



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

Succession Case 75 of 2000

IN THE MATTER OF THE ESTATE OF MUKINDIA MUGUIKA DECEASED

SILAS MBAYA M'MUKINDIA PETITIONER/RESPONDENT

VERSUS

GLADYS REGERIA NJIRU.....1ST APPLICANT

STANLEY NKONGE.....2ND APPLICANT

HARRIET KANUGU NKONGE.....3RD APPLICANT

KINOTI MBAYA.....4TH APPLICANT

MUGAMBI MBAYA.....5TH APPLICANT

MUTWIRI MUKINDIA.....6TH APPLICANT

RULING

1. The Notice of Motion dated 15.4.2003 seeks Orders under Order XLV Rule 15 of the Civil Procedure Rules that the award filed in court and read to parties on 31.3.2003 be set aside and the dispute be heard and determined by a different arbitrator or by this court. The grounds on the face of the Application are that;

(a) That the arbitrator is guilty of misconduct in the manner the arbitration was conducted.

(b) That the misconduct on the part of the arbitrator resulted in a bad decision which is irregular and unreasonable.

(c) That the Award as filed is bad in law.”

2. I note that the order referring the dispute to arbitration was made on 14.10.2002 and that order was to the effect that the arbitrator would be the District Officer, Abothuguchi West Division. The matter was heard by the arbitrators and the award as read to parties in court was that the Applicant would be awarded a ¼ (quarter) acre of land out of the 9.3 acres of land comprised in the estate of the late Mukindia Mugwika. The Applicant now says that the conduct of the arbitrator was irregular because he allowed elders to sit with him and yet one of them had a vested interest in the matter because he had bought part

of the disputed land. Further that another elder had testified in support of the Respondent which was an irregular and unlawful. The last complaint is that the elders who participated in the decision did not sign the award as required.

3. On his part, the Respondent, Silas Mbaya M'Mukindia in his Replying Affidavit sworn on 20.5.2003 denies that there was anything improper about the process leading to the award and depones that each party was heard and the arbitrator conducted himself properly. He denies that any elder had an interest in the dispute or the land in issue and instead shifts blame for the continuing disagreement over the sharing of the land, on one Stanley Nkonge, a son-in-law of the original 1st Applicant who he says has vowed to get a large share of the Land.
4. I heard submissions by advocates representing the parties and they are in line with the rival issues I have summarized above. On my part since the Applicant has invoked Order XLV Rule 15 of the Civil Procedure Rules, that is the place to start.

It provides as follows:

“(1) The court may set aside an award on the following grounds only-

(a) corruption or misconduct of the arbitrator or umpire;

(b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has willfully misled or deceived the arbitrator or umpire.

(2) where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit”.

5. Since counsel for the Respondent objected to the invocation of this Rule, I may as well deal with that issue first. Rule 63 of the Probate and Administration Rules Provides as follows:

“(1) Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the Civil Procedure Rules, namely Orders V, X, XI, XV, XVIII, XXV, XLIV and XLIX, together with the High Court (practice and procedure Rules, shall apply so far as relevant to proceedings under these Rules.

(2) Subject to the provisions of the Act and of these Rules and of any amendments thereto the practice and procedure in all matters arising thereunder in relation to intestate and testamentary succession and the administration of estates of deceased persons shall be those existing and in force immediately prior to the coming into operation of these Rules.

6. The Rule is not a complete ouster of the Civil Procedure Rules and my view is that when Kasanga Mulwa J. referred the dispute herein to arbitration, the only known procedure for doing so would be Order XLV of the Civil Procedure Rules and since parties followed the order and submitted themselves to arbitration, then a dissatisfied party can only approach the court using Order XLV rule 15 aforesaid and to that extent and invoking the first part of rule 63 above, then Order XLV Rule 15 is applicable in the special circumstances of this case. If I am wrong then Under Rule 73 of the Probate and Administration Rules, this court is obligated to hear all disputes of a Succession nature for the ends of justice and to prevent abuse of the process of court. I am properly seized of the matters now arising and so I shall return to Order XLV rule 15.
7. That Rule is limiting in that only the grounds cited in it may be used to set aside an award. Rule 19 is specific and mandatory that **“An Application under Rule 15 shall be served on the**

arbitrator or umpire.” In this case that was not done and the Applicant has met her first hurdle.

8. The operative words in Rule 15 include **“Corruption and misconduct”** on the part of the arbitrator and **“concealment”** of matters that ought to have been disclosed or **“willfully misleading”** or **“deceiving”** the arbitrator. In this case, I am told that the arbitrator **“Misconducted”** himself and that fact led to an irregular award.
9. **“Misconduct”** is defined as **“incorrect or erroneous conduct”** (Oxford Dictionary of Law 5th ed, Oxford University Press 2002). I have seen the proceedings sent to court by the arbitrator Peter O. Orora. Each party’s evidence is recorded meticulously and the evidence of the witnesses too. I note that one of the witnesses was John Muriithi recorded as a clan elder who testified for the Respondent Silas Mbaya. Another elder who testified for him was Daniel Mureithi. On the part of the original Applicant, Monica Muthoni, now deceased and two elders testified viz Moses Kinoti and Justus Buuri. The Assistant Chief of the area, Julius Kimathi Mugambi testified as an independent witness and took the side of the original Applicant Monica Muthoni. I see at page 6 of the arbitration proceedings that the arbitrator noted as follows;

“After lengthy deliberations by all present, it was felt that a few elders should be chosen from the larger group to remain behind with the chairman/DO to make the final arbitration.....”

Silas Mbaya objected to Stanley Nkonge’s presence while Harriet bitterly objected to Mr. John Muriithi’s presence. It was finally resolved that the following be the ultimate arbitrators.

1. **Daniel Murithi M’lithire (for Silas Mbaya)**
2. Justus Buuri – (for Monica Muthoni)
3. Julius Mugambi – Assistant Chief”.
4. **Peter Orora – D.O. chairman”.**

10. Clearly the complaint that John Muriithi sat in the decision making panel is misguided and unsupported by the record. It also would seem that all the objections above i.e. against John Muriithi and Stanley Nkonge were upheld and the parties agreed on those to make the final decision. What is surprising is that the two elders who were chosen by the parties i.e. Daniel Muriithi and Justus Buuri had been witnesses in the same proceedings and after they made their statements and were intensely cross-examined, they returned in the new roles of elders assisting the arbitrator. They cannot have been acting bona fide and the arbitrator should not have allowed them into the inner sanctum of his arbitration. It is reasonable and is common sense that a witness cannot end his testimony and then ascend the steps to go and be a Judge in the same cause. Granted, each side is guilty of doing so but it does not matter because the arbitrator as an independent arbitrator should not have allowed it to happen in the first place. To have done so as he did renders his decision irregular and influenced by partiality on the part of those he chose to assist him. The process of decision-making is as important as the decision itself.

11. The actions of the arbitrator fit the definition of misconduct, it being **“incorrect or erroneous conduct.”** It also amounts to corruption of his thought and decision making process when he allowed one-sided persons to sit and purport to make an impartial decision based on evidence before them.

12. What I am saying is that the Applicant has properly bought her complaint under Order XLV Rule 15 (1) (a) and the order of setting aside of the award is merited. Accordingly prayer 1 of the Application dated 15.4.2003 is granted as prayed.

13. Costs shall however be in the cause as no party is to blame for the errors in the arbitration process.

Orders accordingly.

Dated, signed and delivered in open court at Meru this 20TH . Day of February 2007

ISAAC LENAOLA

JUDGE

IN PRESENCE OF

Petitioner present .

Mr. Gitonga holding brief for Mr. Karuti Advocate for the Objectors/Applicants.

ISAAC LENAOLA

JUDGE