



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

**Civil Case 202 of 1980**

**JOHNSON GITHAIGA KIRAGU ..... PLAINTIFF**

**VERSUS**

**MACHARIA KIRAGU ..... DEFENDANT**

**RULING**

By a notice of motion dated 7<sup>th</sup> December 2005, brought under Order XLV rules 15 & 19 and section 3A of the Civil Procedure Act Macharia Kiragu the Defendant/Applicant seeks orders:

- (1) That this court be pleased to set aside the arbitration award which was read in this court on the 2<sup>nd</sup> October 1985 under the above rules.***
- (2) That the suit do proceed to hearing on its merits and to be heard in this honourable court.***
- (3) That this Honourable court may make such other orders which to this court may deem fit.***

The application is premised on the grounds that there is no referral order to Arbitration in the court file facilitating the award read on 2<sup>nd</sup> October 1985, secondly that even if there was such a referral, it is not ascertainable that the award was filed within time and further if the award was filed within time then same should be set aside as the arbitrators did not hear the applicant. The application is also supported by an affidavit sworn by the applicant's advocate in which he depones that though the matter was initially referred to the D.O. Mathira for arbitration on the 14<sup>th</sup> July 1981, the court file does not contain any reference to arbitration nor is there any evidence that time was extended for filing the award which was read on 2<sup>nd</sup> October 1985.

The Plaintiff Respondent objects to the application contending that the reference to arbitration was made by consent and the award filed within time and therefore the application has no merit and ought to be dismissed with costs. The Respondent has sworn a replying affidavit averring that the reference to arbitration was made by consent on 11<sup>th</sup> May 1984. He has annexed a photocopy of an unsigned order. He has also maintained that the award was filed within 60 days on 29<sup>th</sup> June 1984. He has annexed what he calls a copy of the translated award.

Mr. Mahan has urged this court to reject both documents as they are not signed nor are they certified as true copies of the original. Mr. Mahan has further submitted that if the copy of the award filed were to be accepted, then the award should be set aside as the arbitrators misconducted themselves by refusing to

hear the parties but instead re-affirmed a previous award which had been set aside.

I have considered the application, the affidavit in support and in reply and the submissions made by both counsels. I have also had the opportunity to peruse through the skeleton file in respect of High Court Misc. application No. 87 of 1979. I note that in the absence of handwritten proceedings or certified extracts, it is rather difficult to tell for certain what transpired. Be that as it may, although the annexures to the Respondent's affidavit are neither signed nor certified and therefore not of any evidential value, a photocopy of the original award dated 29<sup>th</sup> June 1984 forms part of the skeleton file in respect of High Court Misc. 87 of 1979. This is a clear indication that this matter was in fact referred to arbitration and that an award was duly filed. From the photocopy of the original award (whose contents is similar to the Respondent's annexure JWG – 2, it is evident that the arbitrator mis-apprehended the mandate given to him as he started on the premise that since the dispute had been the subject of an earlier award, the matter before him was an appeal. That was clearly a misdirection as the earlier award had been set aside and the Arbitrators were required to hear the dispute afresh.

By failing to hear the dispute and adopting the previous award which had already been set aside the arbitrators grossly misconducted themselves.

Notwithstanding the delay in prosecuting the application to set aside the award, in view of the gross misconduct of the arbitrators. It is only fair and just that the award dated 29<sup>th</sup> June 1984 read on 2<sup>nd</sup> October 1985 be set aside and it is so ordered.

I further order that the suit do proceed to hearing and final determination before this court.

Costs of this application shall be in the cause. Orders accordingly.

***Dated signed and delivered this 25<sup>th</sup> day of October 2006.***

H. M. OKWENGU

**JUDGE**