



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 92 of 1999

BEATRICE KATHUNI.....APPELLANT

V E R S U S

IRENE GATABI.....1ST RESPONDENT

LUCY KIENDE.....2ND RESPONDENT

JOEL CHAKU.....3RD RESPONDENT

DAVID MWIRIGI.....4TH RESPONDENT

J U D G M E N T

1. This Appeal arises from a Ruling delivered on 14.7.1999 by Hon. David K. Gichuki, Senior Resident Magistrate delivered within CMCC No. 12477 of 1997. The Ruling is quite brief and I deem it proper to reproduce it in full. It reads as follows:-

“Having considered the application dated 5.10.1998, the issues raised in support of the application by Miss Mwangi, the issues raised against the application by Mrs Ndorongo and Mr. Ondieki. I find that the failure to serve the D.O. with the application alone would lead the application to fail. Secondly referral was by consent and no issues were framed – hence a party who was a party to a consent order cannot come round and challenge such consent. On these two main grounds, I find that the application would fail. I dismiss the same with costs to the Respondents.

Orders entered accordingly.

DAVID K. GICHUKI

SRM.

14/7/1999”

2. The Appellants were unhappy with it and instituted this Appeal on 16.7.1999 and on the following grounds that:-

- 1) The Learned Senior Resident Magistrate erred in Law and fact in not setting aside the elder’s award

when it was clear that the elders had no jurisdiction to entertain the suit.

- 2) The Learned Senior Resident Magistrate erred in law and fact in not setting aside the elders award which was a nullity ab-initio.
- 3) The Learned Senior Resident Magistrate erred in law and fact in not finding that there was no award or at all.
- 4) The Learned Senior Resident Magistrate erred in law and fact in not setting aside the elders award when it was clear that the appellant was not allowed to ask questions.
- 5) The Learned Senior Resident Magistrate erred in law and fact in not setting aside the elders award despite the fact that the claim of the respondent was not stipulated and also the arbitrator went beyond his jurisdiction.”

3. Before turning to the arguments made in the Appeal, a brief background of the dispute is necessary;

4. The Appellant was the 3rd Defendant in CMCC No. 1247/1999(Meru) which had been instituted by the present Respondents as co-Plaintiffs and the claim centered around land parcel number Nkuene/Uruku/804 which originally belonged to Mwobobia Mungania (deceased). All the parties to the suit in the lower court and the present Appeal claimed beneficial interest to that land.
5. On 27.5.1998 the record of the lower court reads as follows:-

“Before D.K. Gichuki – S.R.M.

Plaintiff present

Defendant present

C.C. Karemu English – Kimeru

Mrs Ndorongo for plaintiff – present

Mr. Ondieki for defendant – present

Mrs Ndorongo

The 1st and 2nd plaintiff are children of the deceased son of 2nd defendant. The 3rd defendant is daughter of 2nd defendant. The 1st and 3rd defendant are children of 2nd defendant. I am applying that the matter be referred for arbitration before the D.O. at Nkubu. Award be filed within 30 days.

D.K. Gichuki

S.R.M.

27.5.1998

Mr. Ondieki

I have no instructions to refer matter for arbitration. We have agreed.

D.K. Gichuki

S.R.M.

27.5.1998

Court

By consent, case be referred for arbitration before D.O. Nkubu. Each side to appoint two elders who will seat with D.O. Each side to call all the witnesses they would wish to call. Award be filed in court within 90 days. Mention on 26.8.1998. In the meantime all parties to maintain the status quo as it exists today. Costs in the cause. Orders entered accordingly.

D.K. Gichuki

S.R.M.

27.5.1998”

6. Pursuant to that order the matter was referred to arbitration and the award was read to parties on 9.9.1998 and the award was in these terms:-

“**Award**

The Panel felt that the beneficiaries should be awarded as below

PARCEL NO. NKUENE/URUKU/804

Irene Gatabi and Lucy Kiende 1.8 Acres

Josphat Minenge 3 Acres

Davide Mwirigi 1.7 Acres

Karimi Mwobobia 1 Acre

Joel Chaku 0.5 Acre

PARCEL NO. NKUENE/URUKU/286

Irene Gatabi and Lucy Kiende 1.03 Acres

David Mwirigi 1 Acres

Beatrice Kathuni 1 Acres “

7. On 5.10.1998, the Appellant filed a Notice of Motion under Order XIV Rule 15 of the Civil Procedure Rules for orders that the award be set aside for reasons that the arbitrator misconducted himself and the misconduct as distilled from the Supporting Affidavit sworn on 5.10.1998 is that:-

(a) that the elders who sat with the arbitrator and purportedly chosen by the Defendants were in fact not so chosen by all the 4 Defendants.

(b) That the present Appellant was not allowed to put questions to any of the witnesses.

(c) That the Arbitrator “**had some association with the Plaintiffs because after the hearing the Plaintiffs were left talking to him.**”

(d) That at no time did the Defendants present evidence.

8. The arguments in that Application led to the Ruling reproduced above and which is the subject of appeal.

9. Both Mr. Ondieki for the Appellant and Mrs. Ndorongo for the Respondent made useful submissions similar to those made before the lower court and Mr. Ondieki relied on the decision in Bagwasi Nyang'au vs Omosa Nyakwara (1982 – 1988) I KAR 805 to urge the point that where the arbitrator misconducts himself, then the proceedings before him have to be nullified.

10. I have elsewhere above reproduced the order sending the dispute for arbitration. The Appellant in the lower court and in this court has argued that she never consented to such an action and did not participate in the arbitration proceedings. That argument was rejected by the lower court and my own evaluation of it leads one to the conclusion that it is a pedestrian and less than candid proposition. I say so, with respect, because Mr. Ondieki who argued this Appeal was present and represented the Appellant when the order was made by consent and is recorded as saying that although he had no instructions, he was agreeable to the matter going for arbitration. The consent order was then recorded and on 26.8.1998 the said Mr. Ondieki appeared and is recorded as stating;

“ I pray for mention on 9.9.1998. Period of filing be extended.”

11. On 9.9.1998, he is recorded as saying:-

“We have agreed with Mrs. Ndorongo that award be read”

12. On all the occasions starting from the 27.5.1998, the Appellant as a co-Defendant is recorded as being present and clearly participated in the proceedings in court and knew what was going on but I see no record that either her advocate nor herself ever complained that they were not party to the arbitration or that they had a problem with it.

13. Another pointer to the lack of good faith on the part of the Appellant is that she is recorded as having given evidence before the Arbitration panel on 30.6.1998 and her evidence is meticulously recorded. If she had misgivings about the arbitration, why did she actively participate in it? The only possible reason for her change of tact is the final award which reduced the land she was entitled to and not any misconduct on the part of the arbitrator as she alleges.

14. Picking up on the subject of the Appeal itself, it is argued that the elders had no jurisdiction to entertain the dispute. This argument cannot hold any water because the Appellant in the Application dated 5.10.1998 invoked Order XLV Rule 15 of the Civil Procedure Rules.

That Rule provides as follows:-

“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.”

15. The invocation of that Rule would necessarily mean that the Appellant accepted that the arbitration was by order of court under order XLV Rule 1 which provides as follows:-

“Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, that may, at any time before judgment is pronounced, apply to the court for an order of reference.”

16. In this case, the order referring the matter to arbitration of the District Officer and elders was properly made under that Rule and the elders panel was properly conferred with Jurisdiction to entertain and

determine the dispute which they did. Grounds 1 and 5 of the Appeal must fail.

17. In Grounds 2,3 and 4 of the memorandum of Appeal, the issues arising would be simplified as;- that the award was a nullity and that the arbitrator failed to conduct himself properly. Order XLV rule 15(1) (a) and (b) of the Civil Procedure Rules provide that the award can only be set aside if there is

“(a) Corruption or misconduct of the arbitrator or umpire or

(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.”

18. In this case, the operative word is **“Misconduct”** on the part of the arbitrator because I have held above that the arbitration proceedings were properly referred to the panel and the only issue raised in the Motion dated 5.10.1998 is that the arbitrator did not allow the Appellant to ask questions or participate in choosing the elders. Before I go back to what amounts to misconduct, I have seen the record of the proceedings before the arbitration panel. The evidence is meticulously recorded and in some instances, the verbatim is also expressed. In respect of the Appellant particularly, her evidence is well documented. It may not be clear however if she had a chance to cross-examine the Respondents and in her Replying Affidavit to the Motion Irene Gatabi does not answer this allegation. The other person who was expected to answer the allegation would be the District Officer, and arbitrator, one P.K. Harsama. The procedure to bring him to explain the complaint against him is found in Order XLV Rule 19 of the Civil Procedure Rules which provides as hereinunder;

“Applications under this Order other than under rule 15 shall be made by summons, and an application under rule 15 shall be served on the arbitrator or umpire”

19. In this case before the Motion was heard, the arbitrator had to be served and in this case, there is no evidence that he was indeed served. The reason for service is so that the arbitrator can explain the issue and also answer the complaint of corruption or misconduct. Without his evidence, the lower court and this court cannot resolve the issue one way or the other. Rule 19 aforesaid is in mandatory terms and once the Appellant as Applicant failed to serve the arbitrator, then she has also failed to fully explain her case which cannot succeed.

20. There is only one other issue; the elders who sat with the arbitrator. The record of the arbitration proceedings would show that the Defendants chose two (2) elders to sit on the panel as did the Plaintiffs. The Defendants included the Appellant who happily took part in the proceedings thereafter. The complaint in that regard is misplaced.

21. Did the arbitrator in the circumstances misconduct himself? I submit not.

“Misconduct” is defined as **Delinquency, dereliction, impropriety, malpractice, misbehaviour unethical behaviour** – see Oxford Concise Thesaurus.

22. I have said before that the record of proceeding before the panel were meticulous. The decision may not be favourable or agreeable to the Appellant but it was reached, rightly or wrongly using the correct procedure. What is at challenge is the conduct of the arbitrator and not the decision per se.

23. Misconduct must be proved by clear and believable evidence and on the facts. None has or have been properly shown here.

24. In the event and since all grounds of appeal are without merit, the Appeal is hereby dismissed with costs to the Respondents.

25. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 30TH DAY OF OCTOBER 2007 AT MERU.

ISAAC LENAOLA

JUDGE

In the presence of

Mr. Omari holding for Mr. Ondieki Advocate for the Appellant

N/A Advocate for the Respondents.

ISAAC LENAOLA

JUDGE