



CIVIL PRACTICE AND PROCEDURE

- What to consider when setting aside consent order.
- Courts have power to extend time for making arbitration award.

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

CIVIL SUIT NO. 120 OF 1988

LAWRENCE KINYUA MWAI PLAINTIFF

VERSUS

NYARINGINU FARMERS CO. LTD 1ST DEFENDANT
ZAKARIA NKAABU 2ND DEFENDANT

CONSOLIDATED WITH

HIGH COURT CIVIL CASE NO. 141 OF 1988

LAWRENCE KINYUA MWAI PLAINTIFF

VERSUS

NYARIGINU FARMERS CO. LTD 1ST DEFENDANT
ZAKARIA NKAABU 2ND DEFENDANT

RULING

There are two applications for consideration in this ruling. I will begin by considering the one filed first in time. It is a Notice of Motion dated 29th June 2009. It is filed by Lawrence Kinyua Mwai (Lawrence). It is worth mentioning that there are two suits which were consolidated as can be seen from the title of this ruling. The consolidation was by consent order recorded before this court on 29th November 1989. Now returning back to the Notice of Motion dated 29th June 2009, it seeks the following orders:-

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

Lawrence has filed more than one affidavit in support of that application. In those affidavits, he repeats the same theme. He accused the then presiding judge Oguk J. of wrong doing alleging that he, after these matters were referred to for arbitration, that, he, the said judge, interfered with the arbitration process. Lawrence however did not produce to this court evidence of such interference with this matter. Lawrence further referred to allegations leveled against the said judge of corruption and alleged that the judge had similarly involved himself in wrong doing in these two matters. Again there was no evidence of such wrong doing. It is unfortunate that Lawrence is not legally represented and I do believe if he had legal representation he would not have made the allegations that are now before court. Suffice it to say that I can find no basis for those allegations as it concerns these files and I therefore reject them. Lawrence further sought an order to set aside the order consolidating these two suits. As stated before, the order of consolidation was recorded on 29th November 1989 and the proceedings show that the order was by the consent of the advocates in the presence of the parties. Presumably one of those parties was Lawrence. Lawrence in support of his prayer for separation of these files deponed as follows:-

“That the resident judge and advocates had erred (sic) when they on consent consolidated together these cases without thinking of the plaintiff and overloading him (plaintiff had objected to this).”

In considering that prayer by Lawrence, a case in point is **Flora Wasike Vs. Wamboko** [1982- 88] 1 KA 625 where the Court of Appeal set out the conditions under which a consent order would be set aside. The court held as follows:-

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them.....and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court.....or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement.”

Lawrence in his application failed to show that the consent to consolidate these suits was obtained by fraud or collusion. There is no basis for that prayer to set aside the consent order. In the end, the application dated 29th June 2009 is dismissed with costs being awarded to the defendant Mwambia Nkaabu. The second application is dated 5th May 2010. It is filed by Mwambia Nkaabu. The application seeks an order that the court do extend time for making of arbitration award filed in court on 23rd July 1992. The fact that the award was filed out of time, that is, out of the period of time set by the court was considered by Justice Ouko in this very matter. For clarity, I can do no more than quote from the said judge’s ruling dated 19th February 2009. It is as follows:-

“I confirm that the arbitrator’s award was indeed forwarded and filed on 23rd July 1992. It took three (3) years from the date of the order to the date the award was finally filed instead of four (4) months. The case was, however, mentioned before the judge every so often to monitor the progress of arbitration and each time time was extended.

The last such extension was granted on 16th September 1991 for 90 days i.e. up to 16th December 1991. The award was filed approximately six months after the last order extending time. After the filing of the award, the same was listed two times in 1996 for reading but it was not read, instead there have been applications for all kinds of relief and on several occasions the suit has been set down for hearing.

In terms of Order 45 Rule 1 of the Civil Procedure Rules the time for the making of the award was specified by the court to be four (4) months. The court, however, has power to extend and indeed it did extend that time several times until on 16th September 1991 when the time was further extended to 16th December 1991.

Under Order 45 rule 8(2) the court can either extend time or make an order superseding the arbitration in which case it shall proceed with the suit. The order of 16th September 1991 read as follows:-

“Court

The period for filing arbitration award now extended for 90 days to the 16th December 1991. The Arbitrator to be informed.”

The above order and subsequent orders setting down the suit for hearing, in my view, do not amount to orders superseding the arbitration. The award having been filed is part of the record. Instead of the matter being listed for mention as happened here the parties ought to have moved the court either under Order 45 rule 8(1) or (2) for the extension of time for making the award. The court is also not without blame in the delay in reading the award. As soon as the award was forwarded and filed, under Order 45 Rule 10, the court ought to have given the notice of filing to the parties and where, like in this case, one party (the plaintiff) is not represented by counsel, notice of the filing of the award must specify the date and time for reading of the award. I say no more and hope the parties will move appropriately.”

From that ruling, it is clear that the date of filing the award was extended by the court from time to time but when the award was finally filed in court, the court failed to inform the parties. Order 46 rule 8 (8) of the Civil Procedure Rules provides the court with the power to extend time for making award. That rule provides as follows:-

“46. 8 (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.”

In view of the fact that the order for arbitration was made by the consent of the parties as stated before and because the period of making the award was extended from time to time, I find that the interest of justice demands that the period be extended as sought in the present application. The granting of the extension as sought would in my view be in the spirit of the overriding objective of section 1A of the Civil Procedure Act. I say so because as it is obvious from the title of this ruling these cases have been pending before court for a considerable period of time. The overriding objective of section 1A (1) provides as follows:-

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”

It is with that in mind I grant the following orders:-

- 1. The Notice of Motion dated 29th June 2009 is dismissed and the costs thereof are awarded to Mwambia Nkaabu.***
- 2. The court hereby extends the time for making the arbitration award filed in court on 23rd July***

1992. That award shall be read by this court to the parties on a date to be given at the reading of this ruling.

3. There shall be no orders as to costs in respect of the Notice of Motion dated 5th May 2010.

Dated, signed and delivered at Meru this 17th day of March 2011.

MARY KASANGO
JUDGE