



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 4821 of 1988**

MR. MACHARIA THUKU.....PLAINTIFF

VERSUS

KIRIRO GITHAIGA.....DEFENDANT

RULING

The applicant by way of this Notice of Motion dated 5th December, 2000 and brought under Section 3A and 80, and Order XL Rules 1 and 2 of the Civil procedure Rules seeks orders for review vary and/or set aside the orders made on 8th December 1998, fixing the case for hearing together with all the subsequent orders and judgment dated 29th March 2000. The applicant also seeks orders for extension of time for filing and/or reading the arbitrators award filed herein to such a reasonable time and on such terms as it may find fair and just to grant.

The suit was filed by way of a plaint (undated) in 1988. About 8 years later on 29th May 1995 the dispute was by consent referred to arbitration.

The consent order was in the following terms:-

“By consent the matter in dispute between the parties in this suit are hereby referred to arbitration under Order XL R of the Civil Procedure Rules, by the District Officer of Mbogo I and II Division Nakuru District. The District Officer to file the award within 90 days.

Each party to appoint (3) three elders to sit with the District Officer. The parties be at liberty to call witnesses. The matter was to be mentioned on 18th September 1995 at the expiry of the 90 days.”

By 18th September 1995, the award had not been filed. Time to file the award was extended by consent to 2nd November 1995, but no award was filed. Time to file the award was extended by consent to 5th December 1995 and to 19th January 1996. The last mention which was by consent of both parties was on 22nd February 1996 and when it was apparent that no award was forthcoming, both parties agreed to appear before the duty Judge on 8th December 1998 for mention for directions.

It was by consent agreed that the suit be heard in court and by consent hearing was fixed for 23rd and 24th of March 1999.

On 23rd March 1999 when the suit came up for hearing there was no mention that the award had been filed. The applicant was represented by a very senior counsel Mr. Githuka. Both parties attended the hearing to conclusion. The plaintiff gave evidence and was cross examined at length. At the close of the

plaintiff's case the defendant took the witness box testified at length and was cross examined by Miss Gwaro.

At the close of the hearing both parties submitted. Judgment was written and delivered on 26th January 2000. When a matter is referred to arbitration by consent under Order XLV and award is to be filed within a given time, the parties may by consent extend the time for the filing of the award if on that given date the award is found not to be ready.

Both parties consented to the extension of time between 18th September 1995 and 22nd February 1996. But on 22nd February 1996 when they realized that no award had been filed they consented to have the dispute heard by the court and the hearing took place with full participation of both parties. The judgment was regularly entered after full hearing and the applicant cannot be heard to say that he now wants the same to be reviewed and set aside.

Keeping in view of the long delay after the institution of the suit and the fact that it involves land which is sensitive to all Kenyans it was in my opinion appropriate and more satisfactory in the whole to have the suit tried in a competent court of law in normal cause rather than by lay arbitrators who are not bound by the law of evidence or by the law of procedure.

For the reasons stated above the defendant's application is dismissed with costs.

Orders accordingly

Dated and delivered at Nairobi this 24th day of February, 2005.

J.L.A. OSIEMO

JUDGE