



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL DIVISION

CIVIL APPEAL 78 OF 1990

ELIJAH KOGI DICHAGA.....1ST APPELLANT

ESTHER WANGARI GICHAGA.....2ND APPELLANT

LABAN MWANGI GICHAGA.....3RD APPELLANT

VERSUS

SAMWEL MUNYUA GICHAGA.....RESPONDENT

JUDGMENT

This appeal arises from the ruling of the Senior Resident Magistrate in Nakuru RMCC No. 883 of 1989 wherein on 14/11/89 the advocate for the plaintiff therein (now the appellant) asked the court to refer the dispute to a panel of elders for determination under Section 9 of the Magistrate's Jurisdiction (Amendment) Act No. 14 of 1981 which was operational then. The respondent who was unrepresented, did not object to that application and so the court granted the application and referred the dispute to a panel of elders under the chairmanship of the District Officer, Ol Kalau Division which commenced its deliberations on 30/1/90. The subject matter of the dispute was a parcel of land then known as Plot Number 60 Ngorika Settlement Scheme and the dispute involved members of the same family in that the first and the third appellants and the respondent are all brothers and their mother is the second appellant.

The appellants' contention as per their plaint that was filed in the aforesaid suit was that the said Plot Number 60 in Ngorika Settlement Scheme was acquired by the father of the three brothers from the Settlement Fund Trustees but was registered in the name of the respondent for the benefit of himself and also in trust for the appellants. The appellants alleged that all the parties moved into the property in or about 1965 and had been living there since then. The appellants therefore urged the court to make a declaration that the respondent was a trustee for himself and the appellants in respect of the said parcel of land. They also prayed that the property be sub-divided into four equal plots for each one of the parties.

The respondent denied the appellants' claim and in his defence stated that the parcel of land was his and that the appellants had no claim over the same. The panel of elders, after listening to the parties and their respective witnesses decided the matter in favour of the respondent. The award by the panel of elders was forwarded to the court and on 11/5/90 was read to the parties and they were given sixty days within which to apply for confirmation or setting aside of the award.

The appellants applied to set aside the award and argued that the respondent concealed some important information and misled the elders to believe that there was another parcel of land at Naivasha where they could move to. They also alleged that the award was tainted with corruption because the District Officer

had told one of the elders to ask the parties to pay Kshs.300/- each and the respondent agreed to that suggestion and paid the money. The respondent in reply stated that both parties contributed and paid the money which was used to buy lunch for the panel of elders. In his ruling, the trial magistrate held that since both parties contributed money to provide lunch for the members of the panel, that act did not amount to corruption and he proceeded to confirm the award.

The appellants, through their advocate Mr. Karanja-Mbugua argued in their appeal that the trial magistrate should not have referred the matter to the panel of elders without giving appropriate directions as to how the panel of elders was to be appointed. They also stated that there was corruption in the making of the award and argued that it was only the respondent who gave the sum of Kshs.300/- as was demanded. They further argued that the holding by the trial court that there was a parcel of land in Naivasha where the appellants could shift to was wrong and unfounded. They therefore urged this court to set aside the said award.

In response the respondent's counsel, Mr. Ombui blamed the appellant's advocate before the trial court for having applied for the referral of the suit to a panel of elders when such a panel did not have jurisdiction to entertain the dispute as the property in question was at the time a registered one under the provisions of the Registered Land Act. He submitted that the respondent as a lay person who was unrepresented at the time when the said application was made, conceded to the same out of ignorance of the law. However, with regard to the merits of the award, he defended the same, saying that the elders had properly considered all the issues before they arrived at their decision.

Regarding the alleged incident of corruption, counsel submitted that both parties gave Kshs.300/- each for the elders' lunch but none of them had made any complaint anywhere and both participated in the proceedings. I have looked at the record of appeal and it is not in dispute that the parcel of land that was known as Plot Number 60 Ngorika Settlement Scheme (the subject matter of the dispute) was registered as NYANDARAU/NGORIKA/346 on 18th January, 1989 and the registered proprietor of the same is the respondent. The suit that was in the subordinate court RMCC No. 883 of 1989 was filed on 3rd October, 1989. At the time of filing suit, the respondent was the registered sole proprietor of the parcel of land.

That having been the case, the dispute over the said property could not have been lawfully referred to a panel of elders. It matters not that both parties consented to such a move, the panels of elders that were established under the Magistrates Jurisdiction (Amendment) Act No. 14 of 1981 had no jurisdiction to deal with disputes involving registered parcels of land. The Court of Appeal in WANJALA WEKESA VS PATRICK MUCHENGUE [1985] K.L.R. held that:- "The panel of elders had no jurisdiction to arbitrate over the two parcels of land, a panel of elders cannot lawfully entertain an issue which concerns title to land."

Jurisdiction cannot be conferred upon a court or an adjudicating body by consent of parties to a dispute if such jurisdiction has not been granted by the relevant statute. The proceedings and the award by the panel of elders were a nullity and must be set aside. Turning briefly to the issue of the alleged corruption on account of the fact that the chairman of the adjudicating panel had unofficially asked either both parties or one of them to pay Kshs.300/- which was justified as "lunch money", whether that money was politely requested for or demanded from the parties to the dispute or whether only one party agreed to pay or both of them did, the fact of the matter was that the money was illegally paid.

There was no requirement under the Act that a party or parties to any dispute had to provide lunch to the panel of elders. It is wrong for any judicial or adjudicating body to request for or demand or even accept without any form of request or demand any money from either or both of the parties to a dispute. Where that happens, it is a clear case of corruption and the offence is not made any lesser by the fact that both sides may have given the money. I therefore agree with the appellant that the decision of the panel of elders was tainted with corruption and must be rejected.

Having set aside the award by the panel of elders, I order that the suit that had been filed by the appellants in the subordinate court be reheard by that court or any other court with appropriate pecuniary jurisdiction. Each party shall bear its own costs.

DATED, SIGNED & DELIVERED at Nakuru this 13th day of July, 2005.

D. MUSINGA

JUDGE

13/7/2005