



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CIVIL APPEAL NO. 27 OF 2015

MARY WANGU

MWANGI RUCATHI

GEORGE MUNUHE MAINA

NANCY WANJIKU WACHIRA

MILLICENT NJOKI RUCHATHI.....APPELLANTS

VERSUS

MURIITHI RUCATHI.....1ST RESPONDENT

MANAGER, MWEA IRRIGATION SCHEME.....2ND RESPONDENT

JUDGMENT

(Being an Appeal from the decision by Hon. D. Nyaboke – Principal Magistrate delivered on 28th September 2015 in Misc. Succession No. 22 of 2004, (WANGURU).

This Appeal arises from a ruling by Hon. D. Nyaboke delivered on 28th September 2015. The gist of the decision is that in a Notice of Motion application dated 7th September 2015, the Appellants moved the lower Court for the following orders:-

- (1) Stay of execution of the orders dated 18th August 2015 pending hearing and determination of the application.*
- (2) The Honourable Court be pleased to review, vary and/or set aside its orders given on 18th August 2015 and order that rice holding No. 1693, Mwea Irrigation Scheme be utilized as follows:-*

A. MAIN HOLDING

- (a) Philip Muriithi Rugathi - 1 acre*
- (b) Mary Wangu Rucathi - 1 acre*
- (c) Mwangi Rucathi - 1 acre*
- (d) Maina Rucathi - 1 acre.*

B. EXTRA FIELD

- (a) Nancy Wanjiku - ¼ acre*
- (b) Millicent Njoki - ¼ acre*

(As per the Manager, Mwea Irrigation Settlement Scheme Verdict dated 15th July, 2014).

(3) That in the alternative, the Honourable Court be pleased to refer this matter to the Manager Mwea Irrigation Settlement for Arbitration and final determination.

(4) The costs of the application be provided for.

The said application was opposed by the Respondent, Muriithi Rucathi who filed Grounds of opposition and a Notice of Preliminary Objection dated 17th September 2015 respectively. In a ruling delivered on 28th September 2015, the trial Magistrate upheld the Preliminary Objection. That decision aggrieved the Appellant who lodged a Memorandum of Appeal dated 15th October 2015 citing the following six (6) grounds:-

(1) The learned magistrate erred in law and in fact in ruling that the appellants did not have locus standi to move the Court under Order 45 of the Civil Procedure Rules.

(2) The learned magistrate erred in law and in fact in ruling that the appellants had to first move the Court to be enjoined as parties before they could be heard.

(3) The learned magistrate erred in law and in fact in finding that the appellants were not interested parties because they were claiming ownership of the land.

(4) The learned magistrate erred in law and in fact in finding that it was functus officio the matter.

(5) The learned magistrate erred in law and fact by failing to find that the 2nd respondent herein had powers under the Irrigation Act, Cap. 347 of the Laws of Kenya to determine the number of settlers to be accommodated in an Irrigation Scheme, to issue and terminate licences and generally regulate the manner of use of a rice holding and its produce, hence the application dated 7th September 2015 was viable and tenable in law.

(6) The learned magistrate erred in law and in fact in failing to find that the ruling in the main succession delivered on 7th September 2006 upholding nomination of the 1st respondent herein was subject to the approval of the Irrigation Committee hence the application dated 7th September 2015 was viable and tenable in law.

Appellants Submissions

The Appellants through the firm of Wangechi Munene & Co. Advocates submitted generally on the six (6) grounds of Appeal.

First, the appellant submitted that the original licence of Rice Holding No. 1693 was one Phillip Rucathi Mukumbu who was the father to the appellants and Muriithi Rucathi, the 1st respondent herein. Before his death and pursuant to Regulation 7 (2) of the Irrigation (National Irrigation Schemes Regulations of the Irrigation Act), he had nominated his son Muriithi Rucathi as his successor. They submitted that after the demise of the original licensee Phillip Rucathi, the family filed Succession Cause No. 22 of 2004 (Wanguru) where the nomination of Muriithi Rucathi was upheld subject to the approval by the Irrigation Committee pursuant to Regulation 7 (2) of the Irrigation Act. Thereafter, the 2nd respondent sat down and authorized that the rice holding No. 1693 be utilized as follows:-

- (i) Pharish Muriithi Rucathi - 1 acre
- (ii) Mary Wangu Rucathi - 1 acre
- (iii) Mwangi Rucathi - 1 acre
- (iv) Maina Rucathi - 1 acre
- (v) Nancy Rucathi - ¼ acre
- (vi) Millicent Njoki Rucathi - ¼ acre.

The distribution was vide a letter dated 15th July 2014. The Appellants submitted that it was on the basis of that letter, they sought to review lower Court orders on 18th August 2015 which had *inter alia* ordered the 2nd respondent to issue the 1st respondent with a tenant card. The Appellants further submitted that by upholding the Preliminary Objection that the trial Court had no jurisdiction for being functus official, the trial magistrate misapprehended the facts and the law. They submitted that what the High Court did is to declare the Appeal as having abated and thereby upheld the lower Court judgment that had upheld the 1st respondent nomination subject to the approval by the Irrigation Committee. They further argued that the Irrigation Committee through the Manager, Mwea Irrigation Settlement Scheme sat down and on 15th July 2014 where the 2nd respondent gave a decision on how the rice holding would be utilized. They submitted that the nomination of the 1st respondent as the successor of the rice holding No. 1693 was not absolute as the Court held that it was subject to the approval of the Irrigation Committee.

They further submitted that the 2nd respondent having decided the utilization of the rice holding, the lower Court had jurisdiction to entertain the appellants' application dated 7th September 2015. They cited the case of Republic Vs Chairman Advisory Committee Mwea Irrigation Settlement Scheme and 2 others, High Court Misc. Application No. 67 of 2006. They also cited *Section 15 (2) (f) of the Irrigation Act, Bernard Gichobi Njira Vs National Irrigation Board J.R. No. 23 of 2014 (U.R), Republic Vs National Irrigation Board & 5 others Ex-parte Josphat Kariuki Mutuanjara Misc. Application No. 20 of 2014, Accredo Ag. & 3 Others Vs Steffaro Ucceli & Another (2017) e K.L.R.*

1st Respondent's Submissions

The 1st Respondent through the firm of Kebuka Wachira & Co. Advocates submitted that in their application dated 7th September 2015 which was dismissed on 28th September 2015, the appellants had sought to review/vary and/or set aside orders given on 18th August 2015 whereby the 2nd respondent was ordered by the Honourable Court to issue the 1st respondent with a tenant card in his own name in respect of Rice Holding No. 1693, Mwea Irrigation Scheme and also to put the 2nd respondent back into possession of the Rice Holding. He argued that this matter had started in Wanguru SRM Misc. Succession Cause No. 22 of 2004 and judgment was delivered on 7th September 2006 where the Honourable Court upheld the nomination of the 2nd respondent as a successor of the original Licence Holder Phillip Rucathi Mukumbu. He further submitted

that his nomination was not appealed against within the prescribed period of 30 days under the Irrigation Act Regulations. Aggrieved by the decision, Peris Muthoni Rucathi appealed in Kerugoya ELC Appeal No. 19 of 2013. Unfortunately, she died and was not substituted and the appeal abated.

The Honourable Court as such confirmed the said lower Court decision on 31st July 2014 and that that order has neither been appealed against nor reviewed and/or vacated. The 1st respondent submitted that thereafter, the appellants then filed the above stated application which is the subject of the impugned order by the trial Court on grounds that they lacked locus standi to bring the application for review under *Order 45 CPR* since they have never been parties in the lower Court nor in the Appeal. He cited the case of *Zephir Holdings Limited Vs Mimosa Plantations Limited, Jeremiah Malagaro & Ezekiel Misango Mutisya (2014) e K.L.R.* The 1st appellant also argued that the appellant did not seek leave of the Court to be enjoined in the lower Court matter nor did the Court order suo moto that they be enjoined. Further, the 1st respondent submitted that the appellant filed the said application as interested parties when they had not been enjoined as parties either in the lower Court or in the Appeal. It was also submitted that the trial magistrate held that the Court was functus officio in view of the fact that the proceedings had been finally concluded and the decision was a subject of Appeal. He referred the definition of *Functus officio* in the *Black's Law Dictionary, Ninth Edition*. He also cited the case of *ICEA Lion General Insurance Company Ltd Vs Julius Nyaga Chomba (2018) e K.L.R* where the decision in the case of *Jersey Evening Post Limited Vs Al Ihani (2002) J.L.R. 542 at page 550 and Republic Vs National Irrigation Board & Another Ex-parte Antony Munene Mbui & Another (2018) e K.L.R.*

Legal Analysis and Decision

Before getting into the substance of the Appeal, it is imperative to bring into remembrance the duty bestowed by the law. In that regard, the case of *Selle Vs Associated Motor Boat Co. (1968) E.A 123* is instructive where the Court set out legal parameters guiding the Court as follows:-

“The Appellate Court is not bound necessarily to accept the findings of fact by the Court below. An Appeal to the Court of Appeal from a trial by the High Court is by way of a re-trial and the principles upon which the Court of Appeal acts are that the Court must reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in this respect. In particular, the Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally”.

The subject of this Appeal is a Rice Holding No. 1693, Mwea Irrigation Settlement Scheme. The said Rice Holding was originally registered in the name of one Phillip Rucathi Mukumbu (deceased) who was the father to the appellant and the 1st defendant herein. Under the Irrigation Act, Cap. 347 Laws of Kenya and the rules made thereunder, the National Irrigation Board is the body mandated to manage all operations of the rice holdings within the country including the issuance of licences, determination of the number of licensees/tenants in each rice holding and cancellation of those licences/tenancies in accordance with the cardinal principles of fair hearing such as illegality, impropriety, unfairness or want of jurisdiction. The National Irrigation Board is not to be directed by any person on how to conduct the operation of their duties, not even by an order of a Court. Before the said Phillip Rucathi Mukumbu died, he had nominated his son, Muriithi Rucathi as his successor in accordance with the Irrigation (National Irrigation Scheme) Regulations, 1977. **Section 7 of the Regulations** provide as follows:-

(1) A licensee may, at any time after the date of being granted a licence, nominate, in writing to the Manager, another person to succeed him as licensee in the event of his death; and a licensee may at any time, in writing to the Manager, revoke or alter any such nomination which may have been made by him;

Provided that no person nominated as successor may succeed until he has attained the apparent age of eighteen years; if he has not reached that age, his guardian under customary law may; within one month of the licensee's death, and with the approval of the manager, appoint a person to act on his behalf until the successor is of age. No person nominated as a successor may succeed without the approval of the Committee.

(2) The authorized dependent of a deceased licensee may, within thirty days of his death, appeal to the Court against the nomination, under paragraph (1) of this regulation of a successor”.

By a letter dated 20th March 2001, Mwea Irrigation Settlement notified the District Magistrate Court, Wanguru Law Courts of the death of the holder of Rice Holding No. 1693 Mr. Phillip Rucathi Mukumbu vide a Burial Permit No. 827362 of 27th January 2001. The Manager wanted the Court to conduct a hearing to determine whether there was any objection to the nominee, Muriithi Rucathi taking over the Rice Holding pursuant to *Regulation 7(2) of the Irrigation (National Irrigation Scheme) regulations, 1977*. The said **Section (2) of the Irrigation (National Irrigation Scheme) Regulations, 1977** reads as follows:-

“No person nominated as a successor may succeed without the approval of the Committee”.

After hearing the witnesses, the learned magistrate on 7/9/2006 upheld the nomination of Muriithi Rucathi as the holder of the rice holding No. 1693, Mwea Irrigation Settlement. In his ruling, the learned magistrate held as follows:-

“That being the case, this Court would not disturb the nomination of Muriithi Rucathi which is hereby upheld subject to the approval of the Irrigation Committee (underline mine)”.

While rendering himself on the issue, the trial magistrate was cognizant of the provisions of ***Regulation 7(2) of the Irrigation (National Irrigation Scheme) Regulation of 1977*** where any decision by the Courts was subject to the approval under the ***Irrigation Act, Cap 347*** and the Regulations made thereunder. After the Court ruling on the said 7th September 2006, the National Irrigation Board through its Advisory Committee sat down and authorized the rice holding No. 1693 to be utilized as follows:-

- (i) Pharis Muruthi Rucathi - 1 acre
- (ii) Mary Wangu Rucathi - 1 acre
- (iii) Mwangi Rucathi - 1 acre
- (iv) Maina Rucathi - 1 acre
- (v) Nancy Wanjiku - ¼ acre
- (vi) Millicent Njoki Rucathi - ¼ acre

The decision by the Irrigation Committee was communicated vide a letter dated 15th July 2014. Based on that letter, the appellants moved the trial Court for the review of its orders issued on 18th August 2015 which had ordered the Manager, Mwea Irrigation Scheme (2nd respondent) to issue Muruthi Rucathi (1st respondent) with a tenant card. The appellants had also sought an order that the rice holding No. 1693 be utilized as per the recommendation in the 2nd respondent's letter dated 15th July 2014 and/or the matter be referred to the 2nd respondent for Arbitration and final determination. I have deliberately laid down these background which is necessary for the determination of the Appeal. I now re-evaluate and re-examine the six grounds as combined as hereunder:-

Ground 1, 2, 3, 4, 5 & 6 combined

The appellants are challenging the findings by the trial Court that they lacked the locus standi in the suit property. They are also challenging the findings of the Court that it was functus officio on the subject matter having rendered itself on the matter previously. From the proceedings of the trial Court, it is not in dispute that the appellants and the 1st respondent are sons and daughters of the original licensee of the rice holding No. 1693. It is not also in dispute that they are all beneficiaries of the Estate of their father. It is not also denied that an Advisory Committee of the 2nd respondent sat down and shared the suit property Rice Holding No. 1693 in terms of a letter dated 15th July 2014. That letter was annexed to the application for review dated 7th September 2015 which is the subject of this Appeal. The Rice Holding which is now the subject of this Appeal is a property of the 2nd respondent who has the full power and responsibility of determining the licensees of the various rice holdings including the manner of determining such licensees and cancellation of the same in accordance with the law. The 2nd respondent in her letter dated 15th July 2014 has

determined the licensees to occupy the rice holding No. 1693. The 2nd respondent is the one giving the locus standi to individual licensees to occupy and farm in their respective rice holdings and not the Courts. The operation and management of the rice holdings including rice holding No. 1693 is subject to the Irrigation Act, Cap. 347 Laws of Kenya and the Rules made thereunder. The management of the National Irrigation Settlement Schemes are not subject to ***the Civil Procedure Act Cap. 21 Laws of Kenya*** or the rules made thereunder save where a party is challenging its decision on grounds of illegality, impropriety, unfairness or want of jurisdiction under ***Article 47 of the Constitution of Kenya 2010***. By declaring that the appellants had not sought and obtained leave to be enjoined into the former suit before being heard, the trial magistrate erred in that she was abrogating the duties of the National Irrigation Board in the Management of the Rice Holding in accordance with the Act and the Regulations made thereunder. Even where the Court has recommended a particular nominee as successor to a particular rice holding under ***Regulation 7(1)***, it behoves upon the same Court to review its orders and sanction the approval of a different nominee as may be approved by the Advisory Committee of the Irrigation Board under ***Regulation 7(2)***. In this case, the Recommendation of Muriithi, the 1st respondent as successor to the Rice Holding No. 1693 by the trial Court was not sanctioned/approved by the Advisory Committee. Instead, the Committee vide a letter dated 15th July 2015 gave a list of new licensees to occupy the Rice Holding No. 1693. The trial magistrate was obligated under ***Regulation 7(2)*** to reconsider its earlier orders and replace with the new list presented by the Advisory Committee in accordance with the Regulations. The trial Court was bound to review its orders to give way to the Advisory Committee of the 2nd respondent dated 15th July 2015 in accordance with the ***Irrigation Act Cap. 347*** and the Regulations made thereunder. The trial magistrate erred in applying the Rules of procedure under the ***Civil Procedure Act Cap. 21 Laws of Kenya*** and upholding Preliminary Objections which are procedural technicalities contrary to the applicable law.

I also find that the trial magistrate erred in law and in fact in failing to find that the powers of the 2nd respondent supersede any orders of the Court that is in conflict with the ***Irrigation Act Cap. 347 Laws of Kenya*** and the ***Irrigation (National Irrigation Scheme (Regulations, 1977)***. My parting shot is that this Appeal succeeds in all the six (6) grounds and the same is allowed in the following terms:-

- (1) ***The Ruling by the trial magistrate delivered on 28th September 2015 is hereby set aside.***
- (2) ***The Appellants' Notice of Motion dated 7th September 2015 is allowed in terms of prayer No. 3 thereof.***
- (3) ***The costs of this Appeal shall be borne by the 1st Respondent.***

Judgment READ, DELIVERED physically in open Court at Kerugoya and SIGNED this 18th day of June, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Ms Kimata holding brief for Kebuka Wachira for 1st Respondent
2. Ms Makazi holding brief for Wangechi Munene for Applicant
3. 2nd Respondent/Advocate – absent
4. Kabuta – Court clerk.