

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

Civil Case 112 of 1985

MOSES WAMUGO THINWA APPLICANT/INTERESTED PARTY

VERSUS

JOHN NDEREBA THINWA PLAINTIFF/1ST RESPONDENT

CHARLES GIKUNJU THINWA DEFENDANT/2ND RESPONDENT

RULING

Following the applicant's successful application to be joined as an interested party vide a ruling delivered on 30th June 2004, the applicant has now come to this court by way of notice of motion dated 26th July 2004 in which he seeks to have the award filed in this court on 4th February 1998 set aside and the matter ordered to proceed before this court for hearing or alternatively remitted back to the elders for reconsideration.

The application is premised on grounds *inter alia* that the arbitrators misconducted themselves by failing to file the award within the required time and also acting outside their terms of reference and contrary to the rules of natural justice.

In his supporting affidavit, the applicant explains that although he was not initially a party to the suit the award was prejudicial to him in that it ruled that the Defendant should inherit Aguthi/Mungaria/402 which land has already been subdivided into two portions Aguthi/ Mungaria/576 and 577 and the applicant is the registered owner of one of the subdivisions Aguthi/Mungaria/576. The applicant maintains that there was breach of rules of natural justice in that he was not heard before the award was made. The applicant further complains that the arbitrators acted outside their mandate as they purported to determine a question relating to title to land which was not referred to them under Order 45 rule 1 of the Civil Procedure Rules. The affidavit of the applicant is very lengthy and deals with many other issues which I do not find necessary to go into.

In response the Defendant Charles Gikunju Thinwa has filed a replying affidavit in which he maintains that the application is a sham, frivolous and an abuse of the court process. He maintains that the applicant has been aware of the elders award for more than 6 years and his application is extremely belated and a waste of the courts time and that the applicant's interest being one of compensation he ought to file suit for the same.

It is clear from the record that the reference to arbitration was made by the consent of the parties on 6th November 1992 and that the award was to be filed within 150 days from that date. I have perused the court record but do not find any order or consent for the extension of time for the filing of the award. The filing of the award in court on 4th February 1998 was filed way out of the time given. On the authority of the case of **Bagwasi Nyangau v/s Omosa Nyakwara (1982 – 88) 1 KAR 805** the failure to file the award within the stated period, in the absence of an agreement or order to extend the time, rendered the award a nullity.

Secondly it is evident from the court record that the consent order referring the matter to arbitration

referred “all matters in dispute.” This can only be read in the light of the pleadings which were before the court. Although I have been unable to trace the defence on record, it is evident from the plaint that the Plaintiff’s claim was for special and general damages from the Defendant Charles Gikunju Thinwa for trespass on Plaintiff’s Land Aguthi/Mungaria/577. The matters in dispute therefore related to Aguthi/Mungaria/577. In the award however the arbitrators digressed into issues of inheritance concerning Aguthi/Mungaria/402 which was not what had been referred to them. It is apparent that the arbitrators misconducted themselves by acting outside the mandate accorded to them.

It is further evident that in dealing with the issue of ownership of Aguthi/Mungaria/402 the arbitrators ignored the fact that this land was already subdivided into two portions and one of the sub-division Aguthi/Mungaria/576 was registered in the name of the applicant who was then not a party to the suit. The arbitrators made an order which was adverse to the applicant’s proprietary interest without giving him a chance to be heard and the arbitrators therefore contravened the rules of natural justice.

It was submitted that the applicant was guilty of inordinate delay in bringing this application as he was aware of the matter before the court even though he was not a party. It is true that the applicant may have been aware of this suit and the reference to arbitration since this matter is essentially a family dispute, Nevertheless the applicant not being a party to the suit may not have appreciated the full purport of the award until the same was filed in court and there was a likelihood of its adoption as the judgment of this court. The Respondent cannot rely on this delay it being clear that he neither joined the applicant in his suit nor did his suit relate to the applicant’s land Aguthi/Mungaria/576.

The upshot of the above is that I do grant the application to the extent of declaring the arbitration award a nullity the same having been filed outside the given period.

I further rule that the arbitrators’ award would in any case have been set aside on the basis that the arbitrators misconducted themselves by acting outside their terms of reference.

On the above premises I order that this court shall proceed with the hearing of the suit under Order XLV rule 15 (2) of the Civil Procedure Rules.

Dated signed and delivered this 22nd day of March 2005.

H. M. OKWENGU

JUDGE