



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NYERI**

**Civil Appeal 74 of 1999**

**GATUMBO KIRIGE ..... APPELLANT**

**VERSUS**

**LEONARD KUNGA KABUITU ..... RESPONDENT**

*(Appeal from the original ruling and orders of the Principal Magistrate's Court at Nyeri in Civil Case No. 229 of 1983 dated 15<sup>th</sup> October 1998 by Mr. J.S. Muchelle – P.M.)*

**J U D G M E N T**

The appellant has brought this appeal against the ruling and order of **J. S. Mushelle**, the then principal magistrate delivered on 16<sup>th</sup> October 1998 in which he dismissed an application seeking to review the earlier order of 16<sup>th</sup> December 1997. In short and terse ruling, the learned magistrate delivered himself thus:

“..... This is a ruling into (sic) an application dated 19.8.98. It seeks orders that the judgment entered in terms of the award be reviewed and set aside. I have fully considered the applicant's application. I have also considered the reply by the Respondent. I have further considered the award. It is the finding of this court that the applicant's application has no merit.

**ORDERS:**

**(i) The applicant's application dated 19.8.98 is hereby dismissed.**

**(ii) Costs of application to the Respondent .....**”

That ruling provoked the instant appeal. The appellant has faulted the learned magistrate on the following grounds:-

- 1. There were good grounds to warrant review of the orders of 16<sup>th</sup> December 1997 and the learned magistrate erred in law in not so holding.**
- 2. The arbitration award was null and void as time to file the same had not been extended and the learned magistrate erred in law in not so holding.**
- 3. The arbitration award was null and void in that there was no consent from the parties to have the matter referred to arbitration and the learned magistrate erred in law in not so holding.**

**4. The arbitration award was null and void in that it awarded the suit land to the defendant when the provisions of the land Control Act had not been observed and the learned magistrate erred in law in not so holding.**

**5. The learned magistrate erred in law and in fact in giving his decision in the matter which decision did not indicate the reasons for the holding.**

When the appeal came up for hearing, **Ms Mukuha** and **Mr. Nganga**, agreed that the appeal be heard by way of written submissions. Subsequent thereto parties filed and exchanged respective written submissions which I have carefully read and considered.

The first ground of appeal is to the effect that the matter was referred to arbitration on 17<sup>th</sup> June 1986 without the consent of the parties. In other words, the court on its own motion referred the matter to arbitration. I do not think that, that complaint is born out by the record. The order referring the matter to arbitration made by **E. B. Achieng** on 15<sup>th</sup> May 1989 was couched in the following terms:

**“..... By consent stood over generally. Costs in cause. By consent the current D.O. Ndia to hear the matter afresh on similar terms as before. The award within 90 days mention 14.8.89.....”**

From the foregoing, it is quite clear that the reference to arbitration was made with the consent of the parties concerned and not by the court on its own motion as claimed by the appellant. Then there is the allegation that the arbitration award was null and void as the same was allegedly filed out of time. I think that the appellant has a valid point here. The record supports the appellant’s contention. Between 15<sup>th</sup> May 1989 and 19<sup>th</sup> November, 1996 when the award was read out to the parties there had been intermittent and uncoordinated extension of time within which the award was to be filed. At times the parties were to blame for the failure to have the award filed and read. They would fail to turn up forcing the learned magistrate to adjourn the matter severally. I am aware that in the case of **Francis Lumakali & 4 others v/s Felix Tabalia & 23 others, (unreported)**, the court of appeal said that **“..... The award the subject Matter of this appeal was filed out of time. There was no application for extension of time as provided under Rule 8 (1) of order 45 of the Civil Procedure Rules. The award filed in the superior court was not a valid award. It was a nullity.....”**

The record here shows that the last extension of time was granted was on 26<sup>th</sup> March 1990 when time for the filing of the award was extended to 30<sup>th</sup> April 1990. Between then and 19<sup>th</sup> November, 1996 when the award was finally read out to the parties, there had been no extension of time. We are talking here of a total period of over 6 years. Clearly the award was a nullity since no time extension was sought or granted as per the provisions of order 45 rules 3 & 8 of the Civil Procedure Rules.

This issue is sufficient to dispose of this appeal. I need not consider the other grounds of appeal therefore. In my view the learned magistrate ought to have allowed the application and nullified the award. In the end I have come to the conclusion that this appeal has merit and it is for allowing. I therefore allow the appeal and set aside the ruling and order dated 10<sup>th</sup> June 1997 and substitute therefor with the order allowing with costs the application dated 19<sup>th</sup> August 1998. In the interest of justice I would direct that the suit be heard in court in the normal manner.

***Dated and delivered at Nyeri this 30<sup>th</sup> day of June 2008***

**M. S. A. MAKHANDIA**

**JUDGE**

Delivered by Hon. Lady Justice Kasango this 30<sup>th</sup> day of June 2008

**MARY KASANGO**

**JUDGE**