



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

MISC. APPLICATION NO. 20 OF 2014 (J.R)

IN THE MATTER OF APPLICATION FOR PREROGATIVE ORDER CERTIORARI

AND

**IN THE MATTER OF THE IRRIGATION (NATIONAL IRRIGATION SCHEME)
REGULATION 1977**

AND

**IN THE MATTER OF THE NATIONAL IRRIGATION BOARD-MWEA IRRIGATION
SETTLEMNT SCHEME SUB-ADVISORY MEETING ON RICE HOLDING NO. 1958 OF 10TH
APRIL, 2014**

REPUBLICAPPLICANT

VERSUS

NATIONAL IRRIGATION BOARD.....1ST RESPONDENT

MUCHIRI MUTUANJARA.....2ND RESPONDENT

GLADYS WANGECHI NJAGI.....3RD RESPONDENT

SAMUEL NJERU IRERI.....4TH RESPONDENT

JAMES KAMAU MWAE.....5TH RESPONDENT

AND

JOSPHAT KARIUKI MUTUANJARA.....EX-PARTE APPLICANT

JUDGMENT

By a Notice of Motion of Motion dated 12th September 2014 and filed herein on 15th September 2014, the applicant JOSPHAT KARIUKI MUTUANJARA sought the following orders:-

1. *That the Applicant named herein be granted an order of certiorari to remove into the High*

Court and quash the verdict of the Mwea Irrigation Settlement Scheme Sub-Advisory Meeting on rice holding No. 1958 Unit M 15 Mwea Section held on 10th April 2014.

2. That costs of this application be provided for.

The application was accompanied by a statement of facts and affidavit verifying the same sworn by the applicant on 12th September 2014. In brief, the rice holding No. 1958 Unit 15 Mwea Section was originally allocated to the applicant's father MUTUANJARA KAMURUA (now deceased) before the licence was revoked by the 1st respondent on grounds of poor farming practices. In 1968, the applicant applied for and was granted the licence for the said rice holding and was issued with a tenant identification card and license. However, by a letter dated 8th April 2014, he was invited to attend a meeting at the office of the 1st respondent on 10th April 2014 but upon arrival, he was informed that the meeting had been concluded and the rice holding had been sub-divided and distributed to the 2nd and 3rd respondents without his knowledge or consent. He adds that his attempts to get the necessary documents were frustrated by the 1st respondent's Scheme Manager and it was not until he sought legal advice that he learnt that the rice holding had been transferred by the 2nd and 3rd respondents to the 4th and 5th respondents. He says the 1st respondent did not offer him a hearing.

The application was resisted by the 1st respondent who filed grounds of opposition and by the 2nd and 5th respondents who filed replying affidavits.

In their grounds of opposition to the application, the 1st respondent stated that it is the legal body mandated to issue, regulate and cancel licenses and that it discharged its duties and made a decision which can only be reviewed by way of Judicial Review proceedings. These are Judicial Review proceedings so I do not understand what that ground really means.

The 2nd respondent MUCHIRI MUTUANJARA deponed in his replying affidavit that the applicant is his brother and the rice holding originally was allocated to their late father but in the 1960's the family agreed to have it in the applicant's names to hold in trust for all the siblings but in 2013, the applicant started evicting them. The issue was therefore reported to the Senior Scheme Manager and despite being served to attend the Advisory Committee hearing of 10th April 2014, the applicant did not attend and so the Committee delivered a verdict sub-dividing the rice holding between the applicant and his three siblings. However, the applicant threatened to cause personal violence to his siblings who decided to sell their shares to the 4th and 5th respondents and the 1st respondent effected that transfer.

On his part, the 5th respondent on behalf of himself and the 4th respondent deponed that they were not party to what transpired between the 1st, 2nd and 3rd respondents adding that they only bought their respective rice holding No. 1958 B and 1958 C for valuable consideration without notice of any fraud or irregularity.

Submissions have been filed both by Mr. Ikahu Ngangah advocate for the applicant, Mr. Ombachi advocate for the 1st respondent and Mr. Kiguru Kahiga advocate for the 2nd, 3rd, 4th and 5th respondents.

I have considered the application, the statement of facts, the rival affidavits and the grounds of opposition raised by the respondents.

This being a Judicial Review application of certiorari, the Court is concerned not with the merit of the decision of the 1st respondent's Sub-Advisory Committee dated 10th April 2014 sub-dividing the rice holding between the applicant and the 2nd and 3rd respondents but rather, with the process by which that decision was arrived at. In **MUNICIPAL COUNCIL OF MOMBASA VS REPUBLIC AND UMOJA CONSULTANTS LTD CIVIL APPEAL NO. 185 OF 2001 (2002) e K.L.R.**, the Court of Appeal set out the duty of a Court in a Judicial Review Application as follows:-

“Judicial Review is concerned with the decision making process, not with the merit of the

decision itself. The Court would concern itself with such issues as to whether the decision maker had the jurisdiction, were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did it take into account irrelevant matters. These are the kind of questions a Court hearing a matter by way of Judicial Review is concerned with and such a Court is not entitled to act as a Court of Appeal over the decider, acting as an Appeal Court over the decider would involve going into the merits of the decision itself – such as whether there was or there was not sufficient evidence to support the decision and that, as we have said, is not the province of Judicial Review”

The remedy of Judicial Review is basically aimed at ensuring fair treatment by the bodies mandated to make decisions. Therefore, to succeed in an application for Judicial Review, the applicant must show that the decision complained about was either illegal, irrational or was procedurally improper as where, for example, the applicant was not given an opportunity to be heard. The right to a fair hearing has now attained Constitutional embodiment as provided under **Article 50 (1) of the** Constitution which provides as follows:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court, or if appropriate, another independent and impartial tribunal or body”.

In this matter now before me, the applicant complains that he was not given an opportunity to be heard. He states as follows in ground 11 of his statement of facts:-

“The 1st respondent acted against the rules of natural justice my making a decision in the absence of the applicant who has been the registered tenant since 1968”

The applicant is therefore alleging a breach of the “***audi alteram partem***” rule which simply means hear the other side. In the circumstances of this case, is it correct to allege that the applicant was not given an opportunity to be heard? The applicant concedes that he received a letter dated 8th April 2014 from the 1st respondent inviting him to a meeting at their offices at 10 a.m. on 10th April 2014. In paragraph eight (8) of his affidavit, he says when he arrived, he was informed that the meeting had been concluded. The minutes of the meeting of the 1st respondent’s Sub-Advisory Committee held on 10th April 2014 confirm that the said meeting was held at 11 a.m. at the China Hebei Conference- annexure **JKM 8**

The applicant does not state what time he arrived but since he arrived after the meeting had been concluded, it must have been after 11 a.m. which was an hour late. He says when he approached the 1st respondent’s Scheme Manager, he refused to give him a hearing. This Court can only go by the record before it. Whereas the right to be heard is a basic natural justice concept, I am not persuaded that in the circumstances of this case, that right was flouted by the 1st respondent. It must be appreciated that there are no rigid rules and neither does the audi alteram partem rule mean a full adversarial hearing or anything close to it like what happens in a Court of law – see **SIMON GAKUO VS KENYATTA UNIVERSITY & TWO OTHERS MISC CIVIL APPLICATION NO. 34 OF 2009**. The applicant has not suggested for example, that the notice given to him was not adequate. He was given an opportunity and did not utilize it. In **UNION INSURANCE CO. OF KENYA LTD VS RAMAZAN ABDUL DHANGI CIVIL APPLICATION NO. 179 OF 1998**, the Court had this to say on the right to be heard:-

“The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilized, then the only point on which the party not utilizing the opportunity can be heard is why he did not utilize it”

On the evidence before me, and bearing in mind the circumstances of this case, I am not persuaded that the applicant’s right to a fair hearing was violated. He was given an opportunity to appear before the Committee but he squandered it. The Committee was entitled to hear the complaint as that is its legal

mandate under the ***Irrigation Act CAP 347 Law of Kenya*** and the Regulations made thereunder. As to the merits or otherwise of the decision arrived at, that is not the province of Judicial Review.

Ultimately therefore, the applicant's Notice of Motion dated 12th September 2014 and filed herein on 15th September 2014 is dismissed. Since some of the parties are siblings, the order on costs is that each party meet their own costs.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016

Judgment delivered in open Court this 26th day of February, 2016

Mr. Ngangah for Applicant present

Ms Kiragu for Mr. Ombachi for 1st Respondent present

Ms Thungu for Mr. Kahiga for 2nd to 5th Respondents present

Right of appeal explained.

B.N. OLAO

JUDGE

26TH FEBRUARY, 2016