



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC JUDICIAL REVIEW APPLICATION NO. 2 OF 2016

**IN THE MATTER OF THE APPLICATION FOR LEAVE TO COMMENCE PROCEEDINGS IN
THE NATURE OF JUDICIAL REVIEW**

AND

IN THE MATTER OF RICE HOLDING NUMBER 93 TEBERE/SECTION

AND

**IN THE MATTER OF THE NATIONAL IRRIGATION BOARD MWEA IRRIGATION
SETTLEMENT SCHEME**

AND

**IN THE MATTER OF THE ADVISORY COMMITTEE PROCEEDINGS DATED 15TH JUNE
2016**

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

NATIONAL IRRIGATION BOARD.....1ST RESPONDENT

JANE WANJIKU.....2ND RESPONDENT

AND

PAUL IKONYA NJOROGE.....EX-PARTE APPLICANT

JUDGMENT

The issue that falls for my determination in this Judicial Review Application is whether land in an Irrigation Scheme established under the *Irrigation Act Chapter 347 Laws of Kenya* can be the subject for distribution under the Law of *Succession Act Chapter 160 Laws of Kenya*.

PAUL IKONYA NJOROGE the Applicant herein is the administrator of the Estate of his late mother **MARGARET WANGUI JOHN** (the deceased herein). Prior to her death, the deceased was the licensee of rice holding No. 93 TEBERE SECTION (the rice holding) but following her death, the Applicant

moved to **KERUGOYA SENIOR PRINCIPAL MAGISTRATE'S COURT** and filed **SUCCESSION CAUSE NO. 189 of 2010** where the rice holding was listed as among the properties of the deceased. Following a confirmation of grant issued on **30TH MAY 2011**, the rice holding was distributed among the following persons to be registered jointly:

- 1. PAUL IKONYA NJOROGE**
- 2. PETER FRANCIS KURIA**
- 3. JACINTA WAMBUI NJOROGE**
- 4. JOSEPH KIONGO NJOROGE and**
- 5. GABRIEL KIMANI NJOROGE**

However, the Advisory Committee of the 1st Respondent apparently acting on a complaint filed by the 2nd Respondent (**JANE WANJIKU**) who alleged to have been chased away from the rice holding by the Applicant (her brother in law) upon the demise of her husband, proceeded to re-distribute the rice holding in total disregard of the orders issued in the Succession Cause. It is the Applicant's case that since the rice holding was the subject of the Succession Cause at the Kerugoya Principal Magistrate's Court, the 1st Respondent's Advisory Committee had no jurisdiction to interfere with that mode of distribution as per the confirmed grant. Instead, the 2nd Respondent should have moved to have the grant revoked. Therefore, the Advisory Committee exceeded its jurisdiction and the Applicant seeks the following orders:

- a. *Spent*
- b. *That an order of Certiorari do issue to remove into the High Court for purposes of quashing the award of the Advisory Committee of the National Irrigation Board Mwea Scheme dated 15th June 2016 in respect of rice holding No. 93 TEBERE SECTION of the NATIONAL IRRIGATION BOARD.*
- c. *That the cost of this application be provided for.*

The application is opposed.

The 1st Respondent filed grounds of opposition in which it states that the 1st Respondents' Advisory Committee acted within its jurisdiction since the Succession proceedings in **KERUGOYA PRINCIPAL MAGISTRATE'S COURT** in **SUCCESSION CAUSE NO. 189 of 2010** were of no consequence as the **National Irrigation Board Law** cannot be subject to succession as they are premised on lease/tenancy. That the 1st Respondent did not act ultra vires as it had the jurisdiction to distribute the rice holding No. 93 TEBERE SECTION which was done equitably unlike the Succession Cause which never took into account all beneficiaries of **MICHAEL NJUGUNA**.

The 2nd Respondent confirmed that the rice holding was originally registered in the names of her late father in law **NJOROGE IKONGA** and his wife **MARGARET WANGUI NJOROGE**. That they left six (6) children surviving them including the Applicant and the late **MICHAEL NJUGUNA NJOROGE** who was her husband. That on 8th April, 2014 the 1st Respondents' Advisory Committee held a meeting and it was resolved that one (1) acre be awarded to her to hold in trust for her children. Later on 25th January 2016, the Applicant applied for another meeting with a view to setting aside the previous award. A further meeting was therefore held on 15th June, 2016 with all family members present and after hearing them the Advisory Committee resolved that each of the six (6) gets a portion measuring $\frac{3}{4}$ each. Her late husband's portion was registered in her two (2) children under her guardianship and she was issued with the relevant licence and tenant card. The Applicant and her other brothers in law have

however been hostile and have not allowed her to utilize her portion despite being warned by the 1st Respondent. That she was not aware about the filing of **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 189 of 2010** which was filed secretly without informing her and she only became aware about the grant when the application was filed. That the grant is of no legal consequence since land in an **Irrigation Scheme** is governed by the *Irrigation Act* and not the *Law of Succession Act*. Therefore the 1st Respondent's Advisory Committee acted within its jurisdiction and this application should be dismissed with costs.

The application was canvassed by way of written submissions which have been filed both by **MS R. MUTHIKE** instructed by **R. MUTHIKE MAKWORO ADVOCATES** for the Applicant, **MR. G.O. OMBACHI** instructed by **G.O. OMBACHI & COMPANY ADVOCATES** for the 1st Respondent and **MR. KIGURU KAHIGA** instructed by **KIGURU KAHIGA & CO. ADVOCATES** for the 2nd Respondent.

I have considered the application, the grounds of opposition and replying affidavit as well as the submissions by counsel.

This is a Judicial Review application seeking an order of certiorari. The jurisdiction of a Court considering such an application was set out in the case of **PASTOLI V KABALE DISTRICT LOCAL GOVERNMENT COUNCIL & OTHERS 2008 2 E.A 300** as follows.

“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety..... Illegality is when the decision making authority commits an error of law in the process of taking or making the act, the subject of the complainant. Acting without jurisdiction or ultra vires or contrary to the provisions of law or its principles, one instances of illegality Irrationality is when there is such gross un-reasonableness in the decision taken or act done that no reasonable authority addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards Procedural impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a Statute Legislative instrument by which such authority exercises jurisdiction to make a decision.”

Judicial Review is concerned not with the merits of the decision itself but rather with the decision making process – **MUNICIPAL COUNCIL OF MOMBASA VS UMOJA CONSULTANTS LTD C.A. CIVIL APPEAL NO. 185 of 2001 (2002 e KLR)**.

From the statement of facts herein, it is clear that the Applicant's complaint against the 1st Respondent is that since the rice holding had been the subject of **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 189 of 2010** where orders had been made distributing it between himself and his siblings, the 1st Respondent acted without jurisdiction in further making the orders that it did on 15th June 2016 by which the 2nd Respondent was awarded one (1) acre. His counsel **MS MUTHIKE** has submitted that the only recourse the 2nd respondent had was to apply to have the grant issued in **KERUGOYA PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 189 of 2010** annulled. Issues have also been raised about whether the 2nd Respondent was in fact legally married to the Applicant's brother **MICHAEL IKONYA** but as is clear from the case of **MUNICIPAL COUNCIL OF MOMBASA VS UMOJA CONSULTANTS** (supra), Judicial Review is not about the merits of the decision made but rather, it is concerned with the process of making that decision.

MR. KAHIGA Counsel for the 2nd Respondent, has submitted and rightfully in my view, that land in an **Irrigation Scheme** cannot be the subject of Succession proceedings because such land is the property of the **Irrigation Board** and is not free property of a deceased person that can be distributed under the **Law**

Of Succession Act Chapter 160 Laws of Kenya. Section 14 (2) of the Irrigation Act states that:

“In respect of land, other than Trust Land, in a National Irrigation Scheme, the Minister shall in accordance with the law for the time being relating to the compulsory acquisition of land, take such steps as may be necessary to acquire the right, title or interest in such land and to vest it in the Board for the purposes of this Act.”

It is not in doubt that the rice holding is an ***Irrigation Scheme*** and therefore vests in the 1st Respondent. It was not therefore part of the free property of the Applicant’s late mother **MARGARET WANGUI JOHN** which the **PRINCIPAL MAGISTRATE** at **KERUGOYA COURT** could distribute to her heirs as was done in **KERUGOYA PRINCIPAL MAGISTRATE’S COURT SUCCESSION CAUSE No. 189 of 2010**. It follows therefore that the confirmation of grant issued on **30TH MAY 2011** in so far as it purported to distribute the rice holding was a nullity as the Court had no jurisdiction to do so. And as was held in the case of **MACFOY VS UNITED AFRICA CO. LTD 1961 3 ALL E.R. 1169**:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad”.

The Applicant cannot therefore challenge the decision of the 1st Respondent on the basis that it had no jurisdiction to re-distribute the rice holding after succession Court had done so. On the contrary, it was the Succession Court which had no jurisdiction to distribute the rice holding to the heirs of **MARGARET WANGUI JOHN** when it did not form part of her Estate. The decision of the 1st Respondent’s Advisory Committee dated 15th June 2016 cannot therefore be faulted on account of want of jurisdiction.

The Applicant has also premised his case on the ground that the 1st Respondent’s Advisory Committee ***“irregularly convened and distributed rice holding No. 93 Tebere with full knowledge that the rice holding had already been distributed in succession proceedings”***. I have already found that the Succession proceedings were a nullity and therefore the orders made therein could not take away the jurisdiction of the 1st Respondent Advisory Committee which, under the ***Irrigation Act and Regulations*** made thereunder, has the power to issue and cancel licences. In so doing however, the 1st Respondent must be guided by among others, the rules of Natural Justice one of which is that a party must be heard before a decision affecting him is made. It cannot be true that the 1st Respondent ***“irregularly convened”*** the meeting of 15th June 2016. The record shows that the meeting was convened at the request of the Applicant who was complaining that the 2nd Respondent had been given one (1) acre in an earlier meeting held on 8th April, 2014 yet she was a ***“stranger”***. The record also shows that the Applicant and his other siblings were present including the 2nd Respondent and all the parties were allowed to present their respective cases before the decision subject of this application was made. Clearly, therefore there was full compliance with **Article 47 of the Constitution** which provides that;

“Each person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair”. Emphasis added

Untimely therefore, the Applicant’s Notice dated 16th August 2016 is un–meritorious. It is accordingly dismissed with costs to both Respondents.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017

Judgment dated, delivered and signed in open Court this 6th day of October 2017 at Kerugoya

Mr. Ngigi for Ms Muthike for Applicant - present

Ms Waweru for Mr. Kahiga for the 2nd Respondent - present

Mr. Ombachi for the 1st Respondent - absent

Applicant - present

2nd Respondent – present

Right of appeal explained.

B.N. OLAO

JUDGE

6TH OCTOBER, 2017