



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

MISCELLANEOUS CIVIL APPLICATION NO. JR ELC 66 OF 2010

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF PROHIBITION, CERTIORARI AND MANDAMUS

AND

IN THE MATTER OF THE LAW REFORM ACT, ORDER LIII OF THE CIVIL PROCEDURE RULES AND THE

LAND ACQUISITION ACT, CAP 295 OF THE LAWS OF KENYA

BETWEEN

MAISHA NISHIKE

LTDAPPLICANT

AND

**THE COMMISSIONER OF LANDS1ST
RESPONDENT**

**THE MINISTER FOR LANDS2ND
RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF LANDS3RD
RESPONDENT**

**PERMANENT SECRETARY, MINISTRY OF ROADS AND PUBLIC WORKS.....4TH
RESPONDENT**

EX PARTE: MAISHA NISHIKE LIMITED

RULING

By an application dated 4th March, 2011 the respondents sought the order that:

“This honourable court be pleased to vary, alter and/or vacate the stay orders issued on 30th July, 2010 and extended on 24th January, 2011 to enable the government take possession and proceed with the construction of the Nairobi Northern By-pass Road through the ex parte applicant’s land parcel LR. No.5989/3”.

The application was supported by an affidavit sworn by **Engineer Michael Mwaura Kamau, the Permanent Secretary, Ministry of Roads**. He stated that on 30th July, 2010 Wendoh, J. granted the ex parte applicant leave to commence these proceedings and directed that the leave shall operate as a stay for sixty (60) days in respect of the respondents’ decision to compulsorily acquire a portion of LR. No. 5989/3, hereinafter referred to as **“the suit property”**. The compulsory acquisition of the suit property which measures 1.1998 hectares was being done at the instance of the Ministry of Roads for construction of the Nairobi Northern By-pass Road. The said order of stay has been extended until the matter is heard and determined. Attempts to settle the matter out of court has not been successful.

Engineer Kamau further stated that the order of stay has stopped completion of the said road. The contract for the construction of the road was awarded to China Road and Bridge Corporation for a compound sum of **Kshs.8,549,813,307.76** and the contract period set as 36 months from 17th April, 2009. The construction of the road is almost complete save for the portion that passes through the suit property.

The deponent further stated that the continued existence of the order of stay is highly prejudicial to the government as the contractor has threatened to lodge claims, in the sum of Kshs.2,000,000/= per day against the government for idle equipment, plant and labour.

It was further stated that the government through the Commissioner of Lands has prepared an award and offered to pay compensation to the ex parte applicant in the sum of Kshs.82,800,000/=. However, the applicant wants compensation in the sum of Kshs.126,000,000/=. The claim for the amount payable can only be entertained by the Land Acquisition Compensation Tribunal established under **Section 29 (2) of the Land Acquisition Act Cap 295**, the deponent stated.

Mr. Mutinda for the respondents submitted that the public interest in the construction of the Nairobi Northern By-pass Road far outweighs the private interest of the ex parte applicant. He further submitted that the government stands to lose a huge amount of money if the order of stay remains in force.

Evans Mwaura Githua, a director of the ex parte applicant, swore a replying affidavit in opposition to the said application. He stated that the respondent had violated the orders of stay that had been granted by this court and consequently, the court cannot aid a party who is in contempt of its orders. He further stated that the ex parte applicant’s application for contempt of court ought to be heard first before the respondents’ application is considered.

Mr. Githua further stated that grant of the respondents’ application will violate the ex parte applicant’s constitutional right to a fair determination of its claim as guaranteed under **Article 50 (1) of the Constitution of Kenya, 2010**. The grant of the orders sought will also infringe upon the ex parte applicant’s right of access to justice as provided for under **Article 48** of the Constitution. It will also deprive it of its property contrary to the provisions of **Article 40 (1) and (3)** of the Constitution.

In the event that the court is inclined to grant the orders sought, the respondents ought to be ordered to deposit a sum of Kshs.126,000,000/= in court, Mr. Githua added.

Regarding the alleged loss of Kshs.2,000,000/= per day, the ex parte applicant stated that there was no documentary evidence in support of that averment.

I have considered the affidavit on record as well as the written submissions that were made by counsel for the parties. On 25th February, 2011 this court had occasion to make a site visit and it was clear that the Nairobi Northern By-pass Road is almost complete except the portion that is supposed to traverse the suit property. The construction stopped following issuance of the orders now sought to be vacated or varied, although it has been claimed by the ex parte applicant that the respondents and/or their agents did not fully comply with the order of stay. Indeed there is an application for contempt of court filed by the ex parte applicant which is yet to be heard.

It cannot however, be denied that the real issue in dispute is the amount of compensation that is payable to the ex parte applicant. The Commissioner of Lands has assessed the sum payable to be Kshs.82,800,000/= whereas the ex parte applicant wants compensation in the sum of Kshs.126,000,000/=. It is that dispute that has stalled the said project. Under **Article 40** of the **Constitution of Kenya, 2010**, the ex parte applicant cannot be deprived of its property unless the deprivation results from an acquisition of the land in accordance with **Chapter 5** of the **Constitution** or where the land is required for a public purpose or in the public interest and the acquisition is done in accordance with the provisions of the Constitution. In such instances, appropriate compensation has to be paid to the ex parte applicant.

This court does not have power to determine the amount that is payable as compensation to the ex parte applicant. **Section 29 (7)** of the **Land Acquisition Act** provides that a person dissatisfied with an award that has been made by the Commissioner of Lands may apply to the Land Acquisition Compensation Tribunal to determine the amount payable. Although issues have been raised as to the manner in which the respondent's award of Kshs.82,800,000/= was made in view of the orders of stay that had been issued by this court, there can be no denial that the award is in existence. A copy thereof has been annexed to the respondent's affidavit.

The project that has stalled is of great public benefit. There can be no denial that the government is likely to pay considerable amount of liquidated damages due to delay in finalization of the project. The ex parte applicant does not stand to gain at all by such delay.

In the circumstances of this matter, I am of the view that if for any reason the respondents' award has not formally been served upon the ex parte applicant, such service ought to be effected forthwith so that the ex parte applicant can formally decide to accept or reject the same. In the event that the award is rejected, then the ex parte applicant may act in accordance with the provisions of **Section 29 (7)** of the **Land Acquisition Act** as aforesaid.

In view of the great public interest in completion of the Nairobi Northern By-pass Road and in view of the fact that the delay has occasioned or is likely to occasion unnecessary financial loss to the respondents, I hereby vacate the orders of stay issued on 30th July, 2010 and extended on 24th January, 2011 so as to enable the respondents proceed with the construction of the said road. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF APRIL, 2011.

D. MUSINGA

JUDGE

In the presence of:

Nazi – court clerk

Mr. Nyaribo & Mr. Mushweshwe for the Applicant

Mr. Ochieng for the contractor

Mr. Kipkogei for Mr. Mutinda for the Attorney-General for the Respondents