



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
MISC. APPLICATION. NO.1 OF 2007 (JR)

SAMUEL MBIRI NGUU & 19 OTHERS.....APPLICANTS

VERSUS

THE HON. THE ATTORNEY GENERAL..... 1ST RESPONDENT

THE HON. THE MINISTER OF LANDS

(TO E.N. OGEKA DIRECTOR OF LAND ADJUDICATION)..... 2ND RESPONDENT

R U L I N G

1. This is the Notice of Motion dated 29th July 2013 brought under Order 53 rule 3(2) Civil Procedure Rules, Section 1A, 1B and 3A Civil Procedure Act seeking the following orders;
 - i. *That this application be certified as urgent and service be dispensed with in the first instance.*
 - ii. *That there be a stay of execution of the orders issued by the Honorable Court on 29th September 2009 and further orders issued on 25th June 2013 pending hearing and final determination of this application.*
 - iii. *That the Honourable Court be pleased to join the **NATIONAL IRRIGATION BOARD** as an Interested party.*
 - iv. *That the orders issued by the Honourable Court on 29th September 2008 be set aside and the suit be heard afresh.*
 - v. *That costs of the application be provided for.*

The first two prayers were allowed in the first instance.

2. The application is premised on the following grounds;
 - i. *The parcel of land in dispute was legal Notice No.3099 of 1960 set apart by the Government of Kenya for use by the National Irrigation Board for use as an irrigation scheme by the National Irrigation Board.*
 - ii. *That to date the land has never been de-gazetted.*
 - iii. *That the Applicant was never served with any documents relating to this suit though documents on record show that it has an interest in the suit land.*
 - iv. *That the orders issued by the Court are prejudiced to the proprietary interests of the Applicant who stands to suffer grave prejudice if the orders are left to stand.*
 - v. *That in the event that the said orders are executed the same will lead to chaos within the Mwea Irrigation Scheme with other licencees occupying scheme land as provided in the Irrigation Act seeking to be given title deeds.*

3. It is further supported by the affidavit of Engineer Daniel Barasa the general Manager of National Irrigation Board. His main averment is that the suit land parcel No.MWEA/CHUMBIRI/BLOCK 52-55 KIRINYAGA falls under the area known as Mwea/Tebere Irrigation area in the Kirinyaga County formerly Kirinyaga District of Central Province. The land belongs to National Irrigation Board as shown by the maps DB2 & 3 yet they were never made parties to this case.
4. He also attached a number of annexures DB4 & 6 showing Gazette Notices, letters, Minutes etc. He averred that the letter (SM3) written by a Senior Scheme Manager of Mwea Irrigation Settlement Scheme dated 17/10/2000 was written in error.
5. Karani Kabui the 14th Exparte Applicant filed a long replying affidavit sworn on 16th August 2013. He denies that the suit land belongs to National Irrigation Board (the Applicant).
6. He has raised the issue that no compensation was ever paid to any of them for the suit land to be acquired by the Applicant.
7. Further he averred that several correspondences confirm that the land had not been adjudicated and that the Applicant had no interest in the land (KK 2-5).
8. That since the commissioner for lands and Attorney General had filed a Notice of Appeal the said appeal should be heard first.
9. All Counsel agreed to dispose of the application by way of written submissions. In her submissions Notice M/s Kimani for the Applicant stated that the Applicant and the Defendant County Council of Kirinyaga had been exhibited as persons most likely to be directly affected by any orders issued by the Court herein. Ref: **SMN6**. And failure to serve such persons was fatal to the proceedings Ref: **REPUBLIC –V- A.G. & ANOTHER exparte ABERDARE ENGINEERING LTD [2007]e KLR**.
10. Further she contended that there had been reluctance to issue any title deeds because the concerned officers knew that the said land had been set apart for use by the Government in the mid-sixties **DB5 plus DB2, DB3 and DB4**.
11. She disputed the contention that the suit land was Trust Land as the same had been set apart for use by the Applicant much earlier vide Gazette Notice No.3099/1960.
12. A Court mandated visit confirmed that no one resides on the said land, but it is under cultivation. And that there was clear demarcation between National Irrigation Board and the neighbouring sections. The report of the team was annexed to the supporting affidavit.
13. It was her contention that once land has been set apart for Public use the same cannot thereafter be allocated to private individuals. He cited the case of;
 - i. **JAMES JORAM NYAGA –VS- THE A.G. & ANOTHER [2007]e KLR**
 - ii. **JOHN KIGURU KARUMEN –V- KENYA INSTITUTE OF ADMINISTRATION COUNCIL HIGH COURT ELC NO. 80/09**
14. Finally she submitted that the application dated 18/10/2007 was not properly intitled in the name of the Republic and should have been struck out. She referred to the case of **WELAMONDI –VS- THE CHAIRMAN ELECTORAL COMMISSION OF KENYA [2-2] e KLR**.
15. Mr. P.N. Mugo for the Exparte Applicants/Respondents opposed the application. He submitted that the Applicants did not have *locus standi* as they had no interest in the suit land. And that from the various correspondences e.g. letters dated 18/1/1990, 16/9/1995/ 24/6/1996, 19/6/2000, 7/8/2000, 29/8/2005, 25/10/2005 (annexures), it was clear that the Applicants denied ownership of the said land.
16. And based on the above they could not have found it necessary to serve the Applicants.
17. He also submitted that the suit land has never been acquired for the Applicants as there has been no enquiry, no compensation and no taking possession as the Respondents have been in possession for the last 50 years. He further argued that the Applicants were established in 1966 and land could not have been set aside for them vide Gazette Notice No.3099 of 1960 when they were non-existent.
18. It's his submission that the suit land being community land could not have been set apart by the Minister as is purported to have been done. It was only the Council which could have done so, for land falling under it as the suit land.
19. The Attorney General for the 1st and 2nd Respondents filed submissions through M/s Chimau the learned State Counsel who extensively argued on principles of law laid out in **KIGULA &**

- OTHERS –V- ATTORNEY GENERAL [2005]1 E.A. 132***, Article 50(I), Article 27(1), Article 159 And Article 259 of the Constitution. She submitted that the best cause to take would be to set aside the orders complained of and enjoin the Applicants as Interested Parties herein.
20. She also submitted that the Applicants had shown why they did not participate in the earlier proceedings and yet they have an interest in the subject matter herein.
21. **A factual background**

The Respondents herein are said to have been in occupation of the suit land now for over 50 years. From the correspondence vide letters annexed herein there have been numerous attempts to have the land adjudicated and title deeds issued in vain.

22. Following the frustrations above the *Exparte* Applicants/ Respondents sought leave and filed the present Judicial Review seeking the following orders;
- ii. *Mandamus to compel the Hon. Minister for Lands by himself or servants to complete the consolidation, registration and issuance of title deeds on the suit land namely MWEA/CHUMBIRI/BLOCK 52 – 55 KIRINYAGA to the exparte Applicants.*
 - iii. *Prohibition to restrain the Minister for Lands from alienating, transferring, disposing or allotting/or in any other way interfering with the ownership occupation or issuance of title deed of the said land except for the purpose of consolidation, registration, issuing of title deeds to the Expart Applicants.*
23. On 12/2/2008 P.N. Mugo for *Exparte* Applicants and Mr. Cherogony for 1st and 2nd Respondents entered into a consent where the Notice of Motion dated 18/10/2007 was to be amended within 14 days and the Attorney General to file a replying affidavit within 14 days of service.
24. On 2/5/2008 an *exparte* hearing date was taken for the said application.
25. On 29/9/2008 when the application came for hearing Mr. P.N. Mugo for the *exparte* Applicants was present but Mr. Cherogony for the Attorney General was absent. M/s P.N. Muinithira held his brief and told the Court that she had only learnt of the matter while in Court and had nothing to tell the Court. She therefore left the matter to the Court.
26. Mr. P.N. Mugo then argued the application and the Court ruled in favour of the *exparte* Applicants in a Ruling dated the same day i.e. 29th September 2008.
27. Following the failure by the 1st and 2nd Respondents to act as per the Ruling of 29/9/2008 the *exparte* Applicants sought leave and did file an application for contempt against the Director of Land Adjudication M/s E.N. Ogega. The application is dated 13/8/2012.
28. It is this application dated 13/8/2012 that awoke the Attorney General. Senior Officers from the lands office were even sent to the site to try and trace this parcel of land. A Ruling in respect of the application for contempt was delivered on 25/6/2013 and M/s Ogega was given 45 days within which to act.
29. It was at the point of the hearing of the contempt application that the Attorney General tried to mention to the Court that the suit land belonged to National Irrigation Board and wanted National Irrigation Board enjoined as a party to the proceedings.
30. I have considered all the submissions by Counsel plus the affidavits, annexures and authorities which I must say have been very helpful.
31. I have deliberately given the full factual background to show the frustration the Courts and parties have to go through because of the inaction by the office of the Hon. Attorney General who is the Legal adviser to Government. Why did Mr. Cherogony not file a replying affidavit in this matter at the first instance?
32. Even M/s E.N. Ogega who wants to plead so much innocence over this matter is the same one who had been writing to the parties the various letters annexed herein prior to the filing of this matter in Court. She never at any one point mentioned the existence of Gazette Notices setting apart the suit land for public use.
33. Having stated the above I now wish to address the main issue here. And the issue is whether the Applicants have made out a case for their enjoinder as Interested Parties and for issuance of the other Orders sought.
34. The application was brought under Order 53 Rule 3(2) Civil Procedure Rules and Section 1A, 1B

and 3A Civil Procedure Act. The 1st application that resulted in the Orders sought to be set aside was filed under Order 53 Civil Procedure Rules. Further Order 53 Rule 2 Civil Procedure Rules provides;

“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of proceeding or such shorter period as may be prescribed by any act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired”.

35. The *ex parte* Applicants were expected to notify all parties who could have been affected by the Orders sought of their intended action. It's clear that the present Applicants were not any of such parties by virtue of the correspondence in the possession of the *ex parte* Applicants. They did not therefore notify them as required under the above provision.
36. The Applicants are saying they are aggrieved by the Orders of the Court because the suit land belongs to them while the 1st and 2nd Respondents are saying they are unable to implement the Orders of the Court as registering the *ex parte* Applicants would infringe on the rights of the Applicants.
37. The Applicants would still have come for review under Order 45 Rule (1) (1) which provides;

“Any person considering himself aggrieved –

- a. ***By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
- b. ***By a decree or order from which no appeal is hereby allowed;***

and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or make the order without unreasonable delay”.

38. In as much as there are correspondences from the offices of the Respondents and the then County Council of Kirinyaga none of those offices brought up the issues of the Gazette Notices setting apart this suit land for purposes of irrigation (Ref: Gazette Notice 3099 of 1960).
39. It's however clear again from the correspondences that the *ex parte* Applicants sought clarifications from MWEA IRRIGATION SCHEME, THE LANDS REGISTRAR KIRINYAGA & DIRECTOR OF ADJUDICATION but were never assisted.
40. Had somebody in these offices been diligent enough, the issue of Gazette Notice No.3099 of 1960 would have come up and the issue sorted out. Unfortunately this did not happen.
41. The interest claimed by the Applicants is based on this Gazette Notice No.3099/60. They were however not notified when this matter was filed in Court so that they could defend their interest in the suit land.
42. If indeed this land was set apart for irrigation purposes as stated in Gazette Notice No.3099/60 could it be or can it be available for allocation to individuals for private use? The answer is **NO**. I refer to the case of;

JAMES JORAM NYAGA & ANOTHER –V- THE ATTORNEY GENERAL & ANOTHER [2007]e KLR.

43. The Court can only know what is the real position in the records of this suit land and on the grounds when all the Interested parties have been brought on board. It's at that point that the real issues of this land can be determined. It has also been confirmed that no title deeds have been issued and no one lives on the suit land which is only under cultivation.

44. I therefore find that;

- i. *The Applicants have satisfied this Court that they have an interest in this suit land.*
- ii. *They are also aggrieved by the Ruling of 29/9/2008*
- iii. *They were never served with any Notices as required under Order 53 rule 2 Civil Procedure rules.*

45. It is also not lost to this Court that the careless handling of the 1st and 2nd Respondents case led to the *ex parte* Applicants application being heard *ex parte*. The Ruling of 29/9/2008 was therefore made after an *ex parte* hearing. It's not correct for Mr. Mugo to submit that the application was heard *inter partes*.

46. The Rules of natural justice demand that every party in a dispute be accorded an opportunity to be heard. Article 50(1) of the Constitution provides;

“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”.

47. In this case was the Applicant accorded such an opportunity? The answer is “**NO**”. Even the 1st and 2nd Respondents were not heard though that was not the *ex parte* Applicants fault.

48. Considering all the material now before the Court especially Gazette Notice 3099/60 it is only fair and just that the *ex parte* Orders made on 29/9/2008 and all consequential Orders be set aside. All Interested parties including the former County Council of Kirinyaga (now County Government of Kirinyaga) be brought on board by being enjoined as Interested parties in this matter.

49. I therefore allow the application and grant the following orders;

- i. *The Orders of 29/9/2008 plus all other consequential Orders are set aside.*
- ii. *National Irrigation Board and other Interested parties to be enjoined as parties and to be served with the application.*
- iii. *The matter to be heard afresh by the Environment Land Court Kerugoya High Court under whose jurisdiction the matter falls. File accordingly transferred.*
- iv. *Costs in cause.*

DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 26TH DAY OF MAY 2014.

H.I. ONG'UDI

J U D G E

In the presence of;

Mr. Mwangi for P.N. Mugo for Respondents

M/s Chimau for A.G. and holding brief for M/s Kimani for Applicants

Njue/Kirong – C/c