



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**ELC JUDICIAL REVIEW NO. 19 OF 2014**

**IN THE MATTER OF THE APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN  
THE NATURE OF JUDICIAL REVIEW**

**AND**

**IN THE MATTER OF AN APPLICATION FOR ORDERS OF JUDICIAL REVIEW AND RICE  
HOLDING NO. 3590**

**AND**

**IN THE MATTER OF THE NATIONAL IRRIGATION BOARD ADVISORY COMMITTEE  
PROCEEDINGS DATED 15<sup>TH</sup> MAY 2014**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**AND**

**NATIONAL IRRIGATION BOARD.....1<sup>ST</sup> RESPONDENT**

**ALICE WARUGURU.....2<sup>ND</sup> RESPONDENT**

**VERSUS**

**JOSPINE WANGITHI KARANI**

**CECILY MICERE**

**NANCY MUTHONI**

**LILIAN WANJIRU (Suing through**

**the next of friend NANCY MUTHONI      EX-PARTE APPLICANTS**

**JUDGMENT**

Pursuant to leave granted by **BWONWONGA J.** on 28th October 2014, the Ex-parte applicants filed this Notice of Motion on 12th November 2014 seeking the following orders:-

**1. That the Honourable Court do issue an order for certiorari against the respondents quashing the proceedings and award of the Advisory Committee of the National Irrigation Board dated 15th May 2014 in respect of the rice holding number 3590.**

**2. That the costs of the application be provided for.**

The application is supported by the statement of facts and verifying affidavit sworn by the 1st applicant herein **JOSEPHINE WANGITHI KARANI** and annexures thereto. It is the applicants case that on 27th June 2013, the Court at Wanguru referred the dispute regarding the rice holding number 3590 (herein the rice holding) to the National Irrigation Board (the 1st respondent) for resolution under the ***Irrigation Act CAP 347 Laws of Kenya***. That on 15th May 2014, all the parties interested in the said rice holding appeared before the 1st respondent which made the following decision:-

**1. ALICE WARUGURU (the 2nd respondent) to hold 1½ acres which should remain under her daughter's name while she remains the guardian.**

**2. That JOSEPHINE WANGITHI KARANI, LILLIAN WANJIRU, CICILY MICERE and NANCY MUTHONI (the applicants) to hold 2½ acres.**

The applicants allege that the said decision by the 1st respondent was not fair for the following reasons:-

1. That none of the parties was given an opportunity to be heard.
2. That they never agreed on the sharing of the rice holding during the meeting.
3. That they had before the meeting agreed to sharing the rice holding equally among ALICE WARUGURU, JOSEPHINE WANGITHI KARANI, LILLIAN WANIRU, CICILY MICERE and NANCY MUTHONI.
4. That as a family, they had agreed that ALICE WARUGURU should hold her share of 0.80 Ha in trust for her daughter POLINE NJERI.
5. That they aired their issues during the hearing but the same were not captured in the minutes.
6. That the 1st respondent did not reach a fair decision in this matter and they were denied a fair hearing.

In opposing the application, the 1st respondent filed grounds of opposition in which it stated that it acted within its mandate as per the provisions of the ***Irrigation Act*** and applied the rules of Natural Justice. Further, that it was not aware of any agreement between the applicants and the 2nd respondent and all the parties were given a fair hearing before a just decision was arrived at and this application should therefore be dismissed.

On her part, the 2nd respondent filed a Preliminary Objection questioning the jurisdiction of this Court and adding that the applicants did not exhaust the dispute resolution machinery under the ***Irrigation Act and Rules***.

The 2nd respondent also filed a replying affidavit in which she deponed, inter alia, that she is wrongly enjoined in the proceedings as she has no quasi judicial powers capable of being challenged by way of prerogative proceedings. The 2nd respondent further pleaded that the 1st respondent has the sole statutory mandate to control, regulate and allocate land within the National Irrigation Scheme. Further, that the dispute was first heard by the 1st respondent on 5th November 2013 and she was awarded 2 acres and the applicants 2 acres. The applicants were not satisfied and applied for a review and her allocation was reduced to 1 ½ acres as per the award dated 15th May 2014 which is the subject of this application. That during those proceedings, both on 5th November 2013 and 15th May 2014, all the parties were invited and fully participated in the hearing and it is false and malicious for anyone to allege that they

were not heard. That the rice holding belonged to her late husband who left behind a daughter and the 1st respondent's decision to give her daughter a big portion is well founded and justifiable. That the applicants are busy bodies who only want to disinherit her and her daughter.

The application was canvassed by way of written submissions which have been filed by **Mr. MAGEE WA MAGEE advocate** for the applicants, **G.O. OMBACHI advocate** for the 1st respondent and **KINYUA KIAMA advocate** for the 2nd respondent.

I have considered the application, the statement of facts and rival affidavits together with the relevant annexures and the submissions by counsel.

A Preliminary Objection has been raised by the 2nd respondent questioning this Court's jurisdiction to determine this application. That Preliminary Objection must be determined first because, as was held in the case of **OWNERS OF THE MOTOR VEHICLE "LILLIAN S" VS CALTEX OIL (KENYA) LIMITED 1989 K.L.R 1**, jurisdiction is everything and once a Court finds that it is not seized of the requisite jurisdiction to determine any dispute before it, then it must down its tools. No reasons have really been advanced as to why this Court has no jurisdiction to hear this application except what is deponed in paragraphs 4 and 5 of the 2nd respondent's replying affidavit as follows:

***4: That the National Irrigation Board has the sole statutory mandate to manage, control, regulate and allocate land within National Irrigation Scheme"***

***5: That the National Irrigation Act is a self sustaining law with definite provisions for dispute resolution and appeal mechanism for anyone aggrieved by the decision made by the Board under the Act"***

Counsel for the 2nd respondent has repeated those averments in his submissions and added further that the 2nd respondent is wrongly enjoined in those proceedings. It is of course correct that the 1st respondent has the sole mandate to regulate, manage, control and allocate land within the National Irrigation Scheme. Those powers are donated by the ***Irrigation Act CHAPTER 347 Laws of Kenya*** and the Rules made thereunder. However, while exercising those powers, the 1st respondent like any other quasi-judicial body, must operate within the law and the rules of Natural Justice and a party aggrieved with such exercise of power is entitled to move to Court to have any decision wrongly arrived at quashed through Judicial Review orders. It cannot therefore be correct to suggest, as the 2nd respondent appears to be implying, that the 1st respondent is not subject to the supervision of the Court while exercising its powers.

Secondly, this Court's jurisdiction under ***Section 13 (7) of the Environment and Land Court Act*** includes the power to grant prerogative orders such as the ones sought in this application. That provision reads as follows:

***"In exercise of its jurisdiction under this Act, the Court shall have power to make any orders and grant any relief as the Court deem fit and just, including –***

***(a) interim or permanent preservation orders including injunctions***

***(b) prerogative orders***

***(c) award of damages" etc.***

And on the complaint that the 2nd respondent is wrongly enjoined in these proceedings, nothing can be further from the truth. From her own replying affidavit, it is clear that she has an interest in the rice holding. Therefore, she would be affected by whatever decision this Court makes and that is why ***Order 53 Rule 3 (2) of the Civil Procedure Rules*** requires that she be served as a person who will be "***directly affected***". In any case, having been served, it was within her right to elect not to file any reply to the application.

From the above, it is clear that the Preliminary Objection questioning this Court's jurisdiction is not well founded. It is hereby dismissed.

This is a Judicial Review Application and the broad grounds upon which a Court shall grant prerogative remedies were stated in the case of **PASTOLI VS KABALE DISTRICT GOVERNMENT COUNCIL & OTHERS (2008) 2 E.A 300** as follows:

***“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety. .... Illegality is when the decision making authority commits an error of law in the process of taking or making the act the subject of the complaint. Acting without jurisdiction or ultra vires or contrary to the provisions of law on its principle are instances of illegality.... Irrationality is when there is such gross un-reasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards.... Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision”.***

Similarly, as was held in the case of **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC & UMOJA CONSULTANT LTD CIVIL APPEAL No. 185 of 2001**, this Court must bear in mind that Judicial Review is concerned not with the merits of the decision itself but with the decision making process.

What the applicant herein is alleging is a breach of the Rules of Natural Justice in the manner in which the 1st respondent shared out the rice holding between the applicants and the 2nd respondent. It is alleged that that decision was not arrived at fairly because the parties were not given an opportunity to be heard and did not agree on the sharing of the rice holding at the meeting. However, the applicants seem to contradict themselves on the issue. In paragraph 7(i), 7(ii) and 7(iii) of the verifying affidavit, the 1st applicant depones as follows:-

**7(i) “That none of the parties was given an opportunity to be heard”**

**7(ii) “That we never agreed on the sharing of the land during the meeting”**

**7(iii) “That we had before the meeting agreed to sharing the land equally among ALICE WARUGURU, JOSEPHINE WANGITHI KARANI, LILLIAN WANJIRU, CICILY MICERE and NANCY MUTHONI”.**

That has been rebutted by the 2nd respondent who in paragraph 9 of her replying affidavit has deponed as follows:-

***“That during both proceedings of 5.11.2013 and those of 15.5.2014 all parties concerned were duly invited and we all fully participated in the hearing and it is false and malicious for anyone to allege that they were not heard”.***

On its part, the 1st respondent in its grounds of opposition states that all the parties were given an opportunity to be heard and a just decision was arrived at.

I have looked at the record of the proceedings of 15th May 2014 and it shows that all the applicants and the 2nd respondent were present when the 1st respondent's Advisory Committee sat to determine the sharing of the rice holding. After the preliminaries, the record reads as follows:-

***“Josephine requested the Committee to equalize the holding among the family members.***

*All other family members present supported this.*

*The Committee requested them to maintain peace among themselves and finalize the case since they have been moving from one office to the other”.*

The Advisory Committee then proceeded to share out the rice holding as follows:-

**1: The 2nd respondent to hold 1½ acres which should remain under her daughter’s name and she remain the guardian.**

**2: Josephine Wangithi, Lillian Wanjiru, Cicily Micere and Nancy Muthoni to hold 2½ acres.**

It is clear from the above that the proposal as to how to share the rice holding was made by the 1st applicant **JOSEPHINE WANGITHI** and **“all other family members present supported this”**. In an attempt to demonstrate that the Rules of Natural Justice were flouted and that the parties were not heard, counsel for the applicant has cited my own decision in the case of **REPUBLIC VS MANAGER MWEA IRRIGATION SCHEME & OTHERS EX-PARTE DAVID NDUBAI, KERUGOYA HIGH COURT JUDICIAL REVIEW APPLICATION No. 18 of 2013**. In that case, I said as follows:-

**“While it is true that the applicant was present at the meeting, the record does not reflect that his side of the dispute was considered. Mere presence at the meeting did not amount to a hearing and it has not been suggested that he was invited to give his side of the case and that he declined to do so. If that was the position, the record of the proceedings ought to have reflected that indeed that was what transpired at the meeting. Unfortunately, as I have shown above, the record of the meeting is quiet on what went on and this Court can only conclude that the applicant was not given an opportunity to put forward his side of the dispute and this was in breach of the rules of Natural Justice”.**

No two cases can ever be similar and each case must be considered on its own peculiar circumstances. In the **DAVID NDUBAI** case (supra), it is clear that **“the record of the meeting is quiet on what went on”** and the Court was entitled to find, as alleged, that the applicant was not heard. In this case now before me, the record of the proceedings conducted on 15th May 2014 is clear. It shows that the 1st applicant made a proposal on how the rice holding should be shared and that **“all other family members present supported this”**. This Court is entitled to believe that the above narration is a proper and genuine record of what transpired on 15th May 2014. It must be remembered that quasi judicial bodies do not operate like Courts. As was held in **SIMON GAKUO VS KENYATTA UNIVERSITY & TWO OTHERS MISC CIVIL APPLICATION No. 34 of 2009**:

**“The audi-atteram partem rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the Court room situations and as per Section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the Court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view”.**

Further, in **KENYA REVENUE AUTHORITY VS MENGINYA SALIM MURGANI C.A CIVIL APPEAL No. 108 of 2009**, the Court of Appeal addressed this issue in the following words:

**“There is ample authority that decision making bodies other than Courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task, it is for them to decide how they will proceed”.**

Finally, in his book **JUDICIAL REVIEW HANDBOOK 4<sup>th</sup> EDITION, MICHAEL FORDHAM** has stated that:

***“Procedural fairness is a flexi-principle. Natural Justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case”.***

In the circumstances of this case, once the 1st applicant made a proposal which the other family members supported, I don't think there was need for the 1st respondent's Advisory Committee to proceed any further and record what every other party wanted to say. The parties had arrived at a consent and there can be no room for the suggestion that the rules of Natural Justice were not adhered to. It must be remembered that in paragraph 7(iii) of the 1st applicant's verifying affidavit, she states as follows:

***“That we had before the meeting agreed to sharing the land equally .....”***

Earlier on in the same affidavit, she had deponed that they never agreed on the sharing of the land during the meeting. Part of the annexures in this application are previous proceedings involving the same parties on 5th November 2013 when, after hearing the parties, the 1st respondent's Advisory Committee made a decision that the applicants be given 2 acres and the 2nd respondent 2 acres.

It must always be remembered that Judicial Review remedies are meant to ensure that parties receive fair treatment from the tribunals or other bodies hearing their dispute. It was never designed to enable the Court substitute the decisions of other tribunals and bodies with its own decision. That is why the remedy of certiorari is a discretionary one and will not be granted as a matter of course in **HALSBURY LAWS OF ENGLAND 4th EDITION VOL 1 paragraph 12 page 270**. It is stated:

***“The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus), are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief, the Court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or un-meritorious conduct, acquiescence in the irregularly complained of or waiver to the right to object may also result in the Court declining to grant relief”***

Bearing in mind that Judicial Review remedies such as certiorari are meant to curb arbitrariness, abuse of power and unfair treatment of parties, I am not persuaded that in the circumstances of this case, the 1st respondent flouted the rule of Natural Justice in the manner in which it conducted the proceedings dated 15th May 2014 and arrived at the decision that it did with respect to the rice holding. It is clear from the record that the 1st applicant made a proposal that was supported by all the other parties present. The Court is satisfied that that record is a true reflection of what transpired on that day. Previously, the parties had been engaged in a similar exercise relating to the sharing of the same rice holding. The applicants must appreciate that in the discharge of its duties, the 1st respondent may not always appease all the parties by granting them what they had hoped for. But so long as the decision complained of is not tainted with illegality, irrationality or procedural impropriety, this Court will be hesitant to disturb that decision fully appreciating that the 1st respondent has a mandate under the law which it must discharge to the best of its ability. In the circumstances of this case, I am satisfied that that mandate was properly executed and there can be no justification for the complaint raised by the applicants that they were not given an opportunity to be heard when a proposal was raised by one of them and was **“supported”** by the other family members. It has not been suggested that the record of what transpired on 15th May 2014 may have been doctored by the 1st respondent. Indeed there is the 1st applicant's verifying affidavit which confirms that at some point they had agreed to share the land equally. The applicants and the 2nd respondent are a family and in my view, substantial justice was done to them in the circumstances of this case.

The up-shot of all the above is that I find the applicants Notice of Motion un-meritorious. It is accordingly dismissed with an order that each party meet their own costs.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**

Judgment dated, delivered and signed in open Court this 1<sup>st</sup> day of February 2017

Ms Kiragu for the Applicant present

Ms Muthike for Mr. Ombachi for 1<sup>st</sup> Respondent and also holding brief for Mr. Kiama for 2<sup>nd</sup> respondent present.

Right of appeal explained.

**B.N. OLAO**

**JUDGE**

**1<sup>ST</sup> FEBRUARY, 2017**