REPUBLIC OF KENYA

IN THE ENVIRONMENT LAND COURT AT KERUGOYA

JUDICIAL REVIEW MISC. 1 OF 2018

IN THE MATTER OF APPLIATION FOR ORDERS OF JUDICIAL REVIEW BY JOSEPH MUTAHI KARUIRU, PETER KIBUCHI KARUIRU AND ROBERT GAKURU KARUIRU

AND

IN THE MATTER OF IRRIGATION ACT CAP 347 LAWS OF KENYA

AND

IN THE MATTER OF RICE HOLDING NUMBER 2423 AND VILLAGE PLOT NO. 2423 UNIT H3 THIBA SECTION OF THE NATIONAL IRRIGATION BOARD–MWEA IRIRIGATION SETTLEMENT SCHEME

AND

IN THE MATTER OF SCHEME MANAGER MWEA IRRIGATION SETTLEMENT SCHEME LETTER DATED 31.9.2017 BETWEEN

REPUBLIC OF KENYA.....APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD

MWEA IRRIGATION SETTLEMENT SCHEME.....1ST RESPONDENT

JOHANA MURIMI KARUIRU.....2ND RESPONDENT

AND

JOSEPH MUTAHI KARUIRU.....1ST EXPARTE/APPLICANT

PETER KIBUCHI KARUIRU.....2ND EXPARTE/APPLICANT

ROBERT GAKURU KARUIRU.....3RD EXPARTE/APPLICANT

JUDGMENT

The Applicants commenced these proceedings Ex-parte and obtained leave to file substantive Notice of Motion on 31st October 2018. In a Notice of Motion filed subsequently dated 27th November 2018, the Applicants sought an order of certiorari to bring into this Honourable Court for purposes of being quashed the proceedings and decision of the Scheme Manager Mwea Irrigation Scheme contained in a letter dated 31st September 2017 in respect of Rice holding No. 2423 and Village plot No. 2423 H 3 Thiba Section of the National Irrigation Board. In support of their Notice of Motion, the Applicants contend that they are sons of the late Meshack Karuiru together with the 2nd Respondent and that sometime in 1988, their late father transferred the rice holding aforesaid together with Village Plot No. 2423 to his wife who is also their mother one Millicent Wangithi. The Applicants also stated that during the life time of their mother, she showed them and the 2nd Respondent portions of the suit rice holding where they took possession and started utilizing. Sometime after her demise, the 2nd Respondent came up with a letter purporting to be a Court order issued by Wanguru District Magistrate Court in Succession Cause No. 10 of 1974 where he was allegedly appointed as the successor of rice holding No. 2423 and Village Plot No. 2423 with guardianship of Millicent Wangithi. The Applicants then lodged a complaint with the Scheme Manager who on 21st April 2014 shared the rice holding among the

Applicants and the 2nd Respondent which each was to utilize one (1) acre. In a letter dated 18th May 2017, the Applicants and the 2nd Respondent were communicated of the farmers' changes where each was to be issued with a licence. Again on 31st September 2017, the Scheme Manager Mwea Irrigation Settlement Scheme revoked the farmers changes issued on 18th May 2017 vide a letter dated 6th June 2017 and another letter dated 31st September 2017 and distributed rice holding number 2423.

APPLICANTS CASE

It is the Applicants contention that the distribution of rice holding as per the two letters dated 6th June 2017 and 31st September 2017 respectively was in total disregard of their interests and ultra vires to the Irrigation Act and without jurisdiction.

THE 2ND RESPONDENT'S CASE

The 2nd Respondent filed a Preliminary Objection opposing the said application. According to him, he is the legal licencee of tenancy or rice holding No. 2423. He attached a tenancy licence and issued by the Manager, Mwea Irrigation Settlement Scheme on the strength of a Court order issued vide Succession Cause No. 10 of 1974. He stated that the initial licencee Meshack Karuiru who is his late father wrote a letter to the then Scheme Manager one Mr. S.N. Kanai expressing the desire to surrender his rice holding No. 2423 and plot No. 2423 Thiba Section to him under the guardianship of his late mother Millicent Wangithi as he was a minor by then. He further stated that his late father filed Succession Cause No. 10 of 1974 at Wanguru Law Courts after the then Scheme Manager wrote to the District Magistrate Wanguru Law Courts stating that he had no objection to the matter. The Court proceeded and issued an order stating that he was the legal tenant of the suit holdings under the guardianship of his late mother which was confirmed vide a letter dated 28th January 1974. On 28th January 1994, the Court proceeded and issued a decree confirming that he had been appointed as the successor tenancy of the suit holding. The 2nd Respondent further stated that the Manager Mwea Irrigation Scheme is the one who has powers to study and give advice and guidance on all rice holding disputes. He also stated that the Applicants lodged a complaint with the Scheme Manager who after going through the history of the dispute in respect of the suit holding wrote a letter dated 31st September 2017 advising all concerned parties that the Board had no mandate to interfere with the decree of the Court issued in the Succession Cause No. 10 of 1974.

ANALYSIS AND DECISION

The dispute between the Applicants and the Respondent relates to a holding No. 2423 and plot No. 2423 Thiba Section. The original registered licensee of the said holding and Village Plot No. 2423 was Mishack Karuiru (deceased). On 14th March 1974, the said Mishack Karuiru presented himself before the then District Magistrate II one L. Rutere who applied to be allowed to surrender his holding No. 2423 to his son the 2nd Respondent who by then was a minor under the guardianship of his mother Millicent (deceased). The Court granted him his wishes and directed him to pay costs thereto.

The Applicants complaint in this case is that the actions by the Scheme Manager, Mwea Irrigation Scheme through a letter dated 31st September 2017 was ultra vires and without jurisdiction. This being a claim under Judicial Review, the jurisdiction of the Court is conferred by statute. In ***Suchan Investment Limited Vs Ministry of National Heritage & Culture and 3 others (2016) K.L.R at page 55 – 58***, it was held:

> ***"An issue that was strenuously urged by the Respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while Judicial Review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, Judicial Review is not concerned with the merits of the case. However, Section 77 (2) (1) of the Fair Administrative Action Act provides proportionally as a ground for statutory Judicial Review. Proportionality was first adopted in England as an independent ground of Judicial Review in Republic Vs Home Secretary; Ex-parte Daly (2001) 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; first, proportionality may require the reviewing Court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit, that the limitation of right is necessary in an open and democratic society; in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory Judicial Review applications. Analysis of Article 47 of the Constitution as read with the Fair Administrative Actions Act reveals the implicit shift of Judicial Review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture House Ltd Vs Wednesbury Corp. (1948) 1 K.B. 223 on reasonableness as a ground for Judicial Review. Section 7 (2) (j) (1) and (IV) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (1) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, the reviewing Court has no mandate to substitute its own decision for that of the administrator. The Court can only remit the matter to the administrator and/or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act".***

The subject of this dispute is a protracted claim between siblings over rice holding No. 2403 and 2826 as observed by the Scheme Manager Mwea Irrigation Settlement dated 31st September 2017. The original allottee of that holding was one Mishack Karuiru who was allocated the same on 4th June 1966. It is alleged that the 2nd Respondent (Murimi Karuiru) was appointed successor to the said holding through DM Succession Cause No. 10 of 1974 under the guardianship of Millicent Wangithi on 22nd March 1974. It is further alleged that on 28th June 1994, Millicent Wangithi wrote to the Scheme Manager requesting to transfer the tenancy of rice holding to Mishack Karuiri Johana on grounds that she had commitments that were denying her time to attend to the farm but that request was rejected through a letter dated 18th July 1994 on numerous grounds one being that the applicant (Millicent) was not a tenant but a guardian. From that background, it is important to understand the duties and obligations conferred to a tenant in a rice holding. Under ***Section 7 of the Irrigation (National Irrigation Scheme) Regulations, 1997***, the law provides as follows:

> ***"7 (1) A licensee may, at any time after the date of being granted a licence, nominate, in writing to the manager, another person to succeed him as licensee in the event of his death; and a licensee may at any time, in writing to the manager, revoke or alter the nomination which may have been made by him.***
>
> ***Provided that no person nominated as a successor may succeed until he has attained the apparent age of eighteen years; If he has not reached that age, his guardian under customary law ma, within one month of the licensee's death, and with approval of the manager, appoint a person to act on his behalf until the successor is of age.***
>
> ***(2) No person nominated as successor may succeed without the approval of the Committee.***
>
> ***(3) The authorized dependant of a deceased licensee may, within thirty days of his death, appeal to the Court against the nomination, under paragraph (1) of a successor.***
>
> ***(4) The authorized dependant may***
>
> ***(a) Where a licensee dies without having nominated a successor in accordance with paragraph (1); or***
>
> ***(b) Where, under paragraph (3) an appeal to the Court against the nomination of a successor has been successful.***
>
> ***Within one month of the death of the licensee or one month after the determination of the appeal, as the case may be, nominate, in writing to the manager, a successor who must be approved by the Court.***
>
> ***(5) In the event of:***
>
> ***(a) no person being appointed within the time prescribed in the proviso to paragraph (1); or***
>
> ***(b) no person nominated within the time prescribed in paragraph (4); or***
>
> ***(c) any person nominated or appointed under this regulations failing to assume the responsibilities inherent in such nomination or appointment within a period of three months from the death of the licensee: or***
>
> ***(d) no successor being acceptable to the Committee.***
>
> ***The holding shall be deemed to have been vacated, the license in respect of such holding shall terminate, and a fresh license may be granted in accordance with regulation 5 and 6.***
>
> ***(6) In the event of a holding being deemed to have been vacated in terms of paragraph (5) –***
>
> ***(a) the manager, may make provisions for the cultivation of any such holding and where appropriate recover the costs from the incoming licensee; and***
>
> ***(b) in accordance with regulation 23 recognable compensation may be paid to the authorized dependant of a licensee in respect of any improvement to the holding effected by the licensee.***

From my reading of the regulations under the ***Irrigation Act***, NO person nominated as a successor may succeed without the approval of the Committee. The original licensee in respect of rice holding No. 2423 purported to surrender his holding No. 2423 to his son Johana Murimi Karuiru on 14th March 1974 who by then was a minor. The said surrender was registered as Succession Cause No. 10 of 1974. The manner in which the said licensee nominated a successor was foreign to the regulations as provided under the Act. The nomination of a successor by a licensee was to be done in writing to the manager which was to be approved by the Committee but not the Court. Registering a nominee as a succession cause was also irregular as the same was not a succession cause in the strict sense. The rice holding is a property of the Irrigation Scheme and not a personal property to be succeeded under the Succession Act and the operations and management of Mwea Irrigation Settlement Scheme is the preserve of the National Irrigation Board and cannot be shared by the Courts or any other body whatsoever.

The order of Magistrate's Court issued on 14th March 1974 through Succession Cause No. 10 of 1974 is therefore tantamount to usurping the functions and duties of the Mwea Irrigation Settlement. The same is therefore liable to be quashed by an order of certiorari for being ultra vires the statutory regulations of the ***National Irrigation Act Cap 347 Laws of Kenya***. In the result, the Notice of Motion dated 27th

November 2018 is allowed in the following terms:

> ***1. An order of certiorari do issue to remove into this Court for purposes of quashing the proceedings and award of the Scheme Manager Mwea Irrigation Scheme letter dated 31st September 2017 in respect to Rice holding No. 2423 and Village plot No. 2423 H 3 Thiba Section of the National Irrigation Board.***
>
> ***2. Each party to bear her own costs of this case.***

READ, DELIVERED and SIGNED in open Court at Kerugoya this 14th day of June, 2019.

E.C. CHERONO

ELC JUDGE

14TH JUNE, 2019

In the presence of:

1. Johana Murimi Karuiru

2. Joseph Mutahi Karuiru

3. Peter Kibuchi Karuiru

4. Robert Gakuru Karuiru

5. Court clerk - Mbogo