



**Gathuna(Suing as the Administrator of the Estate of the Late Shem Gathuna Thiongo)
& 2 others v National Irrigation Board (Through the Manager Mwea Irrigaion
Settlement Scheme) & 3 others; Gathuna & another (Interested Parties) (Constitutional
Petition 2 of 2016) [2023] KEELC 21718 (KLR) (23 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
CONSTITUTIONAL PETITION 2 OF 2016**

**JM MUTUNGI, J
NOVEMBER 23, 2023**

BETWEEN

**JACKSON MWANGI GATHUNA(SUING AS THE ADMINISTRATOR OF THE
ESTATE OF THE LATE SHEM GATHUNA THIONGO) 1ST PETITIONER**

JACKSON MWANGI GATHUNA 2ND PETITIONER

JIMMY HUMPHREY GATHUNA 3RD PETITIONER

AND

**NATIONAL IRRIGATION BOARD (THROUGH THE MANAGER MWEA
IRRIGAION SETTLEMENT SCHEME) 1ST RESPONDENT**

CHAIRMAN MWEA LAND DISPUTES TRIBUNAL 2ND RESPONDENT

**SENIOR RESIDENT MAGISTRATE WANG'URU LAW COURTS 3RD
RESPONDENT**

ATTORNEY GENERAL 4TH RESPONDENT

AND

PELISCA WAMBUI GATHUNA INTERESTED PARTY

AGNES MUGURU GATHUNA INTERESTED PARTY

JUDGMENT

1. The Petitioners filed the Amended Petition dated 7th December, 2021 on 8th December 2021. The Petitioners pray for orders as follows:



- aa) A declaration that the Petitioners' fundamental rights to be heard and accessed to Justice, under Articles 48 and 50 of the Constitution have been infringed by the Respondents by ordering that the Rice Holding No. 2032 be subdivided into three (3) portions so that Shem Gathuna Thiong'o gets 1 Acre, Agnes Muguru Gathuna gets 1 ½ ACRES and Pelisca Wambui Gathuna gets 1 ½ ACRE without involving the owners and when one party was deceased.
 - b) A declaration that the rights of the 2nd and 3rd Petitioners' were infringed by the 1st Respondent by cancelling their Tenant Cards and Licenses without giving them a hearing, without authority and without a Court Order, and the Respondents' decisions violated Article 47 of the Constitution.
 - c) An order that this Court in exercise of its supervisory powers be pleased to call for Wang'uru Arbitration Cause No. 5 of 2007 and quash all orders infringing on the Petitioners' Constitutional Rights.
 - d) This Court be pleased to order the reinstatement of the 2nd and 3rd Petitioners as owners of Rice Holding No. 2032 as it was on 20/9/11.
 - e) Costs of the proceedings to be awarded to the Petitioners.
 - f) Any other relief that the Honourable Court may deem fit and just to grant.
2. The Petitioners are the sons of Shem Gathuna Thiongo(deceased) and the 2nd Interested Party, Agnes Muguru Gathuna is their mother. The 1st Interested Party Palisca Wambui Gathuna was the 1st wife of Shem Gathuna Thiong'o (Deceased) and Co-wife of the 2nd Interested Party.
 3. The Petition concerns the succession and ownership of Rice Holding No. 2032 Mwea Irrigation Scheme. As per the facts in support of the petition set out in the Affidavit in support of the petition by Jackson Mwangi Gathuna, Shem Gathuna Thiong'o(deceased) was the original allottee of Rice Holding 2032 as licensee of the 1st Respondent. After the death of Shem Gathuna Thiongo, the 1st Interested Party herein referred a dispute respecting the distribution of the Rice Holding before the Land Disputes Tribunal at Mwea who made an award as follows:-
 - i. Shem Gathuna Thiong'o – 1 Acre
 - ii. Agnes Muguru Gathuna – 1 ½ Acres.
 - iii. Pelisca Wambui Gathuna – 1 ½ Acres.
 4. The award was subsequently endorsed and adopted by the Senior Resident Magistrate's Court Wang'uru and a Decree issued in terms thereof that was implemented and executed by the 1st Respondent. The Petitioners aver that they have been the legal tenants of the Rice holding since 18/2/2011 and that the award of the Mwea Land Disputes Tribunal was made after Shem Gathuna Thiongo had died. They aver at the time of his death he was not the owner of the Rice Holding and contend that the Land Disputes Tribunal entertained the dispute when it had no jurisdiction and that in doing so infringed on the Petitioners' rights. The Petitioners allege that the Tribunal proceeded to adjudicate on the dispute without any notice to the Petitioners and/in clear breach of the Petitioners' rights under Articles 47, 48 and 50 of the Constitution. The Petitioners urge the Court to hold that their rights under the Constitution were violated and hence quash the 1st Respondent's decision cancelling their Tenant Cards and Licenses over the Rice Holding and to restore them as the lawful owners of the Rice Holding.



5. The 1st Respondent in opposition to the petition filed a Replying Affidavit through Lucy Wambui Kamau Assistant Administrative Officer of the 1st Respondent. The 1st Respondent averred that they were not party to the Land Disputes Tribunal matter but were served with a decree in Wang'uru Senior Resident Magistrate's Court Arbitration Case No. 5 of 2007 made on 20/9/2011 which they implemented by effecting changes in regard to Rice Holding No. 2032. The 1st Respondent contend that their action cannot be impugned as they merely complied with an order of the Court as they were obligated to do.
6. The 1st Respondent further averred that the Petitioners ought to have raised the issue of the death of Shem Gathuna Thiong'o before the Tribunal and/or before the Court that adopted the award and/or could have appealed or applied for review or setting aside of the award if they were aggrieved by the award/decrece.
7. The Attorney General filed a Replying Affidavit and grounds of opposition to the Petition on his own behalf and on behalf of the 2nd and 3rd Respondents. The Replying Affidavit was sworn by Francis O. Makori, a litigation Counsel in the Office of the Attorney General. The Attorney General took the position that the Petition was defective and did not meet the threshold of what constitutes a Constitutional petition and prayed for its dismissal. In particular, the Attorney General averred that the Petitioners had not exhausted the remedies provided under the Land Disputes Tribunal Act, 1990 (repealed) Section 3(1) 7 and 8 as read together with Section 30 and 31 of the Environment and Land Court Act, 2011. Further the Attorney General contended the petition contravened the principle of the rule of Law espoused under Article 10 of the Constitution as read together with Sections 25 and 26 of the Irrigation Act and the Irrigation (National Irrigation Schemes) Regulations, 1977.
8. The 1st Interested Party in opposition to the petition filed a Replying Affidavit sworn on 8th June 2023. The 1st Interested Party averred that the petition was fatally defective and incompetent as it did not satisfy the legal requirements to sustain a Constitutional petition. The 1st Interested Party contended that she was a wife of the late Shem Gathuna Thiong'o (deceased), who was the registered licensee of Rice Holding No. 2032 Thiba Section, a beneficiary of the same. She stated her late husband had only effected a surrender of the Rice Holding in 2007 to Agnes Muguru Gathuna, the 2nd Interested Party herein who was her Co-wife only because he was in poor health as was captured in paragraph 3 of the Affidavit of surrender. She stated the Affidavit of Surrender dated 30th October, 2007 was to merely give the 2nd Interested Party authority to deal with the Rice Holding owing to their husband's poor health and was not intended to be a transfer of ownership of the Rice Holding. She averred the subsequent transfer and subdivision of the Rice Holding amongst her sons, the 2nd and 3rd Petitioners herein was fraudulent and was calculated to disinherit her and her family (household). The 1st Interested Party maintained that the decree issued by the Wang'uru Magistrate's Court in Arbitration Case No. 5 of 2007 was never challenged in Court and a subsequent Constitutional Petition No. 2 of 2015 by the Petitioners on the same subject matter was dismissed and hence the instant petition was res judicata and ought to be dismissed.
9. The petition was canvassed by way of written submissions. The Petitioner, the 1st Respondent, the 2nd, 3rd and 4th Respondents and the 1st Interested party filed their respective submissions. The 2nd Interested Party filed no submissions.
10. The 2nd and 3rd Petitioners in their submissions filed on 19th June 2023 submitted that their rights as the registered tenant of Rice Holdings 2032 A and 2032 B which were subdivisions of Rice Holding No. 2032 previously registered in the name of the 1st Petitioner (their deceased father) were violated when the Tribunal gave an award that was prejudicial to their rights without affording them an opportunity



of being heard. The 2nd and 3rd Petitioners submitted that once they had been issued with tenant cards and licenses, they acquired proprietary rights over Rice Holdings 2032 A and 2032 B and hence ought to have been given a hearing before their rights could be interfered with to their detriment.

11. The 1st Interested party in her submissions reiterated that the petition was defective and ought to be struck out. She argued that as a wife of Shem Gathuna Thiongo (deceased) who was the registered licensee of Rice Holding No. 2032 Unit 20 Thiba Section she was entitled to a share of the Rice Holding as a beneficiary. She contended that the 2nd Interested Party was in 2007 given by the deceased authority to manage Rice Holding No. 2032 vide an affidavit sworn by the Deceased sometime in 2007 (date unclear from copy annexed) owing to the poor health that the deceased was enjoying at the time. The 1st Defendant argues that the surrender of authority affidavit was not intended to be a transfer of the Rice Holding to the 2nd Interested Party because the deceased had two families and could not have intended to disinherit one of the families. The 1st Interested party averred that the 2nd Interested Party with intent to defraud the 1st Interested Party's family (household) connived with her sons and on or about 18th February 2011 purported to swear an affidavit surrendering the Rice Holding to herself and her two sons. The 1st Respondent effected farmer changes in line with the affidavit submitted by the 2nd Interested Party but following complaint by the 1st Interested Party, the NIB effected changes in regard to Rice Holding 2032 on the basis that there had been material no disclosure of the existence of a Tribunal award and decree of the Court which had decided on the distribution of Rice Holding No. 2032. The 1st Interested Party submitted that the Wang'uru Resident Magistrate's Court vide Arbitration Case No. 5 of 2007 issued a decree whereby the suit property (Rice Holding No. 2032) was ordered to be shared equally amongst the beneficiaries and hence the instant petition was unsustainable considering that the award by the Land Disputes Tribunal and the decree of the Court were never challenged in any Court of Law.
11. The 1st Respondent (NIB) in its submissions stated that the 1st Interested Party filed a case before Mwea Land Disputes Tribunal against her husband Shem Gathuna Thiongo (deceased) and an award was made that was adopted and a decree issued by the Wang'uru Resident Magistrate's Arbitration Case No 5 of 2007. The 1st Respondent maintained that in complying with the decree of the Court, it did not in any way infringe on the Petitioners Constitutional rights as alleged as it was under a duty to obey the Court order. The 1st Respondent argues that in the event the Petitioners were aggrieved by the Court Order, they ought to have appealed and/or applied to have the award and the decree of the 2nd and 3rd Respondents reviewed and/or set aside. The 1st Respondent in support of its submissions relied on the Case of Four Farms Ltd –vs- Agricultural Finance Corporation (2014) eKLR.
12. The 2nd, 3rd and 4th Respondents anchored their submissions on two issues. Firstly, whether the Petitioners fundamental rights were infringed; and Secondly, whether the petition was an abuse of the Court process. The Attorney General on behalf of the 2nd, 3rd and 4th Respondents submitted that the dispute that was referred to Mwea Land Disputes Tribunal was a dispute amongst family members and the Petitioners were members of that family. The dispute pitted the 1st Interested Party and her husband Shem Gathuna (deceased) who wanted to cede the suit land to Agnes Muguru (the 2nd Interested Party) who was the 2nd wife to the exclusion of the 1st Interested Party and her children. The Attorney General argued that the Petitioners must have been aware of those proceedings before the Tribunal.
13. The Attorney General further submitted once the decision of the Tribunal was made, the procedure provided under the Land Disputes Tribunal Act (Repealed) under Section 8(1) was not complied with



and hence the Tribunal decision as adopted by the Magistrate's Court remained unaffected. Section 8(1) of the Land Disputes Tribunal Act (Repealed) provided as follows:-

“ Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within Thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the subject matter of the Dispute is situated.”

14. Neither the Petitioners nor their deceased father challenged the decision of the Tribunal on appeal before the Appeals Committee. The Attorney General in support of his submissions placed reliance in the decision of this Court sitting at Nakuru where the Court reiterated that where there was procedure set out by the Law for resolution of disputes, that procedure ought to be exhausted before the jurisdiction of the Court is invoked. The Attorney General further in his submissions contended that the failure by the Respondent's to exhaust the process established under the repealed Land Disputes Tribunal Act (now repealed) was fatal and rendered the present petition an abuse of the Court process.
15. I have reviewed and considered the pleadings and the submissions of the parties. The issues for determination in this petition are whether the petition as presented is competent, and if so, whether the Petitioners rights have been infringed to warrant the grant of the reliefs sought by the Petitioners.
16. It is not disputed that the deceased was the Petitioners father and also the husband to both the 1st and 2nd Interested Parties. It is also not contested that vide an affidavit sworn by Shem Gathuna Thiong'o (deceased) dated 30th October 2007, the deceased owing to poor health voluntarily surrendered Rice Holding No. 2032 in regard to which he was the Licensee, to the 2nd Interested Party to manage. The 1st Interested Party however disputes that the affidavit of surrender constituted a transfer of the entire interest of the Rice Holding to the 2nd Interested Party to her exclusion together with her children arguing that her husband could not disinherit her and her children totally of the Rice Holding. The 1st Interested Party cites paragraph 3 of the Affidavit of surrender to back her claim which is as follows:-
 3. That due to my poor health I am unable to manage the said Rice Holding to the standard required by National Irrigation Board.
17. The 2nd Interested Party incidentally just a few days before the death of their husband on 18th February 2011 swore an Affidavit surrendering the entire Rice Holding No. 2032 to her two sons, Jackson Mwangi Gathuna and Jimmy Humphrey Gathuna, who are the 2nd and 3rd Petitioners herein. The husband as per the annexed copy of the death certificate died on 28th February 2011. It is not clear what the motivation was for the 2nd Interested Party to move to effect the surrender and to have the farmer changes effected shortly thereafter on 24th March 2011 yet she had the surrender in her favour wayback from 2007.
18. It is also apparent from the record that the 1st Interested Party, had way back in 2007 made a claim before the Mwea Land Disputes Tribunal as evidenced by Wang'uru SRMC Arbitration Case No. 5 of 2007 where the Tribunal made an award that was adopted by the Court on 20th September, 2011. That the deceased was involved in dealings with Mwea Land Disputes Tribunal is also evident as the deceased as per the record instituted proceedings against the Chairman Mwea Land Disputes Tribunal vide Wang'uru SRM CC No. 14 of 2007 (Shem Gathuna Thiong'o -vs- Chairman Mwea Land Disputes Tribunal) seeking to have a restriction lodged over Rice Holding No. 2032 at Mwea Irrigation Scheme Office lifted. The restriction was lifted on 16th August 2007. By implication as at 30th October, 2007 when the deceased gave an affidavit of surrender to the 2nd Interested Party, the 1st Interested Party's claim before the Land Disputes Tribunal at Mwea was live and it is not possible the Petitioners and the 2nd Interested Party were not aware of the proceedings at the Tribunal. It is instructive that the



Petitioners infact did institute a Constitutional petition before this Court being ELC Petition No. 2 of 2015 against the 1st Interested Party, John Kimani Gathuna and Agnes Muguru Gathuna seeking inter alia that Wang'uru Arbitration Cause No. 5 of 2007 that adopted the award of the Mwea Land Disputes Tribunal be quashed. The Petition was dismissed by the Court for being incompetent and misconceived.

19. I have carefully evaluated the petition, the affidavits in support and in opposition and have considered the parties submissions and I am not satisfied the matters in dispute are such as would qualify to be raised in a Constitutional Petition. The Mwea Land Disputes Tribunal made an award in reference to a dispute regarding Rice Holding No. 2032 in 2007 which was filed at Wang'uru Magistrate's Court as Wang'uru Arbitration Case No. 5 of 2007 for adoption, while it was not explained why the award was not adopted immediately after it was filed, the record indicates the award was adopted on 20th September 2011. The Land Disputes Tribunal Act (repealed) did not give any time limit within which the award should be filed and/or adopted by the Magistrate's Court. The Magistrate's Court under Section (7) of the Act was merely required to enter Judgment in terms of the award.

Section 7 provides as follows:-

- (1) The chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the magistrate's court together with any depositions or documents which have been taken or proved before the Tribunal.
- (2) The court shall enter judgement in accordance with the decision of the Tribunal and upon judgement being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.

Section 8(1) of the Act provided for appeal to the Provincial Appeals Committee. It provides as follows:-

1. Any party to a dispute under section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision, appeal to the Appeals Committee constituted for the Province in which the land which is the subject matter of the dispute is situated.

20. Once the Mwea Land Disputes Tribunal and the Magistrate's Court had exercised their mandate, their decisions could only have been challenged either by way of Judicial Review or appeal within the confines of the Law. As per the Act, the adoption by the Magistrate's Court of the award was subject to any appeal that may have been preferred to the Appeals Committee under Section 8(1) and/or to the High Court under Section 8(9) of the Act. Where no appeal was preferred the decision of the Tribunal became final in all respects.

21. In the present matter no appeal and/or Judicial Review application was made against the decision of the Tribunal and/or the Magistrate's Court. In the premises those decisions remained valid as they were not varied and/or set aside. The Petitioners have complained that, the adoption of the award as Judgment was made after the death of their father who was affected by the award and hence was a nullity. I have observed that the award was made in 2007 for it to be filed, in Court. That was during the lifetime of the deceased. He never challenged the award from 2007 to 2011 when he was alive. The Magistrate had no mandate to change the award and his role was to merely enter Judgment in accordance with the award to enable a decree to issue for purposes of facilitating execution of the award. The extracted decree shows on the 20th September, 2011 when the award was adopted as Judgment, the deceased was represented by Counsel which must mean, it was the Petitioners and the 2nd Interested Party who must have instructed Counsel which fortifies my finding that the Petitioners must at any rate have been aware of the Tribunal Proceedings. In case the Petitioners were aggrieved by the decision of the Tribunal, they ought to have challenged the same in the manner prescribed under the Act. The



award was not challenged either by way of appeal or Judicial Review and it therefore became final and enforceable. Under Section 8(8) of the Land Disputes Tribunal Act, the decision of the Appeals Committee was final and was only appealable on a point of law under Section 8(9) of the Act to the High Court.

22. In the premises it is my determination that there was a clear laid down procedure under the Land Disputes Tribunal Act that should have been followed by the Petitioners which they did not do and that rendered the present petition unsustainable. In the Case of the Speaker of National Assembly v James Njenga Karume [1992] eKLR the Court of Appeal expressed itself on the issue succinctly as follows:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

23. The 1st Respondent in effecting changes in regard to Rice Holding No. 2032 acted lawfully as they were, giving effect to a valid order of the Court and they cannot be faulted. The decree served upon them was not varied and/or set aside. The Petitioners in instituting the present petition overlooked the clearly laid down procedure under the Land Disputes Tribunal Act. The exhaustion doctrine demands that where there is an alternative procedure to resolve a dispute, that procedure be exhausted before the jurisdiction of the Court is invoked.
24. The upshot is that the petition lacks any merit and I dismiss the same. The dispute being essentially amongst family members, I in exercise of my discretion order that each party bears their own costs of the petition.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 23RD DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

