and Likoni Muslim Community in Likoni over the said property and cannot be protected under Section 28 of the Registered Land Act (Cap 300) or any other law and as such the same be declared null and void ab initio.

d. A mandatory order of injunction be issued compelling the rectification of the register by cancellation of all entries indicating the Respondents and their predecessors in title or any other person as registered owners and inserting new entries making it as community land or as the court may deem just as per Article 63(i) of the Constitution or any other enabling provisions of the Law.

e. A declaration that the arbitrary and forceful change of the name of the Mosque to Sakina Jamia Mosque from Masjid Riyadhwa infringed on the Petitioners' inherent dignity as a people and as a community envisaged by Article 28 of the Constitution and the

right to have that dignity respected and protected.

f. A declaration that by attempting to force the Petitioners to act or engage in mauid festivals inside the Mosque building contrary to their belief and by being forced to worship in a Mosque whose identity had been stolen by the 1<sup>st</sup> Respondent the Petitioners' rights have been violated contrary to Article 32(4) of the Constitution.

g. (i) A declaration that by alienation of Land Parcel NO. Mombasa South Block 1/15 without any adjudication of rights and determination of the long and immemorial user of the land, the Administrative action thereof was not efficient, lawful, reasonable and procedurally fair. That the same went against public policy and public interest and should be reviewed by the Court by certiorari orders quashing the title held by the Respondents and all entities in the register be cancelled pursuant to Article 47 of the Constitution.

(ii) A declaration that the Administrative action by the Respondents above stated is contrary to Article 27 of the Constitution which provides for:-

1. Equality before the law and a right to equal protection and equal benefit of the law and full and equal enjoyment of all rights and fundamental freedoms including the freedom of conscience, religion, belief and opinion in Article 32 of the Constitution.

2. That the Respondents' action amounts to discrimination by the State on the grounds among others religion, conscience, belief and culture and the same should be appropriately addressed by an order of Judicial Review, pursuant to Article 27(4) of the Constitution.

h. A declaration that the Respondents' activities from 1932 upto now have subjected the Petitioners to wanton torture both psychological and physical and the Petitioners have been treated to a cruel, inhuman and degrading manner through generations over generations from 1932, by the undue violation and infringement of their right and freedom to practice their religion on the Wakf property unhindered contrary to Article 29(c), (d) and (f) of the Constitution.

i. A permanent injunction restraining the Respondents or any person, body or entity by themselves or through their agents, employees or in any other manner whatsoever or by whomsoever from denying, violating or infringing the Petitioner's rights or fundamental freedoms or threatening and or continuing to deny, violate and infringe the same over their user of land Parcel NO. Mombasa South Block 1/15 by interfering in any manner whatsoever and howsoever with the administration and worship and prayers in the Mosque and learning in the Madrassa and all other religious activities in the other facilities on the subject property.

j. A perpetual injunction against the 1<sup>st</sup> Respondent or any other person from ever interfering with the Petitioner's rights and interest in the suit property eternally.

k. Any other order the court may deem just and appropriate in the circumstances and costs of the Petition.

12. The Petition is supported by a lengthy affidavit sworn jointly by Kombo Mikdadi, Athman Bindo, Juma Hamadi, Abed Juma, Aboud Athman, and Mohamed Ramadhan. They more or less repeat the averments that I have disclosed above and have annexed various documents including pleadings and judgment in the suit Mombasa SRMCC No. 3427 of 2004 and Mombasa HCCC No. 544 of 2011.

13. The Petition is opposed by the 1<sup>st</sup> respondent who filed a replying affidavit sworn by Mohamed Amin Bharadia, one of the trustees of the 1<sup>st</sup> respondent. First, he has contended that the persons who filed this Petition have no authority to represent the persons named in the Petition. He has deposed that the 1<sup>st</sup> respondent is not the registered proprietor of the suit land but a lessee for a specific term and is thus entitled to protection under the Constitution. It is thus stated that they have been wrongly sued. He has deposed that no list of the persons to benefit from the Petitions is listed; that it is not clear if the Likoni Muslim Community is a registered body, and if so, who its office bearers are, what their objectives are, and has questioned the whereabouts of other inhabitants of Likoni who do not profess the faith of the Petitioners. He has averred that Article 40 of the Constitution protects the right to property and he has stated that the suit land is private land. He has pointed out that the Petitioners allege to have been in possession of the property for over 200 years yet most of them are hardly 50 years old. He has deposed that the true fact of the matter is that the disputed land is private property and the registered owners out of their good will have allowed the community and those around the area to come and worship at the Mosque and even draw water from the well in the land. This, it is said, does not deprive the owner of his good title. He has deposed that the 1<sup>st</sup> respondent manages and maintains the Mosque, which belongs to the lessors, and does developments and improvement of structures to facilitate its objectives to advance education and its religious obligations.

14. It is further contended that the Petitioners have approached this court with unclean hands on the grounds that the 1<sup>st</sup> respondent had sued some of the Petitioners, as ex-employees, in the suit Mombasa HCCC No. 544 of 2010 seeking that they be restrained from the disputed land; that the 1<sup>st</sup> to 3<sup>rd</sup> Petitioners were employees of the 1<sup>st</sup> respondent and were given the duties of teaching and managerial positions which they abused and as a result they were terminated from employment; that the 1<sup>st</sup> to 6<sup>th</sup> Petitioners have failed to vacate the premises despite their employment having been terminated; that out of bad faith, the Petitioners have caused incitement to the community. It is also deposed that the property has changed hands several times without the Petitioners raising any complaint and that the property has been in private hands since the year 1932. It is thus argued that the Petitioners are guilty of inordinate delay. He has denied that the 1<sup>st</sup> respondent has compelled worshipers to engage in strange actions not allowed in the Muslim faith and has explained that any ceremony conducted in the Mosque or premises has to be approved by the Management Committee in consultation with the owners of the property. He has asserted that this is private property and is not designated as public property and one has the option of attending a different Mosque if he is uncomfortable. He has deposed that the 1<sup>st</sup> respondent does not need to seek consent from the Petitioners for its procedures and the Petitioners are free to pray in any other Mosque.

15. Directions were taken that the Petition be disposed of by way of written submissions. I have seen and read the written submissions of Mr. Opolu, learned counsel for the Petitioners, and those of the law firm of M/s N.A. Ali & Company Advocates for the 1<sup>st</sup> respondent. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents do not appear to have filed anything. I have considered these submissions before arriving at my decision.

16. I think it is critical to first understand the nature of the property in dispute. The land is held under freehold tenure and from the material before me, the first owner was Abdurehman and Ali Mohamed & Co. It is not clear to me when they were issued with title. However on 6 July 1932, title was transferred to Ali Mohamed Haji Suleman for a consideration of Shs. 1,500/-. On 27 March 1951, title was transferred to several persons who I believe were beneficiaries of Mohamed Haji Suleman. On 19 October 1951, title was transferred to Ismail Abdulrehman for a consideration of Shs. 22,000/= and subsequently on 11 June 1960 to Abdulla Kaderdina for a consideration of Shs. 17,000/=. On 23 October 1968, Abdulla Kaderdina created a Wakf and transferred the deed to Abdulla Kaderdina, Abdulkadir Mohamed Husein and The Trustees of The Nasserpuria Memon Jamat Registered Trustees, as first trustees. There is then a lease registered on 4 September 1982 for a period of 33 years in favour of Abdulla Kaderdina, Adam Abdulshakur, and Mohamed Mohamed Welton as trustees of Jami Iyatu Taalimil Quran, the 1<sup>st</sup> respondent. What we therefore have is a registered property held under a freehold tenure by individuals. In all respects this is private property and is not public or community property as claimed by the Petitioners.

17. The Petitioners of course allege that the alienation of the property was illegal in the first instance. Well, I have not been shown any illegality in the manner in which the property was alienated to the first allottee, and in any event, if it is the position of the Petitioners that the allotment was wrong, trying to reopen that issue after close to 100 years will be an exercise in futility given the effluxion of time.

18. Secondly, I have no record that can be authenticated on the ownership and use of this land before the year 1932. It is claimed by the Petitioners that the land was set apart by one Hamisi Zumba in the early 1800s but this cannot be verified. But even if it is true that the land was set apart by one Hamisi Zumba in the 1800s it really doesn't matter because all this was overturned when the land became titled under a particular statute. From that moment in time, it is the statute and the provisions thereof which prevailed, and this overrode any other alienation that occurred earlier in time, unless such alienation was preserved by the same statute. Such alienation would be indicated in the title itself and I have seen no entry in that regard in the register of the title herein. There is in this Petition a prayer that Section 128 of the Registered Land Act (repealed), which protects the first registration of land, ought to be declared unconstitutional but that cannot be determined in these proceedings, because the first registration for the disputed land was made earlier than 1932 and could not have been made under the Registered Land Act, for the Registered Land Act, came into force in the year 1963. I am therefore unable to grant any orders declaring that the registration of the first registered proprietor was illegal or unlawful.

19. There is the claim that the Petitioners have prescriptive rights over this property based on the alleged long use of it as a Mosque by their ancestors which they themselves have continued. I am not persuaded that the Petitioners have proved that they have any prescriptive rights over this property through adverse possession or any other known prescriptive rights. What emerges is that this is private land. The owners of this private land have leased out this land to the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent uses the land inter alia as a Mosque. A Mosque is a place of worship for all kinds of people. It would be superfluous, in fact ridiculous, for one to state that because he/she has been attending a church, mosque, shrine, or other place of worship for a long time, for over 12 years, then they have prescriptive rights over the said property and that the individual or individuals who have been attending worship are thus entitled to ownership through adverse possession. To break it down into legal terms, attending a place of worship, in order to pray or perform any religious rite, is not similar to an occupation, so that one can be said to have occupied the place of worship to be entitled to own it. Worship is also not a continuous uninterrupted act for it is intermittent. You worship, then go back to your home, or other activities. Most importantly, there is no *animus possidendi*, or intention to acquire and own the place of worship, by attendees. It follows from the above that the claim that the Petitioners have acquired prescriptive rights over the suit land falls flat in the face, whether it be an easement or a right to title to the land by way of adverse possession.

20. In any event, this suit is not filed against the owners of the property but against persons who only hold a lease for a limited period of time. The owners of the property are not parties to this suit and I cannot hold against them without them having been made parties and for their views to be heard and considered.

21. The Petitioners also argue that the 1<sup>st</sup> respondent purports to own the Mosque, Madrassa, well and other facilities on this land. They seem to suggest that these cannot be owned. Nothing can be further from the legal position. The legal position is that the land and all that is erected on the land form part of the land. This follows the maxim *quicquid plantatur solo solo cedit*, which in simple terms prescribes that whatever is affixed to the land is part of the land, a principle that is applicable in our land laws.

22. The other complaints of the Petitioners regard the manner in which the 1<sup>st</sup> respondent has been conducting worship in the Mosque, the persons the 1<sup>st</sup> respondent has employed to undertake Madrassa classes, and the general management style of worship employed by the 1<sup>st</sup> respondent. I will reiterate that the 1<sup>st</sup> respondent is a lessee of the premises. The 1<sup>st</sup> respondent is of course the entity in charge of this property. As lessees, the 1<sup>st</sup> respondent is free to use this premises as it wishes, so long as it does not clash with the terms of the lease. Where there is a clash, the lessors of the property, being the ones who leased it out, can come and sue for any alleged breaches of the terms of the lease. Being lessee, the 1<sup>st</sup> respondent does in fact have the right of ingress and egress into the property, and are free to bar anyone from the suit premises, and the type of user of the premises is immaterial. The 1<sup>st</sup> respondent is also free to name whatever structures are on the property including to give a name to the Mosque, or the School, or other structures on the property. In other words, as lessee, the property is fully in their hands subject only, as I have explained, to the control of the lessor and not to external parties who have no legal interest in the land. In fact, Mr. Opolu in his submissions did not give me any law that states that because a property is used as a place of worship then the owners of that property have no right of ingress or egress.

23. What I can see is a clash, probably of religious practices and principles between the Petitioners and the 1<sup>st</sup> respondent. It may be that the Petitioners and the 1<sup>st</sup> respondent belong to different schools of thought on matters religion. I regret to inform the Petitioners that in so far as it relates to conduct within the premises that the 1<sup>st</sup> respondent has leased, then the 1<sup>st</sup> respondent has a right to the manner of conduct and how persons conduct themselves within this premises. If there is a clash in doctrine or conduct, then that of the 1<sup>st</sup> respondent will prevail. If the Petitioners feel that their way of worship is contrary to the manner in which the 1<sup>st</sup> respondent conducts its worship, they are free to abandon the suit premises and the Mosque, and conduct their worship in a different location. The fact that an institution or religious body

conducts its affairs in a manner that varies with the doctrine of an individual cannot be claimed to be a curtailment of the individual's freedom of worship. I am not therefore persuaded that the 1<sup>st</sup> respondent has curtailed in any way the constitutional right of freedom of worship as alleged by the Petitioners. There is therefore no violation of the Article 32 right to freedom of conscience, religion, thought, belief and opinion.

24. It will be seen from the above that it is my view that this Petition is not merited. I proceed to dismiss the same with costs to the 1<sup>st</sup> respondent.

25. Judgment accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 12<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Chebukaka holding brief for Mr. Opulu for the petitioners.

Ms. N. A Ali for the 1<sup>st</sup> respondent.

No Appearance on the part of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Court Assistant; David Koitamet.