



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CONSTITUTIONAL PETITION NO. 2 OF 2016

IN THE MATTER OF AN APPLICATION UNDER CHAPTER 4 ARTICLE

40 & 50 AND SCHEDULE 6 PART 5 CLAUSE 19 OF THE

CONSTITUTION OF KENYA

AND

IN THE MATTER OF WANG'URU ARBITRATION CASE NO. 5 OF 2007

AND

IN THE MATTER OF CANCELLATION OF TENANT IDENTIFICATION

CARDS AND LICENCES TO RICE HOLDING

NO. 2032 A AND 2032 B

AND

IN THE MATTER OF DENIAL OF FAIR HEARING

FOR THE 1ST PETITIONER

AND

JACKSON MWANGI GATHUNA (Suing as the Administrator

of the Estate of the late SHEM GATHUNA THIONGO.....1ST PETITIONER

JACKSON MWANGI GATHUNA.....2ND PETITIONER

JIMMY HUMPHREY GATHUNA.....3RD PETITIONER

VERSUS

NATIONAL IRRIGATION BOARD (Through the MANAGER

MWEA IRRIGATION SETTLEMENT SCHEME.....1ST RESPONDENT

CHAIRMAN MWEA LAND DISPUTES TRIBUNAL.....2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE WANG'URU

LAW COURTS.....3RD RESPONDENT

ATTORNEY GENERAL.....4TH RESPONDENT

AND

FELISCA WAMBUI GATHUNA.....1ST INTERESTED PARTY

AGNES MUGURU GATHUNA.....2ND INTERESTED PARTY

RULING

BACKGROUND

The application coming up for hearing is the Notice of Motion dated 4th June 2018 brought pursuant to **Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. The applicants are seeking for the following orders:

(1) Spent.

(2) The Honourable Court be pleased to issue a temporary injunction restraining the interested parties and the respondents or their agents and/or representatives and/or the Police from interfering with the applicants ownership and possession of rice holding Number 2032, now sub-divided into rice holding No. 2032 A and 2032 B, pending the hearing and determination of this application.

(3) The Honourable Court be pleased to issue a temporary injunction restraining the interested parties and the respondents or their agents and/or representatives and/or the Police from interfering with the applicants ownership and possession of rice holding Number 2032, now sub-divided into rice holding Nos 2032 A and 2032 B pending the hearing and determination of the petition.

(4) Costs of this application be provided for.

The application is premised on grounds apparent on the face of the said application and a supporting affidavit sworn by the 1st petitioner/applicant. The application is further supported by numerous documents attached to the supporting affidavit.

When the application filed under certificate of urgency was placed before the duty Judge, the same was certified urgent and temporary injunction orders granted until the hearing of the application inter-partes. On 19th October 2010, the 1st respondent instructed the firm of Ngaywa Ngigi & Kibet Advocates who filed grounds of opposition in response to the said application. On 29th October 2019, the Honourable Attorney General entered appearance on behalf of the 3rd and 4th defendants and also filed grounds of opposition thereto. On 15th November 2019, the 1st interested party filed a replying affidavit through her son one John Kimani Gathuna. On 7th November 2018, the 2nd interested party also filed a replying affidavit.

PETITIONERS/APPLICANTS CASE

According to the petitioner, Rice holding No.2032 Unit 20 Thiba Location belonged to their father one Shem Gathuna Thiongo. On 30th October 2007, the said Shem Gathuna did an affidavit of surrender of the whole rice holding to his wife, Agnes Muguru Gathuna. Thereafter, a tenant card was issued to her. Later, on 18th February 2011, Agnes Muguru Gathuna surrendered the rice holding number 2032 to the petitioners whereby Jackson Mwangi Gathuna was to get 2 acres while his brother Jimmy Humphrey Gathuna was to get the remaining 2 acres. Agnes swore an affidavit of surrender on 18th February 2011 to that effect. In pursuant to these facts, the National Irrigation Board acted upon the affidavit of surrender and Jackson got a tenant card in respect of rice holding number 2032 B also measuring 2 acres. The petitioners thereafter took possession and occupation of their portions and have been in exclusive possession of their respective rice holdings and have even been paying for outgoings such as water to the National Irrigation Board.

The petitioner state that on 20th September 2011, an award from the Mwea Land Disputes Tribunal was read and adopted as an order of the Court that, rice holding No. 2032 A and B be shared as follows:

- (a) Shem Gathuna Thiongo - 1 acre**
- (b) Agnes Muguru Gathuna - 1½ acres**
- (c) Felisca Wambui Gathuna - 1½ acres**

The petitioners contend that the award was given despite the fact that Shem Gathuna Thiongo was already deceased having died on 20th February 2011. Further, the said Shem Gathuna had already procedurally surrendered his whole rice holding number 2032 to his wife Agnes Muguru Gathuna way back in 2007 which surrender was duly effected by the National Irrigation Board.

The petitioners further stated that the 1st interested party and her son John Kimani Gathuna filed an application seeking to stop the petitioners

from working on the rice holding in Wang'uru Magistrate's Court Arbitration No. 5 of 2007. That application was dismissed. They stated that the interested parties are now using the Police to harass them yet the rice holdings were registered in their names.

1ST RESPONDENT'S CASE

The 1st respondent did not enter appearance or file any response to the petitioners' application.

2ND RESPONDENT'S CASE

The 2nd respondent stated that the application is unmeritorious, incompetent, totally defective and an abuse of Court process and should therefore be dismissed. The 1st respondent also contends that the Court issued an order on 20th September 2011 which has not been set aside by the applicants who must therefore obey the same.

3RD AND 4TH RESPONDENTS CASE

The 3rd and 4th respondents contend that the application and the petition do not raise any cause of action against them. They stated that the 3rd respondent was exercising its judicial authority as provided for under **Article 169 (1) (a) of the Constitution of Kenya 2010 and the Magistrate's Court Act 2015**. They stated that the applicants should have appealed against the impugned award in the event that they were not satisfied.

1ST INTERESTED PARTY'S CASE

The 1st interested party stated that she is a beneficiary in the Estate of the late Shem Gathuna Thiongo who was her biological father and John Kimani Gathuna is her son. She stated that she was fully dependent on the deceased who was her husband. She deponed that the late Shem Gathuna was the registered licensee of rice holding No. 2032 which was later sub-divided into 2032 A and 2032 B. On 30th October 2007, her late husband swore an affidavit which was a mere form of authority to Agnes Muguru Gathuna for purposes of management as he was by then sick and unable to perform the required tasks as required by the Irrigation Board. She stated that a tenant card was fraudulently issued to Agnes Muguru Gathuna as her husband was sick and could not execute the transfer. The tenant cards were subsequently cancelled by the National Irrigation Board. The rice holding No. 2032 was then sub-divided vide a decree of the SRMCC at Wang'uru in Arbitration Case No. 5 of 2007 between Shem Gathuna Thiongo – 1 acre (2032 A), Agnes Ruguru Gathuna 1½ acres (2032 B) and Felisca Wambui Gathuna – 1½ acres (2032 C). The petitioners/applicants filed a Constitutional Petition in ELC being Constitutional Petition No. 2 of 2015 in respect of the whole of Rice Holding No. 2032 which was dismissed on 3rd June 2016. The petitioners later filed the current petition No. 2 of 2016 which is still pending before Court. The 1st interested party further stated that in 2018, she planted rice on the portion allocated to her but the petitioners are trespassing on the said plantation and frustrating her making it hard to properly maintain the plantation.

2ND INTERESTED PARTY'S CASE

The 2nd interested party stated that the late Shem Gathuna Thiongo was her husband and that rice holding No. 2032 belonged to her late husband. However, due to his poor health, he was unable to manage the same and thereby surrendered it to her in the year 2007 vide an affidavit of surrender sworn on 30th October 2007. Pursuant to that, she was issued with a tenant card. She took possession of the said rice holding until 2011 when she decided to surrender the same to her two sons, namely Jackson Mwangi Gathuna and Jimmy Humphrey Maina Gathuna. She stated that the 1st interested party has never been an owner and neither has she been in occupation of rice holding No. 2032. In conclusion, the 2nd interested party contends that the Scheme Manager Mwea Irrigation Scheme has never objected to any transfer of the rice holding into her name and the 2nd and 3rd petitioners herein.

ANALYSIS AND DECISION

I have carefully considered the Notice of Motion dated 4th June 2018 and the rival affidavits and responses. I have also considered the submissions by the counsels and their written submissions. The applicants are seeking an equitable relief of an injunction pending the hearing and determination of this petition. The principles which guide a Court in granting an interlocutory injunction were set out in the celebrated case of **Giella Vs Cassman Brown & Co. Ltd, (1973) E.A 358**. An application for interlocutory injunction must demonstrate a prima facie case with a probability of success. Secondly, the applicant must demonstrate that he might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. If the Court is in doubt, the application is to be determined on a balance of convenience.

A prima facie case was succinctly defined by the Court of Appeal in the case of **Mrao Limited Vs First American Bank of Kenya Limited & 2 others (2003) K.L.R 125** as follows:

“..... a prima facie case is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the later. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case”.

The definition of a prima facie case was even expounded and made clearer in the case of **Nguruman Limited Vs Jan Bonde Nielsen & 2 others (2014) e K.L.R** where the Court held as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.

The petitioners/applicants claim in this petition and the application is based on a license issued by the National Irrigation Board through Mwea Irrigation Settlement Scheme. The subject matter of the dispute between the applicants and the interested parties is a rice holding number 2032 which initially was registered in the name of Shem Gathuna Thiongo (deceased). The said Shem Gathuna Thiongo (deceased) had two wives namely Felisca Wambui Gathuna (1st interested party) and Agnes Muguru Gathuna (2nd interested party). From the affidavit evidence and the pleadings, the said Shem Gathuna Thiongo (deceased) vide an affidavit sworn on 30th October 2007 surrendered the rice holding in question to the 2nd interested party due to poor health. The 2nd interested party took possession and ownership of the said rice holding and decided to sub-divide the same to her two sons namely Jackson Mwangi Gathuna (2nd petitioner) and Jimmy Humphrey Gathuna (3rd petitioner) vide a surrender affidavit sworn on 18th February 2011. The two petitioners were subsequently issued with tenant identification cards for rice holding No. 2032 A and 2032 B respectively.

Sometimes on 1st February 2016, the 1st interested party went to the District officer to report on a dispute in relation to the suit land. She was then referred to Mwea Land Disputes Tribunal. The Dispute was later heard before the Mwea Land Disputes Tribunal under Wanguru Arbitration Case No. 5 of 2007 and was determined on 20th September 2011. In its decision, the Tribunal made the following award:

- **Rice Holding No. 2032 sub-divided into three portions as follows:**

- (i) Shem Gathuna Thiongo - 1 Acre (2032 A);**
- (ii) Agnes Ruguru Gathuna - 1½ Acres (2032 B);**
- (iii) Felisca Wambui Gathuna - 1½ Acres (2032 C).**

The terms of the above award was read and adopted by the Magistrate’s Court at Wanguru and issued a decree on 11th June 2012. The said order and decree was issued by a Court of competent jurisdiction which has not been appealed against, set aside and/or reviewed. Deciding this application on the principles set out in the *Giella* Case, I find that on the face of it, the petitioners/applicants have not established that a legitimate right has been or is threatened with violation. The petitioners/applicants have not shown a clear and unmistakable right to be protected and which is directly threatened by an act sought to be restrained.

In the upshot, I find the application dated 4th June 2018 lacking merit and the same is hereby dismissed with costs to be in the cause.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 4th day of October, 2019.

E.C. CHERONO

ELC JUDGE

4TH OCTOBER, 2019

In the presence of:

- 1. Ms Wambui holding brief for Maina Kagio for 1st, 2nd & 3rd Petitioners*
- 2. M/S Ndundu holding brief for Nyawria for the Attorney General*
- 3. Wachira – Court clerk*