



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CIVIL APPEAL NO. 24 OF 2014

JOHN KANIU APPELLANT

VERSUS

JASON BUNDI GITARI RESPONDENT

**(BEING AN APPEAL FROM THE RULING DELIVERED ON 18TH NOVEMBER, 2009 BY
HON. P.T. NDIKA – S.R.M AT KERUGOYA PRINCIPAL MAGISTRATE’S COURT CIVIL
CASE NO. 254 OF 2000)**

JUDGMENT

This is an appeal against the ruling/order of the Senior Resident Magistrate at Kerugoya (P.T. NDIKA) delivered on 18th November 2009 in KERUGOYA SENIOR RESIDENT MAGISTRATE’S COURT CIVIL CASE NO. 254 of 2000.

The memorandum of appeal raises the following grounds:-

1. *That the learned magistrate erred in law and in fact by failing to up-hold that the arbitrators misconducted themselves from the report*
2. *That the learned magistrate erred in law and fact by relying on the report which was un-dated*
3. *That the learned magistrate erred in law and fact by holding that the arbitrators conducted themselves properly when it was clear the parties had not been called during the hearing*
4. *That the learned magistrate erred in law and fact by dismissing an application without giving reasons.*

The appeal itself was filed on 6th December 2010 and was admitted for hearing by Dulu J. on 18th May 2011. Although I do not see from the record any order granting the appellant leave to file the appeal out of time, I can see that an application was made to that effect on 30th June 2010 in Embu High Court Miscellaneous Civil Application No. 78 of 2010 and since, as I have stated above, the appeal was admitted on 18th May 2011 by Dulu J. this Court is satisfied that such leave must have been granted by the High Court.

The appellant was represented by Mr. Ndana Advocate while the respondent was acting in person and when the parties appeared before me on 15th October 2014, it was agreed that the same be canvassed by way of written submissions.

Submissions were filed by both parties as agreed.

I have considered those submissions and the record herein.

The appellant had filed this dispute in the subordinate Court seeking an order that he is the owner of plot No. 57 Kaitheri which the defendant/respondent had encroached upon and fenced resulting in a loss of KSh. 9,600/= which the appellant also sought. The defendant/respondent denied those allegations adding that he would ask the Court to visit the scene.

When the dispute came up for hearing before both Mr. S.A. Okato R.M. and Mr. J.N. Onyiego R.M., efforts were made to refer the dispute to a surveyor and at one stage the magistrate even visited the scene. The appellant did testify at some stage but nothing more happened because the surveyor never filed any report until he was summoned by the Court on 14th October 2004. On that date, the appellant applied that the dispute be referred to arbitration and the respondent agreed. The Court then made the following orders:-

***“By consent, the dispute herein touching on plot No. 57 Kaitheri Village and 56 is hereby referred to Kerugoya Municipal Council for arbitration. The clerk to the Council to give the arbitration or award within 90 days from today’s date.*”**

J.N. Onyiego

SRM

14.10.04”

Arbitration is one of several dispute resolution methods that parties may choose to use outside the Courts. The parties may opt for it in the cause of litigation under **Order 46 Civil Procedure Rules** or provide for it in contractual obligations in which case the **Arbitration Act** would apply. It is clear from the record herein and particularly the orders of the trial magistrate dated 14th October 2004 that the reference of this dispute to the Kerugoya Municipal Council for arbitration was pursuant to the provisions of the then **Order 45 Civil Procedure Rules** (now **Order 46 Civil Procedure Rules**). That is what the parties herein chose as the mechanism of resolving their dispute and the law allowed them to take that course. **Order 46 Rule 3(1) of the Civil Procedure Rules** provides as follows:-

“The Court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award and shall specify such time in the order”

On the other hand, **Order 46 Rule 8(1) of the Civil Procedure Rules** provides as follows:-

“The parties may by filing an agreement in writing, extend the time for the making of the award, whether or not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed”

Under the law therefore, the arbitrator in this case Kerugoya Municipal Council was required to determine the dispute between the parties herein and file the award within 90 days from 14th October 2004 when the order appointing the said council as arbitrator was made. If that was not possible, the law provides for the extension of such time if the parties so agree.

The Municipal Council of Kerugoya/Kutus, acting on the orders of the Court dated 14th October 2004 proceeded to establish a Special Committee to hear the dispute and thereafter filed its award in Court. The award itself is un-dated and it is not even clear when it was filed in Court. However, what is clear is that the said Special Committee held its meeting to resolve the dispute at 12 p.m. on 1st July 2008. The hearing of the proceedings are instructive and they read:

“Minutes of Municipal Council of Kerugoya/Kutus Special Town Planning Works and Housing Committee meeting held on 1st July 2008 in Council’s Boardroom Chamber at 12 p.m.”

It is therefore clear that although the Municipal Council Kerugoya/Kutus was required to file its award within 90 days from 14th October 2004, a Special Committee of the Council actually convened to determine the dispute almost four (4) years later. Indeed the record in Kerugoya Senior Resident Magistrate's Court Case No. 254 of 2008 shows that by 12th June 2008, the Council had not filed the award. The proceeding of that day read as follows:-

“Court: I have noted that on 14.10.04 the Court

ordered by consent Clerk Municipal Council

Kerugoya/Kutus to file arbitration report.

There is no report filed since then. Mention on

3.7.08 for Clerk Municipal Council to file award

J.N. Onyiego SRM

12.6.08”

The record was eventually filed long after the 90 days period without leave and an application by the appellant to set it aside on grounds of mis-conduct was dismissed with costs by P.T. Nditika Senior Resident Magistrate on 18th November 2009 giving rise to this appeal.

The award having been filed way beyond the 90 days period provided for by the Court order, and without any extension of time agreed by the parties, the same was a nullity – see **BAGWASI NYANGAU VS OMOSA NYAKWARA 1982-88 1 K.A.R 805.**

Similarly, in the case of **CLEOPHUS WASIKE VS MUCHA SWALA COURT OF APPEAL CIVIL APPEAL NO. 6 of 1983 NAKURU**, Nyarangi J.A. said:-

“The award the subject matter of this appeal was filed in the Senior Resident Magistrate’s Court on September 10, 1981. There is no evidence that an application was made pursuant to Order XLV Rule 8 for the Court to extend the time for making of the award. The Senior Resident Magistrate accepted and acted on an award which has been filed in Court long after the elapse of the time fixed under Order XLV Rule 4(2) for making of the award. But the award was a nullity”

The issue of the award having been filed out of time without any agreement as to extension by the parties herein is a matter that went to jurisdiction and is a matter that was not raised before the trial magistrate in the subordinate Court. However, the issue of lack of jurisdiction by the arbitrator is an issue that goes to the legality of the decision arrived at and is thereby an issue that can be raised in this Court even if it was not raised in the subordinate Court – **NYANGAU VS NYAKWARA** (supra). If the trial magistrate had considered that infact the award that he was being asked to set aside was a nullity, he would not have dismissed the application as he did. That was an error of law which this Court must address. This appeal must therefore succeed on the issue of jurisdiction alone.

The other ground raised in this appeal touch on misconduct on the part of the arbitrator. This was raised before the trial magistrate who however found that there was no misconduct. However, under **Order 46 Rule 16(2) Civil Procedure Rules**, an application seeking the setting aside of an award on the grounds of misconduct “***shall be served on the arbitrator or umpire***”. There was no evidence that the application that resulted in the ruling sought to be impugned herein was served upon the arbitrator as per the mandatory provisions of **Order 46 Rule 16(2) Civil Procedure Rules**. That ground of appeal must therefore fail.

Ultimately therefore, having considered this appeal, it is clear that the award which was filed in Court by

the arbitrator was a nullity because it was filed outside the time required and there was no extension sought or granted. That award was therefore a nullity and the trial Court ought to have set it aside as a matter of law. This appeal is therefore allowed on that ground and I set aside the order of the trial magistrate dismissing the application to set aside the award as contained in his ruling dated 18th November 2009 and substituting therewith an order setting aside the un-dated award of the Municipal Council of Kerugoya/Kutus.

Pursuant to the provisions of **Order 46 Rule 16(3) of the Civil Procedure Rules**, the suit is remitted to the Chief Magistrate's Court Kerugoya to be determined.

As the appeal has succeeded on grounds not canvassed in the Memorandum of Appeal, I order that each party meets their own costs here and in the Court below.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

18/9/2015

Before

B.N. Olao – Judge

Gichia – CC

Mr. Ndana for Appellant – absent

Respondent – present

COURT: Judgment delivered this 18th September, 2015 in open Court.

Mr. Ndana for the Appellant – absent

Respondent – present

Right of Appeal explained.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015

Explanatory note on delay

This judgment was due on 8th May 2015. However, I proceeded on leave to attend to my sick mother who later passed on and I was out of the country until 7th July 2015 when the Court proceeded on vacation soon after until 16th September 2015. That explains the delay which is however regretted.

B.N. OLAO

JUDGE

18TH SEPTEMBER, 2015