REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE 161 OF 1991

JULIUS NJUGUNA NJERU ..... PLAINTIFF

VERSUS

MWAURA KIRIMA ..... DEFENDANT

R U L I N G

This Chamber Summons application brought under orders XLV Rule 16 and XLV rule 1 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act seeks to review and set aside the judgment and or order made herein on the 13th June 2003. It also seeks that all orders and or rulings made subsequent to the said judgment be reviewed and set aside as well. The grounds upon which the orders aforesaid are sought are that there was a gross error of law apparent on the face of the record. That the alleged award was adopted as a judgment of the court illegally, improperly and in an irregular manner. Finally that the said judgment cannot stand as it was improperly obtained.

The application was supported by a sworn affidavit of the applicant. In the main he depones that this dispute was first referred for arbitration before the D.O. Kigumo on 27th July 1992. The award was later filed in court and read to the parties on 24th February 1994. An application to set aside the said award was thereafter filed and it was allowed on 31st October 1996. The dispute was once again referred for arbitration a second time by the D.O., Maragwa. To date the award by the D.O. Maragwa has never been filed nor read to the parties. However on 13th June 2003, the previous award which had been set aside as aforesaid was again read to the parties at the instigation of the respondent and adopted as a judgment of the court on the same date which was irregular. It is for this reason that the applicant is seeking for the orders on the face of the application.

In his oral submissions in support of the application, **Mr. Kimani**, learned advocate for the applicant merely expounded on the grounds in support of the application as well as the supporting affidavit.

No replying affidavit or any other papers in opposition to the application were filed by the respondent. However, **Mr. Njiraine**, learned Advocate for the Respondent submitted that on 30th September, 2008 this court made orders in effect adopting the award. The application had thus been overtaken by events.

Having carefully considered the application, the replying affidavit and rival oral submissions, this is my take on the matter. On 27th July 1992 this court referred the dispute herein to arbitration by the D.O. Kigumo by the consent of the parties. The D.O. having listened to the dispute made an award which was filed in court. The award was subsequently read to he parties on 24th February 1994 by **Justice Ang'awa**. Subsequently thereto an application to set aside the award was filed by the applicant. That application was duly heard on 17th October 1996 culminating in the setting aside of the said award on 31st October 1996 by **Osiemo J**. The dispute was thereafter again by consent of the parties referred to arbitration by the D.O., this time for Maragwa pursuant to order 45 of the Civil Procedure Rules. To date the D.O., Maragwa has never tendered his verdict nor filed his award in court. Yet on 2nd April 2003 the advocate with the full knowledge of the above state of affairs proceeded to fix the matter for the reading

of the award on 13th June 2003. On that date the advocate for the respondent was present. There is no evidence however that the advocate for the applicant had been notified of the "reading of the award" by court. The advocate for the respondent deliberately failed to inform the court that the award that the court was about to read had in fact been set aside on application by the applicant. Whether the respondent's advocate's failure to inform the court of that fact was deliberate and intentional is not difficult to fathom. Nonetheless a non-existent award was read and adopted as the judgment of the court on the same day. Alas, even the usual 30 days grace period normally given for a dissatisfied party to raise objections if any, was ignored. The issue at hand is, which award was read on 13th June 2003. Certainly it could not have been the award by the D.O. Maragwa as there was and still no such award filed in this court. It is evidently clear that the advocate for the respondent misled the court into reading the award by the D.O. Kigumo which award had already been set aside on 31st October 1996. The advocate for the respondent cannot feign ignorance over this issue for as late as 25th September 2007, he had addressed a letter to the District Officer, Maragwa and copied the same to this court. In pertinent paragraphs he wrote "**..... The Dispute in the above case was referred to your office by the Hon. Court on 31.10.96 and the award was to be filed within 60 days. A referral order was sent to you by the court on 23.1.97. Since then the case has been severally mentioned in court with a view of reading the award and has been adjourned as the D.O's award has never been received by the court. From the information received from our client they appeared before the D.O. with their witnesses and the dispute was heard ..... On further checking with the court file we confirmed that no award has been filed. Our client wishes to have his case finalised the earliest possible but cannot do so due to delays from that end .....**"

From the above it is quite clear that the respondent and his advocate knew very well that the award upon which they would have moved the court to have it read and adopted as a judgment of the court had never been filed. Yet much earlier they had misled this very same court into reading a non-existent award. The same having been set aside previously. There is therefore clearly an error apparent on the face of the record. For that reason, I would allow the application dated 28th June 2007 in its entirety. Because, the advocate for the respondent actively participated in misleading the court in to acting on a non-existent award and for that mischief, I order that he pays personally the costs of this application.

Dated and delivered at Nyeri this 11th day of May 2009

M. S. A. MAKHANDIA

JUDGE