



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
HIGH COURT CIVIL CASE NO. 268 OF 1987

1. JOSPHAT NDUNGU NAIRANGU)

2. TIRAS KAGO KIUGU & 60 OTHERS) APPLICANTS/ PLAINTIFFS

VERSUS

1. THE HON. ATTORNEY GENERAL)

2. THE CHAIRMAN GAKANGA EXCH.) COMMITTEE)

3. DISTRICT FOREST OFFICER)..... RESPONDENTS/DEFENDANTS

R U L I N G

By a notice of Motion dated 14th August 2003 Josphat Ndungu Ndirangu and 60 others who were the Plaintiffs in his suit have come to this court under Order XLV rules 15 (1)(a)(b), (2) and rule 16 of the civil procedure Rules and Section 3A of the Civil Procedure Act seeking to have the award which was filed in this court on 12th November 1997 and read on the 18th July 2003 set aside and the court to proceed with the matter afresh.

It is contended that the arbitrator misconducted himself in not allowing the Plaintiffs to cross examine the 2nd Defendant and that the 2nd Defendant concealed vital information pertaining to the agreements reached between the Plaintiff and the government and that the arbitrator totally ignored his terms of reference.

The order of reference made by this court on 25th November 1987 was as follows:

“By consent the question of resettlement of the Plaintiffs from Gakanga to new Gakanga/Charity be referred to arbitration of the provincial Commissioner, Central Province, who shall also allocate the acreage entitlement of each Plaintiff.

Award to be filed within 90 days. Meantime no action be taken to the matter.”

Following the order the suit was mentioned several times but no award had been filed in court. Time was extended for filing the award, the last order of extension being made on 23rd February 1995 when time was extended to 22.6.95. On 22nd June 1995 the matter came up before court when it was noted that the award had not been filed. No further extension of time appears to have been made although on 8th January 1999 and 26th February 1999 the matter came up before the Deputy Registrar and it was noted that no award had been filed. On 18th July 2003 the matter came up before the Deputy Registrar when he noted that “the award filed in this court on 12th November 1997 is hereby adopted by the court. Any party wishing to appeal to do so within 60 days.” It is pursuant to this that the applicant brought their notice of motion dated 14th August 2003.

It is evident that the Deputy Registrar did not follow the proper procedure as outlined under Order XLV of the Civil Procedure Rules. The award was not read nor were the parties given an opportunity to make application under rules 13, 14 and 15, for modification, remitting or setting aside the award before considering the adoption of the award as judgment. Under those circumstances the earliest opportunity the applicant had to bring this application was after the purported adoption of the judgment and the applicants cannot therefore be faulted.

It is also apparent that although the award was purported to have been filed in court on 12th November 1997 and bore a court stamp of this date, this could not have been the actual date of filing.

As already indicated the court had mentioned the case on 8th January 1999 and again on 26th February 1999 and on both dates it was noted that no award had been filed. In addition the court file has copies of letters addressed to the Provincial Commissioner between 1999 and 2003 complaining about the delay in filing the award in court. Indeed the court through the Deputy Registrar wrote a letter dated 5th February 2003 to the Provincial Commission Central Province protesting the delay and asking that the award be filed in court by 18th February 2003. Upon receipt of that letter the Provincial Commissioner Central wrote a letter to the Permanent Secretary Ministry of Energy on the same issue, which letter was copied to this court. It appears that it is following these letter that the award was filed in court. Indeed a letter dated 27th February 2003 was thereafter written to the parties advising them of the filing of the award in court.

It is clear that under Order XLV rule 8 of the Civil Procedure Rules where an arbitrator has been given a specific period within which to file an award such an award can only be filed outside the given period if the parties have agreed by consent to extend the period or where the court has made an order extending the period.

In this case there was no consent agreed by the parties nor was there any court order to extend the period beyond 22nd June 1995. It is therefore evident that whether the award was filed on 12th November 1997 or in February 2003, the same was filed way out of time and in the absence of a consent or court order to extend the time the award was a nullity.

In this regard the case of **Bagwasi Nyangau v/s Omosa Nyakware (1982 – 88) 1 KAR 805** is a case in point.

It follows therefore that although this was not raised by the parties the award filed in court was a nullity and the court cannot shut its eyes to this fact.

Notwithstanding the above I have considered the applicants complaint that the arbitrator misconducted himself in failing to allow the Plaintiffs to cross examine the defence witnesses and that vital information was concealed from the arbitrator.

Although the 1st and 3rd Defendant Respondent maintained that the panel appointed to arbitrate visited the individual plots and the Plaintiff/Applicant were allowed to be present and to make their observations, the proceedings and award filed in court does not reflect this. The proceedings do not indicate whether any of the plaintiffs was given an opportunity to ask questions or whether they did ask any questions.

Moreover although it is evident from the proceedings that the first Defendant in his evidence made reference to certain documents which were material to the case, he did not produce the documents but said they were kept by the county council and the District Commissioner. The arbitrator did not therefore have the benefit of these documents. Although the existence of these documents was revealed to the arbitrator, the actual documents were not availed to the arbitrator and there was therefore withholding of material facts from the arbitrator by the 1st Defendant.

The upshot of the above is that I set aside the arbitrators award filed on 12th November 1997 as the same is a nullity. I also find that the arbitrator misconducted himself in the proceedings by failing to give

Plaintiffs opportunity to question witnesses and further that the Defendant withheld material documents from the arbitrators and these would also have been sufficient ground to set aside the arbitrators award if it was not a nullity.

In view of the length of time that this case has already taken I order that the arbitrators' award shall be superceded and the suit shall be tried by this court.

Those shall be the orders of this court.

Dated signed and delivered this 21st day of March 2005.

H. M. OKWENGU

JUDGE