Republic & 3 others v Manager National Irrigation Settlement Scheme & another; Gitau (Interested Party) (Judicial Review Application 1 of 2023) [2024] KEELC 5289 (KLR) (17 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5289 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

JUDICIAL REVIEW APPLICATION 1 OF 2023

JM MUTUNGI, J

JULY 17, 2024

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF CERTIORARI PROHIBITION AND MANDAMUS BY ANTHONY KARANJA MAHUI, JOHNSON KARANJA MAHUI, AND JOHN KARANJA MAHUI

AND

IN THE MATTER OF SCHEME MANAGER MWEA IRRIGATION SETTLEMENT SCHEME

AND

IN THE MATTER OF ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTION 17 OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF ALTERATIONS AND CHANGES MADE BY THE NATIONAL IRRIGATION AUTHORITY ON RICE HOLDINGS T/NO 552 T11 IN TEBERE SECTION PURSUANT TO THE LETTER ISSUED BY WANG'URU LAW COURTS IN MISCELLANEOUS SUCCESSION CASE NO. 9 OF 1982

BETWEEN

REPUBLIC .... APPLICANT

AND

ANTHONY KARANJA MAHUI .... 1ST EXPARTE APPLICANT

JOHNSON KARANJA MAHUI .... 2ND EXPARTE APPLICANT

JOHN KARANJA MAHUI .... 3RD EXPARTE APPLICANT

AND

MANAGER NATIONAL IRRIGATION SETTLEMENT SCHEME .... 1ST RESPONDENT

JOSEPH WAINAINA MAHUI .... 2ND RESPONDENT

AND

JOHN NDUNGU GITAU .... INTERESTED PARTY

JUDGMENT

Background

1. The Ex parte Applicants filed the Notice of Motion dated 30th August 2023 seeking for orders:

    1. An order of certiorari to remove into this Honourable court and quash the decision of the 1st Respondent on farmer's changes made on 13th April 1982 in respect to rice holding T/no. 552 Unit T11 Tebere Section.

    2. An order of prohibition do issue against the 1st Respondent, the Senior Scheme Manager Mwea Irrigation Settlement Scheme, barring them from making any further alteration or changes in respect to rice holding T/no. 552 Unit T11 Tebere Section.

    3. An order of Mandamus do issue to compel the Scheme Manager Mwea Irrigation Settlement Scheme to cancel all the resultant subdivision of Riceholding T/no. 552 Unit T11 Tebere Section and instead issue each of the six households of the late Kihugu Karanja with a license and a tenant card of one acre out of the said Rceholding measuring six acres.

    4. Costs of this suit.

    5. Any such other or further reliefs that this Honourable court may deem just and fit to ground.

2. The Applicant's motion was predicated upon the annexed affidavit sworn by John Ndung'u Kimani, in which he depones that he is a son of Kihugu Karanja (deceased), the original holder and licensed owner of the Riceholding identified as T/Number 552 Unit T11 in the Tebere Section. The Riceholding initially comprised 4 acres before an additional 2 acres were added. This property was officially registered in Kihugu Karanja's name in 1959.

3. The 1st Applicant further detailed that his father had six households and, before he died had divided the property into six equal plots of one acre each, allotting one plot to each of his wives. Additionally, it was indicated that in 1973, in anticipation of his absence or demise, their father designated the 2nd Respondent as his successor in accordance with the then-effective *Irrigation Act* Regulations.

4. The Applicants averred that following the father's death in 1980, the Manager initiated Miscellaneous Succession Case No. 9 of 1982. This succession process ultimately recognized the 2nd Respondent as the exclusive heir to the property, a decision made without the consent or even the awareness of the family members involved. Subsequently, based on the strength of the court-issued Letters of Administration, the 1st Respondent granted the 2nd Respondent a tenant card for the property in question. The 1st Applicant contends that these actions by the 1st Respondent were unjustified and irregular and, therefore, should be deemed null and void.

5. The Applicant asserted that despite previous discussions, the 2nd Respondent only occupied, utilized, and paid maintenance and operational charges for one out of the six-acre parcel. Meanwhile, other members of his late father's family continued to use their respective portions. He argued that even though the 2nd Respondent was granted the tenant card, he was actually holding the disputed property both for himself and on behalf of the late Kihugu Karanja's family. Furthermore, he believed that the 1st Respondent should have convened a meeting with all family members before making any alterations to the land's status.

6. He stated that along with other relatives, he has submitted multiple claims to the 1st Respondent in an effort to resolve the ownership disputes surrounding the property. They lodged a formal claim with the 1st Respondent and, on 30th September, 2010, the Advisory Committee convened a meeting with the deceased's family, ultimately ruling in their favor. He avers that they were similarly invited by the Arbitration Committee on 15th December 2020, which heard them and advised them to file a case in Court. He further averred that in 2021, the 2nd Respondent threatened to evict and stop them from cultivating their shares of the suit property. He further averred that on 7th March 2023, the 2nd Respondent entered into a Sale Agreement of 2 acres belonging to the 1st and 3rd Applicant, with John Ndung'u Gitau, the interested party. John Ndung'u Gitau took possession of the 2 acres he bought. The Applicant stated that on 31st March 2023, the changes transferring the land to the Interested Party were effected by the 1st Respondent. The Applicant stated that the parties were invited by the Scheme Manager following complaint but, it was an academic exercise since the 1st Respondent had already made the said changes.

7. The Respondents and the Interested Party were properly served; however, they failed to file their pleadings, so the case proceeded exparte.

8. The Applicants filed their written submissions on March 18, 2024, and it was their submission that their late father, who had six wives, had designated one acre of land to each wife to cultivate and that inspite of the 2nd Respondent being issued the rent card the riceholding, all six families maintained cultivation of their allocated one acre portion. The situation however drastically charged when the 2nd Respondent sold two acres, and started threatening the Applicants with eviction which precipitated the filing of the instant Judicial Review application.

9. The Applicant contended that the 2nd Respondent was the only one who was actively involved in the proceedings of Misc. Succession No. 9 of 1981, and did not involve other family members. The Applicants averred that the 2nd Respondent, having been issued the tenant card for the whole Riceholding used this as a basis to threaten eviction against the Applicants. The Applicants submitted that they have sought intervention from the 1st Respondent on multiple occasions to wit, in 2010, 2020, and 2023 without any positive results. Realizing that the 2nd Respondent was in the process of selling off two acres of the disputed land, the Applicants lodged a formal complaint with the 1st Respondent, but the 1st Respondent notwithstanding the pendency of the complaint, transferred the two acres to the Interested Party before a resolution was reached regarding the complaint.

10. The Applicants further submitted that the Arbitration Committee had violated the *Fair Administrative Action Act* of 2015 and infringed upon Article 47 of *the Constitution*, which safeguards the right to Fair Administrative Action. They argued the Committee's decision was neither fair nor reasonable and should be annulled. They contended that the Committee's actions constituted a breach of Article 50 of *the Constitution*, which guarantees the right to a hearing, and violated the principles of natural justice.

11. The Applicants asserted that they had consistently paid the Operation and Maintenance (O&M) charges, a factor that the 1st Respondent should have taken into account before making alterations to the suit land. The 1st Respondent in its decision of 1st August 2023 stated it lacked jurisdiction to deal with the dispute before it since the Magistrate's Court ELC No. 27 of 2021 had made a determination awarding the Riceholding to the 2nd Respondent. However in 2010, the 1st Respondent had made a decision to have the Riceholding partitioned into six portions to accommodate all the members of the family on the basis that the 2nd Respondent was supposed to manage the suit land in trust for them, suggesting that it was not the intention of their father to disinherit his other children, especially since before his death he had designated an acre to each household.

12. The Applicants argued that although Judicial Review is basically concerned with considering whether there was procedural impropriety in the decision making process, the *Fair Administrative Action Act*, 2015 has somewhat expanded the scope of Judicial Review to include a consideration of merits review to determine whether the decision was fair and/or reasonable. In the Court of Appeal Case of Suchan Investment Ltd –vs- Ministry of National Heritage & 3 Others (2016) eKLR the Court stated thus:-

> " ---Traditionally Judicial Review is not concerned with the merits of the Case. However Section 7(2) of the *Fair Administrative Action Act* provides proportionality as a ground for statutory Judicial Review. Proportionality was first adopted in England as an independent ground of Judicial Review in R –vs- Home Secretary, exparte Duly (2001) 2 AC 352. The test of proportionality leads to "greater intensity of Review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the Court to evaluate the merits of the decision; First, proportionality may require the Court to assess the balance which the decision maker has struck; not merely whether it is within the range of the rational or reasonable decisions; Secondly, the proportionality test may go further than the traditional grounds of Review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations; ---- In our view, consideration of proportionality is an indication of the shift towards merits consideration in statutory Judicial Review applicants".

13. In the Case of Republic –vs- Dedan Kimathi University of Technology (2022) KEH 358 (KLR), Njagi, J stated as follows:-

> " It is now recognized that one of the grounds for grant of Judicial Review is unreasonableness of the decision being challenged. This is clearly a deviation from the traditional common law approach that what is considered is the process by which the decision is arrived at rather than the decree itself. An examination whether or not a decision is unreasonable clearly calls for some measure of consideration of the merits of the deicision itself though not in the manner contemplated by an Appellate process".

14. While the above two cases referred to represent jurisprudence after the 2010 Constitution and the enactment of the *Fair Administrative Action Act*, 2015 which sought to give effect to Article 47 of

the Constitution, earlier jurisprudence on Judicial Review applications was emphatic that the scope of Judicial Review was restricted to examining whether there was procedural impropriety in the decision making process. For instance the Court of Appeal in the Case of Municipal Council of Mombasa –vs- Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001 (2002) eKLR stated as follows:-

> "Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters...The court should not act as a Court of Appeal over the decider which 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's touching on violation of fundamental rights. These are issues within this court's jurisdiction, hence, on this ground, this case passes the exception requirement."

15. As observed earlier in the Judgment the scope of Judicial Review has since the promulgation of the 2010 Constitution and the enactment of the *Fair Administrative Action Act* 2015 been expanded to include a measure of Merits Review of the decision the subject of Review. In the Case of Kenya Human Rights Commission –vs- Non Government Co-ordination Board (2016) eKLR the Court held thus:-

> "...the Court effectively has a duty to look both into the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, and also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of *the Constitution*."

16. In the instant matter, the 1st Respondent has mandate under the *Irrigation Act* 2019 and the Regulations made thereunder to manage and oversee the use of the land falling under the Scheme which duty includes approving nomination of successors, subdivisions and use of the Riceholdings.

17. The evidence as per the record indicates the disputed Riceholding was allocated to one Kihugu Karanja (deceased) in the year 1959 who as per the records held by the Scheme Manager had four wives. It is indicated that he passed away on 19/11/1980 and that he had on 25th August 1973 nominated his son, Joseph Wainaina Kihugu to succeed him in the event of his death. As at the time of his death, it is indicated that the deceased had 6 wives and that he had allocated each of them a portion of 1 Acre to cultivate in the Riceholding No. 552 and that they were all cultivating their respective portions at the time Joseph Wainaina Mahui was accepted by the Wang'uru Magistrate's Court as legal successors of the Riceholding from his father.

18. It is clear and evident that both during the lifetime of the deceased and upon the 2nd Respondent being nominated and approved as successor of the deceased, the Riceholding No. 552 was being utilized by all the family members collectively and that each household had a distinct portion that they were using. The evidence is unequivocal that the Riceholding was intended to be a family asset to be utilized by all the family members. It could never have been intended that the 2nd Respondent as the nominated successor by his father would mean that the Riceholding would become exclusively his own notwithstanding that the whole family was deriving their livelihood from utilizing the same. It is unfortunate that the National Irrigation (General) Regulations are far from being explicit on how nominated successors from "large families" as in the Case of the Applicants in this case would relate with the Multiple users of the single unit holding. By being nominated as successor of the Riceholding meant that the 2nd Respondent would stand in the shoes of his father and that, the usage of the Riceholding was to remain as it was during the lifetime of the deceased. The 2nd Respondent

was constituted as a trustee for all the family members and was not free to deal with the Riceholding without the consent of the other family members who equally were beneficiaries and had an interest in the Riceholding. The sale of 2 Acres to the Interested Party was not consented to by the other family members.

19. It is my considered view that the Court, apart from considering whether there were any procedural flaws in reaching the decision that the 1st Respondent did, the Court also has an obligation to undertake a merits Review of the decision to ascertain it's reasonableness or otherwise. If the decision was irrational and/or unreasonable, it would be liable to be quashed.

20. In the present matter the Applicants were occupants and were utilizing portions of the Riceholding to the knowledge of the 2nd Respondent during and after the death of their father. The transfer of the Riceholding to the 2nd Respondent as the successor after the death of their father could only have been in the capacity of a trustee for the family. Any decision that resulted in depriving the Applicants of the right to utilize the Riceholding as they had always done would be unreasonable and would violate Section 7(2)(k) of the *Fair Administrative Action Act* which provides as follows:-

    7(2) A Court or Tribunal under subsection (1) may review an Administrative Action or decision, if:-

    (k) the Administrative Action or decision is unreasonable.

21. The Applicants deceased father could not by nominating the 2nd Respondent as his successor in regard to the Riceholding have intended to disinherit all his other children and wives. During his lifetime his wives (households) were each utilizing a portion of the land as designated by him. It could not be that his death was to change and/or alter that position. The 2nd Respondent was in my view to take the responsibility that his father had. The father had deliberately allocated his wives (households) portions to cultivate on the Riceholding.

22. For the foregoing reasons it is my determination that the 1st Respondent acted unreasonably and to the prejudice of the Applicants when they decided that the 2nd Respondent remains as the sole registered owner of Riceholding No. 552 Mwea Irrigation Scheme. The 1st Respondent should have found that the 2nd Respondent was registered to hold the Riceholding as a trustee for the family and should have distributed the Riceholding to all the households in equal shares.

23. In the premises I find merit in the Judicial Review application and I allow the same in terms of prayers 1, 2 and 3 of the Notice of Motion dated 30th August 2022. As relates to costs, I have taken note that this is essentially a dispute within the family and in exercise of my discretion I order that each party will bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF JULY 2024

J. M. MUTUNGI

ELC - JUDGE