REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL 25 OF 1992

JEREMIAH WANJAU GITHAE ..... APPELLANT

VERSUS

FRANCIS C. N. GITHAE ..... 1ST RESPONDENT

JOSEPH MUNDIA MUCHEMI ..... 2ND RESPONDENT

(Appeal from original Judgment of the Senior Resident Magistrate's Court at Nyeri in Civil Case No. 21 of 1989 dated 17th day of March 1992 by J. S. Mushelle – S.R.M.)

J U D G M E N T

This is an appeal from the ruling of the Senior Resident Magistrate, Nyeri, **J. S. Mushelle** dated 17th March 1992. By that ruling, the learned magistrate refused to set aside the award that had been filed and read to the parties. In the same breath he proceeded to adopt the award as the judgment of the court which in essence meant that the land parcel Iriaini/Chehe/950 hereinafter referred to as the suit premises was to be shared as follows:-

(a) Jeremiah Wanjau Githae, the appellant to get

4.25 acres.

(b) Francis C. N. Githae, 1st Respondent to get 2.75

acres

(c) Joseph Mundia Muchemi, 2nd Respondent to get

1.0 acres

The brief background of the case is that the suit premises initially belonged to **Githae Guthua** deceased. He was the father of the appellant and 1st respondent. The 1st respondent however passed on during the pendency of this appeal. He was not substituted though. Accordingly the appeal as against him has abated. This appeal is thus between the appellant and the 2nd respondent. It would appear that the

deceased father got money from the 2nd respondent on the understanding that he would sell to him a portion of the suit premises. Before doing so however, he applied to Mathira Land Control Board for its consent to register himself the appellant and the respondents as proprietors in common of the suit premises with himself owning 1.5 acres, the appellant 3.5 acres and the respondents 2 and 1 acres respectively. This was on 14th October 1985. Subsequently thereto the parties applied to the Land Control board for the subdivision of the suit premises in terms aforesaid. The consent was given. Prior to that application, the deceased father had divided the land on the ground and shown to each of his two sons, the appellant and 1st respondent the portions he wanted given to them. The appellant acting on their deceased's father's wishes aforesaid began to develop the portion assigned to him by establishing a home thereon. Similarly, though the 1st respondent was living away from home, he nonetheless also planted some tea bushes on the portion of the suit premises intended for him. In the meantime, the deceased 1st respondent sold a portion of the suit premises intended for him to the 2nd respondent who proceeded to obtain title for that portion of the suit premises known as number **Iriaini/Chehe/949**.

The Government Surveyor came to the suit premises with a view to subdividing the suit premises pursuant to the consent obtained. However whilst on the ground, he discovered that the appellant had a portion of the suit premises comprising 4.9 acres. At this juncture the deceased father decided to give the appellant the said portion of the suit premises. The parties then went back to the land control board for another consent and in the process disregarded the earlier consent which was for partition. The consent to have the surveyor pick the boundaries according to how the deceased father wanted the suit premises shared between his two sons was granted on 3rd December 1985. The deceased father authorised the drawing of mutation forms which he signed on 6th November 1985 and new numbers given as **Iriaini/Chehe/1106** and **Iriaini/Chehe/1107**. He also signed transfer forms to that effect. Upon passing on of the deceased father, the respondents tried to alter the boundaries by drawing new mutation forms and causing the land Registrar not to register the name of the appellant as owner of Land Parcel No. **Iriaini/Chehe/1107** by use of the said fake mutation form. To counter these schemes by the respondents, the appellant filed suit in the principal magistrate's Court, Nyeri for:-

"**(a) an order for land title Iriaini/Chehe/50 be**

as mentioned in paragraph 7 1a, 1b, 2a, 2b

and 3.

(b) An order for the Plaintiff be requested (sic)

and obtain a separate title for his portion.

(c) Costs of this suit

(d) Any further or better relief this Honourable

Court may deem fit and grant"

The respondents filed their defence to the appellant's claim. Essentially the respondents denied the appellant's claims. In particular they denied that any false documents were presented to the land Registrar and District Surveyor. On 9th January 1990 the court referred the dispute to a panel of Elders to be chaired by the District Officer, Mathira. On 9th October 1990, the award was read to the parties. The award was in these terms:-

"**..... The Elders recommend that the mutation they had signed all of them which indicates that Jeremiah Wanjau get 3½ acres, Francis C. N. Githae 2 acres and Joseph Mundia Muchemi get one (1) acre should be followed and the land be subdivided among them respectively. Their father Githae Guthua was to get 1½ acres. Since Githae is dead, his portion should be shared equally by**

his two sons, Francis C. N. Githae to get ¾ acre and Jeremiah Wanjau Githae ¾ acre respectively from the land in question – Iriaini/Chehe/950..."

It would appear that the appellant was not happy with the award. Accordingly he filed an application to set the award aside on grounds of misconduct. That application was successfully opposed for on 17th March 1992, **J. S. Mushelle**, the then Senior Resident Magistrate delivered a ruling in which he dismissed the application. He contempreneously also adopted the award as a judgment of the court. Subsequent thereto a decree was issued in terms that the appellant and respondents would get 4.2 acres, 2.75 acres and 1.0 acres respectively out of the suit premises and separate titles deeds to issue forthwith.

Undeterred the appellant moved to this court by way of an appeal against the said ruling and or order. In the memorandum of appeal dated 14th April 1992, the appellant faults the ruling and or order aforesaid on 4 grounds to wit:-

"**1. The trial magistrate erred in law and fact in failing to consider that the award did not follow the evidence as it existed before the panel was consulted (sic).**

2. The trial magistrate erred in law and fact in failing to consider that the arbitrators in arriving at the decision did so without due regard to the wishes of the deceased which said wishes should be respected.

3. The learned magistrate further erred in law and fact by disregarding documentary evidence which evidence was vital in arriving at a fair decision.

4. The learned magistrate erred in law and fact in upholding the award and judgment and order of the elders."

At the hearing of the appeal, the lawyer for the respondent was absent though he was aware of the hearing of the appeal since he had earlier on called the lawyer for the appellant and requested him to have the court file placed aside for a while as he was on his way to court. By 10 a.m., the said lawyer had not pitched his tent. **Mr. Kariithi**, the appellant's lawyer then proposed that the appeal be hard by way of written submissions. He undertook to inform the 2nd respondent's lawyer the date by which such written submissions should be filed in court. The date agreed was 24th April 2009. Come 24th April 2009 and only submissions by the appellant had been filed. As the explanation for the absence again of the lawyer for the 2nd respondent in court and or his written submission was not forthcoming I proceeded to give a date for judgment meaning therefore that I would only act on the written submissions of the appellant. I

have carefully read and considered the same.

Though the learned magistrate delivered a short and terse ruling, he cannot be chastised for it. He specifically stated that "**.... Having fully considered the application by the appellant and reply by the respondent and further having personally gone through the sworn affidavit, I find that this application has no merit."**

Which was the application that the learned magistrate found to lack merit. It was the application to set aside the award filed herein. The appellant had sought to set aside the award and further that the hearing of the case henceforth proceed in open court. In the alternative he sought that the award be remitted back to another panel of elders chaired by the District Commissioner or his appointed officer other than the officer who chaired the arbitration proceedings now challenged. The application was anchored on the grounds that during the arbitration proceedings there was apparent bias against the appellant and that his elders were forced to sign blank pages even before the proceedings proper inspite of his protestation. That the arbitration panel ignored and set aside vital documentary evidence which evidence would have altered the outcome of the award. That the wishes of their deceased father were that he should get 4.9 acres. That the proceedings themselves contain many clerical errors and misrecording of the evidence, which in effect is an error on the face of the record. The bottom line of the appellant's complaint was the apparent misconduct of the arbitrators in respect to the appellant and his elders, the failure to consider his documentary evidence and misrecording of the evidence of the witnesses.

Much as **Mr. Mushelle** should have done a much better job in the ruling considering the submissions made by the respective parties I am nonetheless satisfied that he arrived at the correct decision. In any event I am a first appellate court on whom law has imposed a duty to subject the proceedings of the trial court to fresh and exhaustive evaluation so as to reach my own conclusion as to whether to uphold or upset the decision of the learned magistrate. I have gone through the record and I am satisfied that the panel of Elders cannot be accused of misconduct. There is no evidence that any of the elders was forced to sign blank pages. I do not see how any of the elders would have been forced to sign blank pages in place of the award. The proceedings of the panel of elders clearly show that all the elders were present. The proceedings also show that in reaching its decision, the panel of elders reverted to the documentary evidence tendered by the parties to the dispute. Having considered the documentary evidence tendered, the panel accepted to be guided by some of the documents and rejected some. Some of those rejected were tendered by the appellant. The mere fact that the panel failed to utilise some of the documents tendered by the appellant in reaching the award does not in itself amount to misconduct. Further even clerical errors referred to by the appellant unless deliberate were minor and of no consequence and did not affect the final result. There is no evidence that the clerical errors alluded to by the appellant were deliberate. Clerical errors in documents occur every other day. I am not aware that by merely making a minor clerical error in proceedings that is not deliberate should in itself amount to misconduct.

The arbitration was conducted under the provisions of order XLV of the Civil Procedure rules. Under rule 15 thereof the court may only set aside the award on the grounds of corruption or misconduct of the arbitrators or umpire or where either party has fraudulently concealed any matter which he ought to have disclosed, or has wilfully misled or deceived the arbitrator or umpire. In my view the arbitration was conducted fully and strictly in accordance with the order XLV of the civil procedure rules and there are no grounds on which the award could have been set aside as demanded by the appellant. There was no allegation of corruption among the members of the panel. Though allegations of misconduct on the part of the chair of the panel were bundied around by the appellant, there is not enough evidence upon which the trial court would have upheld that contention. I also do not discern such evidence on record. There was no fraudulent concealment of any material facts. If anything the record shows that everything was put on the table. Finally none of the parties to the dispute could be accused of having wilfully misled or deceived the arbitrators.

For all the foregoing reasons I find no merit in this appeal. Accordingly it is dismissed with no order as to costs.

Dated and delivered at Nyeri this 21st day of May 2009

M. S. A. MAKHANDIA

JUDGE