REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 264 OF 2014

ELIUD MAGONDU NJAGI.....PLAINTIFF

VERSUS

THE SENIOR SCHEME MANAGER, MWEA

IRRIGATION SETTLEMENT SCHEME.....1ST DEFENDANT

JOHN KIMITI NJAGI.....2ND DEFENDANT

JAMES MUTHIKE NJAGI.....3RD DEFENDANT

BENJAMIN GACHOKI NJAGI.....4TH DEFENDANT

MARTHA MUGURE NJAGI.....5TH DEFENDANT

JUDGMENT

Background

The Plaintiff vide a plaint dated 18th September 2014 sought judgment against the defendant for the following orders:-

(a) A declaration that the deliberations by the 1st defendant sub-dividing MWEA IRRIGATION SCHEME RICE HOLDING No. 2102, Unit H18 Thiba Section amongst the plaintiff and the 2nd, 3rd, 4th and 5th defendants was null and void and that he exceeded his jurisdiction therefore.

(b) A declaration that the plaintiff is the absolute licensee over MWEA IRRIGATION SCHEME RICE HOLDING NO. 2102, Unit H18, Thiba Section absolutely.

(c) Any other relief that this Honourable Court may deem fit to grant.

(d) Costs of this suit.

The 1st defendant filed a Defence on 12th February 2015 denying the plaintiff's claim and sought to have the same dismissed with costs. On 28th March 2019, the 2nd, 3rd, 4th and 5th defendants filed a joint statement of defence also denying the claim by the plaintiff. The parties also filed their compliance documents under *Order 3, 7 and II CPR* after which the matter was fixed for hearing.

Plaintiff's Summary of Facts

The plaintiff testified on 18th November 2019 and stated that he has been doing rice farming in Mwea Irrigation Settlement Scheme. He stated that he cultivates Rice holding No. 2102 Thiba Section Unit H18 which was allocated to his father but gave it to him. Since he did not have a National Identity Card, his mother was registered as trustee in 1981. By then he was aged 7 years. His mother later passed on in the year 2002. The plaintiff said that he went to National Irrigation Board to obtain a letter. He was given a letter by the Mwea Irrigation Settlement Scheme dated 28/3/2003 addressed to the Resident Magistrate Wanguru Magistrate's Court P.O. Box 2 Wanguru. The letter was produced in evidence as an exhibit. The plaintiff also stated that the Wanguru Magistrate's Court heard the witness and ordered that the land belongs to him. He took the order to National Irrigation and Settlement Board offices in Mwea to have him recognized as the bona fide owner. He was then issued with a card and licence which he produced as Plaintiff Exhibit No. 3. After the demise of his mother, Benjamin Gachoki Njagi and James Muthike Njage came and occupied the suit land without his permission. He went to Wanguru Law Courts and sued them. He was given an order evicting the two from the rice holding by Quickline Auctioneers. However, the defendant went to the Manager,

Mwea National Irrigation Settlement Scheme and sought to have the suit land sub-divided. He said that he was not called. Later, the Scheme Manager, Mwea National Irrigation Scheme called and told him that his land had been sub-divided. He produced a copy of minutes of the Scheme Advisory Sub-committee meeting held on 16th August 2012. He said that he was not present when the meeting was held sub-dividing his land into five (5) portions. The land was thereafter given to John Kimiti Njagi (0.8 acre), James Muthike Njagi (0.8 acre), Bernard (0.8 acre), Eliud (0.8 acre) and Martha (0.8 acre). They were also given cards. He now wants them evicted from his land.

Defendant's Summary of Facts

The 4th defendant Benjamin Gachoki Njagi testified on behalf of the defendants and stated that he is the Elder brother to the plaintiff while the rest of the defendants are his siblings. He stated that the original tenant for Rice Holding No. 2102 was in the name of their late father Njagi Magondu and when their father died, the rice Holding was registered in the name of their mother Josphine Wangithi Njagi (also deceased). On 12th April 2012, the Chief, Thiba Location wrote a letter to the Scheme Manager for purposes of succession and on 16th August 2012, all the children of the later Njagi Magondu were summoned to appear before the Scheme Advisory Sub-committee and upon deliberations, the sub-committee made a verdict that all the children of Mzee Njagi Magondu were to cultivate the rice Holding equally and Martha to hold the share in trust for her sisters. Thereafter, they were issued with licenses and tenant cards and since then, they have been in occupation of their respective portions of the Rice Holding as per the tenant cards and licenses. The 4th plaintiff further stated that the plaintiff was summoned to appear before the 1st defendant Sub-committee but failed to appear and that the sub-divisions of the rice Holding was done in accordance with the rules and Regulations governing the Scheme. He stated that the Rice Holding does not exclusively belong to the plaintiff and the decision made on 16th August 2012 was not irrational. He also stated that the 1st defendant has the mandate to determine the number persons and which person is to occupy which Rice Holding and that the claim by the plaintiff is actuated by malice, greed and an afterthought which ought to be dismissed.

Issues for Determination

(1) Whether the plaintiff was issued a license for the rice holding No. 2102 from 25th May 2008?

(2) Was the 1st defendant served with the orders in Wanguru SPMCC No. 64 of 2005 and Misc. No. 19 of 2003?

(3) Whether the 1st defendant had the mandate to deliberate and make finding over rice holding No. 2102 Unit H18 Thiba on 16th August, 2012.

(4) Whether the decision by the 1st defendant through its Scheme Advisory Sub-committee made on 16th August 2012 is ultra vires and therefore null and void?

(5) Who will bear the costs of this suit?

Legal Analysis and Decision

I have considered the *viva voce* evidence by the parties and the Exhibits produced. I have also considered the submissions by counsels for the parties and the applicable law. The subject matter of the dispute is a rice holding situated in Mwea Irrigation Settlement Scheme described as Rice Holding No. 2102, Unit H18 Thiba Section. The property is owned by the Government of Kenya and managed by the National Irrigation Board (N.I.B). The mandate of the National Irrigation Board is to manage the scheme in accordance with the ***Irrigation Act Cap. 347 Laws of Kenya*** and the ***Irrigation (National Irrigation Scheme) Regulations 1977*** made pursuant to ***Section 27 of the Irrigation Act*** aforesaid.

It is not in dispute that Rice Holding No. 2102, Unit H18, Thiba Section was originally allocated to Njogu Magondu (deceased) as a licensee. The said Njogu Magondu was the father to the plaintiff, 2nd, 3rd, 4th and 5th defendants.

Under ***Section 7 (1) of the Irrigation (National Irrigation Schemes) Regulations 1977***, the licensee of a Rice Holding is required to nominate a successor during his life-time. The deceased, Njogu Magondu therefore nominated the plaintiff under the guardianship of his mother Josphine Wangithi Njagi who also passed away in 2002. By a letter dated 28th March 2003, the Senior Scheme Manager, Mwea Irrigation Settlement Scheme informed the Resident Magistrate, Wanguru Magistrate's Court of the demise of Josephine Wangithi Njagi who was the guardian of the nominee, Eliud Magondu. The plaintiff was subsequently issued with a licence for the rice Holding in dispute by the 1st defendant on 11th day of December 2008. The plaintiff produced a Court order issued by the Senior Resident Magistrate's Court in SRMCC No. 64 of 2005 consolidated with Succession Cause No. 19 of 2003. The order was in respect of an application which had been filed by the plaintiff herein against the 3rd and 4th defendants in this case. The order was directing the 3rd and 4th defendants to be evicted from the suit premises. In a meeting by the Scheme Advisory Sub-committee of the 1st defendant herein held on 16th August 2012, the suit premises were sub-divided amongst all the children of the original allottee Njagi Magondu who are the plaintiff and the defendants herein as follows:-

- John Kimite Njagi - 0.8 acre

- James Muthike Njagi - 0.8 acre

- Benard - 0.8 acre

- Eliud - 0.8 acre

- Martha (to hold in trust

for her sisters) - 0.8 acre

The decision aggrieved the plaintiff who filed the instant suit challenging the same on grounds that the 1st respondent exceeded her jurisdiction and that the said decision is ultra vires, null and void. The plaintiff is also challenging the same on grounds that he is the absolute licensee over the rice Holding No. 2102, Unit H.18 Thiba Section.

Having considered the totality of the evidence adduced, it is not in dispute that the plaintiff was recognized as a licensee of the suit premises from 11th December 2008 and was issued with a card and a license. It is also not in dispute that as a licensee, the plaintiff did not have absolute ownership of the suit premises which was governed under the ***Irrigation Act Cap. 347 Laws of Kenya*** and the Irrigation (National Irrigation Scheme) Regulations 1977. A rice holding is the property of the National Irrigation Board which issues licenses to persons to occupy and work in the various rice holdings and such persons are mere licensees. Such rice holdings do not form part of the Estate of a deceased licensee capable of being distributed to beneficiaries of his Estate under the law of Succession Act. The plaintiff produced a copy of minutes of the Scheme Advisory Committee Sub-committee held on 16th August 2012 which caused the suit rice holding to be sub-divided and distributed amongst the children of the original licensee of the suit premises Njagi Magondu (deceased). The extract of the minutes does not show that the plaintiff who was by then the lawful licensee was present. The 4th defendant produced a letter from the 1st defendant to the plaintiff and all his siblings including the defendants herein requiring their attendance for the hearing of a case involving the suit premises rice Holding No. 2102 on 16th August 2012. There is no affidavit of service indicating that the plaintiff herein acknowledged the said Hearing Notice and therefore, was aware of the alleged meeting held on the said 16th August 2012. To that extent, I find that the plaintiff's right to a fair hearing under ***Article 50 of our Constitution of Kenya 2010*** was violated when the 1st defendant did not involve him in making the decision to sub-divide the suit premises. Originally, a person aggrieved by an administrative decision by a person or body charged with making such decision can challenge the decision by way of Judicial Review under the ***Law Reform Act*** and ***Order 53 CPR Cap. 21 Laws of Kenya***. The main ground for Judicial Review under that regime was the propriety of the process and not the merits of the decision. That was the traditional approach to Judicial Review. The approach has since changed to a more robust and progressive statutory judicial review where the Courts look at Judicial Review on a merit based approach.

The Court of Appeal in a recent decision of ***Suchan Investment Limited Vs Ministry of National Heritage & Culture & 3 Others (2016) K.L.R*** breached a new lease of life to Judicial Review and observed thus:-

> *"An issue that has strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while juridical review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, Judicial Review is not concerned with the merits of the case. However, Section 7 (2) (1) 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; Ex-parte Daly (2001) 2 A.C 532. 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 reviewing Court to assess the balance which the decision maker has struck; not merely whether it is within the range of rational or reasonable decision; secondly, the proportionality test may require attention to be directed to the relative weight accorded to the interest and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (c) 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. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of Judicial Review to include aspect 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 House Ltd Vs Wednesbury Corp. (1948) 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (1) (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) (1) that requires consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken 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 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 II of the Act. On a case to case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act".*

Applying the principle of proportionality set out in the above case, I now turn to the impugned decision and the explanation given by the decision maker for sub-diving the rice Holding which had been given to the plaintiff. The letter by the area Chief addressed to the Scheme Manager, Mwea Irrigation Scheme dated 12/4/2017 was a notification that the trustee of the nominee of the rice Holding No. 2102 which is the suit property had passed on and gave the name of the plaintiff and his siblings as beneficiaries. The Scheme Manager thereafter called for a meeting to discuss the issue on 16th August 2012. After deliberations, the Scheme Advisory sub-committee decided to sub-divide the property amongst all the siblings according to the list supplied by the area Chief. The reasons given by the Sub-committee for sub diving the rice holding was that all the children had a right to the holding since it was their father who had originally been given the licence. Though the plaintiff was not present when the decision was made, I find the reasons given sits well with the proportionality principle. The impugned decision is also reasonable and meets the legitimate expectation of all the siblings of a licence held by their late father. It could have been discriminatory to give the entire rice holding to the plaintiff alone. In my view, it would serve no useful purpose to review the impugned decision and remit back the matter to the decision maker only to return with the same verdict.

For the reasons I have given hereinabove, I find this suit lacking merit and the same is hereby dismissed. In the spirit of cohesion and co-existence between the plaintiff and his siblings, I order each party to pay her own costs. It is so ordered.

JUDGMENT READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 7TH DAY OF MAY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Muchiri holding brief for Ombachi for Defendant

2. Ms Wandia Murimi holding brief for Kebuka Wachira

3. Plaintiff – present

4. Kabuta – Court clerk.