REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Appeal 60 of 2004

JUANINA WANJIRU MUCHOKI……..APPELLANT

VERSUS

MARY MUTHONI WANYOIKE)

ANNA OUMA)…….....……RESPONDENTS

FREDRICK OUMA)

(From original ruling of the Resident Magistrate's Court at Murang'a (G.P. NGARE) in P.M.C.C. NO.45 OF 1994 dated 4th June, 2004.)

J U D G M E N T

This appeal arises from a ruling of the learned Magistrate in the Senior Principal Magistrate's court at Murang'a in Civil Suit number 45 of 1994 – **Juanina Wanjiru Muchoki VS Mary Muthoni Wanyoike & Anor**. The ruling was delivered on 4th June, 2004.

What are the facts leading to this appeal? The appellant who was the plaintiff in the subordinate court had sued the respondents, then defendants claiming:-

"**(a) The illegal subdivision of land parcel No.LOC.17/SABA SABA/743 be declared a nullity.**

(b) The transfer of LOC.17/SABA SABA/T321 be also declared a nullity.

(c) Land parcels No.LOC.17/SABA SABA/743 AND LOC.17/SABA SABA/T.321 be shared equally between the two houses of the plaintiff and Wacheke Muchoki.

(d) Costs and interest of the suit.

(e) Any other or better relief this Honourable Court may deem fit and just to grant."

The respondents filed a defence to the appellant's claim in which they essentially claimed that the family land was properly subdivided and that the plaintiff had refused to collect her title deed for no apparent reason.

The trial court having listened to the case on 3rd May, 2001 did refer the dispute to arbitration before the District Officer, Makuyu pursuant to Order 45 of the Civil Procedure Rules. The award was to be filed in court within 60 days from the date of reference. However it was not until 21st February, 2002 that the District Officer filed with the court the award. The said award was then read to the parties on 22nd march, 2002. Any aggrieved party was given 30 days within which to file any objection if at all. It would appear that the appellant was satisfied with the terms of the award and therefore opted not to challenge it. However the respondents were not happy with the award and instead of filing an application to set aside the same within 30 days as required, they did so on 17th May, 2002 close to two months after the award was read by the court to the parties as aforesaid. This was way out of time and no application for leave to file the objection out of time was ever made by the respondents. That application to set aside was one of the applications that came up for hearing before the learned Magistrate on that day. There was yet another application which confronted the learned Magistrate on the same date. This was the application by way of chamber summons dated 25th June, 2006 by the appellant for the court to enter judgment in terms of the award. The learned Resident Magistrate heard the two applications simultaneously and on 4th June, 2004 rendered the ruling that is the subject of this appeal. In his ruling, the learned Magistrate ruled that:-

"…**1) The award made herein be and is hereby set aside.**

2) The matter do proceed for hearing afresh.

3) The costs be in the cause……"

As already observed, this ruling spurred this appeal. Through **Messrs R.M. Kimani, advocate**, the appellant faults the ruling by the learned Magistrate on the following five (5) grounds namely:-

1. "The learned resident Magistrate erred in law in failing to appreciate the undisputed fact that the application to set aside was filed outside and after the stipulated and mandatory period of 30 days as provided in law.

2. The learned Resident Magistrate erred in failing to see that no leave was obtained to lodge an objection to the award out of time.

3. The learned Resident Magistrate erred in refusing to enter judgment as per the arbitration award whereas there was no objection filed against the award within the prescribed time.

4. The learned Resident Magistrate erred in law in upholding there was corruption by the arbitrator which allegations had not been proved.

5. The learned Resident Magistrate misdirected himself as to the issue of the nature of the award and the period of filing the same in court."

When the appeal came up for hearing both **Mr. Kimani** for the appellant and **Mr. Irungu** for the respondent opted to have the appeal heard by way of written submissions. Respective parties filed their written submissions which I have carefully read and considered.

At the hearing of the applications the appellant took the position that the respondents' application was incompetent and misconceived having been filed out of time and without leave. It was therefore immaterial whatever merit the application may have had; the same could not be entertained as it was not properly before the court.

On the other hand the respondents took the position that the award itself having been filed out of time, it was void abtitio and it matters not at what stage the application to set aside is made.

When the learned magistrate referred the dispute to arbitration, it was out of her own motion.

According to the respondents this was irregular since order 45 of the civil procedure rules contemplates an express agreement for referral by both parties. That the court cannot on its own motion refer parties to arbitration. There was therefore no valid reference to arbitration in this case. The respondents may have a case here. However having fully participated in the arbitration process without raising the issue, I think they are now estopped from raising it now. It was entirely within their powers to object to the arbitral proceedings. They did not and should therefore suffer the consequences.

The only problem I have with the award is that on 3rd May, 2001, when the learned Magistrate referred the dispute to arbitration, she directed that the award be filed within 60 days from the date of reference. That would have meant that the award be filed in court on or before 3rd July, 2001. Indeed the learned Magistrate did set the case for mention on that date presumably with a view to establishing whether the award would have been ready and filed in court.

Come that day and the award was neither ready nor filed in court. With the consent of the parties, time for the filing of the award was extended for a further 60 days meaning that the award was to be filed latest by 3rd September, 2001. Again on this date the award was not ready and the matter was stood over to 27th September, 2001 for mention. This time around no extension of time was sought nor granted. The award again was not ready. It was not until 22nd march, 2002 that the award was read out to the parties. From this synopsis of the court record, it is clear that the award was filed and read out to the parties out of time. None of the parties after 24th September, 2001 sought the extension of time within which the award could be filed in court. The award as filed therefore is a nullity. Indeed the court of appeal in the case of **Maina V Ngonyoro & Anor. (1986) KLR 489** commenting on the issue delivered itself thus:-

"…..**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 making of the award the award was a nullity….."**

If the award itself is a nullity, it remains so and it does not matter whether an application to set it aside is made in time or not.

Again in the case of **Nyangau V Nyangwara, (1986) KLR 712,** the court of appeal observed that an arbitrator should not proceed with an arbitration outside the allowed time without seeking for an extension of time. Contrary to the submissions of the learned counsel for the appellant it was not initially wrong for the lower court to purport to hear and determine the respondents' application. The award was a nullity for want of time. As it was a matter that goes to jurisdiction and we all know that jurisdiction is everything, it did not matter at what stage it was raised. As correctly observed by the learned Magistrate,

"…..**The arbitrator did overstep the referred order and the same bring (sic) a nullity, the issue of seeking, leave by the applicant does not arise…."**

I think I have said enough to show that this appeal has no legs to stand on. Accordingly it is dismissed with costs to the respondents.

Dated and delivered at Nyeri this 11th day of February, 2008.

M.S.A. MAKHANDIA

JUDGE