REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC/JUDICIAL REVIEW APPLICATION NO. 23 OF 2014

IN THE MATTER OF AN APPLICATION BY BERNARD GICHOBI NJIIRA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI, PROHIBITION & MANDAMUS

AND

IN THE MATTER OF RICE HOLDING NO. 220 UNDER NATIONAL IRRIGATION BOARD

(MWEA IRRIGATION SETTLEMENT SCHEME)

AND

IN THE MATTER OF AN ALLEGED VERDICT OF SUB-ADVISORY COMMITTEE DATED 17/4/2014 OF MWEA IRRIGATION SETTLEMENT SCHEME – DEPARTING WITHOUT ANY BASIS FROM THE EARLIER FULL ADVISORY MEETING VERDICT DATED

1ST APRIL, 2014

BETWEEN

BERNARD GICHOBI NJIRA ……..……...… APPLICANT

AND

NATIONAL IRRIGATION BOARD (THROUGH

MWEA IRRIGATION SETTLEMENT SCHEME) …..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL …….……2ND RESPONDENT

JUDGMENT

By a Notice of Motion dated 22nd October 2014, the applicant **BERNARD GICHOBI NJIRA** sought the following orders:-

> ***(1) An order of certiorari to remove into this Honourable Court the 2nd respondent's sub-Advisory Committee verdict dated 17th April 2014 so far as the same states that the applicant ought to get two (2) acres from rice holding No. 220 instead of three point five (3.5) acres as in the previous verdict of the 2nd respondent's full Advisory Committee dated 1st April 2014 for the purpose of it being quashed.***

(2) An order of prohibition directed at 2nd respondent prohibiting it from implementing the verdict dated 17th April 2014.

(3) An order of mandamus directed at both respondents compelling them to implement the 2nd respondents verdict of the full Advisory Committee dated 1st April 2014 which clearly stated that the applicant ought to get three point five (3.5) acres and the 1st interested party two (2) acres from the rice holding No. 220.

The application is based on the applicant's statement of facts and verifying affidavit. Basically from what I can discern from the said statement, verifying affidavit and annextures thereto, the dispute regarding rice holding No. 220 (the rice holding) was the subject of Wanguru Miscellaneous Case No. 43 of 1972 involving the applicant and the 1st interested party **KANINA NJIRA**. The trial magistrate **E.K. NYUTU** decided, and rightly so, that the best forum to determine that dispute was the 1st respondent and so by a ruling dated 1st November 2012, he referred the dispute to the 1st respondent. The 1st respondent deliberated over the dispute and by a verdict dated 1st April 2014, ordered that the rice holding be shared as follows:-

1. Applicant – three point five (3.5)

2. 1st interested party – two (2) acres.

However, the 1st respondent later changed that verdict on 17th April 2014 and sub-divided the rice holding as follows:-

1. Applicant – two (2) acres

2. 1st interested party – two (2) acres

3. 2nd interested party – one (1) acre.

That prompted the applicant to move to this Court. It is clear from the applicant's statement of facts that he only received communication from the 1st respondent's reducing his share of the rice holding from three point five (3.5) acres to two (2) acres on or about 30th May 2014.

In opposing the application, the 1st respondent filed both grounds of opposition and a Notice of Preliminary Objection. In its grounds of opposition, the 1st respondent argued that the verdict dated 17th April 2014 was arrived at judiciously and there was no violation of the rules of Natural Justice and in any event, the license held by the parties is not absolute but is subject to the regulations of the 1st respondent's Board as mandated by the ***Irrigation Act***.

In the Preliminary Objection which was not however canvassed, the 1st respondent stated that the Notice of Motion was fatally defective and ought to be dismissed as it had no supporting affidavit, verifying affidavit or statement of facts.

The 2nd respondent (the Hon. Attorney General) similarly filed grounds of opposition to the application stating the same does not disclose any cause of action against it since the 1st respondent is a body corporate with powers to sue and be sued on its own.

The 1st and 2nd interested parties opposed the application by filing replying affidavits.

In his replying affidavit, the 1st interested party deponed, inter alia, that being aggrieved with the verdict of the Advisory Committee of the 1st respondent dated 1st April 2014, he and his family sought a review of the same which was made by an award dated 17th April 2014 and that the applicant is being dishonest when he claims that he was not aware of the proceedings that led to that second verdict. Further, that he has since been issued with his license and tenant card for two (2) acres. He has doponed finally that the 1st respondent has the sole statutory power to regulate the number of licencees in a scheme and it cannot

be compelled to give the applicant three point five (3.5) acres and his only recourse is to appeal.

The 2nd interested party also deponed that he was issued with a license and tenant card way back on 12th October 2012 before the applicant lodged a complaint with the 1st respondent which reviewed its decision and the applicant attended the hearing on 17th April 2014 when he (interested party) was given one (1) acre. That the award is fair in the circumstances.

Submissions were filed by counsel for all the parties herein.

I have considered the application, the responses thereto together with the relevant annextures and the submissions by counsel.

As indicated above, the 1st respondent has raised a Preliminary Objection that the application was defective for failing to attach the statement of facts and affidavit. However, this was never pursued and in their respective responses, neither the respondent nor the interested parties indicated that they were not aware of the basis of this application or that they were not served with the statement of facts or verifying affidavit. The fact that they were able to respond to the averments raised by the applicant is evidence to prove that they must have been served with the same. What I notice however is that the substantive Notice of Motion filed herein does not contain the statement of facts or verifying affidavit. This Court is however satisfied that there was compliance with the provisions of ***Order 53 Rule 4 of the Civil Procedure Rules*** that requires that the application be served on the respondents and all interested parties together with the statement and affidavit. That Preliminary Objection was clearly not raised with any serious intention of pursuing it and it was obviously abandoned because a Preliminary Objection is based on a pure question of law and cannot be sustained if it is based on facts which have to be proved.

As **Sir Charles Newbold** stated in the case of ***MUKISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS (1969) E.A 696***, a Preliminary Objection

> ***"…. raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"***

I shall now consider the Notice of Motion on its merits.

This being a Judicial Review application, I must remind myself of the role of a Court considering such an application which was described in the case of ***MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001*** as follows:-

> ***"Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision makers took into account relevant matters or did take into account irrelevant matters. The Court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision"***

It is important to remember that the purpose of Judicial Review is to ensure that the party to be affected by the decision is given fair treatment by the body making the decision. The broad grounds on which the Court exercises its Judicial Review jurisdiction were captured in the Uganda case of ***PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT AND OTHERS (2008) 2 E.A 300*** where the Court cited with approval the case of ***COUNCIL OF CIVIL UNIONS VS MINISTER FOR THE CIVIL SERVICE 1985 AC 2*** and ***AN APPLICATION BY BUKOBA GYMKHANA CLUB (1963) E.A 478*** as follows:-

> ***"In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality, and procedural impropriety …. Illegality is when the decision making authority commits an error of law in the process of***

taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of a law or its principles are instances of illegality …. Irrationality is when there is such gross un-reasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision .... Procedural impropriety is when there is a failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in the non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision"

What is the nature of the applicant's complaint herein? As can be gleaned from the applicant's statement of facts and verifying affidavit, the applicant's case really is that the 1st respondent's Full Advisory Committee having made a verdict on 1st April 2014 awarding him three point five (3.5) acres out of the rice holding, this decision was later reviewed by the 1st respondent's sub-Advisory Committee on 17th April 2014 reducing his entitlement to two (2) acres and awarding the 1st and 2nd interested parties two (2) acres and one (1) acre respectively. It is also clear from the applicant's statement of facts that he was not a party to the sub-Advisory Committee's proceedings by which his entitlement was reduced. In grounds 3(a) and (b) it is pleaded as follows:-

(a) After the applicant had applied for tenant license card from the 1st respondent on 1.4.2014, the 1st respondent delayed a lot in issuing the same. When the applicant kept checking with the 1st respondent's manager, he was told unless he gives something small he had to lose part of his 3.5 acres.

(b) On or about 30.5.2014, the applicant received the 1st respondent's letter dated 28.4.2014 vide which the 1st respondent had purported to re-sub-divide the rice holding No. 220 and the applicant had been given 2 acres instead of the previous 3/5 acres and the letter stated that was effective from 13.4.2014 – yet the verdict was dated 17.4.2015.

What the applicant is saying in simple terms is that the decision of the 1st respondent's sub-Advisory Committee dated 17th April 2014 reducing his share in the rice holding from three point five (3.5) acres to two (2) acres was arrived at without hearing him. That the Rules of Natural Justice with regard to giving a party a hearing was not adhered to. The response of the 1st respondent is that infact there was no violation of the Rules of Natural Justice and in any case, the 1st respondent is mandated under the ***Irrigation Act Chapter 347 Laws of Kenya*** and the rules made thereunder, to determine the issue of licenses and regulate the manner of use of rice holdings. The interested parties support that view and add that infact the applicant attended the hearing that resulted in the decision sought to be impugned. In paragraph 5 of his replying affidavit, the 1st interested party **KANINA NJIRA** depones as follows:-

"***That the ex-parte applicant and his sister CICILY WARWARE fully participated in the proceedings and the ex-parte applicant is being dishonest to himself and to this Court when he claims that he was not aware of the proceedings and the Advisory Committee dated 17.4.2014"***

On his part, the 2nd interested party **ABEL NJIRA** has deponed in paragraphs 4 and 5 of his replying affidavit as follows:-

4 "That when I learnt of the award of the Advisory Committee, I took my complaint to the manager who informed me that the Board was due to review the award dated 29.10.2013 since none of the family members was happy with it, and that indeed the ex-parte applicant and her sister CICILY WARWARE were among the complainants (attached is a copy of the letter summoning us for the hearing on 17.4.2014 marked AN III)"

5 "That the dispute was set for hearing on the 17.4.2014 when all the interested family members attended including the ex-parte applicant and her sister CICILY WARWARE".

Annexed to the 2nd interested party's replying affidavit is a letter dated 13th April 2014 from the 1st respondent inviting the applicant, the 1st and 2nd interested parties including the said **CICILY WARWARE** to a meeting at its office at 10 a.m. on 17th April 2014. Minutes of that meeting are part of the applicant's own annextures which were produced in the Wanguru Principal Magistrate's Civil Case No. 87 of 2014 by the 1st interested party herein who was the 1st defendant in the case at Wanguru Court. According to those minutes, it is indicated as follows:-

> "***Cicily Warware opposed the verdict given out by the Committee claiming that Abel was not supposed to get the 1 acre because he was planning to sell it and he was still a minor. She requested the Committee to stick to the previous verdict made on 18th July 2013. She proposed that Kanina should cultivate the holding with her grandson. Abel Njira Kinyua said that he is now grown up and he should get the share of his late father.***
>
> ***Bernard and Cicily said that the affidavit that Kanina had sworn in 2012 was not valid because Bernard was the legal successor and Kanina the guardian of that holding and he was the one who was supposed to sub-divide instead of Kanina"***

The Committee then arrived at its verdict in the following terms:-

> ***"VERDICT***
>
> ***The Committee decided that all family members should have an equal share of the late Njira Njue. They concluded that the holding should be sub-divided as follows:-***
>
> ***- Kanina Njira to hold 2 acres***
>
> ***- Bernard Gachoki to hold 2 acres***
>
> ***- Abel Njira Kinyua to hold 1 acre under the guardianship of his grandmother Kanina"***

It is clear from the above therefore that the applicant was present when the sub-Committee of the 1st respondent made its decision dated 17th April 2014 sought to be impugned in these proceedings and even addressed it. In his supplementary affidavit filed herein on 8th October 2015, the applicant suggests that those proceedings are doctored as he did not attend that meeting. He states as follows in paragraph 6 of that affidavit:-

> ***"That in response to paragraph 5 of the replying affidavit by KANINA NJIRA KATHENDU, I reiterate that the verdict dated 17.4.2014 was manufactured and it is not genuine. I did not participate in its deliberations at all. The verdict is dated 17.4.2014 whereas it was effective from 13.4.2014 according to the 2nd respondent's letter dated 28.5.2014 (see page 25 of my application)".***

The minutes of the meeting held on 17th April 2014 were part of the documents submitted by the applicant himself in support of these proceedings – see **pages 24 and 29** of his application. He now alleges that they were manufactured. That is an allegation of fraud on the part of the 1st respondent. Fraud is a serious allegation which, if raised, must be strictly proved and although the standard of proof may not be as heavy as beyond reasonable doubt, something more than a mere balance of probabilities is required – ***PATEL VS MAKANJI 1957 E.A 314.*** And under ***Section 107 to 109 of the Evidence Act,*** the burden of proving that the minutes were doctored lies with the applicant since he is the person alleging that fraud. I am not persuaded that the plaintiff has discharged that burden. In seeking to impugn the authenticity of the minutes, the applicant, in his supplementary affidavit, talks of the verdict being dated 1st April 2014 yet it was effective from 13.4.2014. He also talks of contradictory statements given by the respondents in the Wanguru Court and at the said meeting. Those are issues of the merit or otherwise of the decision arrived at by the 1st respondent in its deliberations the subject of this application and as is clear from the case of ***MUNICIPAL COUNCIL OF MOMBASA*** (supra) this Court exercising Judicial Review powers cannot delve into such issues. What is clear is that the 1st respondent made decisions

both on 1st April 2014 and 17th April 2014 and I am not persuaded that the minutes of the latter meeting are a forgery. They record the applicant's presence and he cannot claim, as he has done in this Notice of Motion, that he was not aware about the verdict dated 17th April 2014 and only came to learn about it from the 1st interested party's replying affidavit in the Wanguru Case No. 87 of 2014. The applicant was clearly granted an opportunity to be heard and he attended the meeting where both he and his sister **CICILY WARWARE** were heard before the verdict the subject of this application was arrived at. He cannot therefore complain of unfairness on the part of the 1st respondent nor is this Court mandated, while exercising its powers under Judicial Review, to go into the merits or otherwise of the decision arrived at. What is important, in the circumstances of this case, is that the applicant was heard before the decision to reduce his rice holding was arrived at. The evidence before me shows that he was heard and therefore there was no flouting of the Rules of Natural Justice which is the basis upon which this application is founded. The 1st respondent is mandated under the ***Irrigation Act Chapter 347 of the Laws of Kenya*** and the rules made thereunder to determine the licensees of the various rice holding including cancellation of the same so long as the Rules relating to illegality, impropriety, unfairness or want of jurisdiction are not abused in arriving at a decision. In the case of ***KENYA REVENUE AUTHORITY VS MENGINYA MURGANI C.A CIVIL APPEAL NO. 108 OF 2009***, the Court of Appeal delivered itself as follows:-

> ***"There is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down by Statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task, it is for them to decide how they will proceed"***

In the circumstances of this case, I am not persuaded on the material before me that the applicant's right to be heard was violated. It must also be realized that Judicial Review orders are discretionary and are not guaranteed and they will not be issued as a matter of course particularly where what is being sought is to compel the 1st respondent to exercise its discretion in a particular manner, as appears to be the case in this application. I therefore see no merit in this application which I dismiss.

There is one other issue that I must address. The applicant saw it fit to enjoin the Attorney General in these proceedings as the 2nd respondent. Under ***Section 3(1) of the Irrigation Act***, it is provided as follows:-

> ***"There is hereby established a Board, to be known as the National Irrigation Board, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and capable of purchasing or otherwise acquiring, holding, managing and disposing of any property movable or immovable, entering into contracts, and doing all things necessary for the proper performances of its duties, and discharge of its functions under this Act and any subsidiary legislation made thereunder"***

There was no juridical basis for enjoining the Attorney General in these proceedings since the National Irrigation Board is a body corporate with powers to sue and be sued in its own names and the claim against the 2nd respondent can only be for striking out.

Ultimately however, and for the reasons given above, I find no merit in the applicant's Notice of Motion dated 22nd October 2014. The same is accordingly dismissed with costs to the respondents and the interested parties.

B.N. OLAO

JUDGE

22ND APRIL, 2016

Judgment delivered, dated and signed in open Court this 22nd day of April, 2016.

Mr. Wambugu for Applicant - absent

Mr. Macharia for Mr. Ombachi for the 1st Respondent – present

Ms Nyawira for 2nd Respondent – absent

Mr. Kiama for Interested parties - absent

Right of appeal explained.

B.N. OLAO

JUDGE

22ND APRIL, 2016