



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

JUDICIAL REVIEW APPLICATION NO. 18 OF 2013

**IN THE MATTER OF AN APPLICATION BY DAVID GATUIKUNDUBAI FOR LEAVE TO
APPLY FOR ORDERS OF JUDICIAL REVIEW**

AND

IN THE MATTER OF LAND DISPUTE TRIBUNAL ACT NO. 18 OF 1990

REPUBLIC APPLICANT

VERSUS

MANAGER MWEA IRRIGATION SCHEME1ST RESPONDENT

JULIANA WAMBURA 2ND RESPONDENT

FAITH NJOKI3RD RESPONDENT

MARGARET NJERINDUBAI4TH RESPONDENT

DAVID GATUIKUNDUBAIEX-PARTE APPLICANT

JUDGMENT

By his Notice of Motion filed herein on 4th November 2011, the Applicant sought the following orders:-

1. *That an order of certiorari do issue to remove into the High Court for purpose of quashing the decision of Mwea Irrigation Scheme*
2. *That costs of this application be provided for*

The main ground on which this application was filed is that the Applicant was not heard by the Mwea Irrigation Scheme before a decision was made to sub-divide his holding No. 2126 and give a portion to the 2nd, 3rd and 4th Respondents herein.

In her replying affidavit on behalf of the 2nd and 3rd Respondents herein, the 4th Respondent (MARGARET NJERINDUBAI) deponed that the applicant is their brother and that rice holding No. 2126 Thiba Section belongs to their late father NDUBAIKARUBU who was succeeded by the Applicant to hold in trust for the 2nd, 3rd and 4th Respondents. However, the Applicant has secretly and without the knowledge of the 2nd, 3rd and 4th Respondents sold one acre to two other persons which made the 2nd, 3rd and 4th Respondents report to the Manager of the 1st Respondent. Thereafter, a Committee of the 1st

Respondent heard their grievances and on 16th June 2011 made an award sub-dividing the rice holding No. 2126 Thiba as follows:-

- a. **Applicant - 3 acres**
- b. **2nd Respondent - ½ acre**
- c. **3rd Respondent - ½ acre**
- d. **4th Respondent - ½ acre**

That they and their families depend on the said rice holding and the applicant has even been convicted in Court for interfering with their portion. A replying affidavit was also filed by HOSEA K. WENDOT the 1ST Respondent's Senior Manager in which he depones, inter alia, that the Applicant was given an opportunity to be heard and ought to have appealed if dissatisfied.

Submissions were filed by both Mr. Magee Advocate for the Applicant and Mr. Ombachi Advocate for the Respondent.

I have considered the application, the rival affidavits and annexures and submissions.

The main ground on which this application is founded is that the Applicant was not heard by the Mwea Irrigation Scheme (1st Respondent herein) before the decision to sub-divide the rice holding was made. The Applicant is therefore alleging that the 1st Respondent was in breach of the rules of natural justice and he is therefore entitled to Judicial Review orders quashing that decision.

Judicial Review is concerned not with the merits or otherwise of the decision but rather, the decision making process. In the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD C.A CIVIL APPEAL NO. 185 of 2001 (NBI)**, the Court of Appeal set out the duty of a Court in a Judicial Review application as follows:-

“The Court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did those who made the decision have the power i.e. jurisdiction to make it? Were the parties affected by the decision heard before it was made? In making the decision, did the decision-maker take into account relevant matters or did it take into account irrelevant matters?”

The right to be heard is embodied in the Latin phrase “***and; alterampartem***” which means hear the other side. It imposes a duty on a Tribunal determining a dispute to fairly hear both parties before making a decision and this basically means giving the parties an opportunity to give their sides of their case. This duty has now attained Constitutional embodiment as provided in **Article 25 and 50 of the Constitution. Article 50(1)** of the Constitution provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body”

As is clear from the authors of **W.R WADE and C.F. FORSUTU** in their text **ADMINISTRATIVE LAW 10th Edition Page 433**, where an oral hearing is given, the tribunal must consider all the relevant evidence which a party wishes to adduce and allow the parties to call their witnesses. The ordinary rule is that a party who is likely to be affected by an order must be afforded an opportunity of being heard as to why that action should not be taken. In **REPUBLIC VS DEPUTY INDUSTRIAL COMMISSIONER Ex-parte MOORE 1965 1 Q B 456 at 490**, the Court observed that the rules of natural justice require a tribunal to listen fairly where a hearing has been requested or there is a hearing whether requested or not.

I am not in doubt that the 1st Respondent was the right forum to resolve the dispute regarding the rice holding No. 2126 Thiba. Indeed as the managers of the scheme, the 1st Respondent has the powers to issue licences and even terminate them as it exercises its authority to regulate the manner in which the

land in the scheme is used. However, in exercising the powers conferred upon it by the **Irrigation Act Cap 347 Laws of Kenya** and **Regulations** thereunder, the 1st Respondent must operate within the law and the rules of natural justice. For record purposes, this Court in **ENVIRONMENT AND LAND COURT KERUGOYA CONSTITUTIONAL APPLICATION NO.5 OF 2014 CATHERINE MURIITHI'S MANAGER MWEA IRRIGATION SETTLEMENT SCHEME & ANOTHER** upheld the Scheme's decision where the law was not infringed.

In an attempt to resolve the dispute between the applicant and the 2nd, 3rd and 4th Respondent with respect to the use of the rice holding No. 2126 Thiba, the 1st Respondent invited the parties herein to appear before the Scheme Advisory Committee for a hearing in the following terms:-

“RE: RICE HOLDING NO. 2126

You are hereby invited by the Scheme Advisory Committee to attend a hearing of a case concerning the above holding at Mis Guest House on Thursday, 16th June 2011 stating at 10. a.m.

Please attend without fail and observe punctuality

H.K. Wendot

Secretary, Scheme Settlement”

(emphasis added)

It is clear from the above invitation to the parties that what was contemplated to happen on 16th June 2011 was a **hearing** of the dispute regarding the rice holding No. 2126 Thiba. From the material placed before me, there is nothing to show that any hearing took place on 16th June 2011. The record of what transpired before the Advisory Committee meeting of the 1st Respondent is annexed to the Applicant's Supplementary affidavit filed herein on 13th November 2014 following leave granted on 11th November 2014. The record shows that the Applicant and the 2nd, 3rd and 4th Respondents were present but there is no record that they addressed the Committee. The one page record only gives a case background of the dispute and the verdict arrived at. It does not show that either the Applicant or Respondents addressed the Committee or what they said in support of their respective cases. Having been called for a **hearing**, the Applicant must have had a legitimate expectation that he will have an opportunity to present his side of the dispute. In **BLACK'S LAW DICTIONARY 9th Edition**, a hearing is defined to include:

“Administrative law. Any setting in which an affected person presents arguments to a decision maker”

It may very well be that the Applicant was given an opportunity to state his case but failed to do so. However, the record must reflect that. It may very well be that the Committee would still have arrived at the same decision whether or not it heard the Applicant or that the decision it arrived at was in the best interest of all the parties herein. What Judicial Review is concerned about, however, is the process by which the decision was arrived at. In the face of the rival assertions by the parties herein, the Court can only rely on the record of what transpired on 11th June 2011 when this dispute was supposed to be heard by the 1st Respondent's Advisory Committee and that record which I have perused does not reflect that the Applicant was heard in support of his case. In **KANDA VS GOVERNMENT OF MALAYSIA 1962 A.C.322** Lord Denning had the following to say about a proper hearing:-

“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them”.

In the Landmark decision of the House of Lords in **RIDGE VS BALDWIN 1964 A.C 40**, it was recognized that the rules of natural justice and in particular, the right to a fair hearing apply not only to bodies having a duty to act judicially but also to bodies exercising administrative duties. In the **RIDGE VS BALDWIN** case (supra) Lord Hudson identified three features of natural justice as:-

1. ***The right to be heard by an un-biased Tribunal***
2. ***The right to have notice of the charge of misconduct***
3. ***The right to be heard in answer to these charges.***

Although natural justice is a principle of universal application, it is nevertheless flexible and its requirement must depend on the circumstances of each case, the nature of inquiry, the rules under which the Tribunal is acting, the subject matter being dealt with etc – **RUGSELVS DUKE OF NORFOLK 1949 1 ALL.E.R 109.**

Applying the above principles to this case, it is evident that the Applicant was the licensed holder of rice holding No. 2126 Thibasince 27th March 1992 as per his Tenant Identification Card. The decision of the 1st Respondent in sub-dividing that rice holding was a drastic step that affected both the right and livelihood of the Applicant yet there was no allegation of misconduct on the part of the Applicant. At least the letter inviting him to the meeting did not allege any misconduct. In my view, in a situation such as this where a licence was interfered with, the case for application of rules of natural justice is even stronger. In his replying affidavit in opposition to the application, HOSEA K. WENDOT the Senior Scheme Manager of the 1st Respondent has deponed, inter alia, that the termination of the Applicant's tenancy was proper and if he was dissatisfied with the decision, he ought to have appealed within 28 days. The power to terminate a licence is provided for under **Regulation 22 (1) of the Irrigation (National Irrigation Schemes) Regulations** which states as follows:-

“Where the manager is satisfied that a licensee has failed to comply with any of the provisions of these Regulations, or with any instructive given thereunder or under any other law for the time being in force, he may serve a notice in writing on the licensee requiring him to comply with the said provision, instructions, or regulations within such time as is specified in the notice”

Sub-rules (2) (3) (4) and (5) of the same Regulation provides that a licensee who fails to comply with such notice may be called upon to show good cause why the licence should not be terminated and if he fails to do so, the manager may give him notice to remove himself, his dependants and his stock from the scheme and he may appeal within 28 days of such notice to the Minister.

No notice was of course served upon the Applicant but having summoned him for a hearing, the Advisory Committee, as is now clear from what I have stated above, ought to have heard what he wanted to say about the rice holding before making its decision to sub-divide it. That was especially so considering that no allegation of misconduct had been levelled against the Applicant with regard to his management of the rice holding. That is what the principles of natural justice require.

It has also been deponed by Mr. Wendot in paragraph 11 of his replying affidavit that the Applicant ought to have appealed within 28 days to the **Agricultural Appeals Tribunal**. That Tribunal is mentioned in **Section 26 of the Irrigation Act** and deals with appeals by persons aggrieved by the revocation by the National Irrigation Board at the appointment of an agent. That does not apply in the circumstances of this case. The Applicant's right of appeal could only have been exercised under **Regulation 22(4)** of the Irrigation Regulations which reads:-

“A licensee who is given notice under paragraph (3) may, within twenty eight (28) days of such notice, appeal in writing to the Minister whose decision shall be final”

The Applicant was of course given no such notice so it is not clear how else he could have exercised his right of appeal even if he had wanted to do so.

Therefore, the argument by the 1st Respondent that the Applicant could have appealed cannot be

sustained and in any event the availability of another remedy is not a bar to an application for Judicial Review.

It is clear to me therefore that there was a violation of the rules of natural justice in the manner in which the 1st Respondent conducted the proceedings of 11th June 2011 which led to the sub-division of the rice holding No. 2126 Thiba which was registered in the Applicant's names. While it is true that the Applicant was present at the meeting, the record does not reflect that his side of the dispute was considered. Mere presence at the meeting did not amount to a hearing and it has not been suggested that he was invited to give his side of the case and that he declined to do so. If that was the position, the record of the proceedings ought to have reflected that indeed that was what transpired at the meeting. Unfortunately, as I have shown above, the record of the meeting is quiet on what went on and this Court can only conclude that the Applicant was not given an opportunity to put forward his side of the dispute and this was in breach of the rules of natural justice.

Ultimately therefore, having considered all the evidence herein, I find merit in the application filed in this Court on 4th November 2011 and accordingly issue an order of certiorari to remove into this Court and quash the decision of the Mwea Irrigation Scheme in respect of rice holding No. 2126

The 1st Respondent shall meet the Applicant's costs.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

MsKiragu for Applicant – present

Mr. Ombachi for Respondent – present

COURT: Judgment delivered this 18th day of September 2015 in open Court.

MsKiragu for the Applicant – present

Mr. Ombachi for Respondent – present

Right of appeal explained.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

Explanatory note on delay

This judgment was due on 8th May 2015. However, I took leave to attend to my sick mother who later

passed on. I was out of the country until 7th July 2015 when I resumed duties but the Court went on vacation till 16th September 2015 thus necessitating the delay which is however regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015