



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 188 OF 2011**

**JOSEPH PIUS OGWORA ..... PLAINTIFF**

**VERSUS**

**SOPHIA TURUNGI ..... DEFENDANT**

**RULING**

1. Before the court for determination is the plaintiff/applicant's application dated 22<sup>nd</sup> June 2015. By the application the plaintiff seeks to have a consent order made between the parties and endorsed by the court on 29<sup>th</sup> August 2014 referring the dispute between the parties to the arbitration of the District Officer, Marani Division set aside and for the dispute to be heard and determined by the court in lieu of being arbitrated upon by the D. O Marani as consented and agreed to as between the parties. The plaintiff states that the defendant/respondent has failed to attend before District Officer Marani for purposes of commencing the arbitral process and that this has frustrated the arbitral process which the plaintiff states has failed and/or collapsed. The plaintiff avers that in the premises it is fitting for the consent order to be vacated and/or discharged and the court to be seized of the matter so that the resolution of the dispute can be expedited through hearing by the court.

2. The defendant opposes the application and has filed grounds of opposition where he asserts the plaintiff's application is misconceived, mischievous and an abuse of the due process of the court. The defendant avers that the plaintiff has not advanced any grounds that can satisfy the threshold for setting aside or varying the terms of the consent and views the application by the plaintiff as having been brought with ulterior motive to defeat the ends of justice.

3. The plaintiff supported his application with an affidavit sworn on 22<sup>nd</sup> June 2015 where he deposes that the defendant has failed to attend before Assistant County Commissioner, Marani the successor of the office of the District Officer and that this has rendered arbitration impractical. The Assistant County Commissioner's letter dated 8<sup>th</sup> August 2014 marked "JP03" affirms that the defendant indeed indicated she would not participate in the arbitral process stating that she will only participate in the court proceedings.

4. The defendant did not file any replying affidavit to refute the factual depositions of the plaintiff or offer any other explanation. The parties filed written submissions to canvass the plaintiff's application. The plaintiff's submissions dated 18<sup>th</sup> December 2015 were filed on 11<sup>th</sup> January 2016 while the defendant's submissions dated 20<sup>th</sup> January 2016 were filed on the same date. Having considered the application and the affidavit in support and the grounds of opposition together with the parties submissions the issue for determination is whether there is a basis to have the consent vacated, set aside and/or varied.

5. In determining the application it is necessary to consider what the terms of the consent were and I set

out hereunder the terms of the consent order as extracted and issued on 22<sup>nd</sup> April, 2014:

**1. The instant matter be and is hereby referred to arbitration by the District Officer, Marani Division, who shall be the chairman and the chief, Ngeny location.**

**2. The two (2) officers, (details in terms of clause (1) hereof), to be assisted by a panel of four (4) elders, two (2) to be appointed by either side.**

**3. The award and/or report of the panel herein, to be filed and/or lodged in court within 60 days from the date of service of the court order herein.**

**4. The court order herein to be extracted and same be served upon the panel by the plaintiff and/or advocates.**

**5. The expenses of the panel, if any, to be shared equally by the parties.**

**6. The matter herein be mentioned before honourable court, upon filing of the report for purposes of further directions and/or orders.**

6. The instant suit having been commenced before this court, it is clear that inspite of the consent by the parties to have the matter referred to arbitration, the reference was by order of the court and therefore the court retained the residual authority since the arbitral award was required to be filed in court. The terms of the consent order of reference were spelt out and incase any of the terms was not met any party would doubtlessly have recourse to the court for redress. Under clause (iii) of the consent order of reference to arbitration the arbitral panel was required to file their award in court within 60 days from the date of service of the court order on the panel. Although it is not evident when the order was served on the chairman of the panel there is no doubt that it was served as evidenced by the letter by the Assistant County Commissioner dated 8<sup>th</sup> August 2014 addressed to the Deputy Registrar where the reference to arbitrate is acknowledged. In the said letter the chairperson of the arbitral panel states the defendant declined to participate in the process. The last paragraph of the letter states:-

**“Sophia Turungi stated that she will not participate in the process and walked out of my office. I persuaded her to return but she insisted that the case was in court and she will only participate in court and she will never attend in future any proceedings in regard to this case. I called off the meeting.”**

7. In my view the order of reference to arbitration was valid only for a period of 60 days from the date of service of the order of reference on the chairman of the panel. After the expiry of the period the mandate of the arbitral panel would lapse and could only be extended if a formal order to extend the period was sought and obtained from the court.

8. I have seen the submissions by the parties where they have devoted considerable space on the grounds on which a consent may be set aside. The courts have routinely stated consents could only be set aside on grounds of fraud, mistake or misrepresentation. See the cases of **Flora N. Wasike –vs- Destimo Wamboka [1982-88] 1 KAR 625** and **Kenya Commercial Bank Ltd –vs- Benjoh Amalgamated Ltd & Another [1998] eKLR**. I do not think the instant case falls in the genre of those cases. In the present case the consent of the parties was to refer the dispute for arbitration to an arbitral panel as per clauses (i) and (ii) of the order. The duration for the panel to arbitrate and file an award was specific. The chairman of the panel has indicated that indeed one of the parties (the defendant) refused to participate which rendered the arbitral award incapable of complying with the terms of the reference.

9. The defendant did not file any replying affidavit to rebut the averment by the plaintiff that she refused to co-operate by participating in the arbitral process which act rendered it impractical for the arbitral process to take place as contemplated in the order of reference. The essence of the consent order of reference to arbitration was to have the dispute arbitrated and finally resolved through arbitration. That looks like a far cry now given the defendant has declared she will not participate in the arbitral process.

The plaintiff acknowledging this position has moved the court to vacate and or set aside the order of reference to arbitration and to have the matter heard and determined by the court.

10. I have observed that the arbitral process was time bound in that an arbitral award needed to be filed within 60 days of service of the court order on the chairman of the arbitral panel. That did not happen and it is my view the order of reference lapsed and could only be kept alive if the court breathed some life into it by granting an extension of the period. No party has sought any extension and no purpose can be served by granting such an extension when evidence suggests one of the parties has declined to participate in the arbitral process.

11. Having regard to the totality of all the circumstances it is my considered view that the order of reference to arbitration has become superfluous and that it is meet and just to have the same vacated and set aside. It is so ordered and the suit herein is ordered to be heard and determined by the court. The parties are directed to take a date for the mention of the suit in the registry for purposes of taking pretrial directions. The costs of the plaintiff's application will abide the outcome of the suit.

**Ruling dated, signed and delivered at Kisii this 20<sup>th</sup> day of May, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff  
..... for the defendant  
..... Court assistant

**J. M. MUTUNGI**

**JUDGE**