REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 201 OF 2014

PETER GITAU KINYANJUI.....PLAINTIFF

VERSUS

TERESIA WANGARI KINYANJUI.....1ST DEFENDANT

NATIONAL IRRIGATION BOARD..... 2ND DEFENDANT

JUDGMENT

BACKGROUND

In a plaint dated 26th June 2014, the plaintiff sought the following orders:

> ***(1) A declaration that the 2nd defendant's decision sub-dividing rice holding No. 1994 A Unit 16 Mwea Section is null and void and cancellation of the same and a permanent injunction restraining the 1st defendant, her servants, agents, assignees and anybody claiming under her from entering, disposing of, leasing out, remaining on, cultivating or in any other way interfering with Rice holding No. 1994 A Unit 16 Mwea Section comprising 2 ¼ acres.***
>
> ***(2) Costs of this suit and interest.***

Filed contemporaneously with this suit was a Notice of Motion brought under ***Order 40 Rule 1 & 3 CPR*** seeking equitable relief of a temporary nature pending the hearing of the said application and the main suit. The said application was brought under certificate of urgency. Upon placing the application before the duty Judge the same day, the application was certified urgent and temporary injunction orders were issued pending inter-paties hearing of that application. On 25th July 2014, the defendants through the firm of G.O. Ombachi & Co. Advocates filed a joint statement of defence in which they denied the plaintiff's claim. The jurisdiction of this Honourable Court was also denied by the defendant.

PLAINTIFF'S CASE

The plaintiff stated that originally, the rice holding in dispute No. 1994 belonged to his late father Kinyanjui Wakinya. The rice holding in question is measuring approximately 4 ¾ acres. He stated that upon the demise of his father, his mother namely Magdaline Wamugo was appointed successor of rice holding and registered in the records of National Irrigation Board. Later on, her mother also passed on and they commenced the relevant succession proceedings in respect of the rice holding vide Misc. Succession Cause No. 4 of 2000 (Wang'uru) whereby he was appointed as successor in trust of one John Mwangi who is his brother. He stated that he was issued with a tenant identification card to that effect. The plaintiff further stated that on 30th November 2008, after the demise of their mother, they held a family meeting where they agreed that the main rice holding measuring 4 ¾ acres to be inherited by him and his brother John Mwangi in equal shares and their sisters to inherit two (2) acres of the Jua kali rice field measuring 3 ½ acres. He said that all their sisters namely Lucy Njeri, Beth Wanjiru, Mary Wambui and Teresia Wangari who is also the 1st defendant herein were present during the family meeting and they all signed the agreement. The plaintiff also stated that pursuant to the family meeting and agreement, he applied for sub-division of the said rice holding between him and his brother John Mwangi and the application was granted whereby the rice holding was sub-divided into two portions namely 1994 A and 1994 B. The plaintiff was registered licensee of rice holding No. 1994 A measuring 2 ½ acres and his brother John Mwangi got rice holding No. 1994 B also measuring the same 2 ½ acres. He said that immediately after he got his portion of the rice holding, his brother disposed two (2) acres to one Ann Wangithi and ½ acre to one Pius Njogu and the relevant tenant changes were carried out in the office of the Manager, Mwea Irrigation Settlement Scheme and records adjusted accordingly. He stated that to his surprise, one of his sisters Teresia Wangari who is also the 1st defendant herein in collusion with the Manager, Mwea Irrigation Settlement Scheme held a meeting on 25th February 2014 at the Scheme Manager's office and she was surrendered one (1) acre of his rice holding without his knowledge and consent. He stated that the Manager's action was illegal and unlawful.

1ST DEFENDANT'S CASE

The 1st defendant also testified alone and stated that the plaintiff is her brother and that she is cultivating one acre of rice holding in question with her four sisters. She stated that the total acreage of the rice holding given to their father is 4 ¾ acres and the plaintiff and his other brother John Mwangi are cultivating the other acreage. She stated that there was a meeting held in the office of the Manger, Mwea Irrigation Settlement Scheme on 25th February 2014. She said that she attended the meeting and the plaintiff did not attend despite the fact that he was invited. She stated that after the meeting, the Manager shared the rice holding whereby she was given one acre and thereafter she was issued with a tenant card and a licence. She stated that she is not cultivating the Jua kali portion of the land and that the Manager did not touch the same. She stated that the one acre she is cultivating with her sisters does not belong to the plaintiff. The defendant also relied upon her list of documents containing three items which she also produced in her evidence as Defence Exhibits No. 1, 2 and 3 respectively.

ISSUES FOR DETERMINATION

(1) Whether this Court has been properly invoked by the plaintiff?

(2) Whether the plaintiff has established the threshold for setting aside the decision of the Manager, Mwea Irrigation and Settlement Scheme?

(3) Who shall bear the costs of this suit?

ISSUE NO. 1

The defendants in their statement of defence raised the issue on jurisdiction of this Court to hear and determine this suit. The issue was also raised by way of a Notice of Preliminary Objection which was canvassed by the parties at length and this Court rendered itself on the issue vide a detailed ruling delivered by my brother Hon. Mr. Justice B.N. Olao on 13th November 2014. In that regard, I will not belabour the point.

ISSUE NO. 2

The plaintiff's claim is for a declaration that the decision by the 2nd defendant of sub-dividing rice holding No. 1994 A Unit 16 Mwea Section is null and void. The grounds under which the plaintiff is challenging the 2nd defendant's proceedings and decision of 25th February 2014 were conducted in his absence and that the rules of Natural justice were breached. The plaintiff also stated that Advisory Committee did not act rationally in that they failed to take into account that 2 ½ acres were sold out to third parties by his brother John Mwangi and treated his share as family share. It is not in dispute that the National Irrigation Board (2nd defendant) is a legal entity established with Administrative making decision under the ***Irrigation Act Chapter 347 Laws of Kenya*** and the regulations made thereunder. These decisions include the management, use, occupation, tenants, licences, etc. The Board carries out their mandate through its Advisory Committees. It is the mandate of the Board to regulate and govern land under it as to the number of tenants in a rice holding. The proceedings and decisions made by making decisions affecting the rights and lives of citizens are supervised by the High Court and Courts of equal status through Judicial Review mechanisms. The mandate of a Superior Court exercising supervisory role on public bodies decisions is only on whether the decision reached was procedural or not and whether the entity was seized with the requisite jurisdiction or not. In the case of ***REPUBLIC VS JUDICIAL SERVICE COMMISSION OF KENYA EX-PARTE PARENO (2004) 1 K.L.R,*** the Court held as follows:

"3. The remedy of Judicial Review is concerned with reviewing not the merits of the decision in respect of which the application for Judicial Review is made, but the decision making process itself.

4. Under the Wednesbury Principle decisions of Persons or bodies which perform public duties or functions will be liable to be quashed or otherwise dealt with by an appropriate order in Judicial Review proceedings where the Court concludes that the decision is such that no such person or body properly directing itself on the relevant law and acting reasonably could have reached that decision".

I have considered the evidence given by the plaintiff and the proceedings and decision of the Advisory Committee issued on 25th February 2014. Though the defendants produced a letter dated 20th February 2014 addressed to the plaintiff and his sisters requesting them to report to the Scheme Manager's office on 25/2/2014, (past) there is no evidence that the said notification letter was served upon the plaintiff. The said letter did not even give the agenda of the alleged meeting. It is my finding that the process leading to decision to sub-divide the rice holding No. 1994 A by the 2nd defendant was flawed as it did not observe the rules of Natural justice for not producing evidence of service of the hearing notice upon the plaintiff herein whose decision was taken to be adversely affected.

I have found that the process leading to the decision issued on 26th February 2014 was irregular and unprocedural in the sense that it did not take into account the procedural aspect of the law in as far as ensuring that an affidavit of service was filed showing that he was indeed served. However, the ***Irrigation Act Chapter 347 Laws of Kenya*** and the rules made thereunder give the 2nd defendant wide discretion to manage the schemes and ensure there is sufficient food reserve in the country. The regulations therefore sets out the manner in which rice holdings are leased out to tenants and their obligations to assist in the production and sustaining of the country's food basket. That explains why Parliament in their wisdom gave the management absolute powers to manage and regulate the Schemes with only residuary powers to the High Court and Courts of equal status to supervise them under the Wednesbury Principle. It is therefore to be noted that from the regulations that a licence issued to a tenant is not absolute.

Looking at the proceedings and the impugned decision of the Advisory committee by the 2nd defendant, this Court would be empowered to quash such decision under the traditional Judicial Review which was only concerned about the process. However, the remedy of Judicial Review has since moved from being merely procedural to a merit based judicial review. ***Section 7 (2) of the Fair Administrative Action Act*** provides as follows:

"A Court or tribunal under sub-section (1) may review an administrative action or decision, if the administrative action or decision is not proportionate to the interests or rights affected".

In the case of ***Suchan Investment Limited Vs Ministry of National Heritage & Culture and 3 others (2016) K.L.R,*** the Court of Appeal discussed the grounds of unreasonableness and proportionality as giving rise to judicial review on merits of a decision in great length as follows:

"An issue that was straneously argued 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 Judicial 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) 91) 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 Republic Vs Home Secretary; Ex-parte Daly (201) 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 decisions; Secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) 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 Actions Act reveals the implicit shift of judicial review to include aspects 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) (1) 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 Houses Ltd Vs Wednesbury Corp. (1948) I K.B. 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 require 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 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Actions Act".

I agree with the binding decision of the Superior Court. Applying these principles to the instant case, I find the 2nd defendant has given his reasons for dividing the suit plot No. 1994 A between the plaintiff and the defendant in the impugned decision. The Advisory Committee in their verdict held as follows:

"The Committee decided to consider the four sisters by giving them one acre, which is not leased out and Peter to remain with 1 ½ acres .....".

My evaluation of the impugned decision is that the 2nd defendant has given reasonable, proportionate and sufficient reasons for his decision to sub-divide the rice holding between the plaintiff and his five sisters. The decision in my view is a merit based and would not serve any useful purpose to remit it back to the same Committee on mere procedural technicality when there is no guarantee that the same Committee will come out with a different decision. It would not be said that no such person or body properly directing itself on the facts and the relevant law could have reached such a decision. In a similar case between the ***Republic Vs Judicial Service Commission of Kenya Ex-parte Pareno (2004) 1 K.L.R,*** (supra), the Court also held as follows:

"…….. the Court would be empowered to quash the dismissal decision in view of the flawed procedure adopted by the Judicial Service Commission before the dismissal. However, the flawed procedure did not necessarily affect the decision to dismiss. On the facts and even after applying the Wednesbury principle, it could not be said that no such person or body properly directing itself on the relevant law could have reached that decision".

I agree with that decision by the learned Judge. In the final analysis, I find no sufficient grounds have been given by the plaintiff to warrant the review of the Advisory Committee. In the result, this suit fails and the same is hereby dismissed. Ordinarily, costs follow the event but in view of the close relationship between the plaintiff and the defendant and costs being a discretionary power, I order each party to bear his/her own costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 22nd day of May, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. P.M. Muchira holding brief for Ms Ann Thungu for Plaintiff

2. Mr. Asiimwe holding brief for Mr. Ombachi for Defendants

3. Mbogo – Court clerk – present