REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

JUDICIAL MISC. APPLICATION NO. E002 OF 2020 (J.R)

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD, MWEA

IRRIGATION SETTLEMENT SCHEME.....1ST RESPONDENT

ELIJAH FUNDI GICHOBI.....2ND RESPONDENT

AND

JOHN MURIMI GICHOBI.....EX-PARTE APPLICANT

JUDGMENT

Introduction

By an Ex-parte Chamber Summons dated 15th September 2020, the Applicant moved this Court seeking leave to apply for orders of certiorari to remove for purposes of quashing the proceedings and award of the Scheme Manager, Mwea Irrigation Settlement Scheme dated 10th January 2017. The Ex-parte Applicant has also sought for orders that the leave so granted do operate as a stay of any execution of the said award relating to rice holding No. 3784 Karabe Section.

Grounds in support of the Application

(1) Originally rice holding No. 3784 belonged to the Ex-parte applicant's father Simon Gichobi Mbogo. After his demise, his family sat and agreed to allocate rice holding No. 3784 to the Ex-parte applicant and his siblings.

(2) That sometimes in the year 2017, the 2nd respondent started claiming part of the rice holding insisting that he was a beneficiary of the estate of the Ex-parte applicant's father.

(3) The respondent has all along been a half-brother to the Ex-parte applicant having been born out of a wedlock and that he had his paternal father whom he had inherited properties and estate.

(4) That sometimes in 2016, the 2nd respondent lodged a complaint in the office of the Scheme Manager, Mwea Irrigation Settlement Scheme. On the 10th January 2017, the Scheme Manager after summoning all beneficiaries, directed that the suit property be utilized as; Gerald Muriithi to hold ¾ acre No. 3784 (A), John Murimi ¾ acre No. 3784 (B), Richard Makui to hold ¾ acre No. 3784 (C), Elijah Fundi ¾ acre No. 3784 (D), Catherine Wanjiku to hold 1 acre in trust for her five (5) sisters including Lydia Wakuthii No. 3784 (E) with effect from 06/07/2016.

(5) That the Ex-parte applicant and his siblings have been utilizing in equal portions with his brothers getting one acre each and their sisters sharing one acre together.

(6) That when the 2nd respondent lodged a complaint to the Advisory Committee which ruled that Ex-parte applicant and his brothers shares be re-sub-divided from their one acre to now get ¾ of an acre which also the 2nd respondent was given ¾ of an acre

out of their shares.

(7) The Ex-parte applicant moved to the office of the Manager, Mwea Irrigation Settlement Scheme with a view of appealing the decision of the Advisory Committee but the Scheme Manager told the Ex-parte applicant to wait for the next Committee for him to lodge his appeal, which Committee has never been convened.

(8) That the time for filing a Judicial Review application to challenge the Advisory Committee decision lapsed without the Ex-parte applicant filing the suit as he was still waiting for the Scheme Manager's verdict.

(9) That on the strength of the changes, the 2nd respondent entered into the rice field and interfered with the Ex-parte applicant's vacant possession and utilization of the rice holding.

(10) That the 1st respondent acted in excess of his power and jurisdiction by taking over ¼ acre of rice holding each of the Ex-parte applicant and his brothers and giving to the 2nd respondent which is null and void.

(11) That in view of the above, it is mete and just that the Ex-parte applicant be given leave to remove the proceedings and award of the 1st respondent dated 10th January 2017 in respect of rice holding No. 3784 Karabe Section to this Court for purposes of quashing the same.

(12) The Ex-parte applicant will suffer irreparable loss and damages if the unlawful award is executed as they rely on the said rice holding for their subsistence.

Applicants Statement of Facts

In his supporting affidavit sworn on 15th September 2020, the Ex-parte applicant deponed as follows:-

(1) That his late father Simon Gichobi Mbogo (deceased) was the absolute registered licensee of rice holding No. 3784 Karabe Section.

(2) That after the demise of his father, his two brothers, sisters and him succeeded the rice holding of four acres with the three brothers getting an acre and his sisters sharing the remaining one acre.

(3) That sometime in the year 2016, the 2nd respondent who is the Ex-parte applicant's half-brother from the first marriage of his mother started claiming a share of his father's estate and moved to the Manager, Mwea Irrigation Settlement Scheme with a view of having rice holding No. 3784 Karaba Section re-sub-divided afresh on false allegations that he was a son to his father.

(4) That after the alleged claim, the Advisory Committee went ahead and shared rice holding to the 2nd respondent and his three brothers in a new sharing ratio of ¾ acre each of which the three brothers were forced to loss ¼ an acre each that was consolidated to make ¾ an acre and given to the 2nd respondent.

(5) That they later lodged a complaint in the office of the 1st respondent and the Manager informed them to wait for another Committee so that they appeal the decision. That was not done as Advisor Committee was abolished to be re-constituted afresh but until today, they have not been re-constituted.

(6) That the time to challenge the Advisory Committee lapsed before they could challenge its verdict. The Scheme Manager on the 10th January 2017 shared rice holding No. 3784 among the Ex-parte applicant and his two brothers and the respondent with their sisters remaining with their acre to utilize amongst themselves. He annexed a copy of the letter dated 10/01/2017 and marked "J.M.G 1"

(7) That he visited the Scheme Manager on several occasions to know about the changes but the 1st respondent informed him to move to the High Court to challenge the latter dated 10/01/2017.

(8) That he was advised by his advocates which he verily believes to be true that the decision by the Scheme Manager dated 10/01/2017 pertaining rice holding No. 3784 Karaba Section was ultra vires to Irrigation Act Cap 347 Laws of Kenya because the 1st respondent did changes of rice holding No. 3784 within a short period without due notice to him and his siblings.

(9) That the proceedings and award of the Scheme Manager of National Irrigation Board, Mwea Irrigation Settlement Scheme dated 10/01/2017 should be removed into this Court and quashed because it was made without jurisdiction.

(10) That his siblings together with him wholly rely on rice holding No. 3784 as it is the only means of subsistence and if the 1st respondent's decision is not quashed, they shall not have land to cultivate and feed their families.

(11) That it is mete and just that the Scheme Manager of the National Irrigation Board, Mwea Irrigation Settlement Scheme be prohibited from executing proceedings of the letter dated 10/01/2017 in favour of the 2nd respondent pending hearing and determination of this application.

Respondents Statement of Facts

The Respondent filed a replying affidavit in response to the application and states as follows:

(1) That the applicant is his brother.

(2) That the award of National Irrigation Board, Mwea dated 10th January 2017 was in order since they have powers to hear and determine the dispute and the land is registered in their name (Company property).

(3) That they were given each brother ¾ acre each and the five sisters one acre.

(4) That the others are not complaining and that he is the only one who is selfish and he has not shown any biased or misrepresentation by Board.

(5) That each and every party to remain on his portion to avoid friction in family and neighbours.

(6) That the applicant has not attached the said award to his documents.

(7) That the Honourable Court do dismiss the case because land was distributed fairly.

Applicant's joinder of issues

By way of joinder, the applicant filed a further affidavit and stated as follows:

(1) That the respondent being his half-brother and the elder son to his mother used his age to grab from them what was rightfully theirs as he managed to cheat his father to give him land that his father had in Meru to cultivate which he changed to his name without the consent of his father.

(2) That the respondent having acquired land from his father through fraud, waited after his father passed on and laid claim over rice holding No. 3784 Karabe Section.

(3) That there was no agreement between him and his father, he only used his influence for being elder son from another marriage of his mother and managed to fraudulently acquire rice holding illegally.

(4) That his replying affidavit is empty with averments meant to confuse and misdirect the Court.

Legal Analysis and Disposition

I have considered the pleadings in these Judicial Review proceedings and the affidavit evidence. The applicant's contention in this Judicial Review application is that the National Irrigation Board, Mwea Irrigation Settlement Scheme (1st respondent) through their Scheme Manager without jurisdiction gave an award in relation to rice holding No. 3784 Karaba Section dated 10/01/2017. According to the applicant, the aforesaid decision by the 1st respondent was ultra vires to the ***Irrigation Act Cap. 347 Law of Kenya*** in that the 1st respondent did changes to rice holding No. 3784 within a short period without due Notice to the applicant and his siblings. ***Order 53 Rule 12 CPR*** which is the law guiding Judicial Review proceedings states as follows:-

> "*Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purposes of its being quashed, unless the application for leave is made not less than six month after the date of the proceedings or such shorter period as may be prescribed by any Act; and where the proceedings 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"*

My understanding of the law regarding an application to quash a decision by an inferior tribunal or a body functions of a quasi-judicial by way of certiorari is that such an application must be made within six months from the date the impugned decision was made. The applicant deponed in his supporting affidavit that the decision by the 1st respondent which is the subject of this review was made on 10th January 2017. A copy of the impugned award and proceedings have not been attached to the application or the supporting affidavit.

Under ***Order 53 Rule 7 (1)***, it is a mandatory requirement for an applicant to attach a certified copy of the proceedings and the order/award being challenged to the application. The said ***Order 53 Rule 7 (1)*** provides as follows:-

> "*In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order to warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion he has lodged a copy thereof verified by affidavit with the Registrar, or accounts for his failure to do so to the satisfaction of the High Court"*.

The applicant is challenging the validity of the award and proceedings of the 1st respondent dated 10/01/2017. It was mandatory for the applicant to attach a copy of the alleged award and proceedings to this application as required under ***Order 53 Rule 1 (1) CPR.*** The other requirement is that an application for leave to commence Judicial Review proceedings must be commenced less than six (6) months from the date of issue. The applicant in this case is seeking to quash the proceedings and award of the 1st respondent dated 10/01/2017. The applicant is challenging the award and proceedings of the 1st respondent long after the expiry of six (6) months.

Order 53 Rule 2 of the Civil Procedure Act which is similar in all respect to ***Section 9 (3) of the Law Reform Act, Chapter 26 Laws of Kenya*** provides as follows:-

> ***"****In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order decree, conviction or other proceedings or such period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the Court or Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired".*

The interpretation of the two provisions of the law was put into perspective by the Court of Appeal in the case of ***Osolo Vs John Ojiambo Ochola & Another (1995) e K.L.R***

> "*It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9 (3) of the Law Reform Act. Whilst the time limited for doing something under the Civil Procedure Rules can be extended by an application under Order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act. "There is no provision for extension of time to apply for such leave in the limitation of Actions Act Cap. 22 Laws of Kenya which gives some limited right for extension of time to file suits after expiry of a limitation provided. But this Act has no relevance here".*

I agree with the above decision on the interpretation of the law regarding extension of time where the statute has given a limited period within which a claim shall be instituted. This is true particularly where the statute uses the word "***shall***" in relation to the time required in the commencement of the legal proceedings.

The other issue for determination in this suit is the mandate of the National Irrigation Board, Mwea Irrigation Settlement Scheme (1st respondent) to sub-divide the suit land and give the 2nd respondent a portion. First, it is important to note that the 1st respondent is a creature of statute whose sole statutory mandate is to manage, control, regulate and allocate land established within National Irrigation and Settlement Schemes. Being a property belonging to the National Irrigation Board, they have the absolute power to issue licences and to terminate the same toward proper regulation and management of such land. Though the applicant has not annexed the proceedings and the award issued on 10/01/2017 which is the subject of this review, it is apparent from the pleadings that the applicant had lodged a complaint with the 1st respondent to be given a portion of the suit land which was originally given to one Simon Gichobi Mbogo be re-subdivided so that he can also be considered as a beneficiary being one of the sons of the original licencee. The applicant in the application herein admitted that on 10/01/2017, the Scheme Manager after summoning all beneficiaries directed that the suit property be utilized between the existing beneficiaries and the complainant. My view is that under the ***Irrigation Act Cap. 347 Laws of Kenya*** and the regulations set thereunder, the Advisory Committee of the Mwea Irrigation Scheme has absolute powers to sub-divide rice holdings and add new tenants to the existing list of tenants and to issue new licences and to even terminate the same in order to regulate the manner and use of the land.

In view of the foregoing, I find that the Notice of Motion dated 19th October 2020 and filed in Court on 21st October 2020 lacks merit and the same is hereby dismissed. Since the parties are blood relatives, I order each party to bear his own costs.

READ, DELIVERED in the absence of the parties and SIGNED in open Court at Kerugoya this 19th day of February, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Kabuta – Court clerk

2. Applicant – absent