REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 499 OF 2013

ELIZABETH NJERI MUNENE .....PLAINTIFF/APPLICANT

VERSUS

KARIUKI MUCHIRI .....1ST DEFENDANT

LYDIAH WAMBUI.....2ND DEFENDANT

AGNES WAKUTHII .....3RD DEFENDANT

JUDGMENT

BACKGROUND

In a plaint dated 11th March 2010, the plaintiff sought the following prayers:

> ***(a) A declaration that the defendants are not legal dependants of the late Munene Muchiri under the provisions of the Irrigation Act in respect of rice holding No. 2290.***
>
> ***(b) A permanent injunction restraining the defendants by themselves, their servants, agents and/or anyone claiming under them from entering, remaining on, occupying, cultivating, leasing, alienating and/or in any other manner forsoever interfering with the plaintiff's quit possession and cultivation of rice holding No. 2290 within Mwea Irrigation Settlement Scheme.***
>
> ***(c) Costs of the suit with interest.***

On 7th October 2015, the 2nd and 3rd defendants filed a joint statement of defence denying the plaintiff's claim and put her to strict proof thereof. The suit as against the 1st defendant was marked as settled by consent of the parties.

PLAINTIFF'S CASE

The plaintiff's claim that the deceased Munene Muchiri who passed away on 29th August 2005 was her father. On 15th October 2005, her mother one Josphine Waruguru Munene also passed away leaving her behind and her siblings David Muruthi Munene and Dominic Murimi Munene (minors). She stated that the deceased was the sole licencee of the rice holding No. 2290 measuring 4 acres having been allocated the same under the provisions of the Irrigation Act. The plaintiff further stated that upon his demise, she continued utilizing the rice holding with her two siblings who are minors. However, the defendants have attempted to unlawfully and forcefully occupy three (3) acres of the rice holding claiming to be beneficiaries thereof by virtue of being siblings of the deceased thereby interfering with her quiet possession and cultivation. The plaintiff further averred that the defendants are strangers to her and are not entitled to any share thereof.

The plaintiff called one Kuria Muchiri Kori who stated that he was step-brother to the deceased. The witness testified that the deceased had four (4) wives and two properties being the rice holding No. 2290 and Mutira/Kiaga/542. He stated that their father appointed the deceased to be his successor in the rice holding pursuant to Succession Cause No. 406 of 2013. He stated that the rice holding does not form part of his properties.

DEFENDANTS' CASE

The 2nd and 3rd defendants stated that the rice holding No. 2290 belonged to their late father Muchiri Kori who was the original tenant. They stated that their father had four (4) wives whereby two wives were to utilize the rice holding in question being their mother and the mother of the deceased. They stated that when their mother passed on, they were brought up by the deceased's mother and that they were cultivating the rice holding as one family. In 1989, the deceased's mother died and they were left under the care of James Munene as the eldest son who

was registered in the rice holding since he was taking care of them. The plaintiff argued that the plaintiff's father was merely a nominee to the said rice holding and that since the death of their father in 1986, they have been in occupation of the rice holding without any problem with their late brother. The plaintiffs stated that after the deceased passed away, they were chased by the sister Agnes Wanjira. They complained to the Scheme Manager who referred the matter to the Advisory Committee who upon deciding on the issue recommended that the rice holding be divided into four (4) portions as follows:

(a) David Muriithi Muchiri to hold in trust for James Munene's children – 1 acre 2290 A

(b) Kariuki Muchiri – 1 acre 2290 B

(c) Lydia Wambui - 1 acre 2290 C

(d) Agnes Wakuthii – 1 acre 2290 D

The defendants stated that the plaintiff is a daughter of their late brother and that she cannot deny them the right of usage of the rice holding since the matter has been decided by the Mwea Advisory Committee who sub-divided the rice holding into four (4) portions and that the said decision has not been challenged in appeal.

The defendants produced tenant identification scheme for rice holding 2290 issued to Munene Muchiri in 1965. They also produced identification scheme rice holding 2290 (C) issued to Lydia Wambui and 2290 (D) issued to Agnes Wakuthii in 2009 respectively.

ISSUES FOR DETERMINATION

The issues for determination in this case were not framed by the parties. However, from the evidence adduced by the parties and their witnesses, it has become apparent that the subject matter of the dispute before me is a rice holding No. 2290 which was referred to the Advisory Committee who upon deliberation decided to sub-divide the same into four (4) portions being rice holding No. 2290 (A), (B), (C) and (D) which were issued to David Muruthi Muchiri to hold in trust for James Munene's children Kariuki Muchiri, Lydia Wambui and Agnes Wakuthii respectively. It is therefore my view that the following are the issues for determination:

(1) Whether there exists a rice holding known as 2290.

(2) Whether this matter is properly before this Court after the Advisory Committee sub-divided rice holding No. 229- into four portions No. 2290 (A), (B), (C) and (D).

(3) Whether the plaintiff has established the principles for the grant of permanent injunction.

(4) Who will bear the costs of this suit?

ANALYSIS AND DECISION

I have considered the evidence adduced by the plaintiff and the defendants. I have also looked at the documents produced by the parties in support of their respective position. The Irrigation ***Act Cap 347 Laws of Kenya*** which is the applicable law to all area of land designate as a ***National Irrigation Scheme*** at ***Section 26*** provides as follows:

"26 Any person aggrieved by the revocation by the Board of the appointment of an agent for any purpose under this Act, and who has had his representation thereon rejected in writing by the Board, may within twenty eight days of such rejection being communicated to him appeal to the Agricultural Appeals Tribunal established under part XV of the Agricultural Act, (Cap 318) and the provisions of that part (excepting Section 195 (2) thereof shall apply Mutalis Mutardis in relation to every such appeal".

The defendants have annexed minutes of the Advisory Sub-committee meeting held on 25th February 2009 where it was resolved that holding No. 2290 be shared between four (4) beneficiaries namely the children of the late James Munene – 1 acre, Kariuki Muchiri – 1 acre, Lydia Wambui – 1 acre and Agnes Wakuthii – 1 acre. The licencees were identified by the Manager upon the Advise of the Advisory Committee appointed in accordance with ***Section 3 of the Irrigation (National Irrigation Schemes) Regulations 1977*** which reads as follows:

"***3 (1) The Minister may appoint a committee for any scheme. Such committee to be known as an Irrigation Committee, to be responsible for advising the Manager on the general administration of the scheme in accordance with Government policy.***

(2) The committee may either be the district Agricultural Committee of the District in which the scheme is situated or may be comprised of such members as the Minister may approve".

That decision by the Manager seemed to have aggrieved the plaintiff who filed this suit.

It was not therefore open for the plaintiff to ignore the available remedy provided for by statute and move this Honourable Court instead of the one provided for under the statute. Where a fundamental right is regulated by legislation, such legislation should be the first port of entry in search for a remedy in case of violation of such a right. In the case of ***GEORGE S. ONYANGO VS NUMERICAL MACHINES COMPLEX LTD & 2 OTHERS, CONSTITUTIONAL PETITION NO. 350 OF 2012 (NAIROBI***), the Court held as follows:

> ***"If an employer adopts a labour practice thought to be unfair an aggrieved employee should at first instance seek remedy under the relevant legislation. If the employee finds no remedy there, the legislation might come under scrutiny for not giving adequate protection to a Constitutional right. The dominant principle in cases where a wrong is thought to touch on the Constitution, common law and legislation, is that the remedy should be pursued from the first port of entry. The first impression to be made from this decision is that, the petitioner Mr. Onyango wrongly invoked the Constitutional jurisdiction and should have searched for remedy from his contract of employment and the legislation governing that contract".***

I fully associate with the analysis by the learned Judge on the application of the law which is obtained in the instant case. In the final analysis, this suit lack merit and the same is hereby dismissed. Since the parties are blood relatives and in order to promote cohesion amongst the two parties, I order each party to bear their own costs.

READ, DELIVERED and SIGNED in the open Court at Kerugoya this 15th day of February, 2019.

E.C. CHERONO

ELC JUDGE

15TH FEBRUARY, 2019

In the presence of:

1. Mr. Ombachi for the Plaintiff

2. Defendant/Advocate – absent

3. Kabuta Court clerk – present