



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 11 OF 2017

NAOMI NJERI AYUB.....PLAINTIFF

VERSUS

MARY NYAMBURA WANGOMBE.....1ST DEFENDANT

NATIONAL IRRIGATION BOARD.....2ND DEFENDANT

JUDGMENT

The plaintiff has filed this case through a plaint dated 27th January 2017 seeking the following orders:

- (a) A declaration that Rice holding No. 465 Unit T 22 Gathigiriri belongs to the deceased Monica Wairimu Kamondo.***
- (b) An order of cancellation of the beacon certificate issued to the 1st defendant.***
- (c) Costs of the suit and interest.***

According to the plaintiff, the rice holding No. 465 Unit T 22 Gathigiriri belongs to Monica Wairimu Kamondo and not Benson Wangombe. The plaintiff further averred that on or about 10th September 2013, the National Irrigation Board issued a letter to the 1st defendant indication that the said Rice Holding belongs to Benson Wangombe (deceased). The Board gave the 1st defendant one acre of the said rice holding pending succession proceedings for the Estate of the late Benson Wangombe. The plaintiff further averred that on 24th June 2014, the 2nd defendant went ahead and issued beacon certificate to the 1st defendant which she contend is un-procedural. On 15th February 2017, the 2nd defendant filed a statement of defence denying the plaintiff's claim and all averments contained therein.

PLAINTIFF'S CASE

The plaintiff testified alone on oath and referred to her statement recorded on 27th January 2017 which she adopted in evidence. She has also referred her list of document dated the same date which she also produced in evidence as Plaintiff's Exhibit No. 1, 2, 3 and 4 respectively. In brief, the plaintiff reiterated the averments contained in the plaint dated 27th January 2017. In cross-examination, the plaintiff stated that the 1st defendant is the wife of the son of her brother. She said that she has sued the defendants for trespassing into the shamba of her mother. She stated that she is cultivating the suit land as well as the 1st defendant. She said that they were referred to the Manager of the Irrigation Board to resolve their dispute. She attended with her surveyor. She said that she was not aware if the surveyor filed a report. She does not also remember what the Manager stated. She stated that the management took the land from Monica after the 2nd defendant issued the 1st defendant a beacon certificate. She decided to file this suit.

1ST DEFENDANT'S CASE

The 1st defendant testified on oath and stated that she lives in Gathigiriri where she works as a casual labourer. She stated that her husband is one Benson Wangombe (deceased) who passed away in 2013. After her husband passed away, the plaintiff who is her cousin started interfering with her farming in the rice holding which is the subject of this suit. She made a report to the Chief's office. The Chief referred her to the Irrigation Board Manager. She met the Manager and explained to him that her late husband had made application in respect to the portion they were cultivating but passed on before he was given. After listening to her explanation, the Manager issued her with a beacon certificate. She stated that when she got married, she found her husband ploughing one acre of the suit land. The 1st defendant stated that they went to the site with the surveyor who did survey the land in question and gave her one acre from parcel No. 456 Migingo. The surveyor prepared report which gave a distinction between the land in question and rice holding No. 465.

2ND DEFENDANT'S CASE

The 2nd defendant called Rosemary Mwangi who works as an Administration officer. She stated that the records from the Irrigation Scheme touching the suit property is that the rice holding No. 465 is measuring 4 acres and an extra field measuring half an acre. Initially, the holding was allocated to one Kamondo Kimani in 1959. The witness stated that the family filed succession cause at Wanguru Law Courts vide Misc. Case No. 28 of 1997. The Court then ordered that the rice holding No. 465 in Tebere Section be substituted by Wairimu Kamondo Kimani as the successor. Their records were then effected through changes dated 2nd October 1997. On 17th September 2017, the Manager gave a report to the Court indicating the status of the rice holding dated 19th September 2017. According to the report, the Scheme Manager is mandated to allocate or assign scheme land to anybody within the Scheme area. Through the area Manager, he allocated the land in question to Benson Wangombe who is now deceased and later registered in favour of Mary Nyambura Benson. She stated that the succession of rice holding No. 465 which is 4 acres in Tebere Section is not tied to the red soil. The family can proceed to complete the succession. She stated that the succession will only be limited to land registered in the Scheme nominal roll as rice holding No. 465 and its residential plot. The witness stated that any other land other than the two will follow a deferent process that will involve proving ownership in form of an allotment letter, beacon certificate or any other official document from the Board. She produced the said report in evidence as Defence Exhibit No. 2. The witness explained that the procedure of allocating a rice holding is laid down in the **Irrigation Act** where a person can make a request through a letter to the Scheme Manager which is either approved by the Advisory Committee or the other Committee from the Village Committee. She stated that Geoffrey Wangombe who is father to Benson Wangombe requested the Scheme Manager to allocate his son Benson Wangombe Kamondo a parcel of land measuring one acre at the red soil. The Assistant Chief, Gathigiriri Sub-location wrote to the Scheme Manager notifying him that Benson Wangombe hails from his area and was the son of Geoffrey Wangombe Kamondo and married to Mary Nyambura Wangombe who died in 2013. After Geoffrey made that request, Mary Nyambura requested the Scheme Manager for succession of his late husband. She later requested the Scheme Manager through a letter to issue her with a beacon certificate and the same was granted. She stated that in respect to rice holding No. 465, the families have not filed succession.

PLAINTIFF'S SUBMISSIONS

The plaintiff through the firm of R. Muthike Makworo & Co. Advocates submitted that the rice holding is an Irrigation Scheme and therefore part of the free property of the 2nd defendant. The learned counsel also submitted that in dealing with any land, the 2nd defendant must apply rules of natural justice requiring that a party must be heard before a decision affecting changes on ownership can be made. She stated that the 2nd defendant in issuing the beacon certificate clearly indicated in the said beacon certificate “**attached to rice holding number 465**”. The learned counsel submitted that the said wording only means that the rice holding and the red soil had been joined together and one could not deal with the red soil without mentioning the rice holding. Counsel submitted that the two acres of the red soil and the rice holding are one belonging to Monica Kimani (deceased).

DEFENDANT'S SUBMISSIONS

The defendant through the firm of Bwonwonga & Co. Advocates submitted that the plaintiff has no property at all to claim since the rice holding No. 456 Unit T 22 Gathigiriri belongs to their deceased mother and that the family has not filed succession so that they can determine who the real beneficiaries of her Estate are. It is further submitted that accordance to the Natural Irrigation records, the deceased nominated one Geoffrey Kamondo as successor. The learned counsel also submitted that the plaintiff's evidence is full of material contradictions and has therefore failed to establish her case on a balance of probabilities. The defendant cited the following case:

1. Republic Vs The Chairman Advisory Committee, Mwea Irrigation & 2 others HC MISC. Case No. 67/2006 (Embu).

DECISION

The plaintiff's claim in this case is for a declaration that Rice Holding Number 465 Unit T 22 Gathigiriri belongs to Monica Wairimu Kamondo (deceased) and that an order be issued cancelling a Beacon certificate issued to the 1st defendant. First, it is important to note that rice holdings are properties of the Natural Irrigation Board established under the **Irrigation Act (Chapter 347) Laws of Kenya**. **Section 3 of the said Act** provides as follows:

“3 (1) There is hereby established a board to be known as the National Irrigation Board, which shall be a body corporate having perpetual succession and a common seal, with power to sue and be sued, and capable of providing or otherwise acquiring, holding, managing and disposing of any property moveable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties, and discharge of its functions under this Act and any subsidiary legislation made thereunder”

The Board established under **Section 3** above, has powers to appoint an Advisory Committee in respect of each Natural Irrigation Scheme. The Act also provides that the Minister concerned (read Cabinet Secretary) after consultation with the Board may make regulations for the carrying out of the purposes and provisions of the Act which include the day to day administration and control of National Irrigation Scheme. The 2nd defendant called one Rosemary Mwangi who works with Mwea Irrigation Scheme who was sent by the Manager to testify on his behalf. The witness gave evidence and produced a report by the Scheme Manager dated 19th September 2017. In the said report, it is clerk that rancier holding No. 465 (4 acres) in Tebere Section was allocated to Benson Wangombe (deceased) which was later transferred and registered in favour of Mary Nyambura Benson (his wife). The same report also gives a detailed procedure in which land situated in the red soil was being allocated through Village Committees. The report showed that on 10th September 2013, the Scheme Manager wrote to Geoffrey W. Kamondo, Priscilla Wangechi Waweru, Jane Wanjiku Wangombe and John Njoroge Nyanjui directing that the land parcel in red soil situated at Misingo measuring 1 acre and associated with holding No. 465 belongs to Benson Wangombe (deceased). The Scheme Manager further directed that the land be utilized by the wife of the deceased Ms Mary Nyambura Benson. The report further indicates that on 17th June 2014, the said Mary Nyambura Benson wrote to the Scheme Manager requesting for a beacon certificate for the red soil plot measuring 1 acre and on 18th June 2014, the Scheme Manager directed the Irrigation Engineer to assign a surveyor to take measurements and subsequently issue her with a beacon certificate. The report has not been contraverted in any way.

In the case of ***Republic Vs the Chairman Advisory Committee Mwea Irrigation & 2 others (Misc No. 67/2006) Embu, Justice Khaminwa***

held as follows:

“The land designed as Irrigation Scheme belongs to the board and it is for the board to determine the number of settlers to be accommodated in an Irrigation Scheme. The Board has power to establish Advisory Committee for each Irrigation Scheme. Regulations are made which are for the proper management and use of the rice holdings and the board has absolute power to issue licences, to terminate the same and to regulate the manner of use of the land and it’s produce.

I find that the licence held by the applicant is not absolute and is subject to regulations of the Board at any time the decision of the first. Respondent is therefore within the powers granted under the statute establishing the same. I see no reason to quash the same. The Advisory Committee Tribunal can even override orders of Court if the same are not made within the province of the Act (Cap 347)”.

Again in the case of **Catherine Wambui Muriithi Vs Mwea Irrigation Settlement Scheme & another (2014) e K.L.R**, B.N. Olao J. held thus:

“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 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 person are only licencees. Such rice holding are not personal properties of these licencees and therefore do not form part of their estate to be distributed under the law of succession”.

I fully associate with the findings of my learned Judges save to add that the establishment of Irrigation Schemes in the country and the incorporation of the Board is to ensure that there is sufficient food reserves in the country to feed its citizens. The Board therefore has immense powers to regulate the management of the scheme in such a manner to ensure that they discharge those functions.

In the result, I find the plaintiff has not proved her claim on a balance of probabilities. This case is therefore dismissed with each party to bear her own costs.

READ and DELIVERED in open Court at Kerugoya this 11th day of March, 2019.

E.C. CHERONO

ELC JUDGE

11TH MARCH, 2019

In the presence of:

1. Mrs Makwaro for Plaintiff
2. Ms Magara for Defendant
3. Mbogo – Court clerk – present