



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**Succession Cause 245 of 1999**

**IN THE MATTER OF THE ESTATE OF PETER NGOI NYONDU ALIAS NGOI NYONDU –  
DECEASED**

**GICHUKI NGOI ..... PETITIONER/APPLICANT**

**VERSUS**

**BERNARD KIRAGU NGOI**

**NYAMBURA KIBUGU**

**MWETHERA NGOI**

**GICHIGO NGOI**

**WANJIRU GATERE .....  
OBJECTORS/RESPONDENTS**

**OBJECTORS/RESPONDENTS**

**RULING**

The genesis of this matter was a succession cause filed by Gichuki Ngoi (hereinafter referred to as the applicant) in the Principal Magistrate's Court Nyeri in the year 1993. A temporary grant was issued to the applicant on the 19<sup>th</sup> October 1993.

On 28<sup>th</sup> October 1993, Nyambura Kibugu, Mwethera Ngoi, Bernard Kiragu Ngoi and Gichigo Ngoi (hereinafter referred to as Respondents) brought an application seeking leave to file an objection out of time. On 30<sup>th</sup> November 1993 the Respondents were granted 15 days within which to file their objection. The Respondents thereafter filed an objection and petition by way of Cross Petition for grant.

By consent of the parties recorded before the Deputy Registrar on 1<sup>st</sup> February 1994 this matter was referred for arbitration by the D.O. Mukurweini as chairman to be assisted by 4 elders. It was not clear from the consent order under what rules the reference was made. According to the reference order the award was to be filed within 60 days on 5<sup>th</sup> April 1994. Time for filing the award was extended to 5<sup>th</sup> July 1994, but again on 5<sup>th</sup> July 1994 the award was not ready and matter was fixed for mention on the 9<sup>th</sup> August 1994. One 9<sup>th</sup> August 1994 none of the parties were in court and the matter was stood over generally. The award was subsequently filed on 23<sup>rd</sup> August 1994. On 14<sup>th</sup> February 1995 the award was read to the parties.

The Petitioner/Applicant has now brought this application under Order XLV rule 17(1) of the Civil Procedure Rules seeking to have judgment entered in terms of the award. He maintains that no application has been made to set aside the award within the statutory period.

I have considered this application and the court record. It appears that the parties purported to refer this matter to arbitration under Order XLV of the Civil Procedure Rules. Indeed the court is now being asked to enter judgment in terms of the elders' award under Order XLV of the Civil Procedure Rules. However the matter before the court was a succession cause governed under the provisions of the Law of succession Act Cap 160.

Rule 63 of the Probate and Administration Rules made pursuant to section 97 of the law of succession Act provides for limited application of the Civil Procedure Rules to Succession Proceedings. Order XLV of the Civil Procedure Rules is not one of the few orders which are indicated in Rule 63 as being applicable to succession proceedings. This means that the reference to arbitration was improper and even the application before me is defective as it purports to invoke Order XLV rule 17(1)a of the civil Procedure Rules which is not application to those proceedings.

Further, even assuming that Order XLV was applicable, it is evident that the award filed on 23<sup>rd</sup> August 1994 was filed out of time and no order was obtained for same to be admitted out of time.

For these reasons I decline to enter judgment in terms of the arbitration award. I order that the same be superceded and that the suit be tried before this court in accordance with the provisions of the Law of Succession Act Cap. 160.

***Dated signed and delivered this 23<sup>rd</sup> day of June 2006***

H. M. OKWENGU

**JUDGE**