



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 12 OF 2015

MARGARET WANJIKU MUNYI.....1ST APPELLANT

MOSES NJOKA MUNYI.....2ND APPELLANT

VERSUS

MUNYI NJOKA.....1ST RESPONDENT

LUCIA WAMBUI MUNYI.....2ND RESPONDENT

**(BEING AN APPEAL FROM THE JUDGMENT OF HON. P.M. KIAMA – PRINCIPAL MAGISTRATE AT WANG’URU
DELIVERED ON 16TH JUNE 2015 IN P.M.C.C NO. 53 OF 2011)**

JUDGMENT

INTRODUCTION

This Appeal arises from the decision by Hon. P.M. Kiama, Principal Magistrate Wang’uru Law Courts delivered on 16th June 2015 in PMCC No. 53/2011. The Appellants in this case Margaret Wanjiku Munyi and Moses Njoka Munyi who were defendants before the trial Court had been sued by the Respondents who were plaintiffs for among others an order for permanent injunction restraining them from interfering with their quiet possession, occupation, cultivation and enjoyment of 3 acres out of rice holding No. 3170 Unit W1 Wamumu Section. The Respondents had also sought an order for sub-division of the said rice holding into three (3) portions of 2 acres, one acre and another one acre to be registered in the names of the 1st, 2nd Respondents and the 1st Appellant respectively and the Village plot to be shared equally between the 2nd defendant and the 1st Respondent. After hearing the parties, their witnesses and submissions by their counsels, the Court found and held that the plaintiffs had proved their case and gave judgment as prayed in the plaint. The said decision did not go well with the defendants/Appellants who exercised their undoubted right of appeal on the following seven grounds:

- (1) That the learned magistrate erred in sub-dividing a rice holding when he has no jurisdiction to do so under the Irrigation Act which mandate belongs to the Manager Mwea Irrigation Scheme.***
- (2) That the learned magistrate erred in fact and in law in awarding 3 acres in rice holding No. 3170 to the Respondents and in failing to apply customary rights enshrined in the Irrigation Act.***
- (3) That the learned magistrate erred in fact and in law in failing to distribute the rice holding fairly bearing in mind that the Appellants are the family of the 1st Respondent and he was the owner of the rice field as trustee.***
- (4) That the learned magistrate erred in fact and law in ordering a permanent injunction order to issue when no eviction orders had been obtained and in restraining persons who were already in occupation.***
- (5) That the learned magistrate erred in fact and law in recognizing the 2nd Respondent and awarding her part of the rice holding when she is a stranger to the family of the 1st Respondent.***
- (6) That the learned magistrate erred in fact and law in issuing injunction orders on the Appellants who are 1st Respondent’s family over family land.***
- (7) That the learned magistrate erred in fact and law in sanctioning the 1st Respondent actions of selling the family land and failed to take into consideration the expenses the Appellants have paid to protect the land and redeem it.***

APPELLANTS SUBMISSIONS

GROUND NO. 1

On the first ground of Appeal, the Appellant through their counsel submitted that the work of sub-dividing rice holding under the **Irrigation Act** is bestowed upon the Manager of the Scheme and that there is an elaborate procedure on how it is done and the considerations the Manager look at in sub-dividing the rice holdings. She submits that the Court decision is tantamount to directing the Manager of the Scheme on how to conduct his work.

GROUNDS NO. 2, 3, 4 & 6

On the four grounds combined, the Appellants submitted that the learned magistrate erred by failing to apply customary rights enshrined in the **Irrigation Act**. They submitted that the 1st Respondent who is the registered tenant of rice holding No. 3170 holds the same in trust for his family but not as an absolute owner. By issuing a permanent injunction against the tenant's son and wife, the Court interfered with their rights protected under the **Irrigation Act**.

GROUND NO. 4

Under ground No. 4, the Appellants submitted that they cannot be restrained from entering the suit property where they currently occupy and having been in occupation. The Respondents ought to have first sought to have them evicted before seeking the permanent injunction orders.

GROUND NO. 5

The Appellants submitted that the learned magistrate erred by awarding the 2nd Respondent part of the rice holding when she is a stranger to the family of the Appellants.

GROUND NO. 7

The Appellants on the last ground of this Appeal submitted that the Court erred by sanctioning the 1st Respondent to sell the family land.

RESPONDENTS SUBMISSIONS

The Respondents failed to file submissions to this Appeal.

RE-EVALUATION AND DECISION

This appeal is from the decision of Hon. P.M. Kiama, Principal Magistrate in PMCC No. 53 of 2015 (Wang'uru). The Respondents had taken the Appellants to Court over rice holding No. 3170 Unit W1 Wamumu Section and Village Plot. The subject of this appeal which was also the subject of the case before the trial magistrate is a leasehold interest in land parcel described as rice holding number 3170 Unit W1 Wamumu within Mwea Irrigation Settlement Scheme. From the tenant identification card produced before the trial Court, it is apparent that the 1st Respondent is the bonafide tenant in respect of the rice holding number 3170 Unit W1 Wamumu Section. It is trite law that the said rice holding number 3170 Unit W1 Wamumu is situated within Mwea Irrigation and Settlement Scheme which is created under the **Irrigation Act Cap 347, Laws of Kenya**. Under the said Act, the Cabinet Secretary in charge of Agriculture is mandated to designate an area of land to be a National Irrigation Scheme through a Gazette Notice. Under **Section 15** of the same Act, the Cabinet Secretary is empowered to acquire the right, title or interest in such land and to vest it in the Board who shall be responsible inter alia for the development, control and improvement of national irrigation schemes so created.

Section 15 (2) of the said Act provides elaborate functions of the Board as follows:

(2) The Board shall have and may exercise all such powers as necessary to enable it to perform its functions under this Act, and, without prejudice to the generally of the foregoing, the Board shall have power:

(a)

(b)

(c)

(d) To co-ordinate and plan settlement on Natural Irrigation Schemes.

(e) To determine the number of settlers to be accommodated in a natural irrigation scheme.

The **Irrigation Act** and the regulations created thereunder gives the Board absolute autonomy in the management of the National Irrigation Settlement Schemes in the country. **Section 4, 5 and 7** thereof states as follows:

“4 Any person who resides in, carries on business, or occupies any part of the scheme or grazes any stock thereon shall, unless

he is the holder of a valid licence granted to him under these regulations by the Manager with the approval of the Committee or is the authorized dependant of such licensee, be guilty of an offence.

5 (1) Every licence shall be in the form in the first schedule, and shall be prepared in duplicate; the original shall be given to the licensee and the duplicate shall be retained by the manager.

(2) The Manager shall maintain a register in which he shall enter the name of every licensee, the number of his holding and the names of his authorized dependants.

(3) The manager shall also maintain a separate register in which he shall enter the name of any successor nominated by the licensee under Regulation 7 together with the number of the holding in respect of which the successor has been nominated.

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7 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 his 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”.

The Respondents in their plaint before the trial magistrate sued the Appellants seeking among other orders for sub-division of rice holding No. 3170 into three portions. The **Irrigation Act** and the Regulations made thereunder did not donate such authority and power to the Court. The statute gives the National Irrigation Board power to manage and control the operations of all the National Irrigation Settlement Schemes in the county. It is my view that the trial magistrate lacked jurisdiction to issue the orders sub-dividing the rice holding or dealing with it in any way. The functions given to the National Irrigation Board under the **Irrigation Act** are Administrative in nature which, like all other statutory bodies created under the law are required to be exercised in a fair manner. It follows then that when a person is aggrieved by an administrative decision, that person’s fundamental right as defined under **Article 47 of the Constitution** is potentially violated and such a person may therefore opt to bring a suit for enforcement of her fundamental rights under **Article 23 of the Constitution**. Parliament in giving effect to **Article 47 of the Constitution** has now enacted the **Fair Administrative of Actions Act (F.A.A.A)** which provides at **Section 9 (1)** as follows:

“9 (1) Subject to sub-section (2), a person who is aggrieved by an administrative action may without unreasonable delay, apply for Judicial Review of any administrative action to the High Court or to a subordinate Court upon which original jurisdiction is conferred pursuant to Article 22 (3) of the Constitution”.

This Section does not give an option to a party having a dispute in an issue touching a license or licensee in a National Irrigation Settlement Scheme. The first port of entry in all disputes is the National Irrigation Board and once a decision has been rendered and any party affected is aggrieved may thereafter refer the matter to the Environment and Land Court or the Magistrate Court or any other tribunal seized with jurisdiction to determine such a dispute. In this case, the Respondent chose to take their dispute to the Magistrate’s Court which in my view was a false start.

In the final analysis, I find this Appeal merited and the same is allowed in the following terms:

(1) The judgment of the learned magistrate delivered on 16th June 2015 be and is hereby set aside and substituted with an order dismissing the entire suit.

(2) In view of the close relation between the Appellants and the Respondents, I order each party to bear their own costs of the case before the Magistrate’s Court and this Appeal.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 19th day of July, 2019.

E.C. CHERONO

ELC JUDGE

19TH JULY, 2019

In the presence of:

1. Ms Ann Thungu for the Appellant

2. Mbogo, Court clerk – present