



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CONSTITUTIONAL & JUDICIAL REVIEW APPLICATION NO. 47 OF 2013

IN THE MATTER OF MWEA IRRIGATION SETTLEMENT HOLDING NO. 2441 THIBA SECTION

AND

IN THE MATTER OF MWEA IRRIGATION SETTLEMENT SCHEME ADVISORY SUB-COMMITTEE HEARING ON HOLDING NO. 2441

REPUBLICAPPL ICANT

VERSUS

NATIONAL IRRIGATION BOARD1ST RESPONDENT

MWEA IRRIGATION SETTLEMENT SCHEME BOARD2ND RESPONDENT

RUTH WANJIKU3RD RESPONDENT

NAHASON NJENGA 4TH RESPONDENT

DICKSON NJUGUNA GITHINJI5TH RESPONDENT

PETER GACHERU GITHINJI6TH RESPONDENT

AND

JAMES WAWERU GITHINJIEXPARTE APPLICANT

JUDGMENT

By his Notice of Motion filed herein on 20th January, 2014 the applicant sought the following substantive order against the respondents:-

- a. *That this Court be pleased to issue orders in Judicial Review in the nature of certiorari and prohibition as against Mwea Irrigation Settlement Scheme Board decision of 29th October, 2013 on rice holding No. 2441 Thiba Section by removing to this Court and quashing the said decision and prohibiting the respondents from in any way altering the ownership records in the*

ex parte applicant's name
b. *That costs be provided*

The application was based on the grounds appearing on the face of the same and supported by the verifying affidavit of the applicant JAMES WAWERU GITHINJI in which he deponed, inter alia, that the 3rd, 4th, 5th and 6th respondents are his mother and brothers respectively and that his father GITHINJI GICHERU was the registered owner of the Mwea Irrigation Scheme Rice holding No. 2441 Thiba Section. Their father disappeared without trace abandoning the said rice holding and leaving behind debts which he single handedly struggled to pay and in 1992 the family agreed that the rice holding be transferred to him. The 2nd respondent decided to have the matter settled in Court and referred it to the Wanguru Court which in Case No. 31 of 1992 made an order that the applicant be registered owner of the said rice holding and on 18th February, 1993, the 1st respondent duly approved him as the holder of the said rice holding. Since then, none of his siblings nor his mother have laid claim to the said rice holding which he has extremely developed.

On 24th October 2013, he was summoned by the 2nd respondents Advisory Committee to attend a hearing over the same rice holding yet he was not aware about any dispute. He attended the meeting and told the Committee that it had no mandate to change what the Court had ordered but the Committee decided to award three (3) acres to his brothers. That led to this application.

The 6th respondent swore a replying affidavit on behalf of the 3rd, 4th and 5th respondents in opposition to this application.

He deponed, inter alia, that the rice holding belongs to the 1st respondent which can revoke the licence as it is the only body mandated to do so under **Sections 14 and 15 of the Irrigation Act**. He added that upon hearing all the parties concerned the 1st respondent divided the four (4) acre rice holding into four equal portions of one acre each between the applicant and the 3rd, 4th and 5th respondents and tenant cards were issued accordingly. Each of them has been paying the operation and maintenance charges to the 1st respondent. He added that when their seedlings were ready for transplanting, the applicant sprayed them with herbicide and they are now withering. He added further that the applicant has not come to Court with clean hands.

On their part, the 1st and 2nd respondents filed grounds of opposition to the application and raised the following grounds:-

- ***That the Board acted within its mandate under Chapter 347 Laws of Kenya***
- ***That the Board never overturned the order in Wanguru Case No. 31 of 1992***
- ***That the Board never sat on appeal or review of the decision of the Court and acted within its jurisdiction***
- ***That the Board is mandated to issue licences, terminate and regulate the manner and use of the land including the number of occupants***
- ***That the licence granted to the applicant was not absolute and that the Board acted judicially and judiciously in determining the right of the parties***
- ***That the parties were given a fair hearing***
- ***That this Court lacks the mandate to interfere with the Board's decision arrived at on 29th October, 2013 and to do so would be to usurp the Board's powers.***

All the parties filed their written submissions in support of their respective cases.

I have considered those submissions together with the application, the rival affidavits, the grounds of opposition, the annexures and the law.

From the evidence before me, it is not in dispute that the rice holding No. 2441 Thiba Section was previously registered in the names of one GITHINJI GICHERU who is husband to the 3rd respondent and

father to the applicant and the 4th, 5th and 6th respondents. It is not known where he disappeared to but what is clear is that he left behind a debt owed to the 2nd respondent of over Ksh. 35,000/= and on 10th August, 1992, his family met and decided that in recognition of the applicant having worked to clear the said debt, the rice holding should be registered in his names. The family therefore wrote a letter under the signature of the 6th respondent who is the eldest son and addressed it to the 2nd respondent expressing the family's wish. The contents of the said letter are germane to this application and it is therefore important that I reproduce them;

“The Senior Manager

MWEA IRRIGATION SETTLEMENT

Thro

The Irrigation Officer

Thiba Section

RE: TRANSFER OF HOLDING NO. 2441

With humble and much regards I request the above holding No. 2441 to be transferred to Mr. James Waweru Githinji ID NO. 0318315/63.

I am Peter Gicheru being the elder in my father's family and all other brothers of mine have agreed together with our mother that the above named brother to be hold of No. 2441.

The owner Githinji Gicheru (my father) deserted the settlement in 1985 after being a scheme's debtor of over thirty five thousand shillings (35,000). Since then, his whereabouts is unknown.

James Waweru being our brother have worked in the holding wholly heartily and cleared the said debtor.

Sir I wish to inform you that he really struggle to get money during the peak period for transportation and harvesting because the account bears his name.

Si, I would be very grateful if my request meets your sympathy

Yours faithfully

Peter Gacheru Githinji

ID/NO. 0318364/63”

The 2nd respondent clearly did not have any problem with the request contained in the above letter and on 20th August, 1992, its Senior Scheme Manager wrote to the District Magistrate at Wanguru to file the case, hear it and inform it of the decision. The 2nd respondent even enclosed the family's letter. As there was really no dispute that the Court at Wanguru was required to resolve over that rice holding, all that the 2nd respondent wanted was the Court's approval of the decision of the applicant's family with regard to the rice holding No. 2441. This decision may have been guided by **Regulation 7 (3) of the Irrigation (National Irrigation Scheme) Regulations 1977** which was strictly not applicable because, although the original licensee Githinji Gicheru had disappeared, there was really no evidence that he was dead. Perhaps all the parties herein were assuming the presumption of the death of the said Githinji Gicheru as provided under **Section 118 A of the Evidence Act** though even then, a Court would have to be moved to

make that presumption.

That notwithstanding, the District Magistrate's Court at Wanguru dutifully obliged with the request from the 2nd respondent and summoned the applicant and the 3rd, 4th, 5th and 6th respondents who appeared before S.M. Juma District Magistrate on 8th December, 1992 in Misc Succession Cause No. 31 of 1992. From the record of the proceedings which began and ended on 8th December 1992, the applicant and the 3rd, 4th, 5th and 6th respondents all addressed the magistrate and stated that following the disappearance of Githinji Gicheru, it was their wish that the applicant be registered as the holder of the said rice holding. The magistrate then recorded the following order:-

“By consent

The holder of rice holding No. 2441 Thiba Section is now

ID 0318315/63 James Waweru Githinji.

To pay prescribed fees

S.M. JUMA

D M II

8.12.1992”

Following that order, a letter was done by the magistrate on 18th February, 1993 forwarding to the 2nd respondent the Court's decision. The 2nd respondent no doubt satisfied with the Court's approval did allow the applicant to work on the said rice holding as this has not been refuted.

Some twenty (20) years later, the 2nd respondent by its letter dated 24th October, 2013 invited all the parties herein to attend a ***“hearing of a case”*** involving the rice holding No. 2441. It is not clear what case was being heard and no evidence has been placed before this Court to demonstrate that the applicant was in breach of ***Regulation 8 of the Irrigation (National Irrigation Schemes) Regulations 1977*** or indeed any of the regulations of the 2nd respondent. Perhaps that explains why the 2nd respondent did not avail copies of the proceedings of that meeting. What is clear however from paragraph 13 and 14 of the applicant's affidavit is that he had not been made aware of any dispute and he questioned the 2nd respondent's mandate to call that meeting which made a decision to apportion the rice holding between the brothers. The applicant depones as follows:-

13. “That on 24.10.2013, I was summoned by the Scheme Advisory Sub-Committee to attend a hearing over the above said holding. I had not been made aware of the kind of dispute that I was to meet. Annexed is the letter summoning me marked ‘M 5’”.

And in paragraph 14, he depones as follows:-

14. “That on the date of the hearing, I told them that they did not have the mandate to change that which the Court had sanctioned in an order of Court but they proceeded to hear my brothers only to verbally tell me they had decided to take away my three (3) acres and grant them my brothers”

No doubt the 1st and 2nd respondents have the powers under the ***Irrigation Act*** to issue licences and determine the number of settlers to be accommodated in a scheme. However, those powers cannot be exercised capriciously. Counsel for the 3rd, 4th, 5th and 6th respondents has submitted that those respondents filed a dispute before the Advisory Committee for its opinion as to whether they are entitled to get any portion out of the rice holding for them to cultivate. The 6th respondent has also deponed in

paragraph 5 of his replying affidavit about a “*family dispute*”. The particulars of the said dispute were never disclosed. The 1st and 2nd respondents in their grounds of opposition to this application have not only stated that they acted fairly but have also questioned the mandate of this Court to interfere with their decisions. This is a Judicial Review application. Judicial Review is about questioning the illegality, irrationality or procedural impropriety among others, of a decision making body. It is not the law that the 1st and 2nd respondents are not amenable to Judicial Review in their actions. Judicial Review is not concerned about the merits of the decision but rather, the decision making process itself. The 1st and 2nd respondents may very well have been driven by the desire to have this rice holding shared between the family equally. However, in view of the history of this rice holding which I have explained above, the intervention by the 1st and 2nd respondents in the manner that it did was, in my view, un-procedural. The parties herein had essentially arrived at a consent over the said rice holding. The 1st and 2nd respondents had no problem with that consent but decided to refer it to the Court to give it the force of law. The Court did just that after all parties had consented to the rice holding being registered in the names of the applicant. No conditions were attached to that consent which for all purposes became an order with contractual effect which could only be set aside on grounds such as fraud, mistake or misrepresentation = **WASIKE VS WAMBOKO 1988 K.L.R 429**. No such grounds were raised by the 3rd, 4th, 5th and 6th respondents herein and by purporting to vary that consent order, the 2nd respondent was, in my view, acting in excess of its jurisdiction. It is noteworthy that it was the same 2nd respondent that referred the matter to the Court and thereafter proceeded in terms of the Court order which as I have said was a consent order. For the 2nd respondent to then proceed and vary that order as it did some twenty (20) years later in the absence of any allegations that the applicant had breached any of the conditions governing the licence or that the consent was obtained through mistake, fraud or mis-representation or indeed that the applicant had failed to adhere to any directions of the 2nd respondent, was, in my view, a violation of the applicant’s rights to action that is lawful, reasonable and fair as provided for under **Article 47 of the Constitution**. While the 2nd respondent has the mandate to issue licences and terminate the same and also to regulate the manner of use of the land, it is to be expected that such powers will be exercised fairly and in accordance with the law. The least that the 2nd respondent would have done, in the circumstances of this case, would have been to advise the parties to arrive at another consent over the rice holding. I have looked at the case of **REPUBLIC VS THE CHAIRMAN ADVISORY COMMITTEE MWEA IRRIGATION & TWO OTHERS EMBU H.C MISC APPLICATION NO. 67 OF 2007** cited by counsel for the 3rd, 4th, 5th and 6th respondents where the Court held that land in an Irrigation Scheme belongs to the National Irrigation Board which has the absolute power to issue licences and terminate the same and also to regulate the use of such land. That is not in dispute. However, such powers, like all other powers, must be exercised on sound grounds. That was not done in the circumstances of this case. The case of **REPUBLIC VS JUDICIAL SERVICE COMMISSION OF KENYA Ex-parte PARENO 2004 1 K.L.R** cited by the 2nd respondent’s counsel reinforces the position that in Judicial Review, the Court is concerned with reviewing not the merits of the decision made but rather, the decision making process itself. As I have indicated above, the 1st and 2nd respondents may have been motivated by the best interest of equally sharing out the rice holding between the family. However, in so doing, the 1st and 2nd respondents set aside a consent that the parties had themselves agreed upon and further, there was nothing to suggest that the applicant had contravened any of the regulations stipulated under the law that would justify them making the orders that they did.

In the circumstances, I find that the orders sought by the applicant in the Notice of Motion dated 20th January, 2014 are well and I grant them.

Costs to the applicant to be borne by the 1st and 2nd respondents.

B.N. OLAO

JUDGE

9TH DECEMBER, 2014

9/12/2014

Before

B.N. Olao – Judge

CC: Eric

Mr. Karweru for Applicant – absent

Mr. Ombachi for 1st and 2nd Respondent - present

Also holding brief for Mr. Kagio for 3rd – 6th Respondents

COURT: Judgment delivered this 9th day of December, 2014 in open Court.

Mr. Karweru for Applicant absent

Mr. Ombachi for 1st and 2nd Respondent and also holding brief for Mr. Kagio for 3rd, 4th, 5th and 6th Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

9TH DECEMBER, 2014