



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYAMIRA**

**CIVIL APPEAL NO. 14 OF 2017**

**PMO.....APPELLANT**

**=VRS=**

**CBO.....RESPONDENT**

**[Being an Appeal from the Ruling of Honourable A. C. Towett (RM) delivered on 31<sup>st</sup> May 2017 in Nyamira CM’s Court Divorce Cause No. 1 of 2016]**

**JUDGEMENT**

This judgement turns on a ruling of the trial court which set aside an arbitrator’s award made in favour of the appellant. The respondent had petitioned for the dissolution of the marriage between her and the appellant and the court had by consent of the parties referred the petition to their Assistant Chief for arbitration. The Assistant Chief was to file an award within 14 days.

An award was duly filed on 18<sup>th</sup> July 2013 and as the respondent was not satisfied with it she filed an application seeking to set it aside. The trial magistrate who heard the application set the award aside on the ground that **“the same was not signed by the parties involved in the arbitration”** hence **“giving the court reason to believe that the petitioner was not given a fair hearing.”**

The appellant being aggrieved by this ruling has preferred this appeal. The same is premised on grounds that: -

- “1. The Learned Trial Magistrate erred in law in allowing the application by the Respondent herein on grounds that the award was not signed by all the parties in the suit which was not a requirement under the provision of the law.**
- 2. The Learned Trial Magistrate erred in law in entertaining and/or even hearing the application to set aside an award whereas the same had not been served upon the arbitrator as required in or by law.**
- 3. The Learned Trial Magistrate erred and misdirected herself in law and fact in deciding the application on grounds not raised in the application.**
- 4. The Learned Trial Magistrate erred and misdirected herself in deciding the application without paying serious regard to the objection and issue raised by the Appellant herein in the application.”**

By the appeal he urges this court to set aside the ruling of the Learned Magistrate and substitute it with an order dismissing the respondent’s application in the lower court with costs.

Parties agreed to canvass the appeal by way of written submissions but I have only seen those of the appellant. Mr. Soire, Advocate for the appellant submitted that the arbitration in this matter is governed by **Order 46 of the Civil Procedure Rules** which has no requirement that the award be signed and dated by the parties. Counsel submitted that since the gist of the application was misconduct of the arbitrator, it was mandatory under **Rule 6** to serve him and the Learned Trial Magistrate therefore erred in allowing the application yet the arbitrator had not been served. Counsel submitted that the trial magistrate ought not to have heard the application in the first place. He further contended that the trial magistrate did not take into consideration that the application was filed out of time.

As I stated, no submissions were received from the respondent although her Advocate was present and consented to canvassing this appeal by way of written submissions.

I agree with Counsel for the appellant that the arbitration herein is governed by **Order 46 of the Civil Procedure Rules**, the same being an arbitration under order of a court albeit with consent of the parties. The circumstances under which an award under the said order can be set aside by a court are contained in **Rule 16 (1) of the Civil Procedure Rules** which states: -

**“16. (1) The court may set aside an award on the following grounds only: -**

**a) corruption or misconduct of the arbitrator or umpire; or**

**b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has wilfully misled or deceived the arbitrator or umpire.”**

Rule 16 (2) requires that such an application be served upon the arbitrator. The application before the trial magistrate was premised on the ground set out in Sub-rule 1 (a) and it therefore behoved the applicant to serve the arbitrator. It is clear from the ruling of the trial magistrate that she considered an issue that was not before her. The issue that the award was not signed by the parties was not pleaded and neither is it a ground for setting aside an award. It is also not clear what ground she based her finding that the respondent/applicant had not been given a fair hearing. Neither Rule 16 (a) nor (b) makes the ground she based her decision on a ground for setting aside an award. Order 46 Rule 10 requires the award to be signed and dated by the arbitrator (not the parties) and that was done. The trial magistrate therefore clearly misdirected herself.

Be that as it may, my finding is that the award did not deal with all the issues before the court and that it was inconclusive as the Assistant Chief instead of ruling on the issues before him referred the matter to the family of the parties. In my view for the above reason the award should have been remitted to the arbitrator for reconsideration. Accordingly, this appeal is allowed and the order setting aside the award is quashed and substituted with an order that the award be remitted back to the Assistant Chief for reconsideration within 30 days. Thereafter the Assistant Chief shall file the award, in the lower court, within fourteen days. As for the costs of this appeal, this being a family matter, each party shall bear its own costs. It is so ordered.

**Signed, dated and delivered at Nyamira this 31<sup>st</sup> day of January 2019.**

**E. N. MAINA**

**JUDGE**