



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 201 OF 2014

PETER GITAU KINYANJUI
PLAINTIFF

VERSUS

TERESIA WANGARI KINYANJUI1ST
DEFENDANT

NATIONAL IRRIGATION BOARD 2ND
DEFENDANT

RULING

The plaintiff herein filed this suit against the defendants seeking the following reliefs:-

1. ***A declaration that the 2nd defendant’s decision of 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 of 2 ½ acres***
2. ***Costs of this suit and interest.***

The claim is based on the pleadings that although the plaintiff has been in exclusive use of rice holding No. 1994 A Mwea Section, the 1st defendant entered the same without his consent and when he went to the offices of the 2nd defendant to enquire, he was informed that the rice holding had been sub-divided and an acre given to the 1st defendant by the Sub-Advisory Committee of the 2nd defendant. The plaintiff avers that all this was done without giving him a hearing.

The defendants did file a defence in which they pleaded that the plaintiff was given an opportunity and fair hearing before the decision complained of was made and that the said decision was made because the 1st defendant is a sister to the plaintiff and there was a need for equitable sharing of the rice holding. The defendants further pleaded that the 2nd defendant has the mandate to determine the number of tenants on a rice holding and that what it did was in accordance with its regulations governing the scheme and was in fulfillment of its mandate under the ***Irrigation Act Chapter 347 Laws of Kenya***. The defendants finally pleaded that a Preliminary Objection would be raised on point of law to have this suit struck out.

That Preliminary Objection was indeed raised on 17th July 2014 on the following grounds:-

1. ***That this Court lacks jurisdiction to interfere with the decision of the National Irrigation Board***

- save in exercise of its Judicial Review proceedings power*
2. *That this Court lacks jurisdiction to cancel or interfere with the mandate of the National Irrigation Board under the Irrigation Act Chapter 347 Laws of Kenya*
 3. *That the decision of the National Irrigation Advisory Committee can only be challenged by way of Judicial Review*
 4. *That the entire suit is fatally defective hence the same should be struck out with costs*

That Preliminary Objection forms the basis of this ruling.

Submissions have been filed by counsels for both parties and I have considered the same together with the pleadings herein and the relevant laws.

I have set out the relief sought by the plaintiff herein. He seeks both declaratory and injunctive orders. **Section 13 (7) of the Environment and Land Court Act** provides that in exercise of its jurisdiction, the Court shall have powers to make any order or grant any relief as the Court may deem fit including:-

- a. *Interim or permanent preservation orders including injunctions*
- b. *Prerogative orders*
- c. *Award of damages*
- d. *Compensation*
- e. *Specific performance*
- f. *Restitution*
- g. *Declaration or*
- h. *Costs.*

There is no doubt therefore that the declaratory relief sought by the plaintiff herein is among those reliefs that this Court can grant and so too is the relief of permanent injunction.

From my reading of the submissions by the defendants, it is their contention that the plaintiff could only have moved the Court by way of Judicial Review to have the decision by the 2nd defendant set aside and that this Court has no mandate to deal with issues of cancellation and termination of leases as that is the sole prerogative of the 2nd defendant. This Court therefore lacks the jurisdiction to intervene as its powers have not been properly invoked. The respondents have cited the following cases in support of their position:-

1. *Misc Case No. 67 of 2006 High Court at Embu*
2. *Judicial Review Case No. 187 of 2013 High Court at Nairobi*
3. *Misc Case No. 1025 of 2003 High Court Nairobi.*

I have considered those cases. Misc Case No. 67 of 2006 was decided in 2007 before the promulgation of the new Constitution which in **Article 159** provides that justice shall be administered without undue regard to procedural technicalities. In any event, the defendants have not themselves stated what procedure should be adopted in seeking a declaratory order nor cited any authority that a declaration relief cannot be brought by way of a plaint thus rendering this suit fatally defective.

Further, the decision in Misc Case No. 67 of 2006 at High Court Embu was concerned with the issue whether or not the Advisory Committee of the Mwea Irrigation Scheme had powers to divide rice holdings and issue licences and the Court held that the Advisory Committee had absolute powers to issue licences and terminate the same in order to regulate the manner and use of the land. The Court went on to add that the said Committee could even override orders of the Court if the same are not made within the provisions of the law. The orders being challenged had been issued by a subordinate Court. That case can be distinguished from the matter now before me. The plaintiff herein is not challenging the powers of the 2nd defendant to issue licences. His complaint is that the rice holding having been registered in his names and in trust for his brothers and he having been in exclusive possession of the same, the 2nd defendant proceeded to sub-divide it and give an acre to the 1st defendant without giving him a hearing.

He is therefore pleading the breach of a fundamental rule of natural justice. It is true that the 2nd defendant has the mandate to interpret and apply the Rules and Regulations under the ***Irrigation Act***. There is however a presumption that in interpreting and applying those Rules and Regulations, the 2nd defendant will be guided by the rules of Natural Justice. It is a breach of those rules that the plaintiff is complaining about. This Court certainly has the jurisdiction to interfere where it is alleged that a decision has been arrived at in breach of the Rules of Natural Justice.

With regard to Nairobi High Court J.R. Application No. 187 of 2013, it was an application for Judicial Review which was not properly drafted but which the Court nonetheless allowed but denied the applicant costs. That case does not aid the defendant herein as the matter before me is not a Judicial Review Application. The same position applies to the case of ***REPUBLIC VS JUDICIAL SERVICE COMMISSION*** Ex-parte Pareno which is the defendant's third authority.

The plaintiff has chosen to approach this Court by way of a plaint. He has not sought to seek Judicial Review remedies. It is within his right to decide which route to take and no prejudice has been caused to the defendants in any way and the Constitution mandates this Court to administer justice without undue regard to procedural technicalities.

That being my view of the matter, I would dismiss the Preliminary Objection with costs.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2014

13/11/2013

Before

B.N. Olao – Judge

Mwangi – CC

Ms Wanjiru for Thungu for Plaintiff – present

Mr. Abubakar for Ombachi for Defendant – present

COURT: Ruling delivered this 13th day of November, 2014

Ms Wanjiru for Ms Thungu for Plaintiff present

Mr. Abubakar for Mr. Ombachi for Defendant.

B.N. OLAO

JUDGE

13TH NOVEMBER, 2014