



**Karuga v National Irrigation Authority & 4 others (Environment and Land Judicial Review Case E003 of 2023) [2024] KEELC 5562 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5562 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E003 OF 2023**

**JM MUTUNGI, J**

**JULY 31, 2024**

**BETWEEN**

**AGNES MUMBI KARUGA ..... APPLICANT**

**AND**

**NATIONAL IRRIGATION AUTHORITY ..... 1<sup>ST</sup> RESPONDENT**

**MWEA IRRIGATION SCHEME MANAGER ..... 2<sup>ND</sup> RESPONDENT**

**PHYLLIS WANJIKU ..... 3<sup>RD</sup> RESPONDENT**

**MARY WANGUI ..... 4<sup>TH</sup> RESPONDENT**

**NANCY NJOKI ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The *ex parte* Applicant was granted leave to institute Judicial Review proceedings on 4<sup>th</sup> October 2023 and by a Notice of motion dated 12<sup>th</sup> October 2023 instituted the present Judicial Review proceedings seeking inter alia the following orders:-
  1. An order of *certiorari* to bring into this court and quash the decision of the Arbitration Committee meeting held on the 29<sup>th</sup> of June 2023 to subdivide Rice Holding No 2251 Unit M.17 Mwea section.
  2. An order of prohibition or in the alternative, an order of injunction prohibiting and restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from continuing implementation of the Arbitration Committee resolution passed on the 29<sup>th</sup> of June 2023 to subdivide Rice Holding No 2251 Unit M.17 Mwea section.
  3. An order of injunction restraining the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent from registering to subdivide Rice Holding No 2251 UNIT M.17 Mwea section in the name of the



3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents or any other than the Applicant, Agnes Mumbi Karuga, or its assignees.

4. An order of *mandamus* compelling the National Irrigation Authority through the Mwea Irrigation Scheme Manager to register the Applicant as the sole licensee of Rice Holding No 2251 UNIT M.17 Mwea section having been the nominee of her late father Karuga Mburia the original licensee.
  5. A declaration that the decision of the Arbitration Committee held on 29<sup>th</sup> June 2023 was fraudulent, illegal, unconstitutional and null and void and that it did not pass any title to the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> Respondents or any other person.
  6. General, punitive and aggravated damages against the Respondents jointly and severally.
  7. Costs of these proceedings.
2. The motion was supported on the annexed Verifying Affidavit sworn by the *ex parte* Applicant where she deponed she was the lawful owner of Riceholding No 2251 M.17 Mwea on the basis of the doctrine of survivorship her co-joint owner of the same having died. She averred that the property originally belonged to her late father, Karugu Mburia, who nominated her and her late mother, Eunice Muthoni Karugi, as his joint successors of the rice holding on 1st December 2000. Following this nomination, the National Irrigation Board recognized both her and her mother as the rightful owners by effecting changes of farmers for the specified property in their register. On 3rd July 2002, they were further endorsed as joint owners through the granting of the property's license. The *ex parte* Applicant was further issued a tenancy card for the property on 18th June 2002, and hence asserted she had been in continuous physical occupation and cultivation of the land for over two decades.
  3. The Applicant challenges the decision taken on 29th June 2023 by the Arbitration Committee, when they decided to have the Rice Holding No 2251 Unit M.17 Mwea section, subdivided. She contended the decision was irrational, illegal, and procedurally flawed. She averred that she had invested in the preparation of the land for the upcoming crop season by settling water charges, purchasing 92 Kg of Basmati rice seed for planting, and securing rotavator services on credit, all in anticipation of cultivation. She stated the 1<sup>st</sup> and 2<sup>nd</sup> Respondents efforts to dispossess her, of the plot were ill intentioned as evidenced by the initial instance where a portion of the land was sold without her late father's approval, leading to a court-ordered compensation to the Applicant by the Respondents vide Embu HCCC No 6 of 2007 where the Court found the 1<sup>st</sup> Respondent to have flouted the laid down procedure in terminating the licence for the 1 acre portion. The Applicant further argues that the arbitration committee's decision lacked legitimacy due to the exclusion of some of the Dishon family members, thus undermining the meeting's competence.
  4. In a Replying Affidavit, sworn by Nancy Njoki Dishon on 25<sup>th</sup> October 2023, for herself and on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the Respondents averred that the contested rice holding had originally been owned by their father before being transferred to their late mother, who passed away in 2008. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents asserted that after their mother's demise, they continued and have consistently utilized the rice plantation up to the present day. The Respondents further averred that pursuant to a decision of the Arbitration Committee on 29<sup>th</sup> June 2023, the Applicant who is their sister was granted the major share of the disputed property. The Respondents stated that their father had established another family with a different wife, who, along with her children, departed following the father's death and denied that there were any other children of their father under the care of the Applicant.



5. Despite service, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents did not enter an appearance or file their responses, and the suit proceeded without their participation.

### **Submissions of the Parties**

6. The *ex parte* Applicant filed her submissions on 22<sup>nd</sup> March 2024 and submitted on three issues thus; reasonableness, rationality, and fairness of the decision made by the Dispute Arbitration Committee in light of the evidence presented; the applicability of the doctrine of survivorship; and the applicant's entitlement to the prayers prayed for.
7. The Applicant's counsel argued that the property in question was initially owned by Karuga Mburia, who later surrendered ownership to his wife Eunice Muthoni Karuga, and his daughter Agnes Mumbi Karuga who held the property jointly. The Applicant further submitted that following the death of her mother, by virtue of the doctrine of survivorship, she became the sole owner of the Riceholding the subject matter of the suit. The Applicant contended once the deceased surrendered his interest to his wife and daughter, the changes of ownership were effected in the register of the 2<sup>nd</sup> Respondent and the Applicant and her mother were issued a licence and the 2<sup>nd</sup> Respondent therefore had no basis to reopen the register to allocate three acres of the Riceholding to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents and in doing so the 1<sup>st</sup> and 2<sup>nd</sup> Respondents acted unfairly and unreasonably.
8. Counsel further pointed out that during the Arbitration Committee's hearing on 29<sup>th</sup> June, 2023, the Committee flouted procedure in that the parties were not allowed to present any documentary evidence, which she argued was a violation of the *Fair Administrative Action Act* of 2015 and Article 47 of the *Constitution* of Kenya. The Applicant contended this undermined the principles of fair administration and justice and further submitted that the Arbitration Committee did not consider the evidence or lack thereof, failed to provide an explanation for its decision, and neglected to consider material evidence that was in its possession which was clearly a manifestation of bias.
9. The 5<sup>th</sup> Respondent filed her written submission on 4<sup>th</sup> February, 2024 on 4<sup>th</sup> March, 2024 in which she reiterated the statements made in her Replying Affidavit of 29<sup>th</sup> January, 2024. She argued that the property in question was part of her late father's estate and maintained that, as the property was part of their father's estate, all beneficiaries should be taken into account, and the decision made by the Arbitration Committee served the best interests of all involved parties.

### **Analysis and Determination**

10. After careful consideration of the parties' pleadings, evidence, and submissions, the key issues that arise for consideration are whether the decision made by the Dispute Arbitration Committee was reasonable, rational, and/or fair and whether the Applicant is entitled to the orders sought in the application.
11. Article 47(1) and (2) of the *Constitution* provides as follows:
  - (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
  - (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.



12. Sections 4(1), (2) and (3) of the *Fair Administrative Action Act* 2015 provides as follows:

- (1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
- (2) Every person has the right to be given written reasons for any administrative action that is taken against him.
- (3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-
  - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
  - (b) an opportunity to be heard and to make representations in that regard;
  - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
  - (d) a statement of reasons pursuant to section 6;
  - (e) notice of the right to legal representation, where applicable;
  - (f) notice of the right to cross-examine or where applicable; or
  - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

13. In the Case of *Gathigia v Kenyatta University Nairobi* [2008] KLR 587 the Court held:

“I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza v Chairman Members of Tanga Town Council* 1961 EA 77 where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said, “1. if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3. In such a case, the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses, and it can obtain information in any way it thinks best... 4. The person accused must know the nature of the accusation made; 5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6. The tribunal should see to it that matter that has come into existence for the purpose of the quasi-lis is made available to both sides, and once the quasi-lis has started, if the tribunal receives a communication from one party or a third party, it should give the other party an opportunity of commenting on it.”



14. In the Case of *R v Vice Chancellor JKUAT* Misc. Appl. No 30 of 2007 it was held that:
- “If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”
15. The elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in the *Baker v Canada (Minister of Citizenship & Immigration)* 2 S.C.R. 817 6 where the Court held:
- “The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions.”
16. In the instant matter the Applicant contended that she was denied the opportunity to fully present her evidence in the form of documentary evidence, a claim that was not responded to and/or controverted by any evidence from the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents. The 5<sup>th</sup> Respondent who filed a response on her own behalf and on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondent was clear that arbitration Committee decision given on 29<sup>th</sup> June 2023 related to the succession of Riceholding No 2251 that previously belonged to their father, Dishon Karuga Mburia (deceased) before he transferred the same to their mother (now also deceased) and to the Applicant who is their sister.
17. While the record shows that Applicant’s and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents father (deceased) surrendered ownership of the Riceholding way back in the year 2000 to his wife and the Applicant and changes were effected by the 2<sup>nd</sup> Respondent and both the Applicant and her mother were issued with a rent card for Riceholding No 2251 Mwea dated 1.12.2000, it is evident that as at the time Misc. Succession Application No 22 of 2010 was lodged at Wang’uru CM’s Court, the deceased (Karuga Mburia) was not the registered owner of the Riceholding No 2251 Mwea. The deceased had already during his lifetime surrendered and transferred the Riceholding to his wife and the Applicant.
18. It is unclear whether the Applicant and her mother (deceased) were registered as joint owners and/or common owners of the Riceholding. The Applicant argues they were joint owners, so that once her mother died on 24/12/2008 she became the absolute and sole owner of the disputed Riceholding 2251 by virtue of the doctrine of survivorship, where if a property is registered jointly, and one of the proprietor dies, the property devolves to the surviving proprietor upon proof of death. The issue therefore does arise whether or not the doctrine of survivorship was applicable in the circumstances of the instant case. Was the Applicant and her mother registered as joint owners of Riceholding No 2251 after Karuga Mburia (deceased) surrendered his interest in the plot or was the Applicant and the mother holding the plot in common so that each of them was entitled to distinct share of the plot?.
19. The tenant card issued to the Applicant and her mother dated 1.12.2000 does not specify whether the ownership was joint or common. If the ownership was joint, the doctrine of survivorship would be applicable but if it was common, then the interest held by the Applicant’s mother in the plot would be subject to succession to enable her beneficiaries to be identified.



20. Under Regulation 37(1) of the *Irrigation (General) Regulations 2021* a permit holder may nominate with approval of the Authority a successor to succeed him as permit holder in the event of death. The Regulation provides as follows:-

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- (1) A permit holder may, within reasonable time of being granted a permit and in writing to the Authority or County Irrigation Development Unit, nominate another person to succeed him as permit holder in the event of his death.
21. Where a permit holder dies without nominating a successor the family of the deceased can by consensus nominate one but the Scheme Management has to approve the nomination. Where the nomination is not agreed or is disputed, an appeal may be made by a Defendant to the Court under Regulation 37(5) of the *Irrigation (General) Regulations, 2021*. The *ex parte* Applicant as per the record was the party who filed Wang'uru CM Misc Succession Case No 22 of 2010 which the Court declined to adjudicate as it lacked jurisdiction and impliedly referred the matter to the Advisory Committee of the National Irrigation Authority as per the order of the Wang'uru CM's Court made on 20<sup>th</sup> December 2022. The proceedings before the Arbitration Committee as per the exhibited abstract of the minutes and decision affirm that the Committee handled the matter as a reference from the Court. The Arbitration Committee was the appropriate forum to handle succession disputes respecting any Riceholding. In the instant case it is not clear from the proceedings whether the succession related to the estate of Eunice Muthoni Karuga who was the wife of Karuga Mburia. As I observed earlier in this Judgment once Karuga Mburia (deceased) surrendered and transferred his interest in the plot, he ceased to have any interest whatsoever in the plot and his estate could not properly seek to initiate succession proceedings in regard to the Riceholding 2251 on the basis that he was the owner.
22. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents claimed to have been in occupation and to have been utilizing portions of the Riceholding on the basis that the Riceholding belonged to their late father and that they were entitled to a share of the same. Before the Arbitration Committee, Phyllis Wanjiku, the 3<sup>rd</sup> Respondent gave evidence that after the death of their mother they started utilizing the Riceholding in 2008 and that the 4<sup>th</sup> and 5<sup>th</sup> Respondents and her brother David Wachira (now deceased) were each utilizing portions of 1 acre each and herself 1 ½ Acres while the Applicant was utilizing 1 ¾ Acres. She stated after her brother died, the Applicant took over his portion and was presently utilizing 2 ¾ Acres. This evidence was supported by the Chief of the area. It was on that basis that the Arbitration Committee did the subdivision of the Riceholding notwithstanding the Applicant disputed the evidence and contended she was the sole owner of the Riceholding on the basis that she was registered owner after the death of her mother.
23. On the issue as to whether the Applicant and her mother were jointly holding the Riceholding, the tenant card and the supporting documents from the Mwea Irrigation Scheme Manager are not express. The farmer's changes to Riceholding No 2251 dated 28/5/2002 merely noted that change relating plot 2251 belonging to Karuga Mburia had been effected to Agnes Mumbi Karuga and Eunice Muthoni Dishon with effect from 1<sup>st</sup> December 2000. Licence No 2251 to Eunice Muthoni w/o Dishon Karuga and Agnes Mumbi Daughter of Karuga authorized them to occupy holding No 2251 Mwea Irrigation Settlement from 1<sup>st</sup> December 2000. The Applicant and the mother thus became the allottees of the Licence effective from 1<sup>st</sup> December 2000.



Section 91(1) of the [Land Registration Act, 2012](#) defines co-tenancies as follows:-

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- (1) In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

Subsection (2) of Section 91 of the Act further provides that where the instrument of transfer to two or more persons is silent on the nature of the rights transferred there is a presumption that the transferees hold the interest as tenants in common in equal shares. Section 91(2) of the [Land Registration Act](#), provides as follows:-

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- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.

24. In the present matter the instrument of surrender by Karuga Mburia (deceased) to his wife and daughter was not express on the nature of the interest bestowed on each one of them. In the premises there is therefore a presumption that the licence in regard to Riceholding 2251 was held by the Applicant in common and in equal shares. That being the case, the Arbitration Committee of the 2<sup>nd</sup> Respondent were entitled to determine the successor and/or the distribution of Riceholding No 2251. The doctrine of *ujusascendi* (survivorship) was not applicable in regard to the ownership of Riceholding No 2251 and on the evidence and material presented before the Arbitration Committee I find no basis to hold the decision they reached to be irrational and/or unreasonable. It is irrefutable that the Applicant and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are siblings and no basis has been demonstrated as to why it would be reasonable and/or acceptable for them to be excluded from having a share of what clearly was property owned by their parents.
25. During the hearing before the Arbitration Committee both the Applicant and the Respondents were accorded the opportunity of being heard and to present their evidence. I do not consider that the process was flawed as to render the decision reached by the Committee irrational unreasonable and/or unfair. I have evaluated the evidence for purposes of doing a limited merit review as I am obliged to do under the dictates of Article 47 of the [Constitution](#) and Section 4 of the [Fair Administrative Action Act, 2015](#) and I am satisfied the tenets of natural Justice were not violated as the parties were given a hearing and the process was procedurally fair. The preamble of the Committee proceedings indicates the parties were accorded the opportunity to present their respective cases.
26. In the premises it is my determination that the Notice of Motion application dated 12<sup>th</sup> October 2023 is without merit and I dismiss the same.
27. The Applicant and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents are siblings and therefore family members and for that reason in exercise of my discretion I order that each party will bear their own costs of the suit.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**J. M. MUTUNGI**



**JUDGE**

