



REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT BUNGOMA.

MISC. CIVIL APPLICATION NO. 213 OF 2004.

BENSON KAKAI NAMISI)

JONSTONE MUKASA NAMISI).....APPLICANTS

VERSUS.

STUFFORD MUKASA NAMISI.....RESPONDENT.

RULING.

[1]. The dispute between the parties herein was by consent of the parties sent to arbitration on 17th March 2015. The terms of the Consent were as follows;

By Consent,

- (1). The decree issued in Bungoma SPM'S Court in LDTC No. 7 of 2004 adopted as Judgment of the Court on 15/6/2004 is hereby set aside with no orders as to costs.
- (2). This matter is referred to arbitration chaired by the Sub-County Commissioner of Bungoma East who will sit with Four Elders, two to be appointed by each party and the area chief to sit in the panel as a member.
- (3). Parties to call witnesses to their case if they so wish.
- (4).The award to be filed within 60 days.
- (5). Mention on 17/6/2015.

An award was filed in Court on 15th June, 2015 together with the proceedings. It was read to the parties on 17th June, 2013 and the parties were put on notice. It is against that award that the applicant herein has brought a notice of motion under order 45 rule (1) and (2) of the Civil Procedure Rules and under order 51 rule (1) of the Civil Procedure Rules. The application for review is based on the allegation by the applicant that the proceedings as captured is not what the applicant said at the tribunal, and that the arbitrator has no powers to recommend the cancellation of a valid title in LR No. Ndivisi/Ndivisi/1117 and 1118 respectively. The application is supported by an affidavit of one Benson Kakai Namisi who swears that, what they stated was not captured in the proceedings and that the proceedings are not a true reflection of their views and that the award went contrary to their family meeting and resolution held on 27/12/1999 and for those reasons he urged that the award of the tribunal be reviewed.

[2].The respondent opposed the application. He said that the same lacked merit and is an afterthought.

He argued that the order sought to be reviewed was not annexed to the application dated 14/7/2015. The respondent said that there were no grounds for review and that the award was not contrary to public policy and that there was no fraud and misrepresentation. Finally it was argued that this court lacked jurisdiction to review the orders sought.

Under order 45 rule 1 a court can only set aside a decree or an order from which no appeal is allowed, only discovery of a new and important matter or evidence which, after exercise of due defence, was not within his knowledge and could not be produced by him at the time the decree was passed or order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason. This is not the case here. There is no decree or order here being interrogated. What is before the court is an award filed by a tribunal which was appointed by Consent of the parties and sanctioned by the Court under order 46 of the Civil Procedure Rules.

[3]. An award filed by an arbitrator under Order 46 can only be set aside under Sec. 16 of Order 46 only on the grounds of corruption, misconduct by the arbitrator or when either party has fraudulently concealed any matter which he ought to have disclosed or has willfully misled the arbitrator or umpire. This should be done by an application that must be served on the umpire or arbitrator.

There is no such allegation here against the arbitrator or against the respondent. The mere saying that what applicant said was not captured, and not disclosing what he said does not satisfy Order 46 rule 16. It remains an unsubstantiated allegation. In any case, there is no application under Order 46 of the Civil Procedure Rules and the attempt to review the arbitration award under Order 45 of the Civil Procedure Rules has not met the parameters set under the said Order 45 rule I. For those reasons I am unable to set aside the order. This application is dismissed with costs and Judgment is entered in terms of the award.

Ruling read in open Court before the Counsels.

Dated, Signed and delivered on 29th September, 2016.

S. MUKUNYA

JUDGE.

In the presence of:

Court Assistant - Joy

Mr. Situma for Applicant

Mr. C.K. Areba for the Respondent