



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 1382 OF 2016

(FORMERLY JR.MISC. APPLICATION NO. 544 OF 2016)

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE FOR JUDICIAL REVIEW

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO FILE FOR THE ORDER OF PROHIBITION AND CERTIORARI

AND

AND IN THE MATTER OF THE LAND ACT CHAPTER 280 LAWS OF KENYA

AND

IN THE MATTER OF KENYA ROADS ACT CHAPTER 408 LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE PRINCIPLE OF PUBLIC PARTICIPATION

AND

IN THE MATTER OF NATIONAL VALUES AND PRINCIPLES OF GOVERNANCE

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT, 2015

BETWEEN

THE REGISTERED TRUSTEES OF

JAMIE MASJUID AHL-SUNNAT-WAL-JAMA'IT, NAIROBI.....APPLICANT

AND

KENYA URBAN ROADS AUTHORITY.....RESPONDENT

RULING

Through the application dated 7th November 2016, the Applicant seeks leave to file judicial review proceedings for orders of certiorari and prohibition. The applicant also seeks that the leave granted operates as stay against the Respondent's decision of 3rd May, 2014 calling for the removal of City Park Mosque and Madrasa situated on L.R. No. 209/12477 and 209/12478, within Nairobi.

When this matter first came up under certificate of urgency on 9/11/2016, the court directed that the application for leave should be fixed for hearing in the normal manner. The Applicant then served the Respondent and fixed the matter for *inter partes* hearing on 15/2/17.

The applicant's case is that it purchased L.R. Nos. 209/12477 and 209/12478 ("the Suit Property") for value and got them registered in its name after which it constructed a mosque and madrasa that serves about 2500 Muslims. On 3rd March, 2013 the Respondent issued a removal notice threatening to demolish the mosque and madrasa. The Applicant wrote to the Respondent on 23rd May, 2014 disputing the removal notice while intimating that it was amenable to compulsory acquisition of its land if the law was followed. The applicant also stated that there have been informal discussions between the parties but which had not borne any fruit. The Respondent's letter of 3rd March 2014 confirms that there were several consultative fora between representatives of the two parties. The Applicant contends that the Respondent verbally informed it in October, 2016 that it was going to demolish the mosque and madrasa on the Suit Property. The applicant's main argument is that its titles over the Suit Property are valid and have not been declared illegal and that in any event the Respondent has no authority to issue the removal notice as it did.

The Respondent opposed the application for leave and relied on the Replying affidavit of Josiah Mwangi Wandurua sworn on 16th November, 2016. The Respondent is a State Corporation established under the Kenya Roads Act, 2007 currently implementing the Nairobi Eastern Missing Links Road Project funded by the European Union. The thrust of the Respondent's argument is that under Section 9 (3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, leave to apply for Certiorari must be sought within six months after the proceedings sought to be quashed.

The Respondent argued that the decision sought to be quashed was made on 3rd March, 2014 while the response challenging this decision was given on 23rd May, 2014 and yet the application was filed on 8th November, 2016 which is three years after the notice was issued. The Respondent maintained that the applicant was not deserving of the order sought since the court has to consider factors such as undue delay when granting judicial review orders which are discretionary. The Respondent stated that the contractor is on the site and the construction of the Nairobi Eastern Missing Link is going on. Indeed, the Applicant avers in its Affidavit that the construction of the road has commenced.

This being the threshold stage, the court has to guard itself against making any findings on any point despite the submissions having been made by counsel.

The duty of the Court at this stage is to establish whether or not the Applicant has established that it has

an arguable case.

The time for applying for certiorari set out in Order 53 Rule 2 is limited to six months and the court is prohibited from granting leave if the application is made later than six months after the date of the judgment, order, decree, conviction or other proceeding sought to be quashed. The Court held in the case of **Republic v Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others, Ex parte Mwalulu & 8 Others [2004] eKLR** that the rule applies only to the formal orders set out therein and does not apply generally.

The court is of the view that the decision contained in the Respondent's letter of 3rd March, 2014 does not fall within the formal orders set out in Order 53 Rule 2 of the Civil Procedure Rules and that the six months limitation period does not apply to the removal notice issued to the Applicant.

The Court grants leave in terms of prayer 2 of the application dated 7th November, 2016. The court declines to order that the leave operates as stay as prayed because the effect of granting stay would be to grant final relief without hearing the matter on merit.

Dated at Nairobi this 1st day of March 2017

Read and delivered in open Court on the 1ST day of MARCH 2017.

K. BOR

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

..... Court Assistant