

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 114 of 1991

MONICA NJOKI NDEGWA PLAINTIFF/APPLICANT

VERSUS

1. MARY WANJERI KAGUONGO

2. PETER KARANI KAGUONGO

3. BEN MARU MWENJE.....DEFENDANTS/RESPONDENTS

RULING

The Notice of Motion dated 30th July 2007 seeks the review of the order of this court dated 6th July 2007. The background of that application is that the court heard a Chamber Summons dated 4th June 2001 seeking that judgment be entered in terms of Tribunal Award. That Tribunal Award had ordered a transfer of half share of the suit property to the applicant and that the plaintiff be ordered to sign the necessary documents. On 6th July 2007 the court granted the prayers that were sought. The ruling of that date is the subject of the present application. The plaintiff/applicant's advocate argued that the orders contained in that ruling had an error apparent on the record. He prayed that the court would order that the arbitration which was made a judgment of this court be set aside. Having set aside that the court do order that the suit to proceed for hearing. The argument of the applicant was that the parties agreed to refer the matter to Kirinyaga Land Disputes Tribunal and in so doing failed to set a time within which the award was to be read. The counsel referred to Order XLV Rule 1 which provides *that parties to a suit may refer a matter to arbitration*. He also referred to Sub-rule 3 which provides that *time for the hearing of the arbitration and the reading of the award ought to be stated*. That the fact that the parties when they consented to the matter being referred to arbitration failed to set a time period made the award a nullity as per that sub-rule. In this regard counsel relied on the case of *Mairi v Ngonyoro "B" & another [1986] KLR*. In that case it was found that an arbitration which had been filed out of time was a nullity. By this court's ruling the advocate argued that the court in finding that the award had not been filed and in making it a judgment of this court denied the parties the opportunity to seek to set aside that award. In support of that argument counsel relied on the case of *Wachira v Ndanjeru [1987] KLR*.

“The trial magistrate had misunderstood the process of passing judgment upon an arbitrators’ award as provided by the Civil Procedure Rules order XLV rule 16. He ought to have allowed 30 days from the date of notifying the parties of the award. The trial court had no jurisdiction to pass judgment under rule 17 because 30 days had not passed. The trial magistrate had merged the award of the arbitrators with his judgment. There was therefore no longer an award which was capable of being set aside as the appellant had sought to do”.

Counsel submitted that the adoption of the award as judgment of this court was an error apparent on the record. In opposition to that application the defendant/respondent argued that the applicant ought to have appealed against the order if she was aggrieved.

In considering the application before court I am inclined to agree with the respondent. I am of the view that if the applicant was aggrieved by the order of 6th July 2007 she ought to have filed an appeal. Essentially what the applicant is arguing is that the court misapprehended and wrongly applied the law. That being the case the right course to have taken would have been to appeal against the court's finding. I am in this regard going to borrow the words of *Justice Ringera (as he then was) in HCCC Milimani No.*

“I don’t see that the alleged errors here can be corrected by way of review. I am tempted to say that although the plaintiff’s application has a face of a review application, it has a heart of appeal.”

This court found that the parties had consented to the matter being referred to arbitration and further found that the parties had not neither had the court imposed a time period within which the arbitration was to be undertaken and the award was to be filed. On that basis the court entered judgment as per the award. Accordingly the Notice of Motion dated 30th July 2007 is hereby dismissed with costs being awarded to the respondent.

Dated and delivered at Nyeri this 5th day of March 2008.

MARY KASANGO

JUDGE