Japheth v Wakf Commissioners of Kenya & 2 others (Civil Appeal 71 of 2020) [2023] KECA 1512 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KECA 1512 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 71 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

DECEMBER 15, 2023

BETWEEN

LYDIA KAGUNA JAPHETH ..... APPELLANT

AND

WAKF COMMISSIONERS OF KENYA ..... 1ST RESPONDENT

FARIDA ALMASI MUKIRA ..... 2ND RESPONDENT

SALMA ALMASI MUKIRA ..... 3RD RESPONDENT

(An appeal from the judgment of the Environment and Land Court of Kenya at Mombasa (Munyao Sila, J.) delivered on 16th July 2020 in ELC Case No. 276 of 2018)

JUDGMENT

1. The appellant in this appeal, Lydia Kaguna Japheth, is challenging the judgment of the Environment and Land Court at Mombasa (Munyao Sila, J.) (ELC) delivered on 16th July 2020 nullifying her leasehold title in the property known as Title Number Mombasa/Block XX/62 (the property) which she purchased from Farida Almasi Mukira and her sister Salma Almasi Mukira, the 2nd and 3rd respondents respectively (the Vendors). In the same judgment, the ELC ordered the appellant to vacate the property within 3 months.

2. The facts are that the Vendors became registered as proprietors, as lessees, of the property following the death of their father, Almasi Mukira. Their father had held a lease over the property from the Lessor, Wakf Commissioners of Kenya, the 1st respondent (the Wakf Commissioners) for about 30 years and had over that period operated a bar, a guest house, and a restaurant on the property under the name "White Rembo Bar and Restaurant".

3. The Vendors continued with their father's business under a Lease dated 15th April 2013, by which the Wakf Commissioners leased the suit property to them for a term of 99 years from 1st January 2013 for a premium of Kshs.3,750,000.00 and yearly rent of Kshs.47,880.00.

4. By an Agreement for Sale dated 30th June 2015, the Vendors agreed to sell the property to the appellant for a price of Kshs.60,000,000.00. The sale was completed, and by an instrument of Transfer dated 16th September 2015, the Vendors transferred the property to the appellant. Thereafter, the Land Registrar issued a Certificate of Lease dated 17th September 2015 to the appellant who took possession of the property and commenced business.

5. On 28th November 2018, approximately three years after the registration of the appellant as Lessee of the property, the Wakf Commissioners filed suit against the Vendors and the appellant before the ELC Mombasa seeking: a declaration that the Vendors and the appellant breached the mandatory and fundamental terms of the Lease dated 16th April 2013 (should be Lease dated 15th April 2013) and the mandatory provisions of Section 14 of *Wakf Commissioners Act*; an order nullifying the Lease Agreement dated 16th April 2013 (should be 15th April 2013) and "the illegal transfer of Lease" by the Vendors to the appellant registered on 17th September 2015; an order for eviction of the appellant from the property; a permanent injunction to restrain the Vendors and the appellant from interfering with, leasing, renting, or dealing with the property; and an order directing the Officer Commanding Station to offer security to the Wakf Commissioners in enforcing orders of the court.

6. Muhammad Kibwana Shali (PW1) was the Secretary of the Wakf Commissioners at the material time. His position had changed to that of Administrative Assistant by the time testified before the trial court on 4th February 2020. His evidence was that the Vendors had sometimes in September 2015 illegally and unlawfully transferred the lease to the appellant without the written consent of the Wakf Commissioners as required under the terms of the Lease and Section 14 of *Wakf Commissioners Act*; that the appellant proceeded to carry out the business of selling liquor and alcoholic drinks on the property contrary to Islamic faith and beliefs; that it is well known world over and judicial notice should be taken that the carrying on of such business is prohibited under Islamic faith and is expressly prohibited by the *Holy Quran* and is also prohibited under the Lease dated 15th April 2013; that despite demands by the Wakf Commissioners to desist from carrying on that business, the appellant refused to do so.

7. Under cross examination, PW1 maintained that the vendors did not obtain the consent of the Wakf Commissioners to transfer the lease to the appellant only to discover that the appellant was operating without their consent; that they also established that the appellant was undertaking business of selling liquor, which is offensive, haram, to Islam. When referred to the all-important letter dated 17th August 2015 (to which reference will be made later in this judgment) the witness confirmed that the Wakf Commissioners "received Kshs.450,000 as consent fee". He stated that a "consent document was to be signed and executed once the chairman came back" which did not happen; that by the time the receipt for Kshs.450,000 was issued, the Vendors had already entered into the agreement with the appellant without the consent of Wakf Commissioners; and that consent must be obtained before entering into the agreement and before the transfer of the property.

8. PW1 denied demanding Kshs.3 million from the appellant to drop the matter. He stated that letters were sent to the appellant asking her to stop selling liquor; that without the consent of Wakf Commissioners having been obtained, and on account of liquor being sold on the property, the lease stands terminated; that the Wakf Commissioners declined to issue consent because of sale of liquor on the property but did not refund the money paid as consent fees because the matter was pending.

He concluded by stating that the building on the property is commonly known as "rainbow bar" and conceded that as early as 2004, alcohol was being sold in the premises.

9. Farida Almasi Mukira, the 2nd respondent (DW1) testified on her own behalf and on behalf of her sister, the 3rd respondent. She stated that in April 2013 they (the Vendors) negotiated with the Wakf Commissioners to lease the property and those negotiations culminated with the Lease dated 15th April 2013 and a certificate of lease issued to them; that in August 2015, the appellant expressed interest in purchasing the property whereupon they sought consent from the Wakf Commissioners before entering the transaction; that consent was issued to them on 6th August 2015 upon payment of Kshs.450,000 which was duly receipted by the Wakf Commissioners.

10. It was her testimony that when she planned to sell the property, she consulted PW1 and informed him of the constraints that were compelling her to sell; that he had no issue with the proposed sale; that she paid the consent fee and was given the consent on 17th August 2015; that she would not have known what to pay for the consent if the Wakf Commissioners were not involved in the first place; and that she never received any complaints from the Wakf Commissioners about the transfer.

11. Under cross examination, DW1 stated that the property was transferred to them (the Vendors) by transmission after the death of their father in 2002; that their late father was carrying on business on the property under the name 'White Rembo Bar and Restaurant' and the bar was selling alcohol; that she is aware of other Wakf properties in Mombasa which sell alcoholic drinks; that when the Vendors transferred the property to the appellant, they were not selling alcohol; that as a Muslim, she is familiar with Islamic teachings in which certain things are prohibited; that it is "haram" to sell or deal with alcohol and they had stopped doing so prior to getting the Lease from the Wakf Commissioners dated 15th April 2013.

12. She stated that they (the Vendors) did not have money to pay the consent fees at the onset; they made "an arrangement with the Wakf Commissioners that [they] could proceed and pay this money later"; and that the transaction with the appellant was done through the lawyers. She stated further that she charged the property to the bank with facilitation by the Wakf Commissioners and that the sale agreement with the appellant reveals that a loan had been taken with HFCK.

13. The appellant testified as DW2. She stated that she entered into the agreement for sale dated 30th June 2015 but the transfer of lease was completed and registered and a certificate of lease issued on 17th September 2015; that since the registration of the transfer, the Wakf Commissioners has not issued any demands or otherwise communicated with her; that she has invested heavily in the restaurant business and carried out numerous renovations; that at the time of conducting the search over the property, there were no user limitations indicated in the register; that the property has always been known as "White Label Bar" which has always carried on the business of hotel and bar and the Wakf Commissioners are estopped from raising the issue that the business is contrary to Islamic practices; that the Wakf Commissioners cannot rely on the lease between it and the Vendors as concerns her; that the Wakf Commissioners waited for two years to raise concerns and did not disclose having received the consent fee.

14. The appellant stated further that she bought the property for Kshs.60 million; that DW1 had disclosed to her that the property was charged to the bank; that she:

> " ...and Farida proceeded to the offices of the Wakf Commissioners. We met Sharif (PW1). He is the only one in that office. He said that it was okay, I could purchase the property. We had carried out a search and the title was okay."

That:

> " ...after Farida was given the letter of 17th August 2015 and came with the receipt, I went back to Wakf Commissioners. I found Mr. Sharif and asked him to confirm if I could now pay the purchase price. He said it is okay, I could proceed to make payment as there is no problem."

15. The appellant testified further that at some point after she was registered as proprietor of the property and before the suit was filed, she discussed the matter with the Wakf Commissioners, amongst them one Sheikh Ngao, who claimed the property was transferred to her without consent; that they also told her that she was selling beer on the property yet it is an Islamic plot; that she was surprised as PW1 had not told her of any such condition; that they informed her that if she gave them Kshs. 3 million, they would not revoke the title and would allow her to sell beer in the premises but that she did not have that amount of money.

16. Under cross examination the appellant maintained that the transaction was handled by advocates; that a search was conducted on the property and no restrictions were noted; that she did not receive any letters from the Wakf Commissioners dated 16th November 2016 and 21st April 2017 as they claimed; and that as at the time of her testimony she was still selling alcohol on the property.

17. After considering the evidence and submissions, the learned Judge was satisfied that the Wakf Commissioners had established its case on a balance of probabilities; that consent to transfer the property to the appellant was not obtained; in the absence of such consent, the transfer to the appellant is null and void; and that the appellant should have been aware of the clause in the lease restricting the use of the premises. The judge accordingly ordered:

> " The transfer of lease must be nullified, it is hereby nullified, and the leasehold title of the third defendant [the appellant] must be cancelled, and it is hereby cancelled. This would result in the lease reverting back to the ownership of the 1st and 2nd defendants [the 2nd and 3rd respondents], not to the ownership of the plaintiff [1st respondent]. It also means that the third defendant [appellant] has no right to do business in the suit premises. She will need to vacate, and I give her 3 months to do so. If she does not vacate, as ordered above, the plaintiff [1st respondent] is at liberty to apply for her eviction."

18. The Judge further ordered that the sale of liquor on the property must stop. Regarding costs, the Judge expressed that the Wakf Commissioners was not entitled to costs of the suit; that each party should bear its own costs given that the Wakf Commissioners had "received money for the issuance of the consent but slept on the same without dealing with the application for consent to transfer."

19. The appellant was aggrieved and lodged this appeal. In our view, two main issues arise for our determination. The first is whether the learned Judge erred in concluding that consent of the Wakf Commissioners in respect of the transaction was not obtained. The second issue is whether the Judge erred in concluding that the appellant breached the terms of the lease in selling alcohol on the property.

20. On the first issue, it is the appellant's case that the learned Judge erred in concluding that consent of the Wakf Commissioners to transfer the property to the appellant was not obtained. The Wakf Commissioners pleaded and maintained that "the transfer was done without the express consent" as stipulated under the lease and under Section 14 of the *Wakf Commissioners Act*. The appellant and the Vendors on the other hand maintained that consent of the Wakf Commissioners was granted.

21. Learned counsel for the appellant Mr. Oluga submitted that the letter of 17th August 2015 (at page 74 of the record) was indeed unequivocal that consent was given; that the Judge misconstrued that

letter to mean that it was envisaged that the consent would be signed by the Chairman of the Wakf Commissioners; that there is no prescribed format or standard form the consent should have taken, and the letter is as clear as it can be; that payment for consent fees was duly acknowledged by the Wakf Commissioners; and that the Judge erred in concluding that there was no written consent by the Wakf Commissioners.

22. In any event, counsel submitted, the Wakf Commissioners is estopped by its conduct in relation to the appellant from asserting that there was no consent granted; that the Wakf Commissioners cannot in one breath seek to enforce provisions of the Lease as against the appellant yet claim that it does not recognize the transfer in favour of the appellant; that the conclusion by the Judge that PW1, the Secretary of the Wakf Commissioners, had no authority to give consent is not well founded.

23. Miss. Nafula, learned counsel for the Wakf Commissioners on the other hand urged that the Judge was right that there was no express consent granted; that the Judge correctly found that the letter in question dated 17th August 2015 was not signed by the Wakf Commissioners; that neither the said letter nor the receipt issued in acknowledgment of the consent fees constitutes express consent for the transfer of the property; and that in any case the agreement for sale preceded the alleged consent.

24. We have considered the rival arguments in that regard. In the view of the learned Judge, the said letter of 17th August 2015 was not "unequivocally that of the Wakf Commissioners". According to the Judge, there was no evidence that PW1, as secretary of the Wakf Commissioners, had been authorized by the Commissioners to sign the consent. The Judge stated:

> "...it is the consent of the Commissioners themselves that must be given, not a letter from the Secretary. My understanding is that the consent must be signed by the Commissioners, or a person authorised by the Commissioners. I have not seen any consent presented in this case, which has been signed by the Chairman of the plaintiff, or any of the Commissioners. Neither do I have any document, that would inform me that the Commissioners had authorised the Secretary to sign the consent on their behalf. Given the foregoing, I can come to no other holding, other than, that no written consent, in terms of clause (h) of the Lease, and in terms of Section 14 of the *Wakf Commissioners Act*, and Section 55 of the *Land Registration Act*, was ever given. The letter of 17 August 2015, to me, is not the equivalent of a written consent, as required by the lease instrument and the law."

25. There is no dispute that under Clause (h) of Lease dated 15th April 2013 consent was required in respect of the transaction. Under Clause (h), the Vendors covenanted:

> "(h) Not to sell, transfer, assign or charge the premises without the written consent of the Lessor (which consent will not be unreasonably withheld) provided, however, the lessee shall bear all legal expenses as well as such consent fee which the lessor shall exclusively determine from time to time."

26. As already noted, the Vendors and the appellant maintained that consent was in fact given. It was their case that in August 2015, the appellant expressed interest in purchasing the property; they sought consent from the Wakf Commissioners before entering the transaction and consent was issued to them on 6th August 2015 upon payment of Kshs.450,000 which was duly receipted by the 1st respondent. The testimony of the 2nd respondent in that regard as already stated was that when she planned to sell the property, she consulted PW1 and informed him of her personal challenges forcing her to sell; that he had no issue, she paid the consent fee on 2nd August 2015 and was given the consent on 17th August

2015. In her words: "We were given consent to transfer by the Wakf Commissioners. The letter of 17.8.2015 is the consent." She went on to state that:

> " Mr. Shali took us through the whole process. He had even met Lydia [the appellant] before the sale agreement. I was not stopped from proceeding with the sale on the reason that I had no consent. I was actually given the go ahead to proceed. The payment was confirmation of consent having been given. The chairman was only to come and sign. In the transfer instrument there was nowhere for the Wakf commissioners to sign."

27. The testimony of Farida Almasi Mukira was corroborated by that of the appellant who testified that prior to the conclusion of the transaction, they had called on PW1 at the offices of the Wakf Commissioners; and that he had given the go ahead and that "after Farida was given the letter of 17th August 2015 and came with the receipt" she had gone back to Wakf Commissioners and found PW1 who gave her the green light to make payment "as there is no problem."

28. The letter of 17th August 2015 to which the witnesses referred is at the core of the dispute and it is necessary to reproduce it at length. It read as follows:

> " 17th August 2015
>
> M/s Farida Almasi Mukiru & Salma Almasi Mukira
>
> O. Box 86712-80100
>
> Mombasa. Dear Madam,
>
> RE: Consent Transfer Of Lease
>
> Mombasa/Block XX/62.
>
> Please refer to our Official Receipt No: 53294 dated August 06th, 2015 for K. Shs. 450,000/ = (K. Shs. Four Hundred Fifty Thousand Only) being Consent Fee in respect of Transfer of Lease quoted above.
>
> Kindly be advised immediately the Chairman is back the Transfer Document will be executed and sent to you.
>
> Yours faithfully,
>
> Muhammad K. Shali Secretary
>
> Wakf Commissioners Of Kenya."

29. For a start, we note that that letter was not mentioned or disclosed in list of documents filed before the lower court alongside the plaint by the Wakf Commissioners. Neither did PW1, make any reference to that letter in his witness statement dated 27th November 2018. No mention was also made by PW1 in his witness statement of the fact that the Wakf Commissioners had received and acknowledged payment of Kshs.450,000.00 (sometimes the amount mentioned is Kshs. 480,000.00) from the 2nd respondent and issued a receipt dated 6th August 2015 for that amount "being consent" for the "transfer plot Msa/XX/62 to Lydia Kagura Japheth" (at page 73 of the record). That letter, and the said receipt came to the surface through the list of documents and the witness statements filed on 15th February 2019 by the appellant and the vendors who were the defendants in the suit. It begs the question why the Wakf Commissioners did not do so at the onset. But that is not a matter that was raised before the ELC or before us.

30. That as it may, it is the reasons given by the learned Judge for concluding that the letter did not signify the consent of the Wakf Commissioners that are the subject of inquiry.

The first of those reasons was that there was no evidence that PW1, as the Secretary of the 1st respondent, had been authorized by the Commissioners to sign. It is however apparent from the letter itself that PW1 was signing it as Secretary of the Wakf Commissioners and not in his personal capacity. Secondly, and with profound respect to the learned Judge, he had earlier in the same judgment rejected the contention by the appellant that the suit was incompetent because there was no evidence that PW1, as the person swearing the verifying affidavit to the suit, did not have authority as it had been contended that there was no resolution of the Wakf Commissioners, authorizing PW1 to do so. The Judge expressed:

> "It is not disputed that the person who swore the affidavit, was at the time, the secretary of the plaintiff. It has not been demonstrated to me, that a Secretary of the Wakf Commissioners, is not a person who would ordinarily have the authority, to sign documents on its behalf. Indeed, when I look at Section 7(4) of the *Wakf Commissioners Act*, the Secretary is mentioned as one of the persons who can sign documents on behalf of the Commissioners." [Emphasis added]

31. With respect, it is difficult to reconcile that pronouncement, with the subsequent pronouncement by the Judge, in the same judgment, that "it is the consent of the Commissioners themselves that must be given, not a letter from the secretary. My understanding is that the consent must be signed by the commissioners, or a person authorized by the Commissioners." The positions taken by the learned Judge are in our view irreconcilable and to that extent the judgment is internally inconsistent. No evidence was tendered before the trial court to suggest that PW1 did not have authority to issue that letter which is clearly headed in bold "consent-Transfer of Lease" and which clearly acknowledged receipt of payment "in respect of Transfer of Lease".

32. Furthermore, we agree with learned counsel for the appellant that the learned Judge misconstrued the last paragraph of the letter in which PW1 wrote "Kindly be advised immediately the Chairman is back the Transfer Document will be executed and sent to you." According to the Judge, the import of that passage was that the consent, as opposed to the Transfer, is what was envisaged as requiring to be signed by the Chairman. There was in our view no basis for misconstruing the express words employed in the letter. What was envisaged, and what was clearly stated in the letter was that "immediately the Chairman is back the Transfer Document will be executed". In our view, the letter is testament that consent was in fact given. At that point, consent was a forgone conclusion and what remained was the Chairman to sign the Transfer.

33. We are therefore persuaded, and we hold, that the learned Judge erred in concluding that consent to transfer was not granted. We find that consent to transfer was in fact granted.

34. The next issue is whether the Judge erred in concluding that the appellant breached the terms of the lease in selling alcohol on the property. Under Clause (e) of the Lease between the Vendors covenant with the Wakf Commissioners:

> "(e) Not to permit or suffer illegal use of the premises or any part thereof which would offend in any way any law and, in particular, the beliefs of Muslims which the Lessor in its sole and exclusive discretion considers improper and prohibitory under Islam."

35. Counsel for the appellant submitted that what is prohibited under that clause is "illegal use of the premises in a manner that would offend any law and beliefs of the Muslims". It was submitted for the appellant that no evidence was presented to the court to show that selling of alcohol is offensive to the beliefs of Muslims; that no verse of the Holy Koran was cited; and that evidence was indeed led that demonstrated that other like Muslim establishments do indeed sell alcohol. It was submitted that the issue of alcohol was raised to blackmail the appellant and to extort money from her.

36. Counsel for the Wakf Commissioners submitted that the appellant admitted that she was carrying out a business of selling alcohol and liquor on the property; that she did not reveal to the Vendors that she would be doing so; and that she knew that dealing in alcohol is prohibited under Islamic laws.

37. The learned Judge, on his part expressed that it is the duty of the person taking such a lease to be aware of what is prohibited and what is permitted and to comply, and that if such person is in any doubt, clarification should be sought.

38. The evidence of the 2nd respondent was that for the entire period their father, a Muslim, was running business on the property prior to his demise, he was doing so under the name of Rembo Bar and Restaurant and "the bar was selling alcoholic drinks." It was her testimony that when she and her sister took over the business after the death of their father, they stopped selling alcohol when the lease was renewed to them. She stated that she is familiar with Islamic teaching and that it is "haram" to sell or deal with alcohol and that she knew that if she sold alcohol in the building, she would be offending the clause.

39. The appellant on her part stated that the Vendors did not inform her of any restrictions on the use of the property; that between the time she became registered as the proprietor of the property and the time the suit was filed, she had discussions with Commissioner Sheikh Ngao, among other Wakf Commissioners whose names she could not recall and was surprised when the complaint about selling alcohol was raised. In her words:

> "They also told me that I was selling beer on the plot yet it is an Islamic plot. I was surprised as PW1 had not told me of any such condition. He knew that I was a Christian. Neither did my lawyer tell me of any such condition. PW1 had the opportunity to tell me of any such condition but he did not. They told me at the meeting that if i gave them Kshs. 3 million, they will not revoke the title and would allow me to sell beer in the premises. I did not have the 3 million to give."

40. The Wakf Commissioners produced two letters dated 16th November 2016 and 21st April 2017 addressed to the appellant (which the appellant denied having received) in, which beyond acknowledging that the leasehold interest comprised in the title to the property was transferred to the appellant by the Vendors "in the year 2015" pointed out that it had come to their attention that the appellant was operating "Rainbow Bar (selling liquor) contrary to paragraph "e" of the lease" and that she was required to stop the business within 30 days failing which legal proceedings would be instituted. In the letter dated 21st April 2017, the Wakf Commissioners gave the appellant 14 days "to stop trading in liquor" failing which legal action was threatened. It was contended for the appellant that although the two letters were marked as "registered" no certificate of posting was produced.

41. According to the Wakf Commissioners it is "well known world over" and "judicial notice" should be taken that the carrying on of the business of liquor and selling of alcoholic drinks is prohibited in Islamic faith. The 2nd respondent readily stated in her testimony that carrying on such business is "haram" (forbidden or proscribed by Islamic law), and that they (the Vendors) had ceased carrying on that business after taking over from their father. It is the appellant however who is directly affected by

this claim. In her statement of defence, apart from pleading that she was a stranger to the terms and conditions on which the Wakf Commissioners relied, she put the Wakf Commissioners to strict proof in addition to the plea that prior to the transfer of the property, the business of bar and restaurant was carried on the property and that the Wakf Commissioners is estopped "from raising the issue that it is wrong to sell alcoholic beverages" on the property.

42. We agree with the learned Judge that even though the transaction was handled by lawyers, the appellant should have been aware of the provisions of the Lease being transferred to her. Nonetheless, it was incumbent upon the Wakf Commissioners to prove, on a balance of probabilities, that trading in alcohol constituted "illegal use of the premises ... which would offend in any way any law and, in particular, the beliefs of Muslims".

43. In *Raphael Kahindi Kawala v Mount Elgon Beach Properties Limited* [2018] eKLR this Court cited with approval the words of Lord Sumner in the English House of Lords decision in *Commonwealth Shipping Representative v P. & O. Branch Service* [1923] A.C. 191 at p. 210, that:

> "Judicial notice refers to facts which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer."

44. Section 60 of the *Evidence Act* provides for matters that the court may take judicial notice of. In *Gupta v Continental Builders Ltd* (1976-80) 1 KLR 809, Madan,JA, stated that:

> "The party who asks that judicial notice be taken of a fact has the burden of convincing the judge
>
> a. that the matter is so notorious as not to be the subject of dispute among reasonable men, or (b) that the matter is capable of immediate accurate demonstration by resort to readily accessible sources of indisputable accuracy."

45. Under Section 60(3) it is provided that if the court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it considers necessary to enable it to do so. Sections 107, 108 and 109 of the *Evidence Act* are also pertinent. Section 107(1) in particular provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

46. As counsel for the appellant stated, no provision of the Holy Koran was cited before the Judge and no evidence was led based on which the Judge made a finding that there was breach of clause (e) of the Lease. In a matter such as this where judicial notice is sought to be taken of a religious belief or practice, it is not sufficient to call evidence from those who profess the particular faith that the belief or the practice in question exists. The person seeking such a finding must go a step farther and prove that such a practice or belief is notorious not only amongst those who profess the faith, but also amongst those who do not do so, particularly where the practice or belief is sought to be taken notice of to the disadvantage of a party who does not profess the faith in question.

47. In the result, we allow the appeal and set aside the judgment of the ELC in its entirety. The appellant will have the costs of the appeal.

48. In its notice of cross appeal dated 24th June 2021, the Wakf Commissioners cross appealed the judgment of the ELC contending that the same should be varied or reversed on grounds that the learned Judge erred in failing to terminate the lease between itself and the Vendors despite having found that

the Vendors had breached the terms of the lease. However, having held, as we have, that the Wakf Commissioners granted consent to the Vendors to transfer the lease and that they did not breach the terms of the lease, the cross appeal fails and is dismissed. As the 2nd and 3rd respondent did not participate in the appeal or cross appeal, we make no orders as to the costs of the cross appeal.

49. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

S. GATEMBU KAIRU, FCIARB

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR