



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Civil Case 23A of 1991

BERNARD KARWERU GATHURI alias

KARWERU KITHURI RUKENYA.....APPLICANT

VERSUS

1. JOYCE WANGARI

2. STEPHEN KAMAU MURIMI...RESPONDENTS/PLAINITFFS

SAMUEL MURIMI RUMURU.....1ST DEFENDANT

FRANCIS KARANI GITHURI.....2ND DEFENDANT

R U L I N G

By a notice of motion dated 6th November 2000 brought under order XLV rule 15 and 9 of the Civil Procedure Rules Bernard Karweru Gathuri alias Karweru Kithuri Rukenya (hereinafter referred to as the applicant) seeks to have the arbitration award filed and read in court on 6th October 2000 set aside and that the court proceeds to hear and determine the case.

The application is premised on the grounds that: -

- 1.) ***The arbitrator refused the applicant to testify during the arbitration.***
- 2.) ***The arbitrator made a decision in respect of land parcel Mwerua/Mukure/921 which was registered in the name of the deceased Francis Karani Githuri, without any substitution of the deceased.***
- 3.) ***The arbitration award was filed out of time.***
- 4.) ***The arbitrator misconducted himself by dealing with matters which were resjudicata.***
- 5.) ***The arbitrator awarded land belonging to the Applicant to strangers.***
- 6.) ***That the arbitrator used Kiswahili language during the proceedings, a language that the applicant was not well versed with.***

The applicant has also sworn a supporting affidavit in which He depones that although according to the consent order referring the suit to arbitration the award was to be filed within 90 days from 9th June 1999 the award was only filed in court on 3rd February 2000 which was well out of time.

The applicant further maintained that the arbitrator misconducted himself by refusing to allow the applicant to testify. The applicant also contends that the arbitrator misconducted himself first by proceeding with the arbitration notwithstanding the fact that 3rd Defendant was deceased and had not been substituted and further by distributing the 3rd Defendants land without regard to the law of transmission on death. The applicant also averred that the arbitrator misconducted himself by giving his land to strangers.

Stephen Kamau Murimi the 2nd Respondent has sworn a replying affidavit opposing the application. The Respondents contend that there is no compelling ground to warrant the setting aside of the arbitration award and that the application is only intended to deny the Respondents from enjoying the fruits of their judgment as awarded through the arbitration. It is maintained that no land was awarded to strangers as the matters of beneficiaries was well canvassed and no bias or prejudice was exhibited against the applicant or anyone else.

Mr. Wahome Gikonyo who appeared for the applicant submitted that the 3rd Defendant died on 29th September 1999 during the pendency of the arbitration proceedings, and that there having been no substitution done in respect of the 3rd Defendant the arbitrators misconducted themselves by proceeding with the suit and making a finding touching on the 3rd Defendant's land.

Mr. Wahome has also submitted that the award was filed well outside the period of 90 days which was given in the referral order, and no extension of time having been granted, the award was a nullity. Relying on the case of Nyangau v/s Nyakwara [1986] KLR 712 Mr. Wahome submitted that the award was made without jurisdiction. It was also submitted that the arbitrators misconducted themselves in reviving issues which were conclusively determined in previous suits. Finally it was submitted by Mr. Wahome that the applicant was not given an opportunity to be heard and was therefore condemned unheard.

Mr. Gori who appeared for the Respondents submitted that there was no serious misconduct on the part of the arbitrators to warrant the setting aside of the award. He denied that 3rd Defendant was dead by the time the award was made. He maintained that in any case the interest of 3rd Defendant were taken care of in the award.

He submitted that the applicant was estopped from raising the issue of res judicata as the reference to arbitration was by consent of both parties. He further contended that the previous suit related to a different land parcel than that which was in dispute in this suit. He maintained that the fact that the award was filed out of time did not make it fatal as the arbitration was concluded on 8th October 1999 which was within the 90 days. Finally he submitted that the applicant was given an opportunity to testify but refused to do so and therefore has only himself to blame.

From a death certificate which is part of the court record, it is evident that the 3rd Defendant died on 29th September 1999. The arbitration proceedings and award which were filed in court are dated 8th October 1999. In effect therefore the proceedings were conducted after the death of 3rd Defendant. Interestingly however at page 3 of the proceedings it is noted that the 3rd Defendant could not participate since he was already sick and absent minded person. That could not have been the correct position given the date of death reflected in the certificate. But even if that were so, the correct approach would have been to have a guardian ad litem appointed on behalf of 3rd Defendant to proceed with the suit on his behalf. To this extent therefore I would concur with the applicant that the arbitrators misconducted themselves in proceeding with the matter without proper representation on behalf of the 3rd Defendant.

It is also evident that the arbitration award was filed in court on 3rd February 2000. Contrary to the submissions made by Mr. Gori, the order of 9th June 1999 referring the suit to arbitration was explicit that the award was to be filed in court within 90 days from that date. It is not therefore the date the arbitration was finalized that is material, but the date of filing the award. In this case, the award was filed long after the 90 days period. I have perused the court file but have not come across any order extending the time for filing the award. I concur with Mr. Wahome Gikonyo that the arbitrators had no jurisdiction after the period of 90 days and the award filed after the 90 days period was therefore a nullity.

As regards the issue of res judicata I concur with Mr. Gori that the reference to arbitration having been made by consent the applicant is estopped from raising this issue which in any case was canvassed before this court earlier unsuccessfully as a preliminary issue.

I further do not find any substance in the applicant's allegation that he was denied an opportunity to testify or that proceedings were conducted in a language which he was not familiar with. It is evident that the applicant participated in the arbitration proceedings by extensively questioning the witnesses. I find that he was not denied an opportunity to testify but he is the one who opted not to do so.

The upshot of the above is that I find that the arbitrators misconducted themselves in entertaining the matter in the absence of the 3rd Defendant, and that the award is also a nullity as the same was filed out of time.

Accordingly I do allow the Notice of motion dated 6th November 2000 set aside the award filed and read in court on 6th October 2000 and order that the suit do proceed for hearing and determination before this court.

Dated signed and delivered this 15th of February 2007.

H. M. OKWENGU

JUDGE