



**REPUBLIC OF KENYA**

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

**Succession Cause 214 of 1998**

**In the matter of the estate of Francis Nyaga Muchiri... (deceased)**

**JUDITH KAARI NYAGA.....CO-PETITIONER/APPLICANT**

**V E R S U S**

**MONICA KAGENDO NYAGA .....CO-PETITIONER/RESPONDENT**

**R U L I N G**

1. The Application dated 5.12.2003 which is brought under Order XLV Rule 15 of the Civil Procedure Rules seeks orders as follows:-

- (a) That the undated award read before this court on 17.11.2003 be set aside.
- (b) Costs of this application are also sought.

The grounds in support are that;

- (i) The panel of elders was not properly constituted.
- (ii) The arbitrator D.O. 1 Chuka conducted the proceedings in the absence of the applicant or her witnesses.

2. In the Supporting Affidavit of Judith Kaari sworn on 5.12.2003 it is manifestly clear, and this is also the gist of submissions by Ms Mwangi on her behalf, that the main complaint by the Applicant is with regard to conduct of the arbitration proceedings. It is her case that her witnesses were chased away and that she had no opportunity to be heard. Further that her co-wife, Monica Rugendo misled the panel to believe that she had no other plot and yet she had been given one plot for her use (paragraph 8 of her Affidavit in support). She also contends that the panel of elders that heard the dispute was not well constituted and the award itself was a non-decision in that it did not conform to the expectations of a judicial proceeding.

3. Mr. Riungu for the Respondent co-petitioner relies on a Replying Affidavit sworn on 26.4.2004 and denies that the Applicant was not heard during the arbitration proceedings and challenges the assertion by the Applicant that her witnesses were chased away because the names of those witnesses are not given. The Respondent also denies that she concealed material facts from the arbitrator nor any misconduct on the part of the arbitrator.

4. Mr. Riungu took issue with non-service of the Application on the arbitrator and I gather that he was

relying on Rule 19 of Order XLV of the Civil Procedure Rules and sought for these reasons, dismissal of the Application.

5. Order XLV Rule 15 of the Civil Procedure Rules states 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”.

6. Although not expressly stated in the Application or submissions, I can surmise that corruption on the part of the arbitrator is not raised in the instant Application. Misconduct is raised in the form of the complaint that the arbitrator did not allow the Applicant and her witnesses to give evidence and that she was not present when the arbitration panel visited the disputed plot.

7. On this point I have seen the award and I agree that the proceedings are not well recorded. It is unclear why for example even before the hearing took place, Motor Vehicle KTW 575 would be ordered to be given to the respondent Monica Kagendo when the order of Mulwa J. dated 17.6.2002 was clear that possession of the motor vehicle would be a question for determination during the arbitration proceedings.

8. Secondly, when an arbitration panel visits disputed premises the rules of natural Justice would require that the parties be present. In the proceedings leading to the award it is only recorded that the visit to plot No.C 10 Chuka took place on 6.8.2003 and it is unclear who was present at that visit including whether the whole panel was there. This lends credence to the argument by the Applicant that she was not aware of the visit and was therefore not present during the tour. The Respondent has said nothing about this important matter and the Applicants assertion is therefore unchallenged.

9. Thirdly, there are vague references to two plots owned by the Applicant. It was on the basis of that evidence, if that is what it can be termed, that the arbitrator awarded plot No. C 10 Chuka to the Respondent. The identity and location of those plots is not disclosed and it is unclear how then a decision could be made to visit plot C 10 Chuka without visiting those other unidentified plots for purposes of verification of all evidence with regard thereto.

10. I agree that the arbitrator for these reasons may have occasioned injustice to the Applicant.

11. The other question to consider is whether the Respondent concealed any material fact or willfully misled the arbitrator. It is unclear to me without direct reference to it, what actions of the Respondent can be said to fall within this condition set out under Order XLV Rule 15 (1) (b). At paragraph 8 of the supporting Affidavit of the Applicant she deposes that the “Respondent in my absence must have misled the panel that she did not have a plot as she had been earlier on been given a plot.” This statement is wholly unhelpful as it is speculative and cannot be evidence to be relied upon. There being no other complaint as regards the conduct of the Respondent, that is all there is to be said of this point.

12. Further Order XLV Rule 16 provides as follows:

“Application may be made under rules 12,13, 14 and 15 within thirty days of receipt by the applicant of notice of the filing of the award under rule 10 or, where a date for reading the award has been fixed by the court under rule 10(A) within thirty days of that date”.

13. I have found that the arbitrator handled the arbitration proceedings rather casually and ended up being less than helpful in resolving this dispute and in fact perpetuated it. No Notice was also given under

Order XLV Rule 16 as stated above and the Applicant has made out a good case for the award to be set aside. I shall return to this point shortly.

14. However before I do so there is the one problem raised by Mr. Riungu which is this Order XLV rule 19 of the Civil Procedure Rules provides as follows:

“ Application 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”.

15. The Rule is in mandatory terms and I note that counsel for the Applicant had no answer for non-compliance thereof. Is that a ground to refuse to grant an otherwise meritorious Application? If I may hazard a reason for order XLV Rule 19 to be inserted in our Rules, it is because where allegations of corruption or misconduct are made under Order XLV Rule 15(1) of the Rules those are serious enough allegations to cause the arbitrator to come to court and explain his conduct in that regard.

16. I have set out above matters that I saw as having affected the justice of this dispute. Can those matters be said to be acts of “Misconduct” on the part of the arbitrator.

17. “Misconduct” is defined as incorrect or erroneous conduct (Oxford Law Dictionary, 5<sup>th</sup> ed. 2002)

18. Whether in error or otherwise, the acts of the Arbitrator by this definition amount to misconduct. Whether he had appeared or not, the findings would still be the same.

19. What options are open to this court in as far as this dispute is concerned Order XLV Rule 15(2) provides as follows:-

“Where an award is set aside under this rule the court shall supersede the arbitration and shall proceed with the suit”

20. It is quite clear that I must as I hereby do, set aside the arbitrator’s award read in this court on 17.11.2003. The dispute shall now be determined by this court in the usual manner.

21. The Application dated 5.12.2003 is therefore allowed in terms of prayer (a) thereof.

22. Let the costs await the finalization of the suit now that the hearing will start de novo

Dated, signed and delivered in open court at Meru this 27<sup>th</sup> Day of June 2006

**ISAAC LENAOLA**

JUDGE

**In the presence of**

**Mr. Riungu Advocate for the Respondent**

**Ms Mwangi Advocate for the Applicant**

**ISAAC LENAOLA**

JUDGE