REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

LANDS AND ENVIRONMENT DIVISION

CIVIL CASE NO. 2937 OF 1985

KILUKUMI MUSAU & 4 OTHERS……..……PLAINTIFFS

VERSUS

MALISAU MUSAU & 2 OTHERS ……..... DEFENDANTS

RULING

1. This is the plaintiffs' notice of motion dated 19th January 2012. The plaintiffs pray that judgment be entered in their favour as per the terms of an award filed in court on 14th February 1996 and read to the parties on 22nd March 1996. The motion is expressed to be brought under section 3A of the Civil Procedure Act and order 46 of the Civil Procedure Rules 2010. An affidavit sworn on even date by Kilukumi Musau, the 1st plaintiff, is annexed.

2. The pith of the motion is that the parties consented that this matter be referred to arbitration by the District Officer, Mwala Division. By a written award dated 16th February 1993 marked as annexture "KM 1", he made an award that the suit land be subdivided into 6 equal shares and be allocated to the 6 sons of Musau (now deceased).

3. In an adversarial system of justice, litigation is largely party driven. The record of the court shows that on 18th February 1993, the Registrar of this court endorsed the following order of consent;

"*Upon reading the consent letter reference MMN/CIV/91/147 dated 2nd October 1992, I order;*

By consent the District Officer Mwala Division do hear this dispute and file an award".

I will set out the history of this litigation because it is very relevant. On 1st July 1996, the award was read in court. The award was read again before C.K. Njai, Principal Deputy Registrar, on 25th June 1997. There were objections by the defendants and a prayer that the award be set aside; and that the suit be heard on the merits. By an application dated 31st July 1996, the defendants had earlier prayed that the suit be dismissed for want of prosecution. That application was withdrawn on 12th February 1997.

The plaintiffs then filed a chamber summons dated 6th February 1997 seeking that judgment be entered in

their favour as per the award filed in court on 14th February 1996 and read to the parties on 22nd March 1996. That application was in nearly similar terms to the present application. In the meantime, the court noted irregularities in service of the notice to read the award and ordered that the award be read again on 25th June 1997 by the Senior Deputy Registrar. Thereafter, the defendants, then represented by Sane & Company advocates, filed a chamber summons dated 24th July 1997 to set aside the award. The principal grounds were that there was fraud, material disclosure and corruption on the part of the arbitrator. In the meantime, the 1st defendant Malisau Musau died. A notice of motion was filed by the plaintiffs dated 18th March 1998 to enjoin the legal representatives of the deceased into the suit. I find it odd that the plaintiffs were making that application on an allegation in the supporting affidavit that the deceased's estate was "in the hands of his two wives and their eldest (sic) sons" who the plaintiffs deemed to be the legal representatives. Suffice it to say that their application came up before Lady Justice Angawa on 14th July 2000 and was allowed as prayed. The plaintiff was given leave to amend the plaint to bring in the new defendants. The defendants were granted leave to file an amended defence in 14 days. That was the last action.

4. I have also seen a notice of motion dated 2nd March 2012 by the defendants' lawyers to cease acting. The application has not been heard. The present notice of motion dated 19th January 2012 was served on Sane & Company advocates who are seeking to withdraw from acting. That is clear from the affidavit of service of Alex Mwangi sworn on 18th March 2012. The hearing notice dated 7th March 2012 was served on the same date on a court clerk at the said law firm. It is thus not surprising that the defendants have not filed a replying affidavit. It is also not surprising that their lawyer has filed the subsequent motion to withdraw.

5. This matter relates to land. I have stated earlier that the defendants had taken out a chamber summons dated 24th July 1997 to set aside the award and on very serious grounds of complicity and fraud. The record of the court does not show that the matter was heard on the merits.

6. It is thus not true, as stated by the applicants at ground (v) of the application that "since the reading of the award 30 days have lapsed and no application under rules 13, 14, 15 and 16 have been made". To that extent, there has been serious material non-disclosure over a sensitive matter involving the suit land between the parties. That false allegation is repeated by Kilukumi Musau in the supporting affidavit sworn on 19th January 2012 at paragraph 7 where he says;

"That after the issue of the Notice referred to in paragraph 6 above 30 days have long expired yet no application has been presented to this court in respect of the award either under Rules 13,14,15 and 16 of the Civil Procedure Rules 2010".

It is also deponed, without sufficient evidence, that the "parties have already effected the decision (award) on the ground" but that "subdivision cannot proceed". If the subdivision has not occurred, how has the award been "effected on the ground"? I have expressed doubts whether the defendants are even fully aware of the notice of motion before the court. I have also stated that there was a previous application in near similar terms dated 6th February 1997. It was opposed by the defendants. I have formed the clear impression from the history of the matter and the paucity of evidence in the present application that the plaintiffs have deliberately misled the court or left it in a blind spot. There has also been material non-disclosure. There is no cogent evidence or sufficient cause to allow the prayers sought. The motion, in it's entirely and as pleaded is devoid of merit. This is a very old suit dating back to 1985. But that is not a good reason to short circuit justice.

7. In the result I order that the plaintiff's notice of motion dated 19th January 2012 be and is hereby dismissed. I shall make no order on costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 17th day of May 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiffs.

No appearance for the Defendants.

Collins Odhiambo – Court clerk.