Republic v National Irrigation Borad (Mwea Irrigation Scheme); Muriithi (Exparte); Wainoi & 3 others (Interested Parties) (Judicial Review E001 of 2022) [2023] KEELC 18491 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18491 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW E001 OF 2022

JM MUTUNGI, J

JULY 6, 2023

IN THE MATTER OF RICE HOLDING NO. 766 UNIT T.20 TEBERE SECTION

AND

IN THE MATTER OF FAIR ADMINISTRATIVE ACT 2015

AND

IN THE MATTER OF LEAVE TO FILE FOR ORDERS OF CERTIORARI GRANTED ON 19.5.22 AND AMENT TO ENJOIN INTERESTED PARTIES

BETWEEN

REPUBLIC ..... PLAINTIFF

AND

NATIONAL IRRIGATION BORAD (MWEA IRRIGATION SCHEME) ..... RESPONDENT

AND

JANE WAMBUI MURIITHI ..... EXPARTE

AND

GLADYS WAINOI ..... INTERESTED PARTY

CECILY WANJIKU ..... INTERESTED PARTY

DANIEL MURIUKI ..... INTERESTED PARTY

FRANCIS WANJOHI ..... INTERESTED PARTY

JUDGMENT

1. The Exparte Applicant was granted leave to institute Judicial Review proceedings on 19/5/2022 and on 26/5/2022 filed the substantive application vide the Notice of Motion dated 24th May 2022. The exparte Applicant in the application prayed for the following orders:-

    a. An order of Certiorari do issue removing into this honourable Court and quashing the decision of the Respondent on 7th December, 2021 and dated 24th February, 2022 of taking away 1 Acre out of Riceholding No. 766 belonging to the exparte Applicant and reverting it back to Rice Holding No. 352 Unit 8 Tebere Section and distributing the same to Gladys Wainoi (deceased), Cecily Wanjiku and the Applicant and restore her tenant card and licence.

    b. An order of Mandamus be issued to the Respondent directing them to revert 1 Acre from Rice Holding 352 Unit 8 Tebere Section back to Rice holding No. 766 Tebere Section Unit T.20 belonging to the exparte Applicant.

    c. Costs of the application

2. The application was supported on the grounds set out in the statutory statement and the Verifying Affidavit and the Supplementary Affidavit sworn by Jane Wambui Muriithi. The exparte Applicant averred that she was the owner of 1 Acre Riceholding No. 352 Tebere Section Unit 8 until 7th December 2021 when the Respondent took the same away and distributed the same to the Interested Parties. The exparte Applicant asserted that the 1 Acre Riceholding was given to her by her deceased father before his death and that her father swore an affidavit surrendering the 1 Acre Riceholding to her on 12/10/2020. The Applicant further stated her father had earlier on 21/10/2008 surrendered ½ Acre of Riceholding No. 352 of Tebere Section by way of a similar Affidavit. She stated that the 1 ½ Acres surrendered by her father to her were aggregated to her Riceholding No. 766 Mwea which initially was 4 ¾ Acres to become 6 ¼ Acres as per Tenant Card issued to the Applicant by NIB on 21/1/2021. The Applicant stated the surrenders were presented to Respondent's offices by her father and the Respondent effected the farmer changes and issued her with tenant card and license exhibited as "JWM 1a-b" respectively in her verifying Affidavit.

3. The Applicant explained that following a meeting of the Arbitration Committee of the Respondent, the Respondent notwithstanding that they had issued her with a tenant card and license in regard to Riceholding No. 766 that incorporated the 1 ½ Acres that her father had surrendered to her out of Riceholding No. 352 which raised the Acreage of her Riceholding No. 766 from 4 ¾ to 6 ¼ Acres, the Respondent proceeded to distribute Riceholding No. 352 measuring 4 ½ Acres to Gladys Wanoi (deceased) 2 Acres, Cecily Wanjiku 2 Acres and ½ Acre to the Applicant with the result that the 1 Acre surrendered by her father to her was taken away. The Applicant contended that the decision by the Respondent to take away the 1 Acre that her father had given to her was callous, irrational and unfair. The Applicant averred that the Respondent's decision was unreasonable and therefore amenable to Judicial Review.

4. The Respondent in opposition to the application filed a Replying Affidavit dated 19th September, 2022 through Lucy Kamau the Administrative Officer of the Respondent. The Respondent deponed that Riceholding No. 352 was initially registered to Macharia Megwe in 1959 who nominated his son Mureithi Jeremiah Komu as his successor. The son got the tenancy duly effected to him on 14th February, 1972.

5. The Respondent further deponed that on 21st October, 2008 Jeremiah Komu nominated Cicily Wanjiku and Wambui Miriithi as successors of the Riceholding No. 352. On 21/10/2008 Jeremiah Komu signed an Affidavit surrendering ½ Acre out of Riceholding No. 352 to his daughter Jane Wambui Muriithi and later supposedly surrendered another 1 Acre to her.

6. The Respondent stated further that on 11th December 2020 following the death of Jeremiah Komu the family filed a succession for Riceholding No. 352 and that the succession process was effected in accordance with the consent form dated 21/1/2021 by the family whereby 3 Acres were given to Cicily Wanjiku and 1 Acre was given to Jane Wambui and changes were effected on 8/2/2021. The Respondent further stated that on 27th July 2021, the Respondent received a complaint from other family members who were not included in the succession of the Riceholding. The Respondent convened a Dispute Resolution Committee meeting on 7th December, 2021 where the exparte Applicant and the Interested Parties were invited. After the deliberations the Arbitration Committee reached the decision that the Riceholding No. 352 be shared between the two houses of the deceased equally while the exparte Applicant was to retain the village plot measuring ½ Acre.

7. The Respondent maintained that it acted lawfully within the provisions of the *Irrigation Act* which gives mandate to the Dispute Resolution Committee to handle disputes such as the one presented before them. The Respondent contended, the application was devoid of merit and prayed for the dismissal of the same.

8. Cecily Wanjiku, the 2nd Interested Party appeared and filed a Replying Affidavit dated 20th September, 2022. In the Replying Affidavit, the 2nd Interested Party who is the mother of the exparte Applicant supported the contentions and averments by the exparte Applicant. She stated that she and her daughter were not accorded a fair hearing before the Arbitration Committee. She stated the decision reached by the Arbitration Committee was arbitrary, unreasonable, and not based on fair hearing.

9. The Supplementary Affidavit dated 20th September, 2022 by the exparte Applicant reiterated the contents of her affidavit in support of the application. The exparte Applicant averred that she and her mother were not accorded the opportunity to present documents that would have proved that the 1st house to which the 3rd & 4th Interested Parties belonged were given a larger portion of land of 2.5 Acres in Kirinyaga Central by their deceased father while her mother (2nd House) was only given 3/8 Acre of the land in Central Kirinyaga. The Applicant averred that the Arbitration Committee acted in breach of the provisions of the *Fair Administrative Action Act*, 2015 that enshrines the procedure for fair administrative action and hence the Committee's decision was neither fair and/or reasonable and ought to be quashed and an order of Mandamus issued directing the Respondent to revert 1 acre of the Riceholding No. 352 Unit 8 Tebere Section back to Riceholding No. 766 Tebere Section Unit T.20 in the name of the Applicant.

10. The application was canvassed by way of written submissions. The exparte Applicant, the Respondent and the 3rd and 4th Interested Parties filed their respective submissions.

11. The exparte Applicant in her submissions filed on 26th October, 2022 reiterated the facts as set out in the Supporting and Supplementary Affidavits. It was her position that the Respondent in the conduct of the hearing of the dispute before the Arbitration Committee failed to comply with the provisions of Article 47 of *the Constitution* and Section 4(3) and (4) of the *Fair Administrative Action Act*, 2015 which make provision for every party who is likely to be adversely affected by any decision, that a body mandated to exercise any quasi judicial authority may make, to be given an opportunity to be heard as the rules of natural justice demand. The Respondent submitted the failure to be accorded a fair hearing resulted in the Arbitration Committee giving a decision that was unreasonable and irrational.

The Applicant submitted there was procedural impropriety on the part of the Respondent and thus the Applicant's application ought to be allowed.

The exparte Applicant in support of her submissions relied on the Cases of *Suchan Investment Limited –vs- Ministry of National Heritage & Culture and 3 Others* (2016) eKLR and *Republic –vs- Dedan Kimathi University of Technology* (2022) KEH 358 (KLR) where the Courts held that apart from considering whether due process procedure was adhered to in arriving to the impugned decision merit consideration also needed to be appraised in determining whether the decision was fair. In the *Suchan Investment Ltd* Case (supra) the Court of Appeal observed at Paragraph 55 of the Judgment thus:-

> "----- Traditionally Judicial Review is not concerned with the merits of the Case. However Section 7(2) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory Judicial Review. Proportionality was first adopted in England as an independent ground of Judicial Review in R v Home Secretary, exparte Daly (2001) 2 AC 352. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; first, proportionality may require the Court to assess the balance which the decision maker has struck, not merely whether it is within the range of the rational or reasonable decisions: Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24(1)(b) and (e) of *the Constitution* to wit that the Limitation of the Right is necessary in an open and democratic Society, in the sense of meeting a pressing social need and whether interference vide Administrative Action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory Judicial Review applications."

12. In the Case of *Republic –vs- Dedan Kimathi University of Techonolgy* Case (Supra) Njagi, J at Paragraph 52 of the Judgment stated thus:-

> "It is now recognised that one of the grounds for grant of Judicial Review Relief – is unreasonableness of the decision being challenged. This is clearly a deviation from the traditional common law approach that what is to be considered is the process by which the decision is arrived at rather than the decision itself. An examination of whether or not a decision is unreasonable clearly calls for some measure of consideration of the merits of the decision itself though not in the manner contemplated by an Appellate process."

13. The Respondent in its submissions submitted that due process was followed in arriving at the decision that dispute Arbitration Committee made. The Respondent submitted that all the parties were accorded the opportunity to be heard and to tender their evidence. The Respondent denied that the decision was unreasonable and/or irrational arguing that the exparte Applicant at the time she was given the additional One (1) Acre there was misrepresentation that there were no other survivors/ beneficiaries of the deceased who was until his death the registered owner of Riceholding No. 352.

14. The Respondent placed reliance on the Case of *Astoli –vs- Kabale District Local Government Council & Others* (2008) 2 EA 300 to support its submission that the decision was neither unreasonable or irrational and that there was no procedural impropriety and hence there was no basis for the decision to be interfered with by the Court. The Respondent further placed reliance on the Case of *Municipal*

Council of Mombasa –vs- Republic and Umoja Consultants Ltd. CACA No. 185 of 2001 Nairobi where the Court of Appeal outlined the duty of a Court in 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?"

15. The Respondent submitted that the Dispute Arbitration Committee followed due process and that the Applicant's allegations of bias by the Committee were unsubstantiated. The Applicant was not prevented from adducing any evidence that she may have wished to adduce and/or to cross examine any witness. The Respondent contended no basis exists to warrant the grant of the orders sought by the exparte Applicant.

16. The 3rd and 4th Interested Parties in their submissions submitted that their father had 2 wives namely Gladys Wainoi (deceased) and Cecily Wanjiku. They stated their father who died on 29/11/2020 was the licensee of Riceholding No. 352 measuring 4 ½ Acres. They conceded their father before his death had surrendered ½ Acre out of the Riceholding NO. 352 to their step sister, the Applicant herein. It was their position that after their father's death the Applicant together with her mother Cecily Wanjiku immediately on 11/12/2020 filed a succession with the Respondent where they misrepresented and concealed that there were other beneficiaries resulting in the succession process being completed vide a consent and changes effected in the farmer's record on 8/2/2021. The Interested Parties contend the Respondent was justified to reach the decision that it did as one of the houses was excluded when the Respondent at the instance of the Applicant effected changes to the farmer's records pursuant to the succession. The Applicant at the time of the succession had not disclosed the deceased had another family (house) that was not included and/or aware of the Succession proceedings.

17. I have set out hereinabove the rival positions and submissions of the parties as deduced from the pleadings and the submissions. The issue for determination is whether given the circumstances and the facts, the exparte Applicant is entitled to the orders she seeks of Judicial Review.

18. In the present matter there is no dispute that the Respondent under the provisions of the *Irrigation Act* 2019 and the Regulations made there under has mandate to handle and deal with all disputes arising from the Irrigation Scheme touching on their operations and Management including disputes relating to the allotment and succession of licenses regarding Riceholdings. Riceholding 352 Unit 8 Tebere Section was owned by Muriithi Jeremiah Komu (now deceased), father to the exparte Applicant and the 3rd and 4th Interested parties. The deceased was the husband of Gladys Wainoi (deceased) and Cecily Wanjiku the 1st and 2nd Interested Parties respectively. The exparte Applicant's position is that her deceased father apart from surrendering ½ acre of Riceholding 352 in 2008 vide a signed Affidavit dated 21/10/2008 he also vide another Affidavit sworn on 12th October, 2020 surrendered to her another One (1) Acre out of the Riceholding. The Applicant's father died soon thereafter on 29/11/2020 after the surrender of the 1 Acre. The Applicant with her mother Cecily Wanjiku and two sons, Gathee Muriithi and Jeremiah Muriithi Komu filed for succession on 11/12/2020. The 3rd and 4th Interested Parties were not included in the application for succession. The Chief's Office Gathigiriri location wrote a letter dated 26/1/2021 indicating the beneficiaries were Cecily Wanjiku Murithi, Jane Wambui Murithi, Gathee Mureithi and Jeremiah Mureithi Komu. The Four(4) had on 21/1/2021 signed a consent form indicating how the Riceholding was to be distributed. Following confirmation by the Chief the Scheme Manager proceeded to effect the Farmers changes in regard to Riceholding No. 352 on the basis of the consent filed on 8/2/2021.

19. As per the record, it is apparent it was only the members of the second house of the deceased who filed for succession of the Riceholding No. 352 without the involvement of the members of the first house. The 3rd and 4th Interested Parties were the children of Gladys Wainoi the first wife of the deceased who had died before her husband. They were not involved when the exparte Applicant filed for Succession and had not given their consent respecting the distribution of the Riceholding. Upon becoming aware that the exparte Applicant, her mother, and her siblings had applied and obtained succession and distribution of Riceholding 352 belonging to their deceased father without their knowledge and/or consent, the 3rd and 4th Interested Parties filed a complaint with the Respondent which precipitated the Arbitration Committee proceedings.

The exparte Applicant has impugned the decision of the Dispute Arbitration Committee arguing that it was unreasonable, irrational and unfair. While admittedly the traditional approach in considering Judicial Review applications was restricted to considering whether there was any procedural impropriety in arriving to the decision that was under challenge, the scope of Judicial Review has in the recent times been expanded to include a measure of merits consideration in regard to the decision arrived at and now the subject of challenge. In particular, the Court before which the Judicial Review application is made by virtue of Section 7(2) of the *Fair Administrative Action Act*, 2015 and Article 47 of *the Constitution* is obligated to consider various aspects of merit review. The Court of Appeal in the Case of *Suchan Investment Ltd –vs- Ministry of National Heritage & Culture and 3 Others* (2016) eKLR in upholding the shift from the traditional approach at paragraph 56 of its Judgment stated as follows:-

> 56.Analysis of Article 47 of *the Constitution* as read with the *Fair Administrative Action Act* reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the *Fair Administrative Action Act*.

In the same Judgment at Paragraph 58 the Court of Appeal was emphatic that the *Fair Administrative Action Act*, did not clothe the reviewing Court with the power to substitute the decision of the Administrator with its own decision. The reviewing Court is only permitted to set aside the Administrator's decision and to remit the matter for reconsideration where merit is concerned, meaning that decision making on merits is the preserve of the Administrator and not the Courts.

20. In the present matter the Court has to ask itself whether there was any procedural impropriety in the conduct of the proceedings before the Dispute Arbitration Committee to warrant the intervention of the Court. Secondly the Court has further to consider whether on the merits consideration, the decision arrived at was unreasonable, irrational and/or unfair having regard to the evidence presented before the Dispute Resolution Committee.

21. I have perused the record of the Dispute Resolution Committee and note that all the affected parties were invited before the Committee and that they were all given a chance to present their respective cases before the Dispute Arbitration Committee. The record of the proceedings before the Arbitration Committee shows the exparte Applicant and her mother were both given the chance to present their evidence. The exparte Applicant explained that she was given the extra Acre by her deceased father because she had been taking care of him while he was alive. Both her and her mother maintained that the first family had been given a bigger portion of land in Central Kirinyaga.

22. The 3rd and 4th Interested Parties position was that the second family of their deceased father had secretly carried out succession proceedings relating to the Riceholding belonging to their father without disclosing they were also beneficiaries. From the evidence, it is not clear what the status of the land referred to in Kirinyaga Central was as no ownership documents were availed. However as regards the succession in regard to Riceholding 352, the letter of Introduction of the beneficiaries of Jeremiah Komu (deceased) from the Chief's Office Gathigiriri Location dated 26/1/2021 indicated the beneficiaries to be Cecily Wanjiku Muriithi, Jane Wambui Muriithi, Gathee Muriithi and Jeremiah Murithi Komu. The letter did not disclose the 3rd and 4th Interested Parties were also children of the deceased. The consent submitted by the family respecting distribution of the Riceholding No. 352A (Tebere) belonging to the deceased was not signed by the 3rd and 4th Interested Parties and only the members of the deceased second family were included.

23. I have reviewed and considered the process and procedure that the Respondent employed in resolving the dispute referred to them by the 3rd and 4th Interested Parties, who were aggrieved by the decision to distribute their deceased father's Riceholding 352A Tebere solely amongst the members of their father's second family to their exclusion. I find the procedure was compliant with the provisions of Article 47 of *the Constitution* and Section 4 of the *Fair Administrative Action Act*, 2015. Every party was given a chance of being heard and to present their evidence. There is no evidence of any bias on the part of the Respondent in the conduct of the Dispute Resolution process.

24. The decision arrived at by the Dispute Resolution Committee in my view was not arbitrary, irrational and/or unreasonable. The exparte Applicant predicated her case on the fact that her deceased father had allegedly, signed an Affidavit surrendering one (1) Acre to her as a gift slightly over one month before he died. The 3rd & 4th Interested Parties dispute the genuineness of this Affidavit. They however concede the earlier Affidavit by their deceased father made in 2008 where he gave their sister (the Applicant) half Acre (1/2) market plot and have no issue with that as they were aware of it. It would appear their father never disclosed to them about the one (1) Acre gift to their sister. On the evidence tendered I find no basis upon which I could fault the Dispute Arbitration Committee in reaching the decision they did and at any rate do not consider the decision was unreasonable and/or irrational or unfair to warrant the intervention of the Court. The point remains the succession before the Respondent was done by the exparte Applicant in a clandestine manner with the object of locking out the 3rd and 4th Interested Parties who being children of the deceased had a right to participate in any succession proceedings touching on the estate of their deceased father.

25. The net result is that I find no merit in the application for Judicial Review by the Applicant and accordingly I order the Notice of Motion dated 24th May, 2022 dismissed. I have considered that this

was a dispute pitting members of one family and in exercise of my discretion I order that each party shall bear their own costs of the application.

26 Orders accordingly.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 6TH DAY OF JULY 2023.

J. M. MUTUNGI

JUDGE