



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 97 OF 2015**

**JOHN MURIGU KIRAGU.....PLAINTIFF**

**VERSUS**

**VIRGINIA WANJIRU KIRAGU.....1<sup>ST</sup> DEFENDANT**

**JESINTA WAMBUI KIRAGU.....2<sup>ND</sup> DEFENDANT**

**ELENAH WANGITHI KIRIUNGI.....3<sup>RD</sup> DEFENDANT**

**EUNICE WAMWERU MUTUKU.....4<sup>TH</sup> DEFENDANT**

**LYDIA KARUANA NGUGI.....5<sup>TH</sup> DEFENDANT**

**CHARITY WARUGURU NGUGI.....6<sup>TH</sup> DEFENDANT**

**NATIONAL IRRIGATION BOARD .....7<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff vide a plaint dated 12<sup>th</sup> August 2015 and later amended on 16<sup>th</sup> February 2021 approached the Court seeking the following orders:

- a. A declaration that the decision and/or verdict made by the 7<sup>th</sup> Defendant on 29<sup>th</sup> May 2014 was null and void;
- b. The cancellation of the purported subdivisions of Rice Holding Number 1993 Mwea Unit M16 and subsequent registration of the Plaintiff as lawful licensee of the same;
- c. That without prejudice to prayers (a) and (b), and/or alternatively, cancellation of the purported sub divisions of Rice Holding Number 1993 Mwea Unit M16 and subsequent sub-division and registration of the same in the names of the Plaintiff and the 1<sup>st</sup>-6<sup>th</sup> Defendants in 2 equal shares;
- d. Costs of the suit together with interest at court rates;
- e. Any other reliefs that the court may deem just and fair to grant.

2. In response and by way of a Notice of preliminary objection dated 23<sup>rd</sup> November 2020, the 7<sup>th</sup> Defendant herein raised the following objections against the Plaintiff's suit:

- (i) That the Honourable Court lacks the requisite jurisdiction to hear and determine the matter;
- (ii) That the suit is a non-starter; and
- (iii) That the suit is an abuse of court process.

3. By consent the Parties agreed to canvass the application by way of written submissions. The 7<sup>th</sup> Defendant (the Applicant herein) filed his submissions on 23<sup>rd</sup> March 2021. On the question of jurisdiction, it is the Applicant's position that the court is barred from entertaining a matter that has been decided by the National Irrigation Board Dispute Resolution Committee. Reliance is placed on **Sections 8 (2) and 26 of the Irrigation Act No. 14 of 2019**. It is the Applicant's contention that once a litigant is dissatisfied with its decision, recourse is to be sought under the National Irrigation Board Dispute Resolution Committee and not the court. That the function of the court under the Irrigation Act is relegated to a supervisory jurisdiction, which jurisdiction can only be invoked by way of judicial review proceedings under **Order 53 of the Civil Procedure Rules, 2010**. The Applicant relies on the following authorities: **Simon Warui Mwangi & Another v Grace Ruguru Mwangi & Another [2020] e KLR**, **Margaret Wanjiku Munyi & Another v Munyi Njoka & Another [2019] e KLR** and **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited 1989 KLR 1**. It is the Applicant's position therefore that since the court lacks jurisdiction to entertain the present suit, the same is a non-starter and an abuse of court process and ought to be struck out with costs.

4. The 1<sup>st</sup> - 6<sup>th</sup> Defendants herein filed their submissions on 25<sup>th</sup> February 2021. They concur with the preliminary objections raised by the 7<sup>th</sup> Defendant. It is their submission that the Plaintiff's claim relating to the alleged illegality in the sub division of Rice Holding No. 1993 Mwea, Unit M16 cannot be instituted by way of a plaint. They agree that the proper manner of raising the Plaintiff's grievances ought to have been by way of judicial review. That the Plaintiff's failure to follow the correct procedure in law denied him audience before the court. They relied on the decisions in **Municipal of Mombasa v Republic and Umoja Consultants Ltd Civil Appeal No. 185 of 2001 (2002) e KLR**; **Fatuma Maale Mohammed (suing on behalf of a minor, David Kaboro) v National Irrigation Board & 2 Others [2020] e KLR** and **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited 1989 KLR 1**. They therefore pray for the suit to be dismissed with costs.

5. The Plaintiff filed his submissions on 12<sup>th</sup> July 2021. He maintains that the decision made by the 7<sup>th</sup> Defendant was illegal and ultra vires since it resulted in the loss of his entitled 4 acres of Rice Holding Number 1993. It is the Plaintiff's position that the court has jurisdiction to provide the reliefs sought, by virtue of **Section 13(7) of the Environment and Land Act**. The Plaintiff submits that the section above allows the court to give the prerogative orders as well as declarative orders. That the Plaintiff did not seek any prerogative orders in its plaint, but only declaratory reliefs. He places his reliance on a paper prepared by an Indian Judge on the **Scope and ambit of relief of declaration** to demonstrate that his case meets the threshold for the issuance of a declaratory relief by the court. That the prayers sought by the Plaintiff are in the nature of specific performance, restitution and costs and urges the court to be guided by **Articles 47, 50 and 159 (d) of the Constitution, 2010** in dismissing the Applicant's preliminary objection.

6. The court has considered the plaint, amended plaint, notice of preliminary objection and rival submissions.

7. The gravamen of the Plaintiff's case is the decision arrived at by the National Irrigation Board, the 7<sup>th</sup> Defendant herein, on 29<sup>th</sup> May 2014. In its determination, the 7<sup>th</sup> Defendant upheld the 1<sup>st</sup> Defendant's subdivision of Rice Holding Number 1993 Mwea Unit M16 to the 2<sup>nd</sup>-6<sup>th</sup> Defendants, being her daughters, occasioning the loss of the Plaintiff's 4 acres in the rice holding. It is the Plaintiff's case that the decision was arrived at without giving him an opportunity to be heard; that the Board took into account irrelevant matters; that the decision was ultra vires and that on the whole, the decision was marred with illegality. It was upon this basis that he moved to court seeking the reliefs set out above.

8. The 7<sup>th</sup> Defendant on the other hand is of the strong persuasion that the Plaintiff is in the wrong forum, has filed the wrong application and ought not to be entertained.

9. It is trite law that the question of jurisdiction goes to the root of a case and as soon as the court is seized with the realization of its non-possession ought to down its tools. The celebrated case of **Owners of the Motor Vessel "Lillian S" -v- Caltex Oil (Kenya) Ltd (1989) 1 KLR**, cited by both parties is instructive:

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

Similarly, the case of **Adero & Another V Ulinzi Sacco Society Limited [2002] 1 KLR 577**, quite sufficiently summarized the law on jurisdiction as follows;

"1 .....

**2. The jurisdiction either exists or does not ab initio and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.**

**3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.**

**4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal."(Emphasis, mine)**

10. The question for immediate determination therefore is whether or not the court has jurisdiction to entertain the Plaintiff's suit. As already

observed, the Plaintiff's case is founded upon his dissatisfaction with the 7<sup>th</sup> Defendant's decision rendered on 29<sup>th</sup> May 2014. The mandate of the 7<sup>th</sup> Defendant is derived from **Section 9 of the Irrigation Act, No. 14 of 2019**. In relation to dispute resolution, **Sections 25 and 26 of the Act** are instructive. They provide as follows:

#### **'25. Dispute resolution**

*(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. Appeals**

*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.'*

11. It is apparent from **Section 26** that appeals lie first at the National Irrigation Board Dispute Resolution Committee and can thereafter be lodged by court. It is not lost on the Court that by the time of the filing of the Plaintiff's plaint, the law in force was the **repealed Irrigation Act, Cap 347**. Unfortunately, the repealed statute lacked the elaborate dispute resolution mechanism provided for in the present legislation. Under the repealed statute, no appeals framework for decisions arising from the Irrigation Board was formulated. To that end, the court disagrees with the Applicant and the 1<sup>st</sup>-6<sup>th</sup> Defendants that the Plaintiff was barred from lodging his suit in court.

12. The nature of the Plaintiff's case however is clearly and unequivocally, one of judicial review. This is because the Plaintiff specifically admits in the plaint and amended plaint that he was dissatisfied with the following elements of the Applicant's decision making: the fact that the decision was arrived at without giving him an opportunity to be heard; the fact that the Board took into account irrelevant matters and omitted relevant factors; the fact that the decision was ultra vires and that on the whole, the decision was marred with illegality. The Plaintiff's dissatisfaction therefore lies on the procedure used to arrive at the decision and the reliefs sought essentially call for the court to quash the decision of the 7<sup>th</sup> Defendant. The Plaintiff contends that the reliefs are declaratory in nature. With respect, the net effect of the orders sought is to do away with the decision of the 7<sup>th</sup> Defendant. See the decision in of **Municipal of Mombasa Vs Republic and Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e K.L.R.**, the Court of Appeal set out the duty of a court in a judicial review application and stated as follows:-

*"Judicial Review is concerned with the decision making process, not with the merit of the decision itself. The court would concern itself with such issues as to whether the decision maker had the jurisdiction, were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matter or did take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of Judicial Review is concerned with and such a court is not entitled to act as a Court of Appeal over the decider acting as an Appeal Court over the decider 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 and that, as we have said, is not the province of judicial review."*

13. The Court finds succor is found in the Court of Appeal decision in **Geoffrey Ndungu Theuri v Law Society of Kenya (1988) e KLR:-**

*"The law of this country is not deficient in providing the mode by which a civil suit may be commenced. Order 6 rule 1 provides in mandatory terms how such an action may be brought.*

*It says:- " Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed."*

This court in a similar case of **FMM (suing on behalf of a minor DK) v National Irrigation Board & 2 others [2020] e KLR** found as follows:

*"It is trite that the National Irrigation Board has the sole statutory mandate to manage control regulate and allocate land within National Irrigation Schemes in Kenya. It is also trite that the **National Irrigation Act Cap 347** is a self-regulating and sustaining law within definite provisions for dispute resolution and Appeal mechanisms for anyone aggrieved by the decision made by the Board under the Act. These decisions by the Board can only be challenged by way of Judicial Review under Order 53 CPR and Article 22 of the Constitution of Kenya 2010. This suit and the application before me is commenced by a plaint. That is a jurisdictional issue which must be decided right away. In the celebrated case of Owners of Motor Vessel 'Lilians' Vs Caltex Oil (Kenya) Ltd (1989) KLRA 1 the Court held as follows:-*

*"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the*

*moment it holds the opinion that is it without jurisdiction”.*

14. I agree with the above decision. Jurisdiction is expressly conferred either by statute or the Constitution and cannot be inferred. The upshot of my analysis is that this suit is a non-starter. The court has not been properly invoked. The same applies to the application before me.

15. In my view, the upshot of the foregoing analysis is that the Plaintiff’s suit is a non-starter and cannot be entertained. The suit is therefore struck out with costs.

**JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF JANUARY, 2022.**

.....

**HON. E. C. CHERONO**

**ELCJUDGE**

**IN THE PRESENCE OF:**

- 1. MS KIMATA HOLDING BRIEF FOR OMBACHI FOR THE 1ST – 5TH DEFENDANTS**
- 2. MS NDUNGU HOLDING BRIEF FOR NGIGI FOR PLAINTIFF**
- 3. KABUTA – COURT CLERK.**