



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL APPEAL 18 OF 1996**

**ALVINA MUTHANJE.....APPELLANT**

**VERSUS**

**JULIUS NYAGA ZAKARIA..... RESPONDENT**

**JUDGMENT**

The Memorandum of appeal sets out 2 grounds of Appeal. The appeal is challenging the ruling of the Principal Magistrate dated 18<sup>th</sup> March, 1992 in Resident Magistrate Civil Case No. 74 of 1983.

The first ground of Appeal is that the Trial Magistrate failed to exercise his discretion judicially by not granting the appellant a right to challenge the elder's award. The facts on this ground is that the elders award was read in court in presence of advocates representing both parties on 7/3/1990. The right to object to the award was granted on that day to be exercised within 30 days. No action was taken by the appellant and on 31/10/1990 an application was made before the court to enter judgment in the terms of the award there being no objection filed by them. Judgment was therefore entered by the court in terms of the elders award Mrs Wangombe Advocate who represented the appellant was present and she said "**I leave it to court.**"

However on 18/3/1992 Mrs Wangombe Advocates appeared before court representing the appellant with an application seeking that the order entering judgment in terms of award be set aside and that the court do extend time under Order 49 Rule 5 CPC to enable the party to file objections to the elders award on the ground of the misconduct of the elders. The court dismissed the application and allowed execution therein. The court has discretion to set aside its orders but the discretion has to be exercised in a judicial manner. The appellant cited the case of **Macharia vs Macharia Court of Appeal decision in Civil Appeal No. 105/85 KLR [1987] 61**. It was held that the principles to be applied are on the basis that the courts discretion is wide without restriction except that if judgment is to be varied it is done on terms that are just and the discretion is to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake but is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice. And that the factors that must be considered include the facts and circumstances both prior and subsequent and all the respective merits of the parties together with any material factors e.g the nature of the action, the defence, the question as to whether the plaintiff can be compensated with costs for any delay occasioned and that denying a party a hearing should be the last resort and finally it should be exercised selectively but no arbitrary.

In that case there was failure to take necessary steps to file defence to counterclaim, summons for directions were not completed then therefore suit was not ready for hearing, Appellant should have been given hearing notice, the subject matter was ½ the appellants agricultural land and dispute was one between brothers. These were the factors that were taken into account by that court which proceeded to allow the appeal thus setting aside the judgment entered.

In the present case the Trial Magistrate noted that the appellant was represented by advocates at all the important stages. He held that Applicant/Appellant she should have become aware of the decisions of the court and should have consulted her legal advisers on any other steps to be taken. It appears she neglected to visit her legal advisers for long periods. There was no affidavit from her advocates that they never informed her. Therefore it would have been wrong for the Trial Magistrate to make a finding that Appellant was let down by her advocates. The Trial Magistrate made a finding and this court upholds his finding that the appellant was guilty of inordinate delay which was not explained at all.

The trial Magistrate based his refusal to set aside the orders on the issue of inordinate delay. Execution was allowed on the same day, 1992. The appellant was seeking the order to set aside judgment to enable the appellant to challenge the award for misconduct of elders.

The procedure of dealing with the land issues through the elders was and is still special. In the ***Court of Appeal Civil Application No. 82 of 1998*** a land dispute was referred to arbitrator and the award was read on 1/9/1993. There was no application to set aside within the prescribed period. Dealing with order 45 CPC rule 17 (1) an appeal would only be in so far as decree was in excess of or not in accordance with the award. It was also pointed out that an application would be defeated by inordinate delay.

In the present case the appellant stated that she was to challenge the award on the ground of misconduct by the elders. She did not disclose the particulars of any misconduct to the Magistrate.

On the issue of the subject matter of Appeal the decision to be challenged awarded the appellant 4 acres of the land and the Respondent only 1 acre thereof. The Respondent had claimed as purchaser of the land from the husband of the Appellant then deceased and there was some evidence that the Respondent had paid some money and had been put into possession. It is true that the Respondent in his plaint had prayed for money and interest. The Respondent also claimed for vesting order of a portion of the land but having placed the matter before the elders and leading evidence the elders were able to see that the Respondent was claiming land and awarded the land.

I find no way would the appellant had avoided meeting the Respondent claim. After considering all these issues as laid down in the Court of Appeal in Appeal No. 105 of 1985 quoted above I find this appeal has no merit and the same is dismissed with costs to the Respondent.

Dated this 5<sup>th</sup> July, 2006.

**J.N.KHAMINWA**

**JUDGE**

**5/7/2006**

Khaminwa –Judge

Njue – Clerk

N/A

Mr. Njagi

Judgment read in his presence

**J. N. KHAMINWA**

**JUDGE**