



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC MISC APPLICATION NO. 2 OF 2015 (J.R)**

**IN THE MATTER OF REGISTERED LAND ACT CAP 300 LAWS OF KENYA**

**IN THE MATTER OF LAND CONSOLIDATION ACT**

**IN THE MATTER OF MWEA/CHUMBIRI/BLOCK 52 – 55 KIRINYAGA**

**IN THE MATTER OF REGISTERED AND ISSUANCE OF TITLE DEEDS**

**IN THE MATTER OF LEAVE TO APPLY FOR MANDAMUS AND PROHIBITION ORDERS**

**BETWEEN**

**REPUBLIC .....APPLICANT/PETITIONER**

**VERSUS**

**THE HON. ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**THE HON. THE MINISTER OF LANDS.....2<sup>ND</sup> RESPONDENT**

**KIRINYAGA COUNTY GOVERNMENT.....1<sup>ST</sup> INTERESTED PARTY**

**NATIONAL IRRIGATION BOARD.....2<sup>ND</sup> INTERESTED PARTY**

**AND**

**SAMUEL MBIRI NGUU.....1<sup>ST</sup> APPLICANT/EXPARTE APPLICANT**

**KARIUKI MACHARI.....2<sup>ND</sup> APPLICANT/EXPARTE APPLICANT**

**KABUI THIKA.....3<sup>RD</sup> APPLICANT/EXPARTE APPLICANT**

**NEHEMIA NDUATI JONATHA.....4<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**KARIUKI JAMES.....5<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**ZAKARIA KIGOTO KANUMBI.....6<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**JOHNSON MBARAKA.....7<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**FRANCIS MUTHIKE MURIUKI.....8<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**JOSIAH NJAGI NJAARUIRI.....9<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

**MIANO ALBERT MIRUGI.....10<sup>TH</sup> APPLICANT/EXPARTE APPLICANT**

NDAMI KIRUMA.....	11 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
NJUIRI MUTHUNGU.....	12 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
NJUNITU MAGANA.....	13 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
KARANI KABUI.....	14 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
KARIUKI KAGAA.....	15 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
DANIEL MWANGI MAIMBWA.....	16 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
CHARLES MWANGI .....	17 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
PETER MUTHIKE GITONGA.....	18 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
WANJOHI JEPHTHU.....	19 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT
KARU GITHINJI.....	20 <sup>TH</sup> APPLICANT/EXPARTE APPLICANT

## JUDGMENT

### BACKGROUND

This Judicial Review was first filled in the High Court of Kenya at Embu by the applicant vide a Notice of Motion No. 1 of 2007 dated 18<sup>th</sup> October 2007. That application was supported by an affidavit sworn by one Samuel Mbiri Nguu. The applicant sought the following orders:

***(1) That the Honourable Court be pleased to order, command or compel the Hon. Minister for lands by himself or servants or agents to complete the Consolidated, Registration and Issuance of Title deeds on suit land namely MWEA/CHUMBIRI/BLOCK 52 – 55 Kirinyaga to the applicants herein.***

***(2) That the Honourable Court be pleased to issue orders of prohibition restraining the Hon. Minister for lands from alienating, transferring, disposing, allotting or any other way interfering with the ownership, occupation or issuance of title deeds of the said land MWEA/CHUMBIRI/BLOCK 52 – 55 except for the purpose of consolidation, registration and issuing of title deeds to the applicants herein.***

***(3) Any other or further order as this Honourable Court may deem fit to issue.***

***(4) That costs of this application be provided for.***

The said application is further supported by grounds apparent on the face of the said application and a statutory statement. The matter partially proceeded and Ex-parte orders issued. Upon interparties hearing of a Notice of Motion brought by the interested party under certificate of urgency dated 29<sup>th</sup> July 2013, the Hon. Lady Justice H.I. Ong’udi on 26<sup>th</sup> May 2014 granted orders *inter alia* transferring this suit to this Honourable Court under the new Constitution of Kenya, 2010.

In a replying affidavit sworn by one Engineer Daniel Barasa, the interested party opposed the said application. Annexed to that affidavit are numerous documents including copies of Gazette Notices and maps. On 4<sup>th</sup> October 2016, the 2<sup>nd</sup> respondent through one I.E.N. Ogege filed a replying affidavit sworn on 3<sup>rd</sup> October 2016 also in opposition to this application. The said affidavit is supported by numerous annexures thereto. On 1<sup>st</sup> December 2016, this Court allowed an application to enjoin Kirinyaga County Government and National Irrigation Board who were interested parties as 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. On 21<sup>st</sup> November 2016, the National Irrigation Board through one Dennis Banda Aroka filed a replying affidavit sworn on 18<sup>th</sup> November 2016 in opposition to these Judicial Review proceedings.

When this matter came up for hearing on 10<sup>th</sup> July 2018, the parties agreed to canvass the Notice of Motion dated 18<sup>th</sup> October 2007 by way of written submissions.

### APPLICANTS CASE

The applicants contend that they are members of twenty clans with about 500 members of families who have owned and occupied pieces of land comprising land parcel No. L.R. MWEA/CHUMBIRI/BLOCK 52 – 55 within Kirinyaga District for over 80 years. The applicants also stated that the suit land was demarcated and registered in the names of each family representative and each family took possession and occupation of its respective plot. One of the applicants Samuel Mbiri Nguu who swore the supporting affidavit also stated that he owns one of the plots within the suit land which is registered as L.R. No. MWEA/CHUMBIRI/398. The said Samuel Mbiri Nguu also stated that one of the applicants namely Benard Kariuki Macharia also owns and occupies one of the plots in the suit land being L.R. No. MWEA/CHUMBIRI/399 while Kariuki Machari owns and occupies L.R. No. MWEA/CHUMBIRI/158. They stated that the suit property L.R. MWEA/CHUMBIRI BLOCK 53 – 55 is approximately 156.2 acres and that the entire land is occupied by the applicants and their

families. The applicants also stated that the suit land borders Mwea Irrigation Scheme and that Mwea Irrigation Scheme have no claim whatsoever over the suit land. The applicants further stated that the rest of the land in the surrounding area was demarcated and title deeds issued around 1970. The applicants also stated that there have been correspondences between the officials of the Ministry of Lands and them and no reasons have been given why they have not completed demarcation registration and issuance of title deeds in respect of the suit land. They also stated that they have visited the Ministry of Lands, the DO's office, the Minister of Lands, the Chief Land Registrar Kerugoya but have not been assisted. The applicants argued that they have been subjected to discrimination, mistreatment and denied their right to own land.

### **1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS CASE**

The 2<sup>nd</sup> respondent through the Director of Land Adjudication, Ministry of Lands one I.E.N. Ogega stated that the land in issue belongs to National Irrigation Board (NIB) who is the 3<sup>rd</sup> defendant/respondent herein. He attached a copy of the Gazette Notice. On 6<sup>th</sup> November 2012, this Court ordered for a site visit to establish the location boundaries and status of the suit land. He stated that the tasked officers visited the suit land and did the physical inspection whereby the surveyors placed the boundaries and thereafter plotted it on the map which was also attached to the replying affidavit. He stated that the tasked officers who visited the suit property made the following observations:

**(a) That the numbering of portions of land within MWEA/GACHUMBIRI/BLOCK 52 – 55 was a preserve of the National Irrigation Board and not a land registration preserve.**

**(b) That there is a clear external boundary between the National Irrigation Board land and the neighbouring sections that is MWEA/CHUMBIRI and MWEA/KABIRIRI parcels.**

**(c) That nobody resides on the said land and was found to be under rice cultivation.**

The 2<sup>nd</sup> respondent further stated that the orders being sought cannot be granted since the suit land is not available for consolidation adjudication, sub-division and registration in favour of the applicants or any other individuals as it's already reserved for National Irrigation Board according to available Government records.

### **3<sup>RD</sup> RESPONDENT'S CASE**

The third respondent through its Corporation Secretary Dennis Banda Aroka stated that the suit property is a property belonging to the National Irrigation Board and was set apart for public use and does not belong to the applicant. The 3<sup>rd</sup> respondent further stated that the suit property is within the Gazetted area of Mwea Irrigation Settlement Scheme, along Kandongu road on your way to A MIAD and that part of the land is being utilized as a borrow site for murrum for the scheme while the rest has been encroached by people who are farming. The 3<sup>rd</sup> respondent further stated that none of the staff of the National Irrigation Board have trespassed or caused any destruction of any land or crops belonging to the applicants or where they live.

### **LEGAL ANALYSIS**

I have considered the affidavit evidence and the submissions by the parties. I have also taken into consideration the applicable law. The applicants in this suit are seeking an order of mandamus to compel the 2<sup>nd</sup> respondent to complete the consolidation, registration and issuance of title deeds on suit land namely MWEA/CHUMBIRI/BLOCK 52 – 55 Kirinyaga to the applicants herein. Traditionally, Judicial Review is not concerned with the merits of the case but the decision making process. However, that is no longer the case. **Section 7 (2) (1) of the Fair Administration Actions Act** provides proportionality as a ground for statutory judicial review. A proportionality review entails a further analysis to determine whether the decision interfered with the right of an applicant to the least extent necessary to achieve a legitimate aim, and whether there was fair balance between the aim sought to be achieved and the means invoked to attain the aim.

In applying the principle of Proportionality, **Odunga J.** (as he then was) in the case of **James Opiyo Wandayi Vs Kenya National Assembly & 2 others (2016) e K.L.R** held as follows:

***“When the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the Court, so far as possible, to secure that any traditional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice ...***

***It is therefore my view and so hold that in appropriate circumstances, Courts of law and independent Tribunals are properly entitled pursuant to Article 1 of the Constitution to take into account public or national interest in determining disputes before them where there is a conflict between public interest and private interest by balancing the two and deciding where the scales of justice tilt. Therefore the Court or Tribunals ought to appreciate that in our jurisdiction, the principle of proportionality is now part of the jurisprudence and therefore it is not unreasonable or irrational to take the said principle into account in arriving at a judicial determination. “***

The affidavit evidence adduced by the respondents contained in the replying affidavits indicates that the orders sought by the applicants cannot therefore issue on the basis that the land which they wish to enforce adjudication cannot be adjudicated since the same is an alienated land. The land is not available for registration and/or allocation since the same was allocated to the National Irrigation Board by the Kirinyaga County Council on 14<sup>th</sup> April 1970. The suit property was set apart for use by the 3<sup>rd</sup> respondent vide Gazette Notice No. 3099 of 1960.

It is trite law that once land is set apart for public use, the same cannot therefore be allocated to private individuals as the applicants are now seeking. In *James Joram Nyaga Vs The Attorney General & another (2007) e K.L.R*, the Court held as follows:

***“We therefore hold that the suit land having been acquired for public purposes, that is, the construction of a road, is held in trust for the public and could not have been allocated to the applicants who are individuals for their private use”.***

Again in the case of *Republic Vs Commissioner of Lands & 4 others Ex-parte Associated Steel Limited, High Court at Nairobi Misc. Civil Suit No. 273 of 2007 (2014) e K.L.R*, it was held:

***“There was a dispute on whether certain land that had been allocated to a private individual was a public road. The Court held that the land was a public road and was therefore not available for allocation or alienation. The Court held that in order to convert the public utility to private hands, the Commissioner of Lands needed to follow the provisions of Sections 12 and 13 of the GLA and further hold consultations from all stakeholders. It held that the Commissioner of Lands held the land as trustee on behalf of the public and affirmed as follows:***

***“It is thus our holding that the disputed plot having already been set aside as a public utility plot, the same was held in trust by the 1<sup>st</sup> respondents (Commissioner for Lands) for the public and public purposes and was not available for further alienation and could not at any rate be allocated to a private developer as a commercial plot”.***

I fully associate with the decisions of the Court in the two cases. The scenario is obtained in the present case where the applicants are seeking an order of mandamus to compel the Minister of Lands to adjudicate and cause the suit land to be registered in their favour. That cannot happen as the suit property is not available for adjudication the same having been set aside for public purposes.

In the circumstances of this case and considering the issues I have raised in my analysis above, I decline to exercise my discretion in favour of the Ex-parte applicants. For all the reasons given above, I dismiss the applicants Amended Motion dated 20<sup>th</sup> February 2008 for lacking merit with each party to bear his own costs. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 22<sup>nd</sup> day of November, 2019.**

.....

**E.C. CHERONO**

**ELC JUDGE**

**22<sup>ND</sup> NOVEMBER, 2019**

In the presence of:

1. Mr. Abubakar holding brief for P.N. Mugo for Ex-parte Applicants
2. Mr. Chomba holding brief for M/S Kimani for the 2<sup>nd</sup> Respondent
3. Mbogo – Court clerk – present