



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CONSTITUTIONAL PETITION NO. 1 OF 2020

IN THE MATTER OF ARTICLE 40 (1) (2) (3) OF THE CONSTITUTION OF KENYA 2010

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLE 40
(1) (2) (3) OF THE CONSTITUTION**

BETWEEN

MUTHIKE KIMUNYI Alias JAMES MUTHIKE KIMUNYI

(Suing on his own behalf and as Administrator of the

Estate of the late KIMUNYI GAKUYA.....PETITIONER

AND

NATIONAL IRRIGATION BOARD

THROUGH THE MANAGER,

MWEA IRRIGATION SCHEME.....1ST RESPONDENT

CATHERINE CHIIRA (Sued as the Legal

Administrator of the Estate of the late

STANLEY CHIIRA KIMUNYI.....2ND RESPONDENT

FRANCIS WAHOME KIMUNYI.....3RD RESPONDENT

GRACE MICHERE KIMUNYI.....4TH RESPONDENT

JUDGMENT

The Petitioner Muthike Kimunyi alias James Muthike Kimunyi suing on his behalf and also as the Administrator of the Estate of Kimunyi Gakuya vide a Petition dated 11th August 2020 and amended on 22/10/2020 is seeking the following orders:-

(1) (a) A declaration that the decision of the 1st Respondent sub-dividing the rice holding No. 2160 be declared null and void for breach of rules of natural justice and breach of Article 47 of the Constitution of Kenya and be set aside.

(b) A declaration that the decision of the Advisory Committee was unconstitutional, unlawful, null and void for hearing a dispute that had been determined by a Court of law.

(c) A declaration that the Petitioner's right to fair trial protected under

(2) The Honourable Court be pleased to order reinstatement of the Applicant who is entitled to be appointed successor of

Rice Holding No. 2160 as per the nomination of 23.10.1989.

(3) The decision of the 1st Respondent's Committee Meeting of 29/6/2016 and 20/4/2014 be set aside.

(4) Any other relief this Court may deem fit to grant.

The Petitioner averred that the original owner of Rice Holding No. 2160 which is the subject of this Petition was one Kimunyi Gakuya who is now deceased. He further averred that during his lifetime, the said Kimunyi Gakuya had done a nomination in writing to the Manager of the Mwea Irrigation Settlement Scheme nominating the Applicant as his successor in case of his death.

The Petitioner further contends that he was therefore entitled as a nominee of his father and ought to have been summoned and participated in the Advisory Committee meetings of 29/6/2016 and 20/4/2014. According to the Petitioner, he only learnt that the Rice Holding No. 2160 was sub-divided after the 2nd and 3rd Respondents invaded the 3 acres forcefully in the year 2016.

He further stated that he was thereby disinherited without being given a hearing and that the decision of the Advisory Committee was also oppressive as it failed to take into account the deceased other properties in sharing out the Rice Holding. It is also the Petitioner's contention that in the year 2014, the Manager Mwea Irrigation Settlement Scheme vide a letter dated 5th June 2014 wrote to the Court and undertook to take into account the other properties of the deceased to enable fair distribution of the deceased estate and that the Manager later went ahead to distribute the Rice Holding unfairly without taking into account that the 2nd Respondent has five acres Rice Holding in Mutithi and the 3rd Respondent has 10 acre land in Gucwi and the 4th Defendant has no other land and has many children.

The Petitioner further averred that the 1st Respondent did not take into account the way the deceased had settled his family and this led to fracas and the 4th Respondent was evicted and her children charged with a criminal case. He stated that the Advisory Committee has made 2 contrary awards over the Rice Holding whereby on 20/2/2014, it awarded the field to the 4th Respondent but on 29/6/2014, it awarded the Rice Holding to the 2nd, 3rd and 4th Respondents.

He further stated that by purporting to hear a dispute that had been determined by the Court in Wanguru Misc. Case No. 39 of 1993, the Advisory Committee usurped powers of the Court. The Petitioner averred that the Manager of the Mwea Irrigation Settlement Scheme did not give the Applicant a hearing and his rights to land were infringed when the 1st Respondent cancelled his nomination without a hearing.

In conclusion, the Petitioner averred that the Advisory Committee members had not been Gazetted and their role is not defined under the relevant Act and that the work of the Advisory Committee is to advice the Manager of the Scheme and that they cannot reopen the dispute or interfere with decisions they have made.

The 1st Respondent through the firm of Bwonwonga & Co. Advocates filed a replying affidavit opposing the Petition herein. The 2nd and 3rd Respondents filed a Replying affidavit as well opposing this Petition. In their response, the 1st Respondent stated that the Petitioner has not come to court with clean hands since he has always filed several suits hence duplicity of suits. The 1st Respondent further contends that the Petition filed herein is defective, does not disclose any right which has either been infringed, threatened or violated and that the same lacks merit.

The 2nd and 3rd Respondents on the other hand stated that prior to the filing of this Petition, the Petitioner had filed a suit being Kerugoya ELC Case No. 88 of 2017 which is still pending hearing and final determination. According to the 2nd and 3rd Respondents, the original licensee of Rice Holding No. 2160 was Kimunyi Gakuya (deceased) and that the said Kimunyi Gakuya (deceased) did not do nomination in favour of the Petitioner in writing to the Manager Mwea Irrigation Settlement Scheme.

The 2nd and 3rd Respondent further stated that the said original licensee had three wives namely: JANET WANJIKU KIMUNYI, CECILY MUTHONI KIMUNYI and GRACE MICHERE KIMUNYI and that the 4th Defendant herein is the 3rd wife while the Petitioner is son to the 3rd house hold. The 2nd and 3rd Respondent also stated that vide Wanguru DMCC No. 39 of 1993, the Court made an order on determination of sharing out the Rice Holding No. 2160 to the effect that the licensee JANET WANJIKU KIMUNYI was to hold the same in trust of the other two widows who have the right of cultivation of the same. The two further averred that on 30th August 2013, together with the 4th Respondent agreed to refer the dispute over the suit Rice Holding which was pending before the Court in Wanguru PMCC Succession No. 6 of 2013 to the Advisory Committee of National Irrigation Board at Mwea Irrigation Settlement Scheme. On 29th June 2016, the Advisory Committee upon deliberations arrived at a decision whereby they distributed the Rice Holding in dispute into the three households as follows:-

- JANET WANJIKU KIMUNYI - 2160 A

- CECILY MUTHONI KIMUNYI - 2160 B

- GRACE MICHERE KIMUNYI - 2160 C

The 2nd and 3rd Respondents further contend that the 4th Respondent who is the mother to the Petitioner herein was the main beneficiary for getting 2 acres whereas the other households only got 1½ acres each. They also averred that the 1st household nominated the 2nd Respondent as their representative while the 2nd household nominated the 3rd Respondent as their representative and they were both issued with tenant cards for Rice Holding No. 2160 A and 2160 B respectively. The 4th Respondent who is a nominee for the 3rd household was equally issued with a tenant card for Rice Holding No. 2160 and a licence.

The 2nd and 3rd Respondent also contends that the issues on land parcel No. MWEA/NGUCWI/219 have been raised and dealt with in Kerugoya ELC Case No. 31 of 2019 and denied that during the lifetime of the deceased, he had settled his three wives and left the 4th Respondent in charge of and in occupation of Rice Holding No. 2160 as her inheritance. The 2nd and 3rd Respondent further stated that the 4th Respondent has never filed any claim over the Rice Holding as her inheritance and that the suit property did not form part of the households of the deceased but that the Petitioner through his mother who is the 4th Respondent was summoned and took part in the resolution of the dispute before the Advisory Committee.

PETITIONER'S SUBMISSIONS

The Petitioner submitted that having been nominated by his father Kimunyi Gakuya (deceased) as his nominee during his lifetime as shown in a letter annexed to his verifying affidavit and marked as MK 1, he argued that despite being aware of that fact, the Advisory Committee heard the dispute over the suit land without summoning and notifying him which amounted to violation of his right to a fair administrative action as provided under *Article 50 (1) of the Constitution of Kenya 2010*.

He also referred to *Article 47 (1)* which provides for a right to a fair administrative action that is expeditious efficient, lawful, reasonable and procedurally fair.

The Petitioner further submitted that the Advisory Committee of the 1st Respondent usurped powers of the Court when it heard a dispute that had been determined by the Court in Wanguru Misc. Case No. 39 of 1993. Secondly, the Advisory Committee has made 2 contrary awards over the same Rice Holding dated 20/2/2014 and 29/6/2014. In the first award made on 20/2/2014, they gave the suit land to the 4th Defendant but on 29/6/2014, it awarded the same to the 2nd, 3rd and 4th Defendants. He argued that the work of the Advisory Committee is to advise the Manager of the Scheme and not re-open the dispute or interfere with decisions they have made. He cited the following cases in support of the Petition:

(a) *High Court of Kenya at Kerugoya - Misc. Civil Application No. 14 of*

2014 – Republic Vs National Irrigation Board and John Waweru, Margaret Muthoni, Elizabeth Muthoni Ex-parte John Gichobi Karugumi Alias Karaba Karugumi,

(b) *Kerugoya ELC Judicial Review Application No. 21 of 2014 Between Republic Vs National Irrigation Board and Fredrick Mugweru Mugo, Symon Wambugu Mugo Ex-parte Danson Mute Mugo.*

The 1st Respondent on the other hand submitted that the Petitioner has not demonstrated which rights has been infringed as the Rice Holding which is the subject of this dispute belongs to the 1st Respondent which in law is mandated to manage the same and to issue tenant licences tenant cards and also terminate the tenancy of the Rice Holdings. She submitted that *Regulation 7 (2) of the Irrigation Act (National Irrigation Schemes) 1977* provides that it is the 1st Respondent who is conferred the power to approve any nomination by a licensee and not the Court. According to the 1st Respondent, the Advisory Committee, Mwea Irrigation Scheme held its meeting on 29th June 2016 where all the stakeholders including the Petitioner was present as can be reflected from the minutes attached to the Petitioner's verifying affidavit and marked MK 3. The 1st Respondent contends that the Petitioner was given an opportunity to be heard contrary to his allegations. She argued that the 1st Respondent has the mandate to issue licence and to terminate the same as well as to regulate the manner of use of the rice holding in accordance with the Irrigation Act and the Irrigation (*National Irrigation Schemes*) 1977. She referred to the case of *Republic Vs The Chairman Advisory Committee Mwea Irrigation & Two Others Embu High Court Misc. Application No. 67 of 2007*.

The 2nd and 3rd Respondents also submitted that the Petitioner's right to property has not been infringed, violated and/or threatened in any manner whatsoever. They further contend that every Kenyan right to property is protected under *Article 40 of the Constitution* but that a Rice holding is the property of the 1st Respondent.

They further submitted that under the *Irrigation Act 2019*, the 1st Respondent is mandated to issue licences to persons to occupy and work in the various Rice Holdings and that such persons are mere licencees. As such, the Rice Holding is not the personal property (ies) of those licensees. They argued that the licence held by the late Kimunyi Gikuya (deceased) was not absolute ownership of property under *Article 40 of the Constitution*.

The 2nd and 3rd Respondents further argued that the nomination of the Petitioner Is not sufficient prove of ownership of the Rice Holding as the 1st Respondent has to approve the nomination first as provided for under *Regulation 7(2) of the Irrigation (National Irrigation Schemes) 1977*. There is no evidence that the Petitioner moved the 1st Respondent in a bid to have the alleged nomination approved. The 2nd and 3rd Respondents also submitted that upon looking at the verdict passed in the Court's ruling made on 31st August 1994 in Wanguru DMCC No. 39 of 1993, it indicates that the Rice Holding No. 2160 was to be held by one Janet Wanjiku Kimunyi in trust of the other two widows which means that the other two widows include the 4th Respondent and Cecily Muthoni Kimunyi and their children. It is also submitted that the 4th Respondent participated in the Court case at Wanguru when the Petitioner was a minor and she attended the Advisory Committee meetings where she turned out to be the major beneficiary having received two acres while the other two houses only got one and a half acres each out of the Rice Holding No. 2160. They cited the case of *Naomi Njeri Ayub Vs Mary Nyambura Wangombe & Another, ELC No. 11 of 2017 (2019) e K.L.R.*

On the issue of violation of *Articles 48 and 50 of the Constitution*, the 2nd and 3rd Respondents submitted that the minutes of the meeting of the 1st Respondent's Advisory Committee held on 29th June 2016 confirms that the Petitioner was present as reflected from the list of members present, meaning that the Petitioner has not persuaded this Court how his right to be heard under *Article 48 and 50 of the Constitution* has been flouted. They argued that the rule of fair hearing does not mean a full adversarial hearing like what happens in a Court room but when one is given an opportunity to be heard. If the Petitioner was indeed aggrieved by the decision of the Advisory Committee, he should have commenced Judicial Review proceedings within six (6) months of the said verdict. Coming to this Court by way of a Petition four years down the line is an afterthought and a party should not be allowed to benefit from his laches.

Lastly, on the allegations that the appointment of the Advisory Committee was null and void as the members are unknown in law due to their non-Gazettement, the 2nd and 3rd Respondents submitted that there is no requirement under the law that they were not Gazetted. They argued that the Petitioner has not tendered any evidence that the Committee was not properly constituted.

LEGAL ANALYSIS AND DECISION

I have considered the Petition, the Verifying affidavit and the annexures thereto and the Replying affidavits. I have also considered the submissions by the parties and the applicable law. The issues that Distil for determination are as follows:-

- (1) Whether the Petitioner's right to property under Article 40 of the Constitution, 2010 has been infringed, violated and/or threatened?**
- (2) Whether the Petitioner's right to a fair hearing under Article 48 and 50 of the Constitution 2010 has been infringed, violated and/or threatened?**
- (3) Whether the Advisory Committee of the National Irrigation Board usurped the powers of the Court in Wanguru Misc. Application Case No. 39 of 1993?**
- (4) Who will bear the costs of this Petition?**

Whether the Petitioner's right to property under Article 40 of the Constitution, 2010 has been infringed, violated and/or threatened?

Article 40 of the Constitution provides as follows:-

Protection of right to property

"40 (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property:-

- (a) Of any description; and*
- (b) In any part of Kenya.*

(2) Parliament shall not enact a law that permits the state or any person:-

- (a) To arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or*
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4)*

The property in dispute is a Rice Holding No. 2160 which property is owned by the National Irrigation Board who manages it through the Manager, Mwea Irrigation Settlement Scheme. The Manager conducts her operations through Advisory Committee. The mandate of the National Irrigation Act, 2019 is to issue licences to persons to occupy and work in their various Rice Holdings and such persons are merely licensees who have no proprietary rights over the Rice Holdings. In respect of the suit property being Rice Holding No. 2160, the 1st Respondent issued one Kimunyi Gakuya (deceased) a licence to occupy and work on the said Rice Holding. It was a term of the lease agreement between the licensee and the 1st Respondent that the licensee would nominate someone to succeed her/him in the event of death. However, the nominee was subject to approval by the 1st Respondent in accordance with the ***Irrigation (National Irrigation Schemes) 1997. Regulation 7 (2) of the Irrigation (National Irrigation Schemes) 1977*** provides as follows:-

"7 (2) No person nominated as a successor may succeed without the approval of the Committee".

In his verifying affidavit in support of this Petition, the Petitioner annexed a letter dated 27/10/1989 in which the original licensee nominated Muthike Kimunyi, the Petitioner herein as his successor under the guardianship of Grace Michere Kimunyi his mother who is the 4th Respondent. The import of the said letter is that the Petitioner by then was a minor and his mother Grace Michere Kimunyi as a guardian was to safeguard his interests in the Rice Holding. When the Petitioner attained the age of majority, he did not apply to remove his mother Grace Michere Kimunyi as guardian and neither did the said Grace Michere Kimunyi opt to withdraw her guardianship on behalf of the Petitioner. The import of this is that Grace Michere Kimunyi continued to act as guardian for all purposes even after the Petitioner attained the age of

majority.

It is trite law that where a person is nominated as successor to a Rice Holding, such succession crystallizes once the 1st Respondent through its Advisory Committee approves the same pursuant to *regulation 7 (2) of the Irrigation (Nation Irrigation Schemes) 1977*.

Whether the Petitioner's right to a fair hearing under Articles 48 and 50 of the Constitution 2010 has been infringed, violated, and/or threatened?

It is a basic natural justice concept that a person cannot be condemned unheard. I have looked at the minutes of the meeting of the 1st Respondent's Advisory Committee held on 29th June 2016 at Guest House. Members in attendance include:- Grace Micere Kimunyi who was the guardian to the Petitioner in respect of the disputed Rice Holding No. 2160. The Petitioner was also present. There is no evidence that he objected to the decision by the Advisory Committee to sub-divide the Rice Holding to the three houses as shown in the award. The presence of the Petitioner in the meeting called by the Advisory Committee is a clear manifestation that he was afforded an opportunity to be heard before the award was issued. The rule of fair hearing does not mean an adversarial hearing akin to what happens in a Court room. When one is invited to a meeting where a decision is made where his/her interest is likely to be affected, his presence during such meeting is sufficient evidence that he/she was afforded a hearing under the rules of Natural justice.

In the case of *Josphat Kariuki Mutuanjara Vs National Irrigation Board & 4 others (2016) e K.L.R*, this Court cited the case of *Union Insurance Co. of Kenya Ltd Vs Ramazan Abdul Dhang, Civil Application No. 179 of 1998* where it was held:-

"The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it".

I agree with the above decision and persuaded to apply in the case herein. Suffice to state that the 1st Respondent is a Statutory body charged with Administrative decisions in respect of the management of Rice Holdings which is the subject of this Petition. Where a party is challenging a decision by an Administrative body such as the 1st Respondent on grounds of illegality, irrationality and impropriety, the party must first exhaust the internal dispute resolution mechanisms provided but where such mechanisms are not available, he can approach the Judicial system through the *Fair Administrative Actions Act* to have such decision(s) quashed and/or set aside.

Section 7(2) of the Fair Administrative Action Act provides grounds for review to include bias, procedural impropriety, ulterior motive, failure to take into relevant matters, abuse of discretion, unreasonableness, violation of legitimate expectation or abuse of power. The use of Judicial Review as a tool to enforce fundamental rights was put to perspective in the case of *Republic Vs Kenya Roads Board Ex-parte John Harun Mwau HC Misc Civil Application No. 1372 of 2000* where it was held:-

"The remedy of Judicial Review is available as a procedure through which the applicant can come to Court for the determination of any Constitutional issue including striking down of legislation which may be unconstitutional. Judicial Review has an entirely different meaning in Commonwealth countries, which have adopted the written Supreme Constitutional system Judicial Review in this sense means the power to scrutinize laws and executive acts, the power to test their conformity with the Constitution and the power to strike them down if they are found to be in consistence with the Constitution.....".

Applying these principles, I find that the Petitioner has not proved that his Constitutional right to a fair administrative action under **Article 47 or condemned unheard under Article 48 and 50 of the Constitution 2010** has been infringed, violated and/or threatened.

Whether the Advisory Committee of the National Irrigation Board usurped powers of the Court in Wanguru Misc. Application Case No. 39 of 1993?

The Petitioner is challenging the decision of the Advisory Committee for hearing a dispute that had been determined by a Court of law. The **Irrigation Act Chapter 347 Laws of Kenya** which is the applicable law provides the establishment of the National Irrigation Board whose functions are given in **Section 15** as follows:-

"(1) The Board shall be responsible for the development, control and improvement of National Irrigation Schemes in Kenya.

(2) The Board shall have and may exercise all such power as are necessary to enable it to perform its functions under this Act, and, without prejudice to the generality of the foregoing, the Board shall have power:-

(a) To conduct research and investigation into the establishment of National Irrigation Schemes;

(b) in conjunction with the Water Resources Authority established under the Water Act (Cap. 372), to formulate, and be responsible for the execution of policy in relation to National Irrigation Schemes;

(c) in consultation with the Minister and the Minister for the time being responsible for finance, to raise funds for the development of National Irrigation Schemes;

(d) to co-ordinate and plan settlement on National Irrigation Schemes.

(e) To design, construct, supervise and administer National Irrigation Schemes;

(f) to determine the number of settlers to be accommodated in a National Irrigation Scheme;

(g) to provide land in National Irrigation Schemes for public purposes;

(h) to promote the marketing of crops and produce grown or produced on National Irrigation Schemes;

(i) to award scholarships and bursaries for the study of irrigation (both in Kenya and elsewhere) or any other subject which the Board considers to be of benefit to the Board”.

In addition, the National Irrigation Board is also authorized under the Act to exercise its mandate through subsidiary legislation or agents which include appointed committee such as the Advisory Committee. The **Irrigation Act** is categorical that the National Irrigation Board is not under any directions from anybody or quarters in the management of the Irrigation Schemes. The decision which the Petitioner is complaining as having been usurped by the Advisory Committee in Wanguru Misc. Application No. 39 of 1993 was in respect of the suit Rice Holding No. 2160 where the original licensee Kimunyi Gakuya (deceased) had died. Under the law, the issue was referred to the District Magistrate who directed that the issue be referred to the Panel of elders who were to identify the beneficiaries of the Estate of the deceased in accordance with the Customary law applicable (in this case Kikuyu Customary Law). When the matter came up for mention next on 31/8/1994, the District Magistrate adopted the award of the Panel of elders as an order of the Court. The decision by the Panel of Elders was to the effect that Janet Wanjiku Kimunyi who was the licensee of Rice Holding No. 2160 was to hold the same in trust for her house and the other two widows who have a right of cultivation. That order by the Court was subject to approval by the National Irrigation Board. In its Committee meeting held on 29th June 2016 at Guest House, the Advisory Committee of the 1st Respondent approved the decision of the District Magistrate under **Regulation 7 (2) of the Irrigation (National Irrigation Schemes) 1977**.

In my view, the Advisory Committee of the 1st Respondent did not usurp an order of Court but complimented the order in accordance with Irrigation Act and the Regulations made thereunder. I therefore find and hold that the Advisory Committee of the 1st Respondent did not usurp or breach any law in its decision made on 29th June 2016.

Following my analysis hereinabove, I find that the Petitioner has not proved his case on the required standard. Consequently, this Petition is hereby dismissed with costs. It is so ordered.

JUDGMENT READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 5TH DAY OF NOVEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Ndungu holding brief for Magara
2. Mr. Mugo holding brief for Ann Thungu
3. Kabuta- Court clerk.