REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 42 OF 2019

FMM (Suing on behalf of a minor DK).....PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD....1ST DEFENDANT/RESPONDENT

JOHN MICHIRA MURIITHI.....2ND DEFENDANT/RESPONDENT

CECILY WANJIKU.....3RD DEFENDANT/RESPONDENT

RULING

The application before me is the Notice of Motion dated 2nd October 2019 brought under ***Order 40 Rule 1, 2 and 3 CPR.*** The applicant seeks an equitable relief of a temporary nature restraining the Respondents by themselves, their servants, their legal representatives or any person claiming under them from sub-dividing, making changes or in any other way from interfering whatsoever with rice Holding No. 2350 (A) Mwea Section Unit M.13 measuring two (2) acres pending hearing and determination of this suit. The grounds for the orders sought are contained in the supporting affidavit of the applicant sworn the same date. The application is further supported by annextures contained in the supporting affidavit and grounds apparent on the face of the said application.

The application is opposed with a replying affidavit sworn by one Rosemary Mwangi who is the Administrative Officer of the 1st defendant on 5th November 2019. The said replying affidavit is also supported by numerous annextures in opposition thereto.

APPLICANT'S CASE

According to the applicant she is the registered owner and legal tenant of Rice Holding No. 2320 (A) Mwea Section Unit M.13 measuring two (2) acres. She contends that on or about 31st August, 2016 the Advisory Committee Mwea Irrigation Scheme gave her the said Rice Holding as a guardian to DK (minor) and on 6th June, 2019 through an arbitration committee meeting held on the Scheme Manager's office Mwea Irrigation Scheme, the 1st Respondent unlawfully and without any colour of right sub-divided the rice holding No. 2320 (A) amongst the 2nd and 3rd Respondents denying the Applicant her rightful ownership. The Applicant stated that by their unlawful and illegal actions, the Respondent has obstructed the Applicant from making use, cultivating and utilizing her rice holding No. 431 Tebere Section T.21 measuring 4 acres by threatening to make changes to the said rice holding unlawfully.

She stated that the Respondents continued interference with the said Rice Holding which subjects the Applicant to a lot of irreparable loss and damages as he has paid for the costs of preparation for this season and that he is entirely depending on the Rice Holding for his livelihood.

1ST RESPONDENT'S POSITION

The 1st Respondent through their Administrative officer in opposing the said application deponed that the application and the suit as a whole is a non-starter, frivolous, vexatious, mala fides and an abuse of the court process. The deponent further stated that Rice Holdings No. 2320 was licenced to Muriithi Karuri in 1965 and in the year 1994 the scheme sub-committee terminated Muriithi Karuri's licence on account of gross-mismanagement and smuggling of the crop. The 1st Respondent further stated that the sub-committee subsequently allowed one Alice Wambeti Muriithi, Muriithi Karuri's first wife to take over the management of the plot and subsequently registered the rice holding under her name to hold in trust for her family. The deponent stated that sometimes in the year 2011, Alice Wambeti Muriithi surrendered two (2) acres of the rice holding to her son, Patrick Wachira Muriithi whom she had with Muriithi Karuri and whose rice holding became number 2320 'B'. The 1st Respondent through the said Rosemary Mwangi also stated that in the year 2015, Alice Wambeti Muriithi transferred the

remaining 2 acres to her grandson DKW under the guardianship of his mother, the plaintiff as he was a minor at the time. His rice holding became number 2320 (A). She stated that vide a letter dated 20th May, 2016 the area chief wrote to the Scheme Manager, Mwea Irrigation Scheme informing him inter alia that:-

a. The 2nd and 3rd Respondents had lodged a complaint in his office regarding ownership of Rice Holding No, 2320 (A).

b. The 2nd and 3rd Respondents father, Muriithi Karuri had two wives Alice Wambeti Muriithi and Mary Muthoni.

c. Muriithi Karuri later divorced Mary Muthoni and her two children (The 2nd and 3rd Respondents) were left under the guardianship of the 1st wife, Alice till that time.

d. After Muriithi Karuri, Alice changed her attitude under the influence of her only son Patrick Wachira Muriithi and his wife, the Plaintiff herein and transferred the rice holding to her son (2 acres) and the other two to the plaintiff herein without considering the welfare of the 2nd and 3rd Respondents.

e. And further requesting the Senior Scheme Manager to handle the dispute in his office.

The deponent further stated that the complaint was handled by the Advisory Committee which subsequently ruled that the status quo in the matter be maintained. She also deponed that on or about 11th December, 2017 the 2nd and 3rd defendants wrote a letter dated 11th December, 2017 to the scheme manger, Mwea Irrigation Settlement informing him as follows:-

a. Muriithi Karuri had two wives; Alice Wambeti Muriithi and Mary Muthoni.

b. The first wife Alice Wambeti Muriithi disserted the matrimonial home for 8 years leaving behind her son Patrick Muriithi.

c. Following her departure, Muriithi Karuri married one Mary Muthoni who had 2 children; Sicily Wanjiku Muriithi and John Muchira Muriithi.

d. Alice Wambeti Muriithi later returned and the second wife Mary Muthoni left the home leaving behind her two (2) children in the care of Alice Wambeti Muriithi.

e. The rice holding was later transferred to Alice Wambeti who later transferred the rice holding to her son and her grandson, leaving the 2nd and 3rd Respondents without any property.

f. They appealed to the scheme manager to review the current ownership of the rice holding on the ground that they were children of Muriithi Karuri who were entitled to a share of the plot.

She further deponed that subsequently, Alice Wambeti Muriithi, Patrick Wachira Muriithi, Fatuma Maale Mohamed, John Muchira Muriithi (1st defendant) and Cecily Wanjiku (3rd defendant) and all the concerned parties were summoned to the scheme managers office on 12th June, 2018 for arbitration meeting where it was noted that the area chief at the time did not give a comprehensive list of all beneficiaries as requested by the Scheme Manager before the surrender was done and it was resolved that the Scheme Manager would write to the chief to clarify why he misled the office during the surrender. She deponed that the aforementioned parties were again summoned to the Scheme Manager's officer to attend and Arbitration Committee meeting on 6th June, 2019 where they all attended and were given a chance to address the committee. After listening to all the parties, it was resolved as follows:-

a. Alice Wambeti Muriithi to told 2 acres in the rice holding.

b. The 2nd and 3rd Respondents to hold 2 acres jointly to represent the first family.

She further deponed that the area chief did not provide a comprehensive list of beneficiaries to the estate of Muriithi Karuri and that is why the 2nd and 3rd Respondent were not allocated any portion of the 2 acres when the committee first sat. She stated that rice holding 2320 was transferred to Alice Wambeti Muriithi to hold in trust for the family meaning that as children of Muriithi Karuri, the 2 nd and 3rd Respondents deserve to get a share of the family's rice holding.

APPLICANT'S SUBMISSIONS

The Applicant through the firm of G.O. Ombachi & Co. Advocates submitted that *Article 4 of the Constitution of Kenya 2010* provides for protection of right to property. He submitted that the Applicant's right to own and enjoy property has been violated gagged and jeopardized by the Respondents who have unlawfully acquired and possessed the same.

1ST RESPONDENT'S SUBMISSIONS

The 1st Respondent through the firm of Ngaywa & Kibet Partners LLP Advocates submitted that the Applicants have not me the principles for the grant of an injunction as set out in the celebrated case of ***Giella –VS- Cassman* Brown *and Company Ltd. (1973) EA 358.*** They submitted that the Applicants have not established a prima facie face as set out in the case of ***Mirao Ltd Vs First American Bank of Kenya and 2 others (2003) e KLR***. It is also submitted that the Applicant has not established that she will suffer irreparable injury if the orders

sought are not granted. They cited *paragraph 139 in the Hansberry's Law of England 3rd Edition Volume 21 at page 353* which defines the second test.

The 1st Respondent also through their counsel on record submitted that even if the Court was in doubt and decides this case on the last principle, the balance of convenience tilts in favour of the 1st defendant. They cited *paragraph 766 of the same Hansberry's Law of England third Edition Volume 21 at page 366.*

ANALYSIS AND DETERMINATION

I have considered the affidavit evidence, both in support and in opposition, the annextures thereto and the submissions by the counsels for the Applicant and the 1st Respondent. The issue in dispute is a rice holding No 2320 Mwea Section. The rice holding is a property of the National Irrigation Board established under *Cap 347 Laws of Kenya*. The land designated as irrigations scheme is managed by the Board through regulations made thereunder. The board is given power to establish Advisory Committee for each irrigation scheme to assist in the proper management and use of the rice holdings. Towards that end, the board is also given absolute power to determine the number of people to be settled, issued licences to terminate the same and regulate the overall management and use of the rice holdings and its produce as the country's food basket. A licence given to a tenant is not absolute and is subject to regulations of the board.

I also note that the decisions by the National Irrigation Board are donated by statute and such decisions by bodies tribunals or any other persons performing administrative functions are subject to judicial review by the High Court and courts of equal status as provided for under ***Article 265 (6) the Constitution of Kenya 2010*** which reads:-

> **"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".**

The import of that provision of the Law is that any person, body or authority exercising a judicial or quasi-judicial function or performing administrative functions donated by statute can only be supervised by the High Court or courts of equal status. The supervision contemplated under that Article is by way of judicial review under ***Order 53 of the Civil Procedure Act Cap 21*** Laws of Kenya. These matters that have been heard by another body exercising Administrative jurisdiction given by statute and a decision rendered cannot be commenced by way of a plaint as that will be subjecting the dispute to a second hearing which is a waste of time and judicial resources. It is imperative that any party who is aggrieved by those decisions can challenge by first seeking leave to institute judicial review proceedings under ***Order 53 Rule 1 & 2 CPR.***

An application for leave under ***Rule 1 & 2*** will act as filter to frivolous applications and allow only serious matters to be filed in judicial review proceedings. The successful Applicant will now be granted leave to challenge the impugned decisions by subordinate Court, tribunal or body exercising Quasi-judicial or administrate functions. The Applicant in this case is challenging the decision by an Advisory Committee which is a body determining administrative functions.

In the case of ***Municipal of Mombasa Vs Republic and Umoja Consultants Ltd. Civil Appeal No. 185 of 2001 (2002) e K.L.R,*** the Court of Appeal set out the duty of a court in a judicial review application and stated as follows:-

> **"Judicial Review is concerned with the decision making process, not with the merit of the decision itself. The court would concern itself with such issues as to whether the decision maker had the jurisdiction, were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matter or did take into account irrelevant matters. These are the kind of questions a court hearing a matter by way of Judicial Review is concerned with and such a court is not entitled to act as a Court of Appeal over the decider acting as an Appeal Court over the decider would involve going into the merits of the decision itself such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of judicial review".**

I agree with the above decision. It is trite that the National Irrigation Board has the sole statutory mandate to manage control regulate and allocate land within National Irrigation Schemes in Kenya. It is also trite that the ***National irrigation Act Cap 347*** is a self-regulating and sustaining law within definite provisions for dispute resolution and Appeal mechanisms for anyone aggrieved by the decision made by the Board under the Act. These decisions by the Board can only be challenged by way of Judicial Review under ***Order 53 CPR*** and ***Article 22 of the Constitution of Kenya 2010.***

This suit and the application before me is commenced by a plaint. That is a jurisdictional issue which must be decided right away. In the celebrated case of ***Owners of Motor Vessel 'Lilians' Vs Caltex Oil (Kenya) Ltd (1989) KLRA 1*** the Court held as follows:-

> **"I think that 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 is it without jurisdiction".**

I agree with the above decision. Jurisdiction is expressly conferred either by statute or the Constitution and cannot be inferred. The upshot of my analysis is that this suit is a non-starter. The court has not been properly invoked. The same applies to the application before me.

Consequently, this suit and the application dated 2nd October, 2019 are hereby struck out. In view of the close relationship between the Applicant and the Respondents, I order each party to bear her own costs of the application and the suit.

READ DELIVED AND SIGNED in the open Court at Kerugoya this 12th day of June, 2020.

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E.C. CHERONO

ELC JUDGE

In the presence of

1. Ms Wambui holding brief for Ombachi for Plaintiff

2. Mrs Magara for 2nd & 3rd Defendant

3. 1st Defendant/Advocate – absent