REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 141 OF 2014

SIMON WARUI MWANGI……..……1ST PLAINTIFF

SARAH WANGECHI MWANGI……..…..2ND PLAINTIFF

VERSUS

GRACE RUGURU MWANGI…… ……..…….1ST DEFENDANT

NATIONAL IRRIGATION BOARD Through

THE MANAGER, MWEA IRRIGATION SCHEME…….…..2ND DEFENDANT

JUDGMENT

INTRODUCTION

In their plaint amended on 8th October 2015 and filed on 9th October 2015, the plaintiffs sought the following orders:

> ***(1) (A) A declaration that the decision of the Advisory Committee Mwea Irrigation Scheme of 7/2/2007 was irregular and null and void over rice holding No. 3277 within Wamumu Section.***
>
> ***(B) A permanent injunction restraining the defendant from entering, remaining on, working on, cultivating and/or in any other manner forsoever interfering with the plaintiff's quiet possession and use of the rice holding No. 3277 within Wamumu Section.***
>
> ***(2) Costs and interest.***

The 1st and 2nd defendants filed a statement of defence dated 15th October 2015 and 4th January 2016 respectively in which they deny the plaintiffs claim.

PLAINTIFFS CASE

The first witness was the 1st plaintiff Simon Warui Mwangi who stated that the reason why he filed this suit is because there was a Succession Cause Misc. No. 12 of 1990 (Wanguru) after the demise of one David Mwangi Njuguna who passed on in 1990. The witness stated that the succession was in respect of rice holding Number 3277 Unit 2 Wamumu. According to the succession cause, the land was given to him but since he was a minor, his mother Sarah Wangechi Mwangi was appointed as a guardian. He stated that a dispute was thereafter filed at the Advisory Committee of the Mwea Irrigation Board. Following the said dispute, a verdict was given whereby the rice holding was divided into two equal portions of 2 acres each whereby the 1st defendant Grace Ruguru received 2 acres while the plaintiff remained with 2 acres. According to the 1st plaintiff, the 2nd defendant, National Irrigation Board through its Manager Mwea Irrigation Settlement Scheme acted irregular by denying the plaintiffs a hearing thereby contravening the rules of Natural justice. The plaintiffs further contend that the 2nd defendant distributed the rice holding to a stranger. During cross-examination, the witness admitted that the Advisory Committee of the National Irrigation Board is the body mandated to determine disputes of the rice fields, and that there are no titles issued to the owners of the rice holdings. The witness further stated that only licences are issued to allottees which can be terminated by the National Irrigation Board. The witness also confirmed that the Advisory Committee regulates the use of the land and determines the number of settlers on the land.

The 2nd plaintiff also testified and substantially repeated what the 1st plaintiff stated in his evidence. On cross-examination, the 2nd plaintiff conceded that at the time the dispute was being determined by the Advisory Committee of the National Irrigation Board, she was still the guardian hence in law the 1st plaintiff was still presumed to be a minor as the guardianship had not been terminated by then. She called 3

witnesses namely Peterson Warui, Eston Wanjohi and the area-in-charge Mr. Michael Mwangi. The first two witnesses namely Peterson Warui and Eston Wanjohi are brothers to the initial owner David Mwangi Njuguna, hence brothers-in-law to the 2nd plaintiff. She confirmed that soon after the verdict of the Advisory Committee on 7th February 2007, she wrote a letter on 9th February 2007 seeking to be supplied with a copy of the verdict for purposes of quashing and/or appeal. On 21st February 2007, she instructed the firm of Kinyua Kiama Advocates who in turn wrote a letter requesting for a copy of the decision of the Advisory Committee for purposes of Appeal.

1ST DEFENDANT'S CASE

The 1st defendant testified and stated that David Mwangi (deceased) who was the original licensee was her husband. She referred to her statement dated 5th March 2015 which she adopted in her evidence. According to her statement, she got married to David Mwangi (deceased) in 1963 and were blessed with 7 children, 5 sons and 2 daughters. She stated that they settled at Mururuiini Village in her father-in-law parcel of land. Her father in law was Njungu Njamwea. The 1st defendant further stated that sometime in the year 1970, they were given rice holding Number 3277 and relocated to Mwea. They cultivated the said rice fields until the year 1977 when she was chased away by her husband after he allegedly befriended the 2nd plaintiff herein, Sarah Wangechi. She stated that she went to her father's place one Gachanja Kihohia. Her late husband was left with four (4) children, two (2) sons namely Joel Kihohia and Isaac Njungu and two daughters namely Mary Muthoni and the late Jane Wambui. When her husband David Mwangi passed on in 1990, a succession cause was filed and she even appeared in the Court papers. She stated that by then, she had a fractured leg and she could not make it to Court. The Court held that the rice holding was to go to Simon Warui Mwangi under the guardianship of the 2nd plaintiff Sarah Wangechi Mwangi. She stated that in the year 2007, she filed a dispute before the Advisory Committee of the National Irrigation Board. She said that her together with the 2nd plaintiff Susan Wangechi were in attendance and each was given a chance to explain her case. The decision by the Advisory Committee of the National Irrigation Board was to the effect that the four (4) acres of the rice holding be shared equally between her and Sarah Wangechi. She stated that the 2nd plaintiff is dishonest and hypocritical to allege that she did not know her whereas she even brought up her children. The 1st defendant did not call any witness.

2ND DEFENDANT'S CASE

The 2nd defendant did not call any witness(es) or proferred any evidence.

ISSUES FOR DETERMINATION

From the pleadings and the submissions by the parties, I find the following issues distill themselves for determination:

> ***(1) Whether a decision by the Advisory Committee of the National Irrigation Board through the Manager Mwea Irrigation Scheme which is a Quasi judicial body can be challenged by way of a plaint or by way of Judicial Review proceedings?***
>
> ***(2) If the answer to paragraph (1) above is in the affirmative, whether this Court is seized with jurisdiction to entertain this suit?***
>
> ***(3) Who will bear the costs of this suit?***

ISSUE NO. 1

The plaintiff's substantive order in this suit is a declaration that the decision of the Advisory Committee Mwea Irrigation Scheme of 7/2/2007 was irregular and null and void over rice holding No. 3277 within Wamumu Section. The plaintiff is challenging the decision by the Advisory Committee Mwea Irrigation Scheme which is a Quasi judicial body performing administrative functions. It is trite law that where Parliament confers authority to a legal entity to make decisions which decisions affect the ordinary citizenry or their Constitutional rights as protected under any other written law, such decision is amenable to the remedy of Judicial Review Court which is a specialized Court. That was the holding in the case of ***PETER AKECH KADAMAS VS MUNICIPAL COUNCIL OF KISUMU (1985) K.L.R, where PLATT Ag. J.A***. citing the case of ***REPUBLIC VS ELECTRICITY COMMISSIONER 1924 1 KB 171 h***eld as follows:

> ***"Wherever any person or body of persons has legal authority conferred by Legislation to make decisions in public law, which affects the common law or statutory rights of other persons as individuals, it is amenable to the remedy of Judicial Review of its decision either for error of law in so acting or for failure to act fairly towards the person who will be adversely affected, VIZ; by not affording him a reasonable opportunity of learning what is alleged against him of putting forward his own case in answer to it on the part of the person by whom the decision fails to be made".***

The import of that decision as I understand is that a party who is aggrieved by a decision of a Quasi Judicial body such as the one in the instant case can seek remedy through a Judicial Review process which is the right forum. The filing of Judicial Review by way of a plaint is in my view a jurisdictional question which goes into the root of the claim. Unless a suit is instituted in the appropriate forum, the Court is without jurisdiction to determine the merits or otherwise of the relief(s) being sought. The issue of jurisdiction was succinctly put in the celebrated case of ***OWNERS OF MOTOR VESSEL 'LILLIANS" VS CALTEX OIL (K) LTD (1989) K.L.R 1*** where it was held as follows;

> ***"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".***

Section 5 (2) of the Fair Administrative Action Act 2015 (the Act) has even expanded the scope of Judicial Review and provides as follows:

> "(***2) Nothing in this Section shall limit the power of any person to:***
>
> ***(a) Challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice under Section 55 of the Commission of Administrative Justice Act;***
>
> ***(b) Apply for review of an administrative action or decision by a Court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or***
>
> ***(c) Institute such legal proceedings for such remedies as may be available under any written law".***

Jurisdiction is conferred by statute or the Constitution. ***Section 165 (6) of the Constitution*** provides how decisions by subordinate Courts, tribunals and/or persons or bodies of persons exercising Quasi Judicial or Administrative functions are challenged. It provides two ways in which an aggrieved party can challenge those decisions. It can be done through judicial review proceedings under ***Order 53 CPR*** or by way of a petition under ***Article 22 of the Constitution of Kenya, 2010*** which deals with the enforcement of Bill of rights**.** ***Article 165 (6) & (7)*** provides as follows:

> ***"165 (6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a Judicial or Quasi-Judicial function, but not over a superior Court.***
>
> ***165 (7) For the purpose of clause (6), the High Court may call for the record of any proceedings before any subordinate Court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice".***

The supervisory jurisdiction contemplated under the provisions of the law above is one that is by way of Judicial Review proceedings and not by a plaint or otherwise.

In view of the matters aforesaid, I find that this Court has not been properly invoked and this suit commenced by way of a plaint is hereby struck out with costs to the defendants.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 29th day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Muriithi holding brief for Ms Ann Thungu

2. Ms Wambui for 1st Defendant

3. 2nd Defendant/Advocate – absent

4. Mbogo – Court clerk – present