

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

Civil Appeal 207 of 2000

ODIENY MBUI APPELLANT

VERSUS

VERONICA YONGO RESPONDENT

JUDGMENT

The appellant ODIENY MBUI sued the Respondent VERONICAH YONGO before Senior Resident Magistrate Homa Bay seeking for an order to have her evicted from land Parcel No.NORTH NYOKAL/GONGO/1258. Hearing started on 19th March 1997 when the plaintiff gave his evidence before the court. However after he was crossexamined out of the blues the court referred the matter for arbitration by Chief of East Kagan Location assisted by elders. Eventually award was filed. It was in favour of the respondent. The appellant made an application for the award to be set aside. In its undated ruling the court dismissed the objection raised by the appellant and in the same vein adopted the elders award as judgment of the court. It is against that ruling the appellant has brought this appeal.

Mr. Masese for the appellant submitted that there was no basis for the magistrate to refer the case for arbitration after hearing the plaintiff. The parties did not request the case to be referred to arbitration. Further he said the appellant did not take part in the arbitration proceedings yet the court dismissed his application to set the award aside. The award affected his title to the land. Land had already been registered in his name and title deed issued.

Respondent opposed the application and said the land in dispute belonged to her late husband. There was arbitration by elders in 1969.

She further said the referral to arbitration by the magistrate was proper. Appellant failed to prevent his elders to the Chief.

I have carefully considered. I find that the referral of the case to arbitration by the magistrate was wrong and unlawful. In the first place the parties did not request the dispute be referred to arbitration. It seems the magistrate decided out of the blues to refer the case for arbitration on his own.

The magistrate did not say under which provision he referred the case to arbitration. It cannot be under Order 45 rule 17 CPR for he did not say so and the subordinate court do not have powers to do so under that rule.

Further it was not under the Land Disputes Tribunals Act (Act No.18 of 1990 for if that were so he would have referred the dispute to a Land Dispute Tribunal and not to arbitration by the Chief with help of elders. A chief cannot constitute a tribunal. It seems the magistrate referred the dispute under The Magistrate's Jurisdiction (Amendment Act (Act No.14 of 1981). That was the only act which gave magistrates powers to refer land disputes to arbitration with help of elders. That is also why he entertained an application to set aside the award after it was filed. However that Act was repealed by Act No.18 of 1990. Thus by the time the magistrate was referring the dispute to arbitration the act had been repealed. He therefore referred the dispute under nonexistence law.

That is why I find the referral to have been illegal and unlawful. For that reason I find application has merit.

The same is allowed and the order of referral to arbitration by the magistrate and all other consequential proceedings are hereby set aside. Case to be heard De Novo before another magistrate of competent jurisdiction. Each Party to bear its own costs in this appeal.

Dated this 14th day of April 2005

KABURU BAUNI

JUDGE

c/c Mobisa.

Respondent present.