



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 29 OF 1989

EVANGELINE MPINDA M'MWITHIMBU.....APPLICANT/PLAINTIFF

VERSUS

DAVID KITHURE M'MWITHIMBU..... 1ST DEFENDANT/RESPONDENT

JOTHAM KINOTI M'ITHIRI.....2ND DEFENDANT/RESPONDENT

RULING

The applicant through an application dated 2nd November, 2011 seeks the following orders:-

1. That the North Imenti Panel of elders award read in open court on 12/6/1996 be confirmed as the judgment of this Hon. Court and decree do issue appropriately.”

2. That each party to bear own costs.

The grounds in support of the application are stated on the face of the application. The application is supported by annexed affidavit of the applicant. The application is opposed. The respondent swore a replying affidavit in opposition of the application.

When the matter came up for hearing this court heard oral submissions made by the applicant and Miss Mwangi learned Advocate for the respondent. This court read the pleadings, filed by the parties herein in support of their respective opposing positions.

The issue for determination is whether there was a valid award read in open court on June, 1991 and whether there is an award that can be confirmed as judgment of the Honourable court and further whether decree can issue accordingly.

In the present application, the facts are more or less not in dispute. The applicant and the 1st respondent are sister and brother. The 1st defendant is registered proprietor of Ntima/Ntakira/2147 which the applicant claims he holds in trust for her being a family land. That the 1st defendant sold the whole land to 2nd defendant without consent and authority of the applicant. That on 12/4/1990 by consent of the parties the suit was referred to arbitration by elders under the Chairmanship of the District Officer of North Imenti District.

Each party was to have two elders to act with the District Officer as a panel. That the majority decision of the elders and District Officer to prevail. That the dispute was to be heard within 90 days. That on 15th July, 1991 the court made last extension period for filing of the award to 22nd October, 1991.

That on 14th December, 1995 the court noted that there was an award which had been submitted by the District Officer and that parties had not been notified by the registry that the award had been received so as to file any objection. The court noted the fault was not of the plaintiff. The matter came again before court on 1/3/1996 when the same was stood over to 12/6/1996. The court record is clear that after 1/3/1996 the matter was never placed before the court till 23rd April, 2012.

In the present application the award was supposed to be filed by 22nd October, 1991. That no award was filed till 1995 as per court's order dated 14th December, 1995.

The parties had not consented to extension of period of filing the award nor had there been an application to extend the period of the making of the award since it had expired.

Order 46 Rule 8 of Civil Procedure Rules provides:

“18. The court shall on request by any party with due notice to other parties enter judgment according to the award—

(a) when no application has been made within the time allowed by rule 17; or

(b) when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or.....”

Further after receipt of the award parties were not notified of the filing of the award as provided for under Order 46 Rule 11 of Civil Procedure Rules.

Order 46 Rule 11 of Civil Procedure Rules provides:-

“(1) The registrar shall within fourteen days of filing of the award notify the parties of such filing and the notice shall specify a date and time for reading the award.”

Under Order 46 Rule 18 of Civil Procedure Rules it is provided:-

18. (1) The court shall on request by any party with due notice to other parties enter judgment according to the award—

(a) when no application has been made within the time allowed by rule 17; or

(b) when an application under rules 13, 14 or 16 has been heard and determined and no other application has been made within the time allowed by rule 17; or

In the instant application no notice was issued to the parties of the receipt of the award. That no award was read on 12th June, 1996 or at any one time as per court's record. The court record is very clear that no award was made on 12th June, 1996. The application is premature as no award has been read to the parties to date. Secondly the time for filing of the award had expired by the time the award was filed and there had been no extension of time of the making of the award.

In case of **MARIRI –V-NGONYORO”B” AND ANOTHER(1986) KLR 488** Court of Appeal held:-

“As the arbitration award had been filed out of time and nothing had been done under Order XLV rule 8 to extend the time for the making of the award, the award filed was a nullity.”

In the circumstances, I find that the award sought to be confirmed as judgment of this court was filed out of time and no extension of time had been sought before filing of this award or after filing of the award to extend the time The award filed is therefore a nullity.

I further find that no award was ever read to the parties and as such the application is misconceived and fatally defective. The application is therefore dismissed with no order as to the costs.

The parties are at liberty thereafter to set down their suit for hearing and determination on merits.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF SEPTEMBER, 2012

J. A. MAKAU
JUDGE

DELIVERED IN OPEN COURT IN PRESENCE OF:

1. Applicant in person – present
2. Miss Mwangi Advocate for the respondent.

J. A. MAKAU
JUDGE