



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

**AT MERU**

**Civil Case 67 of 1987**

**M'ANTHAKA M'MWOGA ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**M'BOORE MWOGA ..... DEFENDANT/APPLICANT**

**R U L I N G**

1. The Application dated 30.9.2005 is premised on S.80 of the Civil Procedure Act and Order XLIV Rule 1 of the Civil Procedure Rules and is brought by the Defendant M'Mbore M'Mwoga who seeks the following orders:-

a) (i) **THAT** this honourable court be pleased to declare the undated award herein a nullity, review and set aside the judgment entered in this case on 24.10.88 and the subsequent decree drawn and issued on 7.7.89 and all other subsequent and/or consequential orders.

(ii) **THAT** in alternative court do set aside the judgment and do extend  
time for challenging the award herein and;

(a) **THAT** this case be heard by this Honourable court on merit.

(b) **THAT** the name of the Plaintiff M'NDAKA M'MWOGA be cancelled and/or deleted from the register of land parcel No.MWIMBI/MURUGI/1505 and the proprietorship of the said land be restored to the defendant M'BORE M'MWOGA.

(c) **THAT** costs be provided for:-

2. There are ten(10) grounds in support and these are :-

(i) **THAT** judgment was entered in this matter on 24<sup>th</sup> October 1998.

(ii) **THAT** the said judgment was entered on the basis of an undated award forwarded to this court on 15<sup>th</sup> August 1988.

(iii) **THAT** the Applicant was never notified that the award had been forwarded to the court and that

it was due for reading on 22.9.88.

- (iv) **THAT** the Plaintiff herein sued the defendant claiming a portion of land parcel No.MWIMBI/MURUGI/842 which the Plaintiff alleged was being held by the Defendant in trust for the Plaintiff.
- (v) **THAT** this matter was wrongfully referred to arbitration.
- (vi) **THAT** matters of trust are legal matters that can only be determined by this court and not by a panel of elders.
- (vii) **THAT** there was an error and/or misapplication of the law by entering judgment on the basis of an award that was null and void.
- (viii) **THAT** there is sufficient cause and/or reason to warrant the Decree in this matter being reviewed.
- (ix) **THAT** the judgment in this matter has caused the applicant great loss and damages.
- (x) **THAT** the plaintiff/respondent has unlawfully grabbed and/or acquired the applicants land illegally.

3. In his detailed Supporting Affidavit sworn on 30.9.2005 the Applicant reiterates all the above matters but more importantly adds that the Respondent is one of his brothers and that he was entitled to land parcel number No.Mwimbi/Murugi/916 left by their father who is deceased and that the Applicant has no claim to land parcel No.Mwimbi/Murugi/842 registered in the names of the Applicant. That since the Plaintiff has taken over the latter parcel of land, the Applicant has been rendered homeless because of the alleged illegal and irregular take-over of his land.

4. In his Replying Affidavit sworn on 5.6.2006 the Respondent, M'Ndaka M'Mwoga depones that the Application was an after-thought brought inordinately after sixteen(16) years and that the Applicant contrary to his assertions has always been aware of the matters in dispute and cannot be heard to say otherwise. That therefore the Application which is propelled by lies and untruths should be dismissed with costs.

5. Before turning to submissions by Mr. Okwaro, Learned Counsel for the Applicant I should note that in his Plaint filed on 13.4.1987, the Plaintiff claimed that the Defendant was holding half of land Parcel Number "***Mwimbi/Murugi/842 measuring about 4 acres***" in trust for the Plaintiff and he wanted an order that those 4 acres be transferred to him. The Defendant in a statement of defence filed on 3.6.1987 denied the claim and averred that the Plaintiff was entitled to a different portion of land left by his deceased father and had no claim to the land registered in the Defendant's name.

6. On 3.8.1987, P.N. Tank, J recorded a consent order whereby the dispute was referred to arbitration by the District Officer, Chuka with the help of two elders and the award thereon to be filed within 90 days. The award was in any event filed on 31.8.1988 and the "***judgment***" was that the "***defendant gives out four acres to the plaintiff as it had been directed by their father and later held (sic) by the clan elders.***" The proceedings are detailed and well recorded and the Defendant participated fully including calling witnesses to support his case. On 6.9.1988 a letter was written by the Deputy Registrar informing both the Plaintiff and Defendant that the award was ready for reading out to them. On 22.9.1988 the award was read out by Oguk J in the presence of both parties and any aggrieved party given 30 days to challenge it, and when no challenge was made to it ,Oguk J wrote a judgment which he delivered on 24.10.1988 and gave orders of court in terms of the elders' award. Both parties had notice of that date as it was given in their presence on 22.9.1988 and since they were both absent, Oguk J delivered the judgment in their absence.

7. The only substantive issue raised in the Application to my mind is whether the elders had jurisdiction

to determine the dispute, it being one arising out of an alleged trust relationship between the parties. Counsel for the Applicant has relied on the decisions in:-

***(a) Wamalwa Wekesa – vs – Patrick Muchwenge C.A 109/85(UR)***

***(b) Stanely Kiugu – vs – M’Ikiome M’Twerandu C.A 111/1999(UR)***

***(c) Wamwea – vs – Catholic Diocese of Murang’a(2003) KLR 389***

8. In all these decisions it was held that where elders arbitrated over disputes as to ownership of land or trust thereof, their decision would be a nullity and is barred by fact of S.159 of the Registered Land or S.3(1) of the Land Disputes Tribunals Act. I think that the beginning to addressing the issue is the need to consider Order XLV of the Civil Procedure Rules which although not referred to by any party is the applicable law in the circumstances of this case. I say so because although the Application is framed as a review application, all that I see is that it ought to have been and is an application for setting aside of an award subsequent to an arbitration. Even if it is properly an application for review under Order XLIV Rule 1, Order XLV is still the proper law and procedure in view of the events leading to arbitration and subsequent to the reading of the award.

10. Order XLV Rule 1 relates to a reference by parties by consent and before court, of their dispute to an arbitrator and this is what the parties herein did. The award was then properly made under Order XLV Rule 10 and Oguk J in his judgment delivered on 24.10.1988 delivered his opinion under Order XLV Rule 11 and made an order as to costs under XLV Rule 12. The learned Judge upon reading the award to parties on 22.9.1988 gave parties time to challenge the award and seek orders under Order XLV Rule 15 and by so doing he complied with Order XLV Rule 16. His judgment was again properly delivered under Order XLV Rule 17 since no party made any application under Rule 16 aforesaid. A decree was thereafter drawn under Rule 17(2) and no appeal was thereby allowed because the final judgment was in accordance with the award.

11. In effect and applying Order XLV aforesaid, the Applicant in coming to court seventeen(17) years after the judgment is clearly misguided as all doors to challenge the award and judgment were closed to him a long time ago. But suppose I am wrong and in fact he is correctly before court by way of review under Order XLIV Rule 1 and that since no appeal is allowed he is only entitled to a review of the ***“decree or order from which no appeal is allowed?”*** Then he has to contend with the expectations of that Rule viz. that he must show that:-

***(a) “There is discovery of a new and important matter or evidence, which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree or order was made***

***(b) There is some mistake or error apparent on the face of the record***

***(c) For some other sufficient reason, he is desirous of obtaining a review of the decree or order and***

***(d) That the application for review is made without undue delay.”***

12. I have reproduced elsewhere above both prayers in the application and the grounds on which it is brought. It is said that it was an error to refer to the matter to arbitration but I have said that under Order XLV of the Civil Procedure Rules a reference to arbitration can be made “in any suit” as long as parties so agree. I should pause here and state that all the authorities cited by the Applicant make reference to proceedings which contravene S.3(1) of the Land Disputes Tribunals Act, S.9A(1) and 2 of the Magistrates Courts Act and S.159 of the Registered Land Act which have all been harmonized by Act No.18 of 1990 and which have no relevance as argued, to the suit at hand. I say so because the suit was properly instituted before the High Court and to that extent is properly within S.159 of the Registered Land and was again properly referred to arbitration under Order XLV and all other Rules complied with leading to the decree under challenge.

13. Is there any other sufficient reason to warrant a review of the decree? None has been cited and my reading of the Application does not point me to any good reason to warrant such a finding.

14. As to delay, certainly it is inexcusable as the Applicant clearly knew of the award, was party to proceedings leading to it and did nothing for seventeen(17) days. That is what we can properly call inordinate delay which Order XLIV Rule 1 frowns upon.

15. On the whole and for the above reasons, I do not think that a review is merited, setting aside less so and the Application is incompetent and must be dismissed as I am now so ordering. Costs thereof to the Respondent.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MERU THIS 26<sup>th</sup> DAY OF SEPTEMBER, 2006

**ISAAC LENAOLA**

JUDGE

*In the presence of:-*

plaintiff in Person

Mr. Okwaro Advocate for Defendant/Applicant

I. LENAOLA

JUDGE