REPUBLIC OF KENYA

HIGH COURT AT MERU

Civil Appeal 111 of 1999

STANLEY KIUGU ……..…….. 1ST PLAINTIFF

ISAAC KIRIMI …… 2ND PLAINTIFF

VERSUS

M'IKIOME M'TWERANDU ……. DEFENDANT

JUDGMENT OF THE COURT

This appeal is against the ruling of the learned Senior Resident Magistrate, Mr. D.K. Gichuki dated and delivered on 13th August 1999 by which ruling the learned magistrate refused to review his orders of the 28th February 1986 referring Meru CMCC No. 430 of 1984 to the elders for arbitration. From the court record the learned magistrate's ruling of 13th August 1999 arose in the manner detailed below:- By his undated plaint which was duly filed in court on 5th November, 1984 the respondent herein, M'IKIOME M'TWERANDU sued the appellants herein jointly and severally and at paragraph 4 of the plaint the respondent averred thus:-

"4. On 6th October 1984, the defendants trespassed into the plaintiff's parcel of land and damaged the plaintiff's Kikuyu grass, dug a pit latrine hence blocking the path leading to the plaintiff's homestead." The respondent pleaded at paragraph 5 of the plaint that the appellants had refused to heed his requests for making amends or unblocking the blocked path and sought the following reliefs from the court:-

(a) The defendants be ordered to vacate the plaintiff's land parcel No. ABOTHUGUCHI/GITHONGO. (b) The defendants to demolish pit latrine constructed thereon. (c) The defendants to pay a sum of Kshs. 2,000/= being the value of Kikuyu grass so damaged. (d) Costs of the suit. (e) Any other or better relief which the honourable court may deem fit and just to grant.

The plaint was filed through the firm of KAAI MUGAMBI & CO. ADVOCATES. On 28th November 1984 the second appellant Isaac Kirimi filed his statement of defence which was of same date in which he denied liability to the respondent on the respondent's prayer that the appellants be ordered to vacate the suit land and further denied that he was liable to demolish the pit latrine which was allegedly blocking the path to the respondent's homestead. The second appellant stated as follows at paragraphs 4 through 8 of his defence:-

"4. WITHOUT PREJUDICE to the above the 2nd defendant states that the land in dispute is clan land which was left to the plaintiff and the defendant's father by the defendant's grandfather as family land. 5. The 2nd defendant has been living on the said land since birth which is over 40 years and has got a large family and properties thereon. 6. The 2nd defendant avers that this case was heard by members of the clan who ordered the plaintiff to give each of the defendants a portion of one acre and then the plaintiff remains with 2 acres." In paragraph 7 of the defence, the 2nd appellant sought an order of the court

referring the case for trial before the elders under the chairmanship of the D.O. Meru North Division. At paragraph 8 the 2nd appellant averred that the plaintiff's claim was false and fictitious and that the plaint was bad in law as it did not even disclose the number of the plaintiff's land.

On the 28th February 1986, when the parties appeared in court, they consented to refer the case to arbitration before the elders and subsequent thereto, the award by the elders was duly filed and read to the parties on 28th May 1986 and judgment entered in terms of the award on 10th July 1997. On that day when the case was referred to the panel of elders, the appellants herein were not represented, while the respondent was represented by Mr. Mwarania advocate. By an application dated 28th August 1986, the appellant's sought an order that the award filed in court be set aside and the case be heard in open court or by a different panel of elders.

In his supporting affidavit made and sworn on 28th August 1986, the first appellant, STANLEY KIUGU, averred firstly that the panel of elders whose award they were seeking to set aside was presided over by the D.O.'s clerk one Mr. Kimonye and that the said Mr. Kimonye appeared biased right from the beginning hence the appellant's desire then to have the case heard by a different panel of elders. Further M. Kiugu averred that the panel that heard their dispute was not properly constituted. That application to set aside the award was dismissed with no order as to costs.

The main reason for dismissing the application was that the same was not served upon the parties who were adversely mentioned in the application. There have been many other applications filed thereafter by the appellants seeking stay of the ruling confirming the tribunal's award as judgment of the court, but none of those applications by the appellants has been successful. It is worth noting that the elders award was not unanimous, but the chairman used his casting vote and decided that the applicants were to be removed from the respondent's parcel of land known as ABOTHUGUCHI/GITHONGO/111.

By another application filed on 14th July 1998, the appellants sought an order to have the orders of 28th February 1986 set aside and to allow the suit to proceed to hearing in open court, but that application was also refused on 13th August 1999 and that is the ruling that gave rise to the present appeal. At the hearing of the appeal, Mr. Arithi for the appellants gave the history of the case and submitted that because there was an error apparent on the face of the record at the time when the parties consented to refer the case to the panel of elders, the learned trial magistrate erred in law and fact in refusing to review his order dated 28th February 1986 referring Meru CMCC No. 430 of 1984 to a panel of elders when it was abundantly clear that the elders had no jurisdiction to hear and determine a dispute concerning land registered under the Registered Land Act, Cap 300 Laws of Kenya.

He cited two authorities in support of his arguments, namely Court of Appeal Civil Appeal No. 107 of 1985, being the case WAMALWA WEKESA V. PATRICT MUCHWENGE. Mr. Arithi urged the court to especially consider the judgment of Hon Nyarangi JA and that the court should consider further that there was a common mistake by the parties when they consented to refer the case to a panel of elders. On the issue of whether or not consent judgment/order can be set aside, Mr. Arithi relied on the decision in KENYA COMMERCIAL BANK LTD V. BENJOH AMALGAMATED LTD and another. At page 7 and 8 of the judgment, the court of Appeal set out the circumstances under which a consent judgment (or order) may be set aside.

"The circumstances in which a consent judgment may be interfered with were considered by this court in HIRANI V. KASSAM (1952) 19 E.A.C.A. 131, where the following passage from Seton on Judgments and Orders 7th Edition, Vol. 1. page 124 was approved:- "Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and those claiming under them …… and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court …….. or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts or in general for a reason which would enable the court to set aside an agreement." In Mr. Arithis's view, there was clear misapplication of the law when the consent order of 28th February 1986 was being made and that for that reason, the same should be set aside to pave way for the hearing of the case afresh in open court. That this misapplication of the law amounted to an apparent error on record and that the learned trial magistrate should have

allowed the application for review in order to correct this apparent error. In this regard, Mr. Arithi cited the case of BILHA KANYI w/o GEOFFREY GATHUNGU, being Court of Appeal Civil Appeal Number 38 of 2000 at Nairobi.

The facts in that case were that the appellant, by originating summons dated 30.9.98, sought the vesting of land parcel No. IRIANI/CHECHE/386 in herself, on the ground that though the land was registered under the Registered Land Act in the name of the respondent, her deceased's husband's younger brother, she had been in adverse possession of land for more than twelve years. The application before the Court of appeal was against the ruling of The High Court dated 8.11.99 in which the learned judge refused to review the orders made in his earlier ruling of 16.12.98. The Court of Appeal dealt with the twin issues raised of re-judicata and review. More about this case later.

The appeal was opposed. Mr. Ayub Anampiu for the respondents submitted that it is the appellants themselves who requested the court to refer the case to arbitration even long before the consent order was made in court on 28.2.86. He also submitted that the reference to the tribunal was made under the provisions of order 45 Rule 1 of the CPR and not under the provisions of the then Cap 10 Laws of Kenya. Order 45 Rule 1 of the CPR provides as follows:-

"1. Where in any suit all the parties interested who are not under any disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference." That even after the award had been filed, the appellants did not make any application under order 45 Rule 13 of the CPR. Rule 13 of Order 45 of the CPR confers upon the court power to modify an award or part of an award upon a matter not referred to arbitration or where the award is imperfect in form or contains an obvious error which can be amended without affecting the decisions or where the award contains a clerical mistake or an error arising from an accidental slip or omission.

It would seem to me therefore that the modification/rectification envisaged by this rule does not encompass the jurisdiction of the tribunal which is the issue in this appeal and which was the issue in the appellant's application in the lower court asking the court to review its ruling referring the case to arbitration. Mr. Anampiu also submitted that the appellants did not apply to the court to remit the award to arbitration as provided by Rule 14 of Order 45 and that in any event, there was inordinate delay on the part of the appellants in prosecuting their application to set aside the award. Application was filed on 20.8.86 but same was not prosecuted until 1997.

That unless fraud, collusion or some other good reason can be shown by the appellants, the award by the panel of elders, which was confirmed as judgment of the court should not be interfered with. That in any event the elders had jurisdiction to hear the dispute and that if the appellants were indeed dissatisfied with the elders award they should have made timely applications under Order 53 of the C.P.R.

In reply, Mr. Arithi submitted that the lower court should not have allowed the consent of 28.2.86 because the same was illegal. That the court did not on that day, indicate the provisions of the law under which the reference to arbitration was being made and that this court should not be misled into believing that the reference was made under order 45 of the CPR and not under Cap 10 of the Laws of Kenya. That the issue of jurisdiction of the tribunal was raised way back in 1997.

What are the issues for determination in this appeal? First, did the panel of elders have the jurisdiction to entertain the case that was referred to them by the lower court's order of 28.2.86? Two, was the learned magistrate right in refusing to review that order referring the difference between the parties to arbitration? Was there inordinate delay on the part of the appellants in seeking an order for review? And fourth, was the consent order of 28.2.86 faulty and therefore capable of being interfered with? In his ruling, refusing to review the earlier order of the court the learned magistrate said in part:- "Having considered all the issues raised for and against the application herein, I do find that I would wholly agree with the submissions by Mr. Anampiu for the respondent herein this being an order for referral by consent of the parties, there being no appeal to the award and there being no action taken for 13 years about the award, there is no room for the applicants to come now and apply for review as a decree is drawn except in so far

as the decree is in excess of or not in accordance with the award no appeal shall lie from such decrees. A decree herein had been drawn. Same is dated 10th July 1997. This is the decree that the applicant was seeking to have stayed by his application dated and or filed in court on 17.7.97."

The learned magistrate also proceeded to state that at the time when the consent for referral was made there was no disability on either of the parties. He also proceeded to distinguish the case of WAMALWA WEKESA V. PATRICK MUCHWENGWE (supra) from the present case on the ground that the referral therein was made under the magistrates' jurisdiction (Amendment) Act No. 10 of 1980 (since repealed) while the referral made in this case was by consent of the parties as envisaged under the provisions of Order 45 of the CPR, and that the rules of procedure differed in the two instances.

And that for these reasons, the panel of elders had the jurisdiction to determine the issues that were referred to them. Finally, the learned magistrate stated that there were no circumstances in this case that would warrant the setting aside of or interference with the consent order of the parties – that there was no fraud collusion or evidence that the consent was contrary to public policy of the court or that the same was made without sufficient material facts or for any reason that would make the court to interfere with it.

I shall first of all deal with the issue of jurisdiction of the panel of elders regarding the reference made to them. It is not in dispute that the suit land is registered under the Registered Land Act (RLA) Cap 300 Laws of Kenya. In the WAMALWA WEKESA case (civil appeal No. 13 of 1983) – supra- the RM Bungoma ruled that the panel of elders had power to hear a dispute relating to land registered under the RLA and confirmed the award of the panel of elders. On appeal at Kakamega (before Gicheru J as he then was) the appellants' appeal against the RM's judgment was dismissed.

Without going into too many details, the suit land in the WAMALWA case, being LR NO. W. BUKUSU/SOUTH MATEKA/536 was the subject of land arbitration chaired by the DOKanduyi, who after hearing the dispute awarded the land to the respondent, Patrick Muchwenge. On an application to the RM Bungoma, the main contention by the appellant was that the DO had no power under the new Magistrate's Act to entertain complaints relating to disputes under the RLA if the complainant does not relate to boundaries or to trespass. The learned magistrate held that the dispute was plainly a dispute related to the beneficial ownership of family land and therefore that the elders had jurisdiction over it. The same position was maintained by the High Court.

The issue on appeal to the Court of Appeal was whether a dispute relating to beneficial ownership of land could be referred to a panel of elders under section 9A(1) and (2) of the Magistrates Courts Act (the Act) Cap 10 Laws of Kenya in respect of title to land. Section 9A(1) and (2) of the Act, since repealed reads:- "9A. (1) Notwithstanding the provisions of section 5 and 9 or of any other written law conferring jurisdiction, but subject to the provisions of this part, no magistrate's court shall have or exercise jurisdiction and powers in cases of a civil nature involving –

(a) The beneficial ownership of land. (b) The division of, or the determination of boundaries to land, including land held in common. (c) A claim to occupy or work land, (d) Trespass to land. (2) An issue relating to any matter set out in paragraphs (a) to (d) of sub-section (1) shall be referred to a panel of elders to be resolved, but nothing in that sub-section shall be construed as conferring jurisdiction or powers on a panel of elders to determine title to land." The Court of Appeal (Ngarangi J) in dealing with the case in which the respondent applied for transfer of land registered under the RLA and where the executive officer Kakamega had executed the transfer, held that the respondent's claim to title to land was contrary to the law and the purported transfer of land by the executive officer in the presence of the RM Bungoma was a nullity. The learned judge of appeal held that it mattered not that the disputed land was family land. That a panel of elders cannot lawfully entertain an issue which concerns title to land. Referring to section 159 of the RLA, the learned judge of appeal said that the said section excludes the jurisdiction of panel of elders from civil suits and proceedings relating to title and expressly confers jurisdiction on the High Court.

The learned judge also referred to the court's decision in the case of LEONIDA NEKESA V MUSA WANJALA CA No. 23 of 1985 where it was held that if the subject of proceedings before a panel of

elders is land registered in a first registration under section 143 of the RLA, then the elders had no jurisdiction to arbitrate on the same. In this case, it is clear that the suit land is registered under the RLA, and it is also clear that the appellants herein claimed a beneficial interest in the suit land. The decision of the elders, of ordering eviction of the appellants from the suit land was in effect a decision touching on the title of the land. In view of the law, and in particular section 159 of the RLA, the panel of elders had no jurisdiction to arbitrate over the parcel of land.

Their proceedings have no value – they are a nullity. It follows from the above that the learned Senior Resident Magistrate was not, despite the consent of the parties, right in referring the case to the arbitration of a panel of elders in the first place and secondly, he grossly misdirected himself in refusing to review the court's earlier order referring the case to arbitration. In refusing the application for review, the learned SRM stated that there was no proof of fraud, collusion or such other circumstance as would make him set aside the consent order of 28.2.86

Having found as I have that the panel of elders had no jurisdiction to entertain the reference, not just because of the provisions of the RLA but also by virtue of section 9A(2) of the Act (since repealed), then the order of reference was itself a nullity. It does not matter that the award was filed and that it was not challenged. It does not matter that the award was confirmed as a judgment of the court and a decree drawn. In the WAMALWA WEKESA case, a transfer had even been made.

On the issue of interfering with consent judgment/orders, the decision of the court of appeal in KENYA COMMERCIAL BANK LTD B. BENJOH AMALGAMATED LTD & another (supra) is relevant. I have already set out the relevant portion of the said judgment. Considering all the facts of the case in the lower court and the law applicable thereto, I am persuaded that there was in general, a reason that would enable the court to interfere with the consent of 28.2.86. The issue referred to the panel of elders was clearly an issue touching on title of the suit land.

Since the law forbade such an issue from being dealt with by a panel of elders, the order making the reference was a nullity and in my view such a nullity was reason enough to enable the court to set aside an agreement. I therefore do not agree with submissions by counsel for the respondent and the ruling of the learned SRM that the consent was incapable of being interfered with. In my view, there was sufficient ground to justify interference with that consent. Further, having known that the suit before the court involved registered land, there was no basis for the learned magistrate's finding that the reference to the panel of elders was not in accordance with section 9A of the Act but was by consent of the parties as envisaged under Order 45 of the CPR. That conclusion by the learned SRM was a mis-direction on his part.

The learned SRM stated that it was not correct to argue that the panel of elders had no power to deal with an issue dealing with registered land and further that since there were no framed issues for the arbitrator, the arbitrator could deal with the issue as he deemed fit. That again was a mis-direction on the part of the learned SRM. The law forbade the panel of elders from dealing with title under the RLA. On the issue of inordinate delay in bringing the application for review, by the applicants, I find no basis for such contention. Order 44 does not put any limits as to when such applications should be filed. In any event and as rightly submitted by Mr. Arithi for the appellants, there were several other interlocutory applications filed by the appellants so that it cannot be argued that the appellants sat on their laurels for 13 years before filing their application for review.

The respondent also took issue with the long time taken by the appellants to prosecute their application for review, but did not adduce evidence to show that the appellants were either negligent or disinterested in their case. The record shows that the appellants have been on their feet all through. I would therefore not hold any delays that may have occurred between 28.2.86 and the prosecution of the appellant's application for review against the appellants. In the result, I would allow the appeal and set aside the order of the SRM 28.2.86 referring Meru CMCC No. 430 of 1984 to elders for arbitration and all the subsequent orders. I would also award costs of this appeal and those of the subordinate court to the appellants.

Dated and delivered at Meru this 20th day of Jan. 2005.

RUTH N. SITATI

Ag JUDGE

20.1.2005