



Republic v National Irrigation Authority; Wainoi & 3 others (Interested Party); Kirima & another (Exparte) (Judicial Review E004 of 2020) [2022] KEELC 3853 (KLR) (13 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
JUDICIAL REVIEW E004 OF 2020**

EC CHERONO, J

MAY 13, 2022

**IN THE MATTER OF AN APPLICATION BY LAWRENCE MUGO KIRIMA AND
ELIUD GICOBİ KIRIMA FOR JUDICIAL REVIEW ORDERS OF CERTIORARI
AND**

**IN THE MATTER OF RICE HOLDING NO. 311 (A) AND 311(B) OF NATIONAL
IRRIGATION AUTHORITY, MWEA IRRIGATION SETTLEMENT SCHEME
AND**

**IN THE MATTER OF THE ARBITRATION COMMITTEE PROCEDINGS AND
VERDICT DATED 2ND NOVEMBER, 2020**

BETWEEN

REPUBLIC APPLICANT

AND

NATIONAL IRRIGATION AUTHORITY RESPONDENT

AND

LUCY WAINOI INTERESTED PARTY

MARY MUTHONI INTERESTED PARTY

ELIZABETH NJERI INTERESTED PARTY

SAMUEL WAWERU INTERESTED PARTY

AND

LAWRENCE MUGO KIRIMA EXPARTE

ELIUD GICOBİ KIRIMA EXPARTE



RULING

1. The ex-parte applicants filed a Notice of Motion on December 31, 2020 in which they are seeking to be granted the following orders: -
 - a. That prerogative orders of certiorari do issue quashing proceedings and verdict of arbitration committee of the National Irrigation Authority, Mwea Irrigation Settlement Scheme dated November 2, 2020 in respect of rice holding No. 311 'A' and 311 'B' each measuring 2 ¾ acres.
 - b. That costs of this application be provided for.
2. The application is premised on the grounds set out on the face of the application supported by the affidavit of Lawrence Mugo Kirima, statement of facts dated 11th December, 2020 and a Verifying Affidavit sworn on December 11, 2020.
3. The Interested Parties opposed the application by way of a Replying Affidavit sworn by Lucy Wainoi, the 2nd Interested Party on April 20, 2021.
4. When the application came up for hearing on December 8, 2021, the parties through their advocates on record agreed to dispose the same by way of written submissions. The Ex parte applicants filed their submissions on February 9, 2022 while the Interested parties filed theirs on February 10, 2022.

Ex-parte Applicants' Case and Submissions: -

5. The ex-parte applicants' case is that the rice holding No. 311 was originally allocated to their father, Kirima Ngari (deceased) in 1959. However, their father passed away later on February 3, 1998.
6. They stated that prior to his demise, their late father had nominated the 1st ex parte applicant, Lawrence Mugo Kirima, as his successor in the event of his death.
7. They stated that upon the demise of their father, the 1st ex-parte applicant requested the scheme manager, Mwea Irrigation Scheme, to implement the wish of his deceased father and that by consent, they agreed that the 2nd ex-parte applicant be registered as a licensee of part of rice holding No. 311.
8. They stated that they were each issued with a tenant identification card and licence and have been in possession and occupation of the rice holding each identified as rice holding no. 311 'A' and 'B'.
9. They stated that the interested parties' herein caused them to be summoned by the Arbitration Committee, Mwea Irrigation Settlement Scheme, where a verdict dated November 2, 2020 was reached that they get part of the rice holding identified as extra field and jua kali.
10. They stated that the arbitration committee members involved have not been gazetted and therefore had no mandate to arbitrate their rice holding and that they acted ultra vires the *Irrigation Act* and had no jurisdiction to arbitrate over their rice holding.
11. They stated that the said verdict dated 2nd November, 2020 was illegal and wrong.
12. They submitted that the rice holding in dispute is governed by the *Irrigation Act* cap 347 which gives the procedure for succession of a rice holding under section 27 and that the said procedure was used when the ex parte applicants became registered as the holder of the rice holdings in dispute.



13. They submitted that under rule 7 sub rule 2, no person nominated as successor may succeed without the approval of the Committee and that in this case the Committee granted them approval and the said approval was indeed effected.
14. They submitted that contrary to rule 7 sub rule 3, no authorized dependants appealed against the applicants' nomination.
15. They submitted that the Advisory Committee acted ultra vires by trying to change the successor of the rice holding in total disregard of the law.
16. They submitted that the orders sought are merited and ought to be granted as the Respondents did not conform to the laid down law and procedure in arriving at their decision as per the minutes of the Arbitration Committee dated November 2, 2020.

Interested parties' case and submissions: -

17. The interested parties stated that all parties were summoned to the office at Mwea Irrigation Scheme on March 5, 2020 in respect of Rice Holding No. 311 Tebere Section and upon hearing both sides, the Advisory Committee gave their verdict.
18. They stated that accordingly, changes were done and the interested parties were given their shares as per annexure MM2.
19. They stated that the applicants herein are greedy and have not come to court with clean hands as there is no prejudice they will suffer if the orders sought are disallowed.
20. They stated that it is in the interest of justice if this application is dismissed for being an abuse of the court process.
21. They stated that the applicants should be restrained from interfering with the interested parties' portion of rice holdings.
22. They further submitted that the Advisory Committee acted within its mandate and that any further alterations shall be prejudicial to the interested parties.
23. They submitted that the ex parte applicants had alienated the whole property leaving them in destitution contrary to article 27 of the Kenyan Constitution which provides for equality and freedom from discrimination and therefore the application dated 30th December is not merited and the same should be dismissed with costs.
24. They submitted that discriminating against them on ground of sex is outdated and that the verdict ensures justice prevails and *the constitution* is safeguarded.
25. They also submitted that the ex parte applicants violated their rights to own property under article 40 of *the Constitution* and that they lived destitute lives and that overturning the verdict of the committee would prejudice the interested parties greatly.
26. They submitted that the allegation that the Arbitration Committee had no mandate to Arbitrate over the rice holding is wrong and totally misguided. They relied on the cases of *Naomi Njeri Ayub vs Mary Nyambura Wangombe & another* (2019) Eklr and the *Republic v the Chairman Advisory Committee Mwea Irrigation & 2 others* Misc No. 67/2006.
27. They prayed that the application be dismissed with costs.



ANALYSIS:-

28. I have looked at the Substantive Application, Grounds in support, verifying affidavit, statement, replying affidavit and parties' rival submissions as well as the applicable law. The issues for determination can be framed as follows: -
- a. Whether this Honourable Court has jurisdiction to determine the instant application.
 - b. Whether the Advisory Committee acted ultra vires.
 - c. Who should bear the costs?

Whether this Honourable Court has Jurisdiction to determine the instant Application: -

29. The matter herein involves a rice holding whose dispute resolution mechanism has been established under Part VII of the *Irrigation Act*, 2019 which provide that: -

PART VII—Dispute Resolution

25. (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. 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.
30. From the above provisions of the law, a dispute is supposed to be referred to the Dispute Resolution Committee at the first instance for determination before being taken to court.
31. Section 9 (2) of the *Fair Administrative Action Act*, 2015 provides that:
- The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.
32. In the case of *Geoffrey Muthinja & another v Samuel Muguna Henry & 1756 others* [2015] e KLR the Court of Appeal held that: -

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”



33. It is evident from the above decisions and the applicable law that this Honourable Court is only vested with jurisdiction to determine judicial review disputes once all mechanisms have been exhausted under the written law and in this case the National *Irrigation Act*, 2019.
34. In this matter, the ex parte applicants were dissatisfied with the verdict of the Arbitration Committee and ought to have had the dispute referred to the Dispute Resolution Committee in the first instance before coming to court.
35. There is no evidence to show that the Ex parte applicants complied with section 26 of the National *Irrigation Act*, 2019 and therefore, the matter was prematurely brought to this Court.
36. In the circumstances, I find that this application is improperly before this Honourable Court and that this court is not seized with jurisdiction to determine the issues raised therein as the first port of entry. It is trite that jurisdiction is everything and without it, a court has no power to make any step. This was stated in the *locus classicus* case of *The Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* (1989) KLR 1 where Nyarangi J.A. 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 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.'

CONCLUSION: -

37. In view of the foregoing, I find that this Honourable Court lack jurisdiction to hear and determine the ex-parte applicants' Notice of Motion dated December 31, 2020 and the same is hereby struck out. I order each party to bear their own costs. It is so ordered.

Ruling READ, DELIVERED and SIGNED in the open Court at Kerugoya this 13th May, 2022.

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HON. E.C. CHERONO

ELC JUDGE

In the presence of;

Mr. Ombachi holding brief for Magara for Respondent

Mr. Kamuka for Applicant

Kabuta---C/A

