



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Civil Case 202 of 1980

JOHNSON GITHAIGA KIRAGU APPELLANT

VERSUS

MACHARIA KIRAGU RESPONDENT

RULING

By a notice of motion dated 1st November 1985 filed in High Court Miscellaneous application number 87 of 1979, Macharia Kiragu (hereinafter referred to as the applicant) moved this court under Order XLV rules 13, 14 & 15 of the civil Procedure Rules for orders to set aside the arbitration award which was read in court on the 2nd day of October 1985 and a further order for the suit to proceed to hearing on its merits before the court.

On 3rd May 2005, that application was listed for hearing in this file which has apparently been consolidated with High Court Misc. Application No. 87 of 1979. It turned out however that the affidavit in support of the application was defective not having been attested. The court therefore expunged from the record the affidavit as being defective. The court further directed that the applicant makes a formal application for leave to withdraw the application dated 1st November 1985 and leave to file another application.

Consequently the applicant filed a notice of motion dated 29th June 2005 seeking leave to withdraw the application dated 1st November 1985 and leave to file another application to set aside the arbitration award filed in the court dated 2nd October 1985. As per the grounds stated on the body of the application, it is stated that the original file pertaining to this suit was misplaced or lost and that there is no order for referral to arbitration dated 11th May 1984 in the current file, nor is there any indication whether period for filing award was extended.

Mr. K. Wachira who appeared for the Respondent has no objection to the withdrawal of the application dated 1st November 1985 but strenuously objects to the court granting leave to the applicant to file another application for setting aside the award as no leave has been sought to file the application out of time. He maintains that the applicant has not explained the delay of over 20 years.

He maintains that the order for referral was erroneously made in High Court Misc. Application No. 87 of 1979 (which was an application to have file i.e. S.R.M.C.C. 175 of 1977 transferred to the High Court). A copy of the referral order is annexed to the replying affidavit sworn by the Respondent. Mr.

Wachira therefore urged the court to dismiss the application.

It is evident from the above, that the applicant's application for setting aside the arbitration award was filed about 20 years ago as the same was filed on 1st November 1985. The impression being created that there has been a delay of 20 years is therefore erroneous. It is evident that the original substantive file H.C.C.C. No. 202 of 1980 has been missing and this obviously affected the pace at which the proceedings moved.

Although it is alleged that the reference to arbitration was made in High Court Misc. Application No. 87 of 1979. I only have a skeleton file in respect of that application, which file does not contain the referral order of 11th May 1984. I can therefore appreciate the handicap that the appellant is in. In the circumstances it is only fair and just that the applicant be granted leave to file his application for setting aside the arbitration award so that he can have an opportunity of being heard. Moreover no injustice will be caused to the Respondent as he will have the opportunity to respond to and object to the application.

I do therefore grant the application dated 29th June 2005. The applicant to file his application within 15 days from the date hereof.

Costs of the application dated 1st November 1985 to the Respondent.

Orders accordingly.

Dated signed and delivered this 23rd day of November 2005

H. M. OKWENGU

JUDGE