



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Civil Appeal 80 of 2005

KALAYU M'THILAI 1ST APPELLANT

CHARITY MUKOMA2ND APPELLANT

VERSUS

ISAAC MWETI M'KATHIARESPONDENT

J U D G M E N T

The appellants were the defendants at the lower court. The respondent had sued the appellants seeking orders of permanent injunction to restrain the appellants, their agents, servants and employees from interfering with respondent's use, possession or plucking of miraa growing on land parcel No.Machungulu/Akirang'ondu S/1754 or in the alternative refund of the lease agreement sum of Kshs.100,000/- with costs. The appellants filed their defence denying liability.

Prior to hearing of the suit, both counsel filed a consent letter dated 5/3/2003 to have the case referred for arbitration by the Chief Akirangondu Location, Meru North District. On 10th March, 2003 the consent was adopted as an order of court. The award was to be filed within 30 days. The matter was set down for mention on 14.4.2003 on which date court ordered that a reminder be sent to the Chief to file his report by 30th June, 2003 and suit was set down for mention on 30/06/2003. That on 30/06/2003 the court received Chief's award and the same was read to the parties on the same day. The parties were given 30 days to file objection. The appellants being aggrieved by Chief's award filed an application dated 8th July, 2003 seeking that the chief's award be set aside and that court do make any other orders as may meet the ends of justice. The application was based on two grounds namely:-

- a. That the arbitrator did not arbitrate in accordance with the order of reference.***
- b. That the arbitrator decided the dispute in a biasness manner.***

The application was opposed by the respondent. The trial court upon hearing the application dismissed the same on 7/9/2005. The appellants being aggrieved by the said ruling filed this appeal setting out the following grounds of appeal.

- 1. The learned S.R.M erred in law and facts in failing to set aside the Chief's award when the same was manifestly defective.**
- 2. The learned S.R.M erred in law and facts in failing to make a finding on the issues before her but instead dismissed the application technically.**
- 3. The learned S.R.M erred in law and facts in deciding the whole application against the weight of evidence.**

Prior to the hearing of the appeal, counsel for the parties to the appeal sought direction on how to proceed with the appeal. On 10/2/2011 court gave directions that the appeal be heard by way of written submissions. The written submissions were duly filed. This court has carefully considered the said submissions. It has also read the pleadings filed by the parties herein in support of their respective opposing position. The court has also read the proceedings of the lower court and the ruling thereto.

The appellants in ground No.1 of the appeal faults the trial court for failing to set aside the chief's award which was manifestly defective. The matter was referred to chief for arbitration by consent of parties. The matter was due for mention on 14th March, 2003 to receive the award. On the same date court extended period of filing the award to 30/06/2003. The award was subsequently filed on 30/6/2003. The appellants in their application dated 8th July, 2003 did not aver that the award was read out of time neither did they allege that there was no extension of time. In view of the foregoing I find the court having stated that the award be filed by 30.6.2003 had extended time for hearing and filing of the award. I find further the appellants did not raise that point in their application at the lower court. In the circumstances I find no merits in ground No.1 of the appeal and the same is dismissed.

The appellants grounds No.2 and 3 are interrelated and I propose to deal with the same together. The trial court is faulted for failing to make a finding on the issues before it but dismissed the application technically and decided the whole application against the weight of evidence.

The appellants in their application had accused the arbitrator of gross misconduct in determining the matter before him. Under Order 45 Rule 15 of the old Civil Procedure Rules, now Order 46 Rule 16 Rule (1),)2) and (3) of Civil Procedure Rules provides:

“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.

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

(3) Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit or umpire.”

Under Order 46 Rule 16(2) of Civil Procedure Rules it is mandatory that an application based on grounds of misconduct of an arbitration must be served upon the arbitrator or umpire. The appellants had not served the application upon the arbitrator and court found failure to effect service upon the arbitrator was fatal and struck out the application. The application was determined after the court had carefully considered the issues before it and the evidence in the affidavits. I find that the trial court acted properly as the matter before it could not be dealt with without service of the application upon the arbitrator. The arbitrator could not be condemned unheard.

In view of the foregoing I find no merits in grounds Nos 2 and 3 and the same are accordingly dismissed.

The upshot of the matter is that the appeal is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF OCTOBER, 2012.

J. A. MAKAU

JUDGE

Delivered in open court in presence of:

1. Mr. Mr. C. Mbaabu h/b for Kimathi for the appellant
2. V.P. Gituma for the respondent(absent)

J. A. MAKAU

JUDGE