



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 201 of 1996

TABITHA CIORUI KAMUCHERE APPLICANT

VERSUS

GATIMU MARINGA 1ST RESPONDENT

PHILIP MARINGA NDUGUTU 2ND RESPONDENT

RULING

Litigation in this suit commenced on 25th July 1996 when Tabitha Chiorui Kamuchere (hereinafter referred to as the applicant) filed in this court an originating Summons against Gatimu Mariga (hereinafter referred to as the 1st Respondent) and Philip Maringa Ndugutu (hereinafter referred to as the 2nd Respondent). The applicant claimed to be entitled to land Ref. No. Mutira/Kirimunge/99 (hereinafter referred to as suit land) by virtue of adverse possession. On the 19th February 1997 the 1st and 2nd Respondent each swore an affidavit in which they denied the applicant's claim. It was averred that the suit land belonged to the 1st Respondent who had sold it to the 2nd Respondent in January 1995. It was contended that the applicant had merely leased the suit land from 1979 and that her attempts to purchase the land did not succeed as negotiations were abandoned. It was contended that the Applicant was only cultivating the suit land and it was not until 1996 that she put up a house.

On the 20th March 1997, the 2nd Respondent filed Civil Case No. 56 of 1997 against the applicant in the Senior Resident Magistrate's Court at Kerugoya in which the 2nd Respondent sought orders for eviction of the applicant from the suit land, general damages for trespass, a permanent injunction and costs of the suit.

Pursuant to an application made by the applicant an order was made by Hon. Osiemo J on 13th November 1997 transferring Kerugoya Senior Resident Magistrate Civil Case Number 56 of 1997 to this court and consolidating it with this case (i.e. H.C.C.C. 201 of 1996) for trial and disposal.

On the 15th January 1999 the court recorded a consent (pursuant to a consent letter signed by all the parties advocate) referring the matters in dispute between the parties to the land Disputes Tribunal Kirinyaga. It was further agreed that the matter be mentioned before the Senior Principal Magistrate Nyeri on 12th February 2000 for reading of the award.

Following various adjournments the award was finally read to the parties by the Deputy Registrar on 22nd February 2002. The parties were given 30 days within which to appeal if dissatisfied with the award.

On the 25th March 2002 following an application made by Mr. Ghadially for the applicant for judgment to be entered in terms of the award, all the parties advocates appeared before the Deputy Registrar and a consent was recorded that judgment be entered in terms of the arbitrators award and that the case be mentioned on 28th June 2002 for the valuers report. In July 2002 Mr. Ghadially brought the current application seeking to have the award remitted back to the arbitrators under Order XLV rule 14 for determination of payment of costs. Mr. Ghadially contended that the arbitrators overlooked to make an award for costs. He therefore urged the court to remit back the award for determination of costs.

Both Respondents objected to the application. It was submitted that the award had already been adopted as a judgment of the court and the arbitrators were *functus officio*. It was also submitted that the matter having been a reference to the Land Disputes Tribunal, Order XLV of the Civil Procedure Rules was not applicable, and that under the Land Disputes Tribunal Act a dissatisfied party could only appeal to the Provincial Appeals Committee and that the land Disputes Tribunal had no provision for a referral of a matter already decided.

From the foregoing it is evident that the nature of the claim in the two consolidated suits which included adverse possession, eviction and a permanent injunction were not within the jurisdiction of the Tribunal as provided under section 3 (1) of the Land Disputes Tribunal Act. Although the parties did not so specify in their consent letter, the reference to the Land disputes Tribunal Kirinyaga could only have been done under Order XLV of the Civil Procedure Rules thereby conferring on the Land Disputes Tribunal Kirinyaga a special jurisdiction of arbitrators under Order XLV of the Civil Procedure Rules. That is to say that the provisions of the Land Disputes Tribunal Act are not applicable and the court has to be guided by order XLV of the Civil Procedure Rules.

The consent order referring the dispute to arbitration clearly specified the issues which were to be determined by the Tribunal. These were the agreed issues filed on 21st October 1998 according to which issue No. 10 was “who should bear the costs of this suit.” In the award filed on 19th July 2000 and read to the parties on 22nd February 2002 the Tribunal did not make any award in respect of costs of the suit. However none of the parties raised any objection to the award. Under Order XLV rule 14(1) (a) of the Civil Procedure Rules the court has powers to remit an award for reconsideration by the same arbitrators where the award has left undetermined any of the matters referred to arbitration. Order XLV rule 16 of Civil Procedure Rules provides that an application under rule 14 of the Civil Procedure Rules should be made within 30 days of receipt by the applicant of notice of the filing of the award or where a date has been fixed for the reading of the award within 30 days of that date.

In this case the application to have the award remitted back to the arbitrators is being made not only after the 30 days period but also after the adoption of the award as judgment of the court. It is evident that the applicant has brought his application too late. The award is now a judgment of this court and the same cannot be remitted back to the Tribunal.

This application must therefore fail. It is accordingly dismissed.

Dated signed and delivered this 15th day of June 2006.

H. M. OKWENGU

JUDGE