REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW APPLICATION NO. 21 OF 2014

IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW AND RICE HOLDING NO. 227 UNIT T-6 TEBERE SECTION OF THE NATIONAL IRRIGATION BOARD – MWEA IRRIGATION SETTLEMENT SCHEME

AND

AND IN THE MATTER OF SUB-ADVISORY COMMITTEE PROCEEDINGS AND AWARD DATED 15/4/2014

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD.....RESPONDENT

AND

1. FREDRICK MUGWERU MUGO.....INTERESTED PARTIES

2. SYMON WAMBUGU MUGO

EX-PARTE.....DANSON MUTE MUGO

JUDGMENT

The rice holding No. 227 Unit T-6 situated at Tebere Section (herein the suit property) was originally allocated to one **MUGO NGAI** (deceased) who was the father to the applicant **DANSON MUTE MUGO** and the two interested parties **FREDRICK MUGWERU MUGO** (1st interested party) and **SYMON WAMBUGU MUGO** (2nd interested party).

Following the demise of **MUGO NGAI** and as per the **Provisions of the Irrigation Act Chapter 347 Laws of Kenya** and the Rules made thereunder, the respondent as manager of the rice holdings directed that succession proceedings be instituted to determine the successor of the suit property. This led to the filing of **WANGURU SRM's COURT SUCCESSION CAUSE No. 26 of 1984** whereby the beneficiaries of the deceased including the applicant and the interested parties arrived at a consent on 8th February 1985 that the deceased be succeeded by the applicant as the sole licensee of the suit property. That consent was duly implemented by the respondent who, as the allocating authority issued the applicant with the relevant ownership documents to the suit property and he has been in quiet and excusive possession thereof.

In November 2013 the interested parties and other family members moved the **WANGURU COURT** with a view to setting aside or reviewing the consent orders dated 8th February 1985. However, by a ruling dated 5th November 2013, the Principle Magistrate T. Mwangi dismissed that application and advised the interested parties that they could file an appeal to the High Court. The file was ordered closed.

The interested parties and other family members did not give up and took the dispute to the Chief Nyangati Location who, after deliberating over the same on 13th January 2014, recommended that the suit property be shared among the applicant and the interested parties as follows:-

1. DANSON MUTE MUGO (Applicant) - 2 acres

2. FREDRICK MUGWERU MUGO (1st Interested party)

- 1½ acres

3. SYMON WAMBUGU MUGO (2nd Interested party) - 1 acre

Acting on that recommendation, the respondent's Sub-Advisory Committee met on 15th April 2014 and up-held the same and made a verdict that the suit property be sub-divided and shared as proposed by the Chief Nyangati Location and the same was divided into three (3) portions being rice holding No. 227A, 227B and 227C and tenant identification cards were issued accordingly.

Aggrieved by that decision by the respondent's Sub-Advisory Committee and having obtained leave, the applicant filed this Notice of Motion seeking the following orders:-

1. That an order of certiorari do issue to remove into this Court and quash the award and proceedings of the Sub-Advisory Committee of the National Irrigation Board Mwea Irrigation Settlement Scheme dated 15th April 2014 in respect of rice holding No. 227 Unit T-6 Tebere Section originally allocated to DANSON MUTE MUTO measuring 4.5 acres.

2. That an order of prohibition and mandamus do issue against the Senior Scheme Manager – National Irrigation Board Mwea Irrigation Settlement Scheme stopping him from allocating the rice holding No. 227 Unit T-6 Tebere Section or any portions thereof to the interested parties or any other person and such allocations if any be declared null and void and the Senior Scheme Manager be compelled to restore the entire rice holding to the names of the applicant in compliance with the National Irrigation Scheme Regulations and Rules made pursuant to Section 27 of the Irrigation Act Chapter 347 Laws of Kenya and also as per the orders of the Court issued vide WANGURU SENIOR RESIDENT MAGISTRATE CASE No. 26 of 1984 dated 8th February 1985.

3. That costs of this application be borne by the respondent and interested parties.

The application is accompanied by the statement of facts and affidavit verifying the same as is required.
In brief, the applicant's case is that the respondent's proceedings of 15th April 2014 were in breach of the Court's consent order dated 8th February 1985 and were therefore a nullity and ultra vires and should therefore be quashed.

The application is opposed. The respondent has filed grounds of opposition while the interested parties filed a joint replying affidavit.

In its grounds of opposition, the respondent states that the proceedings of 15th April 2014 by its Sub-Advisory Committee with respect to the suit property were judiciously and judicially arrived at and need not be quashed because the respondent is seized with the mandate to issue and allocate licenses which are not absolute. That the parties were given a fair hearing and the rules of Natural Justice were observed and the applicant has not demonstrated which of his rights, if any, were violated when the award was

arrived at. Further, that tenant cards have already been issued and that decision cannot be quashed and in any event, the **WANGURU COURT in CASE No. 26 of 1984** acted without jurisdiction in appointing a successor.

In their replying affidavit, the interested parties depone, inter alia, that at the time of their father's death, the 1st interested party was living at Lamu and the applicant succeeded the suit property to the exclusion of the other children. That the other children therefore complained to the Chief Nyangati Location who called a family meeting to discuss the dispute and it was decided that the suit property be divided as indicated above. The respondent's Scheme Manager at Mwea therefore issued the interested parties with tenant cards for their respective portions of the suit property on which they depend to feed and educate their children. Annexed to that affidavit are the recommendations by the Chief Nyangati Location and the interested parties tenant cards issued on 8th April 2014 in respect to their portions of the suit property being rice holdings No. 227B and 227C respectively.

Submissions have been filed by the firm of **KIGURU KAHIGAH & CO. ADVOCATES** for the applicant, **G.O. OMBACHI & CO. ADVOCATES** for the respondent and **MAGEE WA MAGEE & CO. ADVOCATES** for the interested parties.

I have considered the application, the reply thereto and grounds of opposition, the various annextures and submissions by counsel.

This is a Judicial Review application seeking orders of certiorari, prohibition and mandamus. The scope of the jurisdiction of a Court exercising Judicial Review powers was discussed in the case of ***PASTOLI VS KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300*** where the Court rendered itself in the following terms:-

> ***"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. Such a decision is usually in defiance of logic and acceptable moral standards …. 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 non-observance of the Rules of Natural Justice or to act with un-procedural fairness towards one to be affected by the decision"***

Judicial Review is concerned with the decision making process as opposed to the merits of the decision itself. Therefore, a decision arrived at in disregard of the law or improper assumption of jurisdiction or in breach of the rules of Natural Justice is amenable to quashing by an order of certiorari. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANTS LTD C.A CIVIL APPEAL No. 185 of 2001**, the Court of Appeal stated as follows:-

> "***Judicial Review is concerned with the decision making process itself. The Court would concern itself with such issues as to whether the decision maker had the jurisdiction. Whether the persons affected by the decision were heard before it was made and whether in making the decision, the decision maker 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".***

Broadly speaking therefore, in exercising its Judicial Review jurisdiction, the Court will consider, among other issues, whether there has been abuse or lack of jurisdiction by the body that took the action complained of, whether the action was irrational or taken on the basis of improper motives, whether there was an error of law or an abuse or failure by the body to observe the rules of Natural Justice. Each case

must be considered on its own particular circumstances.

The facts in this case are largely un-disputed and both the applicant and the interested parties have ably summarized the history of the dispute regarding the suit property culminating in the decision of the respondent's Sub-Advisory Committee decision dated 15th April 2014 and which provoked this application. It is not in dispute that the respondent is clothed with the mandate to issue licenses to applicants who wish to occupy and work on rice holdings within the various schemes managed by it. However, in issuing or cancelling such licenses, the respondent must do so in accordance with the law and any act done in contravention of legal procedures will be quashed by the Court. It is the applicant's case that the suit property was allocated to him following a consent order recorded in **WANGURU COURT CASE No. 26 of 1984** on 8th February 1985. That consent order was not availed to the Court and Mr. Magee advocate for the interested parties has taken advantage of that to submit that it is not clear who was present in Court when the suit property was awarded to the applicant. The interested parties in their replying affidavit have deponed at paragraph five (5) as follows:-

> ***"That after the death of our father, the ex-parte applicant succeeded the rice holding without our consent. The 1st interested party was living at Lamu at the time the ex-parte applicant succeeded the rice holding"***

On his part however, the applicant has deponed in paragraph three (3) of his replying affidavit as follows:-

> "***That upon the demise of Mugo Ngai, parties herein at the directions of the Respondent allocating authority instituted succession proceedings vide Wanguru SRM Misc Succession No. 26 of 1984 whereby on 8.2.1985 a consent order was recorded by all the parties to have rice holding No. 227 Unit T-6 Tebere Section be inherited by the Ex-parte applicant (attached is a copy of the proceedings and order thereon marked DMM 1 (a) and (b)".***

The applicant then proceeds to depone in paragraph four (4) as follows:-

> ***"That the order dated 8.2.1985 was duly implemented by the respondent and the suit land registered in the names of the ex-parte applicant who was issued with all relevant ownership documents (attached are copies of tenant card, license and payment receipt marked DMM 2 (a), (b) and (c)"***

Therefore, while the applicant pleads that the suit property was allocated to him by consent of all the family members including the interested parties by a Court order dated 8th February 1985, the interested parties allege that infact the applicant succeeded the same without their consent and infact the 1st interested party was away in Lamu. To answer that question, I have looked at the proceedings of T. Mwangi Principal Magistrate dated 5th November 2013 in **WANGURU PRINCIPAL MAGISTRATE'S COURT CASE No. 26 of 1984** where an attempt was made to refer this dispute to arbitration. In rejecting that request, the trial magistrate made the following pertinent remarks:-

> ***"After perusal of the Court record, the Court has noted that the matter was heard by a competent Court with jurisdiction. A ruling was delivered on 8.2.85. Danson Mute Mugo succeeded rice holding No. 227. This was by consent. The parties/respondents seem to have changed their mind. They filed an application but it was dismissed. Nothing has changed. If they were aggrieved by the decision of the Court they could have preferred an appeal in the High Court"***

That answers the question raised by counsel for the interested parties that there was no consent. The magistrate who made the orders dated 5th November 2013 referred to the consent dated 8th February 1985. That consent essentially settled the dispute relating to this suit property and if the 1st interested party, as alleged, was not party to the same, his remedy lay in appealing against the said order to the High Court. As that was not done, the consent order remains as a valid and binding order of a competent Court as the trial magistrate correctly held in the ruling delivered on 5th November 2013. A consent order can only be set aside by the Court if obtained by fraud or collusion or by an agreement contrary to

the policy of the Court or was given without sufficient material facts or in mis-apprehension or ignorance of material facts or generally for a reason which would enable the Court to set aside a contract – ***BROOKE BOND LIEBIG (T) LTD VS MALIYA 1975 E.A 266***, see also ***FLORA WASIKE VS DESTIMO NAMBOKO 1988 1 K.A.R 625*** and ***KENYA COMMECIAL BANK LIMITED VS BENJOH AMALGAMATED LIMITED & ANOTHER CIVIL APPEAL No. 276 of 1997 (1998) e K.L.R.***

In light of the above consent order recorded by a Court of competent jurisdiction, it is clear to me that both the Chief Nyangati Location and the Respondent's Sub-Advisory Committee acted in excess of their jurisdiction when they purported to re-visit the dispute regarding the suit property. In arriving at its verdict dated 15th April 2014 and which is the subject of this application, the respondent's Sub-Advisory Committee appears to have been influenced by the recommendations of the said Chief and stated:-

> ***"VERDICT***
>
> ***The Committee concluded that the holding to remain as it had been discussed in the Chief's office as per the agreement of the family i.e.***
>
> ***1. Danson Mute Mugo to hold 2 acres***
>
> ***2. Fredrick Mugweru Mugo to hold 1 ½ acres***
>
> ***3. Symon Wambugu Mugo to hold 1 acre"***

I have looked at the minutes of the meeting held by the Chief Nyangati Location dated 13th January 2014 and they end by stating as follows:-

> ***"These are just findings and recommendations to advice any office which is willing to settle dispute in this family to prevent any bad happenings to the family"***

The applicant has of course disputed the Chief's decision saying he never participated in it. The record shows that he was present but that notwithstanding, the law does not cloth the Chief with the jurisdiction to review or vary an order made by a Court of competent jurisdiction. And neither did the respondent's Sub-Advisory Committee have such jurisdiction either acting on its own or pursuant to any recommendations from the said Chief or any other person or authority. If the parties were minded to re-visit their consent recorded on 8th February 1985, the only recourse would have been to have such a consent recorded by the Court. It is clear from the proceedings before the respondent's Sub-Advisory Committee of 15th April 2014 that the applicant "***was not ready to share the holding with his brothers because his father had given him the holding".*** Clearly therefore, even if there was any attempt to arrive at an amicable settlement of this dispute outside the Court, nothing appears to have been achieved in that direction.

The issue before this Court therefore is whether the respondent's Sub-Advisory Committee's decision dated 15th April 2014 was arrived at in excess of jurisdiction and ought to be quashed. Jurisdiction is everything and without it, a Court or tribunal must down its tools – ***THE OWNERS OF THE MOTOR VESSEL 'LILLIAN S' VS CALTEX KENYA LTD 1989 K.L.R 1***. It is also clear from the ***PASTOLI*** case (supra) that where the complaint raised is that the decision making authority acted without jurisdiction or ultra vires or contrary to the provisions of a law, a Court exercising its Judicial Review powers will intervene to quash any decision arrived at. In this case, the respondent's Sub-Advisory Committee acted in excess of its jurisdiction by purporting to reverse a decision arrived at by a competent Court when there was even no basis for doing so. That action on the part of the respondent's Sub-Advisory Committee was contrary to ***Article 47 (1) of the Constitution*** which provides as follows:-

> "***Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair"*** - emphasis added

There is nothing to suggest that the applicant had contravened any of the obligations cast upon him in the

management of the suit property. Whereas the respondent has the right to determine who shall be given a license for a rice holding, such powers must be exercised in accordance with the law and procedure. It was un-lawful and procedurally improper for the respondent's Sub-Advisory Committee to review a consent order by a competent Court. This Court has the mandate to look into whether any tribunal or authority has stepped outside the field of operation entrusted to it by law. In the circumstances of this case, I am satisfied that the applicant is entitled to an order of certiorari to quash the respondent's Sub-Advisory Committee verdict dated 15th April 2014.

The applicant also seeks orders for prohibition and mandamus to stop the Manager National Irrigation Board Mwea Irrigation Scheme from allocating this suit property or any portion thereof to the interested parties or any other person and such allocations, if any, be declared null and void and the said Manager be compelled to restore the suit property to the names of the applicant as per the Court orders dated 8th February 1985. The respondent through its Manager Mwea Irrigation Scheme has already held its meeting and sub-divided the suit property between the applicant and the interested parties and issued them with tenant cards and licenses for their respective portions. Prohibition looks to the future and although the respondent's Manager has already made the decision sought to be prohibited, only an order of certiorari can quash an order already made if the Court is satisfied that the same was done in excess of jurisdiction or in abuse of the rules of Natural Justice or for any other valid reasons – ***KENYA NATIONAL EXAMINATION COUNCIL VS REPUBLIC EX-PARTE GEOFFREY GATHENJI & OTHERS 1997 e K.L.R.*** This Court has already made a finding that the respondent's Sub-Advisory Committee verdict dated 15th April 2014 was arrived at in excess of jurisdiction and therefore null and void. There is therefore nothing left to prohibit. As **LORD DENNING** observed in the case of ***MACFOY VS UNITED AFRICA COMPANY 1961 3 ALL E.R 1169***

> ***"If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without much add though it is sometimes convenient to have the Court declare it to be so. And everything which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse".***

As the sub-division of the suit property was done pursuant to orders that were in excess of jurisdiction, it follows that what was done by the respondent's Sub-Advisory Committee was a nullity and of no legal effect and cannot stand.

The applicant has also sought an order of mandamus to compel the respondent's Scheme Manager to restore the suit property in the names of the applicant. An order of mandamus is usually in the form of a command directing any person, authority or tribunal to do some act specified thereon which appertains to their office. Its purpose is to remedy what has been done contrary to the law and where the applicant has a legal right to expect such duty to be performed – ***KENYA NATIONAL EXAMINATION*** case (supra). The applicant's right to the suit property was taken away contrary to the law and he is therefore entitled to an order to re-store him back to the position in which he was prior to 15th April 2014 when the un-lawful verdict was arrived at.

In the premises and upon considering all the matters herein, this Court enters judgment for the applicant in the following terms:-

> ***1. An order of certiorari is hereby issued removing to this Court for purposes of quashing the decision of respondent's Sub-Advisory Committee made on 15th April 2014 sub-dividing the suit property between the applicant and the interested parties. Any action taken in respect of the suit property pursuant to the said decision is therefore null and void and of no legal effect.***
>
> ***2. An order of mandamus is issued compelling the respondent's Senior Scheme Manager Mwea Irrigation Settlement Scheme to restore the entire suit property to the names of the applicant as per the orders of the Court issued on 8th February 1985 in WANGURU SENIOR RESIDENT MAGISTRATE'S COURT CASE No. 26 of 1984,***

3. The respondent shall meet the applicant's costs.

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Judgment dated, delivered and signed in open Court this 19th day of August, 2016

Ms Kiragu for Interested parties present

Mr. Kahiga for Applicant absent

Mr. Macharia for Mr. Ombachi for the Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

19TH AUGUST, 2016