



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

CIVIL CASE NO. 120 OF 1998

LAWRENCE KINYUA MWAI.....PLAINTIFF

VERSUS

NYARIGINU FARMERS COMPANY.....1ST DEFENDANT

RULING

The applicant LAWRENCE KINYUA MWAI through an application dated 14th October, 2013 sought the following orders:-

- 1. That the court be pleased to set aside all extensions of time in arbitration award filed in court on 23/7/1992.***
- 2. That the extension of time of the arbitration award made on 16th December, 1991 for 90 days.***
- 3. That the extension of the time of the arbitration award on 23rd July, 1992.***
- 4. That court be pleased to set aside the arbitration award filed on 23/7/1992 and the Judge's ruling dated 19th February, 2006.***

5. and to set aside the award read on 30/5/2009.

That costs of the application be provided for:-

The application is premised on several grounds on the face of the Notice of Motion being as follows:-

- a. on 29/11/1989 the parties agreed by consent to refer the masters for arbitration.***
- b. the award was filed within 4 months from the date of consent order with liberty to apply the further extensions of time.***
- c. On 16/9/91 an extension was done by unknown applicant and the both plaintiff or defendants were not served with the application summons.***
- d. The plaintiff was not informed of any filed arbitration.***
- e. That the plaintiff and the defendants were never informed of the arbitration award extension of time.***
- f. That it is against the Civil Procedure Rule to grant any application without all the parties concerned being served to appear before the court when any application is to proceed in court.***

- g. *That the court interfered with the arbitration award as it was a party.*
- h. *That no reason was given by the Resident Judge Hon. Justice S. O. Oguk to keep on extending the time of arbitration award without informing the arbitrator , plaintiff and the defendant*
- i. *The Hon. Justice Mr. S. O. Oguku was at the end dismissed and his advocate certificate was cancelled by the government for being unfaithful to his duties.*
- j. *The supporting affidavit of the notice of motion of 5/5/2010 was done by the late deponent someone who died a long time ago about 20 years ago, had to make an affidavit, which was a great surprise.*
- k. *The supporting affidavit was done by two different deponents, Mwebia Nkaabu and the late Zakaria Nkaabu who had died 20 years ago and is said to have signed the affidavit.*

The replying affidavit in opposition to the applicant's application dated 17th February, 2014 was purportedly filed by Zakaria Nkaabu. The applicant urged this court to expunge the replying affidavit from the record as both respondents in his application died long time ago as per his supportive supplementary affidavits. The counsel for the respondents Mr. Mutunga, learned Advocate conceded that the affidavits were signed by a person who had been substituted for the deceased respondents but in the respondent's name. The court after considering the arguments for and against the expunging of the replying affidavit, proceeded to expunge the replying affidavit to which objection had been raised after Mr. Mutunga, learned Counsel had addressed this court mainly on the said affidavit and points of law. In view of the foregoing I shall therefore consider the points of law raised on behalf of the respondents who had been substituted but their names not indicated in the present application.

I would start by stating that the provisions under which the application is based has not been stated but by reading the application it is not difficult to appreciate that the application is premised under the provisions of Order 46 of the Civil Procedure Rules.

When the application came up for hearing, the applicant urged this court to allow his application basing his submissions on the grounds on the face of the application and supportive affidavit. Mr. Mutunga learned Advocate opposed the application stating the conditions under which the prayers sought can be granted have not been met. He urged that the application was not properly served. He further argued that similar prayers were earlier on made and ruling delivered on 19th October, 2011 and 17th November, 2011. He termed the applicant's application as vexatious.

I have carefully considered the application and submissions by the applicant and the Counsel for the respondents and the relevant law.

The issue for determination in this application is whether the applicant has met the conditions to warrant setting aside the arbitration award and orders for extension of time made by various judges.

The applicant is seeking all orders of extension of time of the arbitration award filed in court on 23rd July, 1992; Extension of time of arbitration award made on 16th December, 1991 for 90 days and on 23rd July, 1992. The applicant further seeks to set aside the arbitration award filed on 23rd July, 1992 and Judge's ruling dated 19th February, 2009 and read on 30th May, 2009. The court's record show that indeed the court extended period for hearing the arbitration on periods the applicant has indicated in his application. That the applicant in an application dated 29th June, 2009 sought that:-

“That the court be pleased to set aside.....all court proceedings done by the former Hon. Justice Samuel Odhiambo Oguk that the above cases be separated.”

On 17th March, 2011 Hon. Lady Justice Mary Kasango dismissed the application and extended the time for making the arbitration award filed in court on 23rd July, 1992 and ordered that the award shall be read by the court to the parties on a date to be given at the reading of the ruling. The reading of the award was fixed for 12th May, 2011. That the award was read to the parties by Hon. Lady Justice Lesiit on 30/5/2011. The applicant subsequently filed a notice of motion dated 17th June, 2010 seeking to set aside

the award made earlier. The court dismissed the application.

Order 46 Rule 8(1) and (2) of the Civil Procedure provides:-

8. (1) 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.

(2) On application made by a party, arbitrator or umpire on notice, the court may either extend the time for the making of the award, whether or not at the date of the application time has expired, and whether or not an award has been made since the expiry of the time allowed, or make an order superseding the arbitration in which case it shall proceed with the suit.

The court has power on application to extend time for making of the award. I have perused the court record and it is clear list the court acted properly in extending time for making the arbitration That further in the ruling of Hon. Mr. Justice Ouko in his ruling dated 19th February, 2009 and that of Hon. Lady Justice Mary Kasango dated 17th March, 2011, the Honourable Judges held that the extension was proper and the court was proper to extend time and indeed it did that severally until 16th September, 1991 when time was further extended to 16th December, 1991.

I agree with the findings of the Honourable Judges that Order 46 Rule 8 of Civil Procedure Rules vests Judges with discretionary powers to extend the time for filing of an award on application.

Order 46 Rule 16 of Civil Procedure Rules sets out the conditions under which an award can be set aside. It provides as follows:-

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 willfully misled or deceived the arbitrator or umpire.

Sub-rule 2 thereof further provides as follows:-

(2) An Application under this rule shall be served on the arbitrator or umpire.

A perusal of the applicants ground in support of the application does not reveal any of the grounds set out under Order 46 Rule 16 of the Civil Procedure Rules. The applicant did not establish corruption or misconduct on the part of the arbitrator or umpire or that either party had fraudulently concealed any matter which ought to have been disclosed or had unlawfully misled or deceived the arbitrator or umpire. The applicant made serious allegations in support of the application but none of them has been substantiated.

Order 46 Rule 16(2) of the Civil Procedure requires an application based on Order 46 Rule 16(1) of the Civil Procedure be served upon the arbitrator or umpire.

Order 46 Rule 16(2) of Civil Procedure Rules provides:-

“(2) An Application under this rule shall be served on the arbitrator or umpire.”

The civil Procedure also provides time for filing an application to set aside arbitrator's award.

O.46 Rule 17 provides for that.

17. An application may be made under rules 13, 14, 15 and 16 within thirty days of receipt by the applicant of notice of the filing of the award under rule 10 or, where a date for reading the award has been fixed by the court under rule 11 within thirty days of that date.”

The instant application was filed on 16th October, 2013. The arbitration award was filed on 23rd July, 1992 and ruling delivered on 19th February, 2009. It is said to have been read to parties on 30/5/2009. The filing of the award in court is after around 22 years ago. The applicant has not given any reasonable ground for failing to have filed an application to set aside the award within 30 days from the receipt of the notice of filing of the award. The applicant cannot claim not to have been aware of the notice as he had filed other applications on the same issue before. He has in his affidavit dated 14th October, 2014 under paragraph 25 mentioned of the filing of the award. The applicant is guilty of laches and he cannot blame any other person for the delay save himself.

One more thing has to be pointed in out this matter is that when the matter was being heard it transpired that the respondent in the current application died many years ago. The applicant in his reply during the oral submission conceded all the respondents were dead as of the time of filing of this application against them. That he knew the deceased respondents had been substituted on 13th June, 1996 with Mwebia Nkaabu and Kabaragu Muita whose name should have been indicated as the respondents, he did not do so.

The upshot is that the application is without merits and the same is dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 9TH DAY OF APRIL, 2014.

J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT IN PRESENCE

1. Applicant in person – present
2. Mr. Mutunga for the respondent.

J. A. MAKAU

JUDGE