



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**JUDICIAL REVIEW APPLICATION NO. 3 OF 2021**

**IN THE MATTER OF THE NATIONAL IRRIGATION AUTHORITY**

**AND**

**IN THE MATTER OF THE ARBITRATION COMMITTEE DECISION DATED 25.3.2021**

**AND**

**IN THE MATTER OF RICE HOLDING NO. 2320 MWEA SECTION AND THE SUB-DIVISIONS THEREOF**

**BETWEEN**

**REPUBLIC OF KENYA ..... APPLICANT**

**VERSUS**

**NATIONAL IRRIGATION AUTHORITY ..... RESPONDENT**

**JOHN MUCHIRA MURIITHI .....1<sup>ST</sup> EXPARTE APPLICANT**

**CECILY WANJIKU MURIITHI ..... 2<sup>ND</sup> EXPARTE APPLICANT**

**ALICE WAMBETI MURIITHI ..... 1<sup>ST</sup> INTERESTED PARTY**

**PATRICK WACHIRA MURIITHI ..... 2<sup>ND</sup> INTERESTED PARTY**

**RULING**

1. The Exparte applicants filed Exparte Chamber Summons dated 9<sup>th</sup> August, 2021 on 10<sup>th</sup> August, 2021 whereby they are seeking the following orders: -

a. Spent.

b. That the Ex-parte applicants be granted leave to institute an application for certiorari seeking to quash the decision of the Respondent dated 25/3/2021.

c. That the applicants be granted leave to institute an application for prohibition seeking to prohibit the respondent from entertaining any further proceedings between the interested parties and the exparte applicants over rice holding number 2320 Mwea Section.

d. That the leave granted herein do operate as stay of execution, implementation and or enforcement of the impugned decision dated 25/3/2021.

e. That the costs of this application do abide with the outcome of this intended judicial review proceedings.

2. The Interested Parties opposed the said application vide a replying Affidavit sworn on 4<sup>th</sup> October, 2021 and filed on 6<sup>th</sup> October, 2021.

### **APPLICANT'S CASE**

3. The Applicant's case is that rice Holding 2320 Mwea Section belonged to his late father who was polygamous.
4. In 2019 the respondent heard and determined dispute over the said rice holding and shared it equally between the exparte applicants and interested parties each party getting 2 acres each.
5. Upon determination of the said dispute no appeal was filed and thus the said decision was implemented fully,
6. On 25/3/2021 the respondent entertained further proceedings over the said rice holding and proceeded to subdivide the holding afresh taking away one acre from the ex parte applicants.
7. The respondent lacks jurisdiction to entertain and determine same dispute twice as it violates the legal principle that litigation must come to an end upon exhausting the available appeal mechanism.
8. The respondent is in the process of implementing the impugned decision despite the fact that the exparte applicant have paddy crops growing on the 2 acres of the rice holding and thus they will be greatly prejudiced if the said decision is implemented before these judicial review proceedings are heard and determined.

### **INTERESTED PARTIES' CASE**

9. The interested parties stated that the impugned rice holding was originally allocated to Muriithi Karuri but on 14.9.1994 his license was terminated/revoked by the allocating authority due to poor management but fortunately the same was issued to her on humanitarian grounds to ensure that her family did not disintegrate and be rendered destitute.
10. In 2016, the said rice holding was subdivided into rice holding nos. 2320(A) and 2320(B). Later her family members including the exparte applicants were aggrieved and lodged an appeal and further proceedings were conducted on 6.6.2019 and a verdict whereby the suit land was shared out awarding her 2 acres and the exparte applicants 2 acres jointly
11. Later the Allocating Authority decided to review its decision vide a further meeting on 25.3.2021 after she complained that the entire rice holding was taken away from her and an award was delivered that the interested parties be awarded 1 acre each and the exparte applicants 1 acre jointly as the fourth acre was already allocated to a 3<sup>rd</sup> party who is not a family member.
12. The decision of 25.3.2021 was not the only decision affecting the suit land and wondered why the exparte applicants never complained over the other decisions of the respondent.
13. The instant application lacks merit and does not meet the legal threshold or raise reasonable grounds to warrant the granting of leave to institute judicial proceedings herein. She prayed that the same be dismissed.

### **LEGAL ANALYSIS**

14. I have considered the exparte chamber summons, statement of facts, supporting affidavit, replying affidavits and the annexures thereto as well as the applicable law.

15. The application has been brought under **Order 53 of the Civil Procedure Rules** which provides as follows: -

*“1. (1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on.”*

16. In the case of **Patel Ravji Lalji & another Vs Attorney General & 3 others [2021] e KLR**, the Honourable Court held as follows: -

*“11. While in most cases it is self-evident that the matter should proceed to judicial review, there are a number of preliminary factors that a Court considers and addresses at the leave stage. These factors have been enumerated in **Judicial Review: Principles and Procedure** by Jonathan Auburn et al at paragraph 26.05 as follows:*

- (1) Whether the enactment, action, decision, or failure to act that is being challenged is amenable to judicial review;*
- (2) Whether the claimant has capacity to bring a claim for judicial review;*
- (3) Whether the claimant has a sufficient interest to bring a claim for judicial review;*
- (4) Whether the particular challenge brought by the claimant is one that may be brought by the judicial review procedure, and*

*whether it is appropriate to bring it by that procedure;*

*(5) Whether the claim is otherwise an abuse of process;*

*(6) Whether all or some of the grounds of challenge relied upon by the claimant are sufficiently meritorious to justify the grant of permission;*

*(7) Whether the claim has been brought promptly;*

*(8) Whether there are any discretionary grounds that justify the refusal of permission in the exercise of the court's discretion".*

17. Further the same Court held that: -

*"13. Once a case is found to be amenable to and appropriate for the exercise of the Court's discretion to grant leave, it is trite that the Court then ought not to delve deeply into the arguments of the parties, but should make cursory perusal of the evidence before it and make the decision as to whether an applicant's case is sufficiently meritorious to justify leave. It was explained by Lord Bingham in Sharma vs Brown Antoine (2007) 1 WLR 780, that a ground of challenge is arguable if its capable of being the subject of sensible argument in court, in the sense of having a realistic prospect of success".*

18. From the foregoing it is evident that the mandate of the court at leave stage a court is to satisfy itself that the applicant's case shall be arguable and not necessarily delve into the merits of the judicial review.

19. At the leave stage the Court is also supposed to satisfy itself that it has jurisdiction to determine the case and whether the applicant has exhausted the available mechanisms provided by the law.

20. The effect will be that even though the case is arguable, leave shall not be granted if available administrative mechanisms have not been exhausted.

21. The dispute herein involves a rice holding which falls under the ambit of the *Irrigation Act, 2019*.

22. The dispute resolution mechanisms are provided under **Part VII of the Act** which provides as follows: -

#### **PART VII — DISPUTE RESOLUTION**

**25. (1) Disputes related to irrigation and drainage scheme development, management, water allocations and delivery, financing, operation and maintenance and other matters shall be resolved within the irrigation water users association or at irrigation scheme level wherever possible. (2) Each association which is legally registered shall have a Dispute Resolution Committee that consists of at least three members selected by its governing body. (3) Decisions regarding any dispute contemplated under this section shall be made by the relevant Dispute Resolution Committee within thirty days of the hearing of the dispute in question. 26. Where the water users association or at the irrigation scheme level is unable to resolve a dispute, the same shall be referred to the Dispute Resolution Committee at the first instance to consider and determine the matter before the same is referred to Court.**

23. The ex parte Applicants claim is that the dispute involving the abovementioned rice holding was heard twice by the Allocating Authority. That is in 2019 and on 25/3/3021.

24. The decision delivered on 25/3/3021 reviewed the one that was delivered by the same body in 2021. Their claim is that the Allocating Authority lacked jurisdiction to determine the dispute the second time as the one granted in 2019 had even been implemented.

25. Concerning challenging decisions made by the allocating authority, Section 26 of the irrigation act provides that: -

***"Where the water users association or at the irrigation scheme level is unable to resolve a dispute, the same shall be referred to the Dispute Resolution Committee at the first instance to consider and determine the matter before the same is referred to Court."***

26. The said provision is coached in mandatory terms and it thus falls that the ex parte applicants ought to have staged their complaint before the Dispute Resolution Committee at the first instance before approaching this Honourable Court.

27. In the case of **Geoffrey Muthinja & another Vs Samuel Muguna Henry & 1756 others [2015] e KLR** the Court of Appeal held that: -

*"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."*

#### **CONCLUSION**

28. In view of the foregoing, I find and hold that the Ex-parte Chamber Summons dated 9<sup>th</sup> August, 2021 is without merit and the same is hereby dismissed with costs.

***Ruling DATED, DELIVERED and SIGNED in open Court at Kerugoya this 18<sup>th</sup> day of February, 2022.***

.....

**HON. E.C. CHERONO**

**ELC JUDGE**

In the presence of:-