

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case 121 of 1998

ROBIN STUART MACDONALD..... PLAINTIFF

VERSUS

1. ESTHER JONATHAN NGUMBI

2. JUSTUS M KYUNGU.....DEFENDANT

RULING

Robin Stuart Macdonald filed a suit against the defendant Esther Jonathan Ngumbi on 14/5/98 seeking orders of possession of the land parcel No. 34 Mtito Andei and mesne profits at the rate of Kshs.3,000/= with effect from 1/11/94 until possession was delivered; general damages and costs.

Later on 21/4/99 the parties agreed to have the matter referred to arbitration under Order 45 Civil Procedure Rules. The award was read to the parties in court on 20/7/01 but the defendant/applicant Esther Jonathan was dissatisfied with the award and filed the application dated 17/8/01 seeking the award to be set aside, that the court do supersede the arbitration and proceed to hear the suit and costs to be provided for. The grounds upon which the application is brought are as follows: that the defendant's witnesses were not allowed to testify; that the plaintiff did not attend the case and yet the case was decided in his favour; that there was no evidence to rebut defendant's/applicant's evidence and that the arbitrator misconducted himself during the arbitration process. The applicant also swore an affidavit in support of the application which basically reiterates the grounds.

A replying affidavit was filed by the plaintiff/Respondent Robin Stuart dated 24/9/01.

The applicant's main argument is that the arbitrator misconducted himself in that he included one Munyambu Kangale on the panel and yet she objected to his presence there and that her witnesses who attended were denied a chance to testify. There is also the applicant's contention that the plaintiff was not called to testify and yet she had vital questions to ask him. Another allegation against the arbitrator is that each party was interviewed independently and they were not cross examined. The applicant relied on an extract from Halsbury's Laws of England 3rd edition Volume 2 Page 57 which deals with the grounds that the court will consider for setting aside of an award. The instances when an award can be set aside include instances where the award is improperly produced/evidence fraudulently concealed or where the arbitrator misconducts himself. At paragraph 126, instances that constitutes misconduct are listed and are numerous and inexhaustive. Some of the instances of misconduct include failure to hear evidence of a material witness; hearing one party and not the other; taking of evidence in the absence of one party, taking an abuse, to name just but a few. Counsel relied on the case of **BAGWASI NYANGAU versus OMOSA NYAKWARA /KAR 1982-88 Page 805** where an award was set aside where the arbitrator failed to permit the calling of a material witness and the court termed that as misconduct.

The application was opposed and Mr Makali for Respondent first took issue with the affidavit dated 17/8/01 for failing to comply with provisions of Order 18 Civil Procedure Rules in that it contained arguments but not information or beliefs and that it offends provisions of Order 18 Rule 3. It is also said to offend provisions of the Oaths and Statutory Act as it does not indicate where the affidavit was sworn and counsel urges that the said affidavit be struck out

The Respondent also urged that this application is not served on all the councilors who form the town council of Mtito Andei. Misconduct on the part of the arbitrator was denied because the councilor that applicant complained of i.e. John Kimundu left the venue and that though the plaintiff was absent the applicant he was so absent with the consent of the Respondents, that the applicant never requested to cross examine him and was denied.

Before going to the merits of this application, I think it is pertinent that I deal with the issues raised regarding the affidavit sworn by the applicant. The said affidavit by the applicant clearly offends the provisions of order 18 Rule 3 and 5. Rule 3 provides that an affidavit should be confined to facts that the deponent is able of his own knowledge to prove or with the leave of the court; it may contain statements of information and belief showing the sources and grounds. The affidavit at paragraph 3 of the application contains arguments; it does not show the source of some of the information or beliefs. The same affidavit offends provisions of Order 18 Rule 5 in that it is not drawn in the first person as required.

Further to the above, the said affidavit offends Section 5 of the Oaths and Statutory Declaration Act Cap 15 in that the place of swearing of the affidavit is not indicated. It was held in the case of *EASTERN AND SOUTHERN AFRICAN DEVELOPMENT BANK versus AFRICAN GREENFIEDS LTD HCC 1189/00* that the provisions of Section 5 oaths are mandatory and that court struck out the affidavit for that reason. I do hold the same view. *See also STEPHEN KIBUNJA versus FOREST RD FLATS LTD. HCC 371/00*. As regards the other defects under Order 18 Rules 3 and 5, I do find that the same cannot be cured by Order 18 Rule 7 as the irregularities go to the substance of the affidavit which cannot be disregarded. The affidavit is incompetent and the whole of it has to be struck out. Without an affidavit to support the application, that application cannot stand and would be automatically struck out and my finding on this issue would suffice to dispose of the application.

The court will, however, go ahead to consider the merits of the application. The first issue is whether all the councilors who were members of the Mtito Andei Town Council whose decision has been faulted were served with this application. Order 45 Rule 19 provides that an application to set aside an award shall be served on the arbitrator or umpire. The consent order dated 2/6/99 referred the matter to the clerk to council Mtito Andei Urban Council for determination. The arbitrator was the clerk to the council and service of this application on the clerk sufficed. There was no need to serve the other councilors.

I have read the proceedings before the arbitrator and I do find that there was some misconduct on the part of the arbitrator for example, even before starting to hear the evidence they locked out the applicant's witnesses; they interviewed parties separately and there is no evidence that parties were cross examined. It is apparent from the record that the applicant agreed with dispensing with the presence of the plaintiff but it is a wonder how he would prove ownership of the land without presenting his evidence. Dispensing with his presence was irregular. From the record, the applicant only objected to the presence of one councilor who was recorded to have left the panel. The applicant cannot be seen to raise the issue of all councilors disqualifying themselves when the same did not arise. All in all, I do agree that there was some misconduct on the part of the arbitrator. However, as earlier found, there is no evidence in the form of an affidavit to support the application the same having been struck out. On that ground alone the application cannot stand despite that the merits considered abuse and the application too, is struck out with costs to the Respondent.

Dated at Machakos this 14th day of December 2004

Read and delivered in the presence of

R.V. WENDOH
JUDGE