



**Mohamed & 13 others v Sugat & 2 others (Petition E018 of 2024)
[2025] KEHC 10768 (KLR) (24 July 2025) (Judgment)**

Neutral citation: [2025] KEHC 10768 (KLR)

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

PETITION E018 OF 2024

JN ONYIEGO, J

JULY 24, 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), 2A, 2B 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

JUDGMENT

1. The petitioners herein instituted this suit by way of a petition dated 18.10.2021 filed together with a notice of motion of even date. The petition sought for the following orders:
 - i. A declaration that the respondent has violated the petitioners' rights to equality and freedom from discrimination as guaranteed under article 27 of *the constitution* and human dignity as protected under article 28 of *the constitution*.
 - ii. A prohibitory injunction restraining the respondent 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 respondent to engage the community in a transparent and meaningful manner regarding the mosque construction.
 - iv. An order for damages for the violations of the petitioners' fundamental rights as outlined, recognizing the distress and harm caused by the respondent's actions that have undermined the petitioners' dignity and rights.
 - v. The cost consequent upon this petition be borne by the respondents.
 - vi. The court do make such other or further orders as it may deem just and expedient in the circumstances.
2. The petition stems from the fact that the respondents' ongoing construction of the aforesaid mosque proceeded without any engagement with the local community. That the exclusion undermined the community's right to participate in decisions affecting their lives. That the ongoing construction 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, potentially threatening safety in the area. It was averred that the community believes that open communication and involvement in the planning process of such a project is crucial for maintaining security and fostering a safe environment.
3. It was averred 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 in vain. That the ongoing construction raised significant security concerns within the community as there has been no trust between the mosque builders and the local residents. Additionally, that due to the absence of public participation in the construction of the mosque, the same has since violated article 10 of *the constitution*.
4. As a response, the 1st, 2nd and 3rd respondents filed a preliminary objection dated 04.11.2024 on the following grounds:
 - i. That this Honourable Court lacks jurisdiction to entertain the matter herein as the same is sub judice.



- ii. That there exists a prior suit, Daadab MCELC E006 of 2024 filed by the respondents where the subject matter, being the construction of a mosque on an unregistered plot measuring 300square meters in Bulla DayDay, Dadaab Constituency, Garissa County and the issues regarding the public participation and insecurity are directly and substantially in issue.
 - 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, contrary to the principles of judicial efficiency and finality to litigation.
 - v. That the petitioners' attempt to re-litigate issues currently before the court at Daadab MCELC E006 of 2024 is vexatious, frivolous and a waste of judicial resources.
5. Reasons wherefore, this court was urged to dismiss the petition with costs to the respondents.
 6. Further to the preliminary objection, the 1st respondent on behalf of the 2nd and 3rd respondents filed replying affidavits sworn on 04.11.2024 and 21.02.2025 deponing that they are the beneficial owners of the unregistered plot measuring 300 square meters located in Bull DayDay in Dadaab Constituency within Garissa County.
 7. That all along, they had an intention to build a mosque which intention they brought into reality when they started the real construction. It was averred that before they could get the construction going, the petitioners without any justification began and have continually attempted to encroach the suit plot. That it is for the same reason that they filed a matter at Dadaab MCELC/006/2024 which is still pending before the court.
 8. It was averred that in as much as the petitioners claim that they have received complaints from the public, no evidence was produced before the court to support the same. That in as much as *the constitution* provides for public participation, the same does not require public consultation/ participation for private use of land. It was stated that constructing a mosque on private land is governed by local land use and planning laws hence not shariah law. Further, that the respondents are using their own finances for the construction and as such, the aspect of public participation ought not arise. They referred to as discriminatory the allegation by the petitioners that they are religiously controversial. It was reiterated that no one has been compelled to attend or participate in their worship as every person has the right to freedom of worship under *the constitution*.
 9. It was deponed that the petitioners' allegations of religious controversy and potential security threats are speculative and not supported by tangible material evidence. That the petition has been presented in bad faith and the reasons advanced therein do not meet the threshold of any fundamental breach that such construction has occasioned or is intended to occasion. Additionally, that the petitioners did not demonstrate that the issue of construction of a mosque within their rightfully acquired land is a proper matter for a constitutional petition. To that end, this court was urged to dismiss the petition herein.
 10. Via a ruling delivered on 17.02.2025, the preliminary objection was dismissed and the matter set for hearing.
 11. The court gave directions that parties file and exchange their respective written submissions in respect to the petition. The petitioners filed submissions dated 10-05-2025 addressing three issues for determination as follows:



- i. Whether a mosque is a *wakf*.
 - ii. Whether the respondents violated constitutional rights and governance principles as provided in *the constitution*.
 - iii. Whether the mosque in question is a threat to peace and national security.
12. The petitioners urged that the respondents' stance that the mosque in question is built on their private land is legally flawed and religiously untenable. That according to section 2 of the *Waqf Act*, a *waqf* is defined as the permanent dedication of property for religious or charitable use in accordance with the Islamic religion. That in Islam, when land is designated or used for the construction of a mosque, it thus ceases being a private property and becomes a *waqf* held in perpetuity for the benefit of Allah and the community.
 13. It was contended that, once the land is designated as a mosque, it can no longer be sold, inherited or claimed as a private property by any individual. To that end, reliance was placed on the case of *Mohamed Ali Elmi & 3 Others vs Suleiman Ogola Mundhwe* [2018] eKLR where the court stated that a mosque is not a private property.
 14. On the second issue, counsel submitted that the actions of the respondents violated the provisions of *the constitution* to wit democracy and religious freedom of the community involvement. That a mosque is not a private property but a religious space intended to serve all the persons professing Islamic religion.
 15. It was contended that the respondents' conduct is shrouded with controversy as the community has not been involved in the process of the construction. In support of the foregoing, Counsel relied on the case of *Nairobi Metropolitan PSV Saccos Union Ltd & Others vs County of Nairobi* [2013] eKLR where the court affirmed that public involvement is mandatory in all public decisions, even when specific procedural details are not explicitly outlined.
 16. On the issue that the building of the mosque is a threat to peace and national security, counsel submitted that Dadaab is a region characterized by vulnerability, complexity and volatility as refugees and marginalized communities have endured decades of insecurity. That in such a sensitive environment, mosques are not merely places of worship but also centres of social influence, community engagement and spiritual guidance. That if the mosques are left to be controlled by private persons without accountability, the said mosques risk becoming platforms for harmful agendas, including sectarian conflict, radicalization and political manipulation, all of which can destabilize the region. Thus this court was called upon to allow the prayers sought.
 17. The respondents filed submissions dated 07.04.2025 and further submissions dated 19.05.2025 urging that the main issues for determination are as follows:
 - i. Whether the requirement for public participation under articles 10, 118 and 196 of *the constitution* applies to private developments on privately owned land.
 - ii. Whether the petitioners have presented sufficient evidence to support their claims that the construction of the mosque will compromise security in the area.
 - iii. Whether the respondents are entitled to the reliefs sought in their opposition to the petition.
 18. On the first issue, counsel for the respondents submitted that the petition hangs on the erroneous assertion that the respondents were constitutionally obligated to conduct public participation prior to commencing construction on their privately owned land. It was argued that the right to public



participation cannot be applied arbitrarily to interfere with a person's private property. That the text and context of articles 10, 118 and 196 were not intended to regulate activities of private citizens in relation to their privately owned property use or occupation. To that end, support was drawn from the case of *Trusted Society Human Rights Alliance vs Attorney General & Another* [2012] eKLR where it was held that:

'The principle of public participation is not a free standing right that can be invoked to interfere with private property rights without specific statutory authorization'.

19. To that end, this court was urged to find that the constitutional provisions on public participation have been grossly misapplied by the petitioners.

20. Counsel urged in reference to the second issue that the petitioners did not demonstrate the allegation that the respondents have introduced 'controversial religious practices' That the onus remained on them to not only allege but also prove. That nothing was presented before this court to support such allegations. Counsel sought reliance on the case of *Mark Otanga Otiende vs Dennis Oduor Aduol* [2021] eKLR where the court held that:

"The burden of proof lies on he who alleges and that burden does not shift and even where the party's case is not defended."

21. That no one had been compelled to attend or participate in the respondents' worship as every person has the right to freedom of worship under *the constitution*. Additionally, that it is discriminatory for the petitioners to label the respondents' act of constructing a mosque as will cause controversy when no demonstration was made to support the same.

22. On costs, counsel submitted that section 27 of the *Civil Procedure Act* states that the issue of cost is a discretionary award that is awarded to a successful party. That in the case of *Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others* [2013] eKLR which cited with approval the words of Murray CJ in *Levben Products vs Alexander Films (SA) (PTY) Ltd* 1957 (4) SA 225 (SR) at 227 it was stated that;

'It is clear from authorities that the fundamental principle underlying the award of costs is twofold. In the first place the award of costs is matter in which the trial judge is given discretion...But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at...In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.'

23. That consequently, the award of costs should be awarded to the respondents herein noting that the petitioners failed to prove their case.

Analysis and Determination.

24. I have considered the petition herein and the parties' respective submissions. Issues that germinate for determination are;

- a. Whether there ought to have been public participation before construction of the disputed mosque project'
- b. Whether the construction of the disputed mosque would jeopardize security, peace and tranquility in the area due to the controversial teachings likely to be rendered therein.



25. The crux of this petition 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.
26. In the same breadth, the respondents urged that the suit herein revolves around a mosque being constructed on an unregistered private land measuring 300 square metres in Bulla Dayday. It was averred that the issue of public participation and insecurity are directly and substantially not in issue and therefore, the suit herein is meant to circumvent the suit before the lower court at Daadab.
27. There is no dispute that there is a pending suit at Dadaab law courts in which the respondents herein sued Mohamed Muhumed Dubat and Mahad Farah seeking an injunction against them trespassing into their plot where construction of the mosque project was going on. The trial court vide its ruling dated 9-10-2024 ordered the respondents in this case to continue with construction of the mosque as their suit had not been opposed. That aside, the suit before me is not about land ownership dispute. The issue of land dispute is before the magistrate's court. The issue before me is a constitutional question.
28. There is no doubt that the project in question is being undertaken on a private land allegedly owned by the respondents who attached a sale agreement dated 10-01-2024 showing that they bought it from one Hussein Mohamed.
29. Was there supposed to be public participation or consultation before the respondents embarked on the project? On the other hand, the petitioners are of the view that a mosque is a public property hence the need for community participation.
30. Article 10 underscores national values and principles of governance which are all binding on state organs, state officers, public officers and all persons whenever any of them; applies or interprets *the constitution*; enacts or interprets any law or makes or interprets public policy decisions.
31. Does construction of a mosque in private property using personal resources require public participation?
32. The scope of public participation was the subject of deliberation in the Supreme Court Petition No. E031 of 2024 as consolidated with Petition No. E032 & E033 of 2024 where the court while relying on a decision by the Constitutional Court of South Africa in *Mogale and Others vs Speaker of the National Assembly and Others* (CCT 73/22) [2023] ZACC 14 at paragraph 37, stated that; there are three factors that ought to be considered in determining whether the process adopted by a duty bearer in facilitating public participation was reasonable. The Court held thus:

“In determining whether conduct has been reasonable in the context of public participation the following factors are of particular importance:

- a) What Parliament itself has determined is reasonable, and how it has decided it will facilitate public involvement;
- b) The importance of the legislation and its impact on the public; and
- c) Time constraints on the passage of a particular bill, and the potential expense.” [Emphasis added]



[Also see Petition No. E031 of 2024 as consolidated with Petition No. E032 & E033 of 2024 of the Supreme Court of Kenya]”.

33. In the same breadth, the Supreme Court in the case of *British American Tobacco Kenya, PLC (formerly British American Tobacco Kenya Limited vs Cabinet Secretary Ministry for Health & 2 Others*, Petition No. 5 of 2017, stated that:

“We would like to underscore that public participation and consultation is a living constitutional principle that goes to the constitutional tenet of the sovereignty of the people. It is through public participation that the people continue to find their sovereign place in the 45 governance they have delegated to both the National and County Governments. Consequently, while Courts have pronounced themselves on this issue, in line with this Court’s mandate under Section 3 of the *Supreme Court Act*, we would like to delimit the following framework for public participation:

Guiding Principles for public participation:

- i. As a constitutional principle under Article 10(2) of *the Constitution*, public participation applies to all aspects of governance.
- ii. The public officer and or entity charged with the performance of a particular duty bears the onus of ensuring and facilitating public participation.
- iii. The lack of a prescribed legal framework for public participation is no excuse for not conducting public participation; the onus is on the public entity to give effect to this constitutional principle using reasonable means.
- iv. Public participation must be real and not illusory. It is not a cosmetic or a public relations act. It is not a mere formality to be undertaken as a matter of course just to ‘fulfill’ a constitutional requirement. There is need for both quantitative and qualitative components in public participation.
- v. Public participation is not an abstract notion; it must be purposive and meaningful.
- vi. Public participation must be accompanied by reasonable notice and reasonable opportunity. Reasonableness will be determined on a case to case basis.
- vii. Public participation is not necessarily a process consisting of oral hearings, written submissions can also be made. The fact that someone was not heard is not enough to annul the process.
- viii. Allegation of lack of public participation does not automatically vitiate the process. The allegations must be considered within the 46 peculiar circumstances of each case: the mode, degree, scope and extent of public participation is to be determined on a case to case basis.
- ix. Components of meaningful public participation include the following: a. clarity of the subject matter for the public to understand; b. structures and processes (medium of engagement) of participation that are clear and simple; c. opportunity for balanced influence from the public in general; d. commitment to the process; e. inclusive and effective representation; f.



integrity and transparency of the process; g. capacity to engage on the part of the public, including that the public must be first sensitized on the subject matter.

34. Drawing guidance from the above guidelines, private undertakings such as the one at hand do not require public participation. The community is at liberty not to attend or worship in that mosque. In fact, it is in the interest of the public that they are getting a mosque for free. A mosque once built and worshippers start going there, the relevant government authorities and Islamic organizations regulating institutions of worship will swing into action to establish whether it is operating legally or within the law. Mere construction of a building on somebody's land does not called for public participation. To do so will amount to overstretching the application of the word public participation too far. Accordingly, that ground fails.
35. As to the question of insecurity and possible radicalization or incitement, that is speculative as no factual foundation nor proof was tendered or was laid to establish that allegation. In any event, those will be criminal activities which the relevant security departments will deal with or handle. As to compliance with the *waqf* principles, it is too early to make such claim and no specific provision has been breached yet. Under section 2 of the [Waqf Act](#), an individual otherwise known as *waqf* can donate his property or cash to be the subject of *waqf* in accordance with Islamic law.
36. In a nut shell, the petition herein does not meet the threshold for grant of any of the prayers sought hence dismissed with no order as to costs.
37. Having dismissed the petition, the pending ruling on the contempt application falls by the wayside hence spent or better still it has been rendered moot. The interim orders in place are hereby lifted.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY 2025

.....

J. N. ONYIEGO

JUDGE

