



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Misc Civil Appli 559 of 2009

**IN THE MATTER OF AN APPLICATION BY JOSPHINE MBULA KILONZO FOR LEAVE TO APPLY FOR
AN ORDER OF PROHIBITION**

AND

IN THE MATTER OF THE PUBLIC ROADS AND ROADS OF ACCESS ACTS

AND

IN THE MATTER OF LAND ACQUISITION ACT

AND

IN THE MATTER OF THE CHIEF ENGINEER, MINSITRY OF ROADS AND PUBLIC WORKS

AND

IN THE MATTER OF CHINA WU YI COMPANY LIMITED

AND

IN THE MATTER OF ROACKWORLD CONSTRUCTION AND ENGINEERING CO LTD

JOSEPHINE MBULA KILONZO..... APPLICANT

VERSUS

THE CHIEF ROADS ENGINEER

& TWO OTHERS..... RESPONDENT

RULING

By the chamber summons dated 22/9/09, Josephine Mbula Kilonzo seeks the leave of this court to apply for an order of prohibition, prohibiting the Chief Roads Engineer, Ministry of Roads and Public works, China Wu Yi Co. Ltd and Rockworld Construction Engineering Co. Ltd from demolishing LR 209/13524 and LR 209/14724 situate at Racecourse Estate Ring Road Ngara, in Nairobi and that the said leave should operate as stay of the Respondent's actions.

The applicant claims to be the owner of LR 209/13254 having been left behind by her late husband. That the Respondents are constructing a road but have not sent her any notification of their intention to demolish her property nor has she been heard. She exhibited the death certificate of her late husband and title documents as proof of ownership of the suit land. Mr. Madara urged that S 23 of Cap 280 Registration of Titles Act gives the Applicant an indefeasible title. That is the Government intends to acquire the land, then due process under S 6 of the Land Acquisition Act should have been followed and the Applicant should have been notified, given a hearing and compensation to follow. Counsel urged the court to disregard the grounds filed by the Respondents and relied on ***OILCOM V P/S MINISTRY OF ROADS***

AND PUBLIC WORKS CA 10/2007 where the court said that such application for leave should be made ex parte.

Mr. Njuguna who appeared on behalf of the Attorney General submitted that they have no objection to leave being granted but they object to the leave operating as stay. He submitted that all affected parties were notified and there are negotiations going on with the Permanent Secretary.

Mr. Masika appearing for the 3rd Respondent opposed the grant of both leave and stay for reasons that the application is frivolous and an abuse of the court process as the 3rd Respondent is a private company and not amenable to orders of Judicial Review. That the 3rd Respondent has not made any decision that can affect the applicant and that the decision to demolish LR 209/13254 was made by Ministry of Roads and Public Works.

Judicial Review orders are public law remedies which can only issue against public bodies or public officers. The Applicant acknowledges and describes the 2nd and 3rd Respondents as private companies and they cannot therefore be amenable to Judicial Review orders and no leave can be granted to commence Judicial Review proceedings against them. They can only be enjoined to these proceedings as Interested Parties.

For leave to be granted, the Applicant only needs to demonstrate that she has an arguable case with chances of success. In the instant case, the Applicant has exhibited a title JMK (4) – (8) issued to the Applicant's late husband. She also exhibited a JMK 6 a letter from the Ministry of Lands dated 6/8/09 which confirms that the title LR 209/13254 is registered in the names of the Applicant's late husband and is free from any encumbrance. The Respondents have urged that what the Applicant seek to stop is implementation of an easement but not an encumbrance. Be that as it may, even if the Government wants an easement on Applicant's property, due process has to be followed. Mr. Njuguna counsel for Respondent submitted from the bar that due process has been followed and those persons affected by the road construction were notified and are negotiating with the Permanent Secretary of the relevant Ministry. However, there was evidence of the gazette notice or evidence that the Applicant has ever been notified of the Respondents intentions. That should have been demonstrated by way of evidence.

Ordinarily, an application for leave will be made ex parte but the court has the discretion to direct that both parties be heard inter partes before any order can issue. I find that the Applicant has demonstrated that she has an interest in the said land and it is not denied that it lies or abuts to the road under construction and is likely to be interfered with. There is no evidence that due process has been followed by the 1st Respondent to notify the Applicant and there is a good case for grant of leave and the same to operate as stay. I direct that there be stay for 30 days. The court is aware that the road is of great public interest and its construction should proceed. It is ordered that the notice of motion be filed and served within 10 days so that the matter can be heard expeditiously. In default, the leave and stay orders do vacate automatically.

Costs to abide the notice of motion.

Dated and delivered this 10th day of October 2009.

R.P.V. WENDOH

JUDGE

PRESENCE:

Mr. Madara for Applicant

No appearance for Respondent

Mr. Masika for Interested Parties

Muturi court clerk