



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC PET. NO. 4 OF 2016

GRACE WACUKA.....PLAINTIFF

VERSUS

NATIONAL IRRIGATION BOARD MWEA

IRRIGATION SETTLEMENT SCHEMEDEFENDANTS

JUDGMENT

A. INTRODUCTION

1. This petition is commenced by way of an Originating Notice of Motion dated 31st August, 2016 and filed on even date with the supporting affidavit sworn by Grace Wachuka of even dates. The Petitioner is seeking the following orders:

a) THAT the 1st Applicant fundamental right to own property has been infringed by the Respondents by granting the portion of 2 acres of Rice Holding No. 3102 to the 2nd to 6th Respondents and leaving her landless.

b) THAT the decision/verdict of the Advisory Committee of the Mwea Irrigation Scheme dated 8th August 2016 was discriminatory and infringes on fundamental rights of the Applicant.

c) THAT the Honourable Court in exercise of its supervisory powers be pleased to call and quash the Advisory Committees verdict made on 8th August 2016 in as far as it infringes on her Constitutional rights.

d) THAT the Honourable court be pleased to order reinstatement of the position on usage of Rice Holding No. 3102 as was before the unconstitutional acts of the Respondents.

e) Costs of the petition.

2. In response to the petition, the 1st Respondent filed their grounds of opposition dated 14th October, 2016 and filed on 25th October, 2016, and a replying affidavit sworn by Innocent Ariemba. They filed their submission dated 11th December 2018 and filed on even date.

3. The 2nd, 3rd and 6th Respondents filed a response vide a replying affidavit sworn by the 2nd Respondent dated 14th October, 2016 and filed on 26th October, 2016 and they filed their written submissions dated 22nd November, 2018 and filed on 23rd November 2018.

4. The 4th and 5th Respondents filed a replying affidavit dated 25th September 2017 and filed on 28th September 2018 and filed their submissions dated 10th December, 2018 and filed on even date.

B. BACKGROUND

Petitioner's case

5. The petitioner alleges that she is the wife of Njiru Njagi the registered holder of Rice Holding No. 3102(hereinafter referred to as the subject property) who died on the 24th April, 2015 aged 91 years. She alleges that upon the demise of her husband, her step children began harassing her over the above subject parcel of land.

6. This prompted her to approach the 1st Respondent. The 1st Respondent in response vide a letter dated 20th April, 2016 invited her to

appear before the 1st Respondent Scheme Advisory Sub-Committee on 28th April, 2016. She alleges that the said meeting did not bear any fruits prompting another letter from the 1st Respondent dated 11th July, 2016 directing her to appear before the Advisory Committee on 13th July, 2016. The Advisory Committee during the hearing made reference to a nomination by the deceased on how the said parcel of land was to be shared. It delivered its verdict on 8th August, 2016 finding that the subject property be distributed as per the deceased nomination.

7. The Petitioner is challenging the 1st Respondent Advisory Committee decision, she alleges that her deceased husband nomination should not stand as he was blind and would not do anything without notifying her. It is her case that the 1st Respondent decision renders her destitute and disinherits from her the rightful share of her deceased husband subject property.

1st Respondent Response

8. The 1st Respondent vide their grounds of opposition and replying affidavit oppose the instant petition. It is their argument that the subject parcel of land belongs to the National Irrigation Board and the same is leased under the Irrigation Act and Regulations thereunder. It is their position that the parcel of land was owned by one Njagi Njiru (deceased) and not the Applicant. It is their position that the deceased had filed a nomination with the 1st Respondent in the year 2013, and that the 1st Respondent Advisory Committee of Mwea Settlement Scheme distribution of the subject property was in accordance with the filed nomination arguing that the same was non-discriminatory and neither did it infringe on the Applicant's Constitutional Rights.

2nd, 3rd and 6th Respondents

9. The 2nd, 3rd and 6th Respondents through their affidavits sworn in support of the petition supported the 1st Respondent's position herein and specifically the impugned decision of its Advisory Committee distributing the subject property as per the Deceased filed nomination.

10. In addition, they argue that the petitioner has not been utilizing the rice holding No. 3102 due to her old age and that they have been giving her support which they are ready and willing to continue giving. Further, it is their position that the issue of the two families does not arise as the mother passed on long ago when they were still young and that the petitioner took care of them since. In sum they support the decision of the 1st Respondent Advisory Committee dividing the subject property as per the deceased nomination filed in 2013.

4th and 5th Respondents

11. The 4th and 5th Respondents in their response to the Petition fully support the petitioner's position challenging 1st Respondent Advisory Committee dividing the subject property in accordance with their deceased father filed nomination of 2013. They argue that the said decision renders the Petitioner destitute as it disinherits her. They argue that since the deceased (Njogu Njiru) had two wives the said parcel of land shall be divided among the two household where the petitioner side would be entitled to 2 acres and the other family 2 acres.

12. It is their argument that the said nomination/decision denies the petition the share of her deceased husband estate including the matrimonial property.

Submissions

13. The parties agreed to dispose of the matter by way of written submissions. The petitioner filed their written submissions on 10th December, 2018. The petitioner submissions further reiterated her position by challenging the 1st Respondent decision arguing that the same was solely based on the deceased nomination, which nomination in her view cannot stand as the deceased was blind and was made without taking into considerations of the petitioner evidence, in sum the petitioner argues that the 1st Respondent decisions infringes her fundamental rights protected under the Constitution.

14. The 1st Respondent in their submissions reiterated their position stating that the decision by their Advisory Committee was in accordance with the law to the wit the Irrigation Act and Regulations thereunder. In addition they argue that their decision does not infringe on the Applicant's rights and that the petitioner has not specified on the said rights infringed and sought the petition to be dismissed with costs.

15. The 2nd, 3rd and 6th Respondents in their submissions filed on 23rd November, 2018 reiterated their position by supporting the decision of the 1st Respondent Advisory Committee distributing the subject parcel of land as per the deceased nomination which subdivided the parcel of land as follows:

Charles Muchiri Njiru	1 acre
Alfred Njagi Njiru	1 acre
Beatrice Mabuti	1 acre
Margaret Wakubu	½ acre
Alikendra Karia Muchiri	½ acre

16. In addition, they argue that the Petitioner has failed to specifically state the right which has been denied, infringed or threatened. In this

regard they rely on the authorities of *Anarita Karimi Njeru –Vs- Republic 1979 KLR 154* and *Mumo Matemu –Vs- Trusted Society of Human Rights Alliance & Others Civil Appeal No. 240 of 2012 2(2013 e KLR)* and the case of *Kerugoya ELC Constitutional Petition No. 1 of 2017 Margaret Wairimu M....& Another –Vs- Faith Wnjiku Gikunju*.

17. The 4th and 5th Respondents in their submissions filed on 10th December, 2018 reiterated their position in support of the petition arguing that the 1st Respondent decision disinherits their mother rendering her destitute thus infringing on her fundamental rights, as it denied her the right of a share of her deceased husband estate including the matrimonial property. In sum they argue that the two families should be entitled to 2 acres each.

C. ISSUES.

The following are the main issues arising from the above:

i. Whether the Petitioner is entitled to a share of her deceased Husband Rice Holding?

ii. Whether the Applicant's fundamental rights have been infringed.

D. ANALYSIS OF THE ISSUES

i. Whether the Petitioner is entitled to a share of her deceased Husband Rice Holding?

18. The applicable Law in regard to the subject parcel of Land classified as a Rice-holding is the Irrigation Act cap 347 Laws of Kenya. Section 14 of the Irrigation Act provides for the designation of the National Irrigation Scheme and vesting of land by the minister. Vide legal **Notice LN/67/1977** Mwea Irrigation Settlement Scheme was established as a scheme.

19. The Irrigation Act at Section 3, establishes the National Irrigation Board whose powers and functions are provided for under Section 15 (1) of the Irrigation Act, and it include being responsible for the development control and improvement of national Irrigation Scheme in Kenya. Section 24 of the Irrigation Act provides that the Board shall appoint an advisory committee in respect of each Irrigation Scheme.

20. What is before this court is an application challenging the nomination by a deceased licensee in respect to Rice Holding No. 3102 registered under the name of one Njiru Njagi (deceased) The Petitioner is the wife of the deceased registered holder. She alleges that the decision of the 1st Respondent Advisory Committee distributing the Rice Holding as per her deceased husband nomination renders her destitute thus infringing on her fundamental rights.

21. **Section 7 (1) of the Irrigation (National Irrigation Scheme) Regulation, 1977** authorizes the licensee to nominate a successor in respect to his/her rice holding, and in this case the deceased made a nomination in the year 2013 dividing his holding among his children as cited above, the nomination was upheld by the advisory committee established by the 1st Respondent in line with **Section 7 (2) of the Regulations**.

22. The Applicant challenges the same as an infringement of her rights. In *Catherine Wambui Miriithi Vs Mwea Irrigation Settlement Scheme & Another (2014) e KLR, B.N Olao J* in this regard noted that:

***“It is of course true that the applicant, like any other Kenyan, is entitled under Article 40 of the Constitution to acquire and own property. A Rice Holding is, however the property of the National Irrigation Board established under the Irrigation Act (Chapter 347 Laws of Kenya). The said National Irrigation Board issued licences to persons to occupy and work in the various rice holdings and such persons are only licensees. Such rice holding are not personal properties of these licensees and therefore do not form part of their estate to be distributed under the view of succession.*”**

23. From the Petitioners point of view as evidence by the documents on record, she is contesting the nomination by her deceased Husband arguing that the said nomination is unfair as the same unequally distributes the subject Rice Holding between the two families. She argues the distribution should have been done in way that the two wives of the deceased husband get equal shares that is two acres each. This is squarely in view of the Law of Succession Act.

24. Taking the position taken by Justice B.N Olao in **Catherine Wambui Miriithi Vs Mwea Irrigation Settlement Scheme & Another (2014) e KLR** which is persuasive to this court, the subject Rice Holding is not personal property to form part of the estate of the deceased, and therefore the distribution of the same should in accordance with the provisions of the Irrigations Act and Regulations thereunder.

25. The Petitioner has failed to tender any evidence challenging the nomination by her Deceased Husband the licensee of the subject Rice Holding, thus the filed Nomination of 2013 , which has been approved by the 1st Respondent Advisory Committee stands. The nomination meets the provision of section 7(1) of the Regulations and the relevant Provisions of the Irrigation Act.

Whether the Applicant's fundamental rights have been infringed

26. The 2nd, 3rd and 6th Respondents together with the 1st Respondents have argued that the petitioner has failed to specifically state the right which has been denied, violated, infringed or threatened. In sum they argue that the Petitioner has failed to frame her case with the precision required under the High Court in *Anarita Karimi Njeru Vs The Republic (1976-1980) KLR 1272* and as affirmed by the Court of appeal in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] e KLR*

27. It is notable from the petitioner's pleadings that indeed they allege infringement of fundamental rights, however she has not provided nor cited the relevant article of the Constitution in which rights have been infringed. Apart from stating that her fundamental rights are being infringed, she has not provided the particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the action before the court. And failure to draft the petition with precision may have prejudiced respondents as was held by the Court of Appeal in **Mumo Matemu Vs Trusted Society of Human Rights Alliance & 5 others [2013] e KLR**.

28. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] e KLR**, the Court noted-

“(41) We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

29. Therefore the 1st, 2nd, 3rd and 6th Respondents submissions in this regard are merited in the circumstances of this case, for the reason that the Petitioner has failed give with reasonable precision the rights allegedly infringed.

ENDING

In Conclusion, it is my considered opinion that the Instant Petition Lacks merit and the same is hereby dismissed with each party to bear her own costs. It is so ordered.

READ and SIGNED in 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 – present
2. Mrs. Magara - present
3. Petitioner/Advocate - absent
4. Kabuta Court clerk – present