



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL APPEAL NO. 74 OF 1979

HENRY GATHU THANDEAPPLICANT

VERSUS

BENSON KAMAU KARIGITHIRESPONDENT

RULING

This application dated 13th November, 1997 is for review of this court's judgment entered on 22nd February 1984. It arose out of the award of elders filed in court on 18th August 1983.

An application filed in this court on 7th June 1984 to have this order set aside was dismissed by Justice Shields (as he then was) on 30th May 1986.

The matter did not end there and around 3rd June 1986 notice of appeal was filed in the Court of Appeal against dismissal of the application to set aside and the judgment of that court delivered on 6th November, 1997 dismissed that appeal.

It would appear that the application to set aside the order of 22nd February 1984 was based on the fact that appellant had not been served with the application for entry of judgment per award – but counsel for the appellant conceded in the court that his client had been served, hence the dismissal of the appeal.

However, the Court of Appeal made it clear that it was not seized of jurisdiction to attack the order entering judgment as per award dated 22nd February 1984 as there was no appeal lodged against it.

This is why the applicant found an opportunity to file this application by way of Review on 13th November, 1997 to say the decree extracted by counsel for the respondent was not as per the award.

In this court, counsel stated that Judgment should be entered per the award, he did not specify what that award stated, and/or that in fact the majority of the elders had found for the applicant.

Counsel for the respondent, on the other hand submitted that in fact by the time the award was made the parties were staying on the plots they had been registered on – albeit by mistake of the Land Registrar, and that this was the status quo they were talking about in the award.

But that the applicant changed this status quo when this case was going on by forcefully moving onto the plot the respondent had planted mature tea crops and settled and putting up a house, thereon to claim ownership as per the award.

I do not know under what provision of law the applicant applied to set aside the judgment of this court dated 22nd February 1984 because under Order XLV the award can be set aside before it is made a judgment of the court and that grounds for setting aside such award are well set out in Rule 15 of the

Order.

No wonder then that the firm of Khaminwa & Khaminwa, Advocates did not specify the provision of law which application to set aside the judgment aforesaid was made, otherwise the proper course to take was to appeal against refusal to set aside. – See Rule 17(2) of the order aforesaid. This was actually done in respect of Justice Shields judgment in which, case, at the time, the applicant found no fault with it.

Then 13 years after that judgment the applicant comes to this court with this application for review and goes into the grounds which he has always been aware of even when he lodged the appeal to the Court of Appeal against Justice Shields order.

But order XLIV Rule 1 of the Civil Procedure Rules provides that such an application should be filed in the court which made the order without unreasonable delay.

13 years delay, and without giving reasons or any sufficient reason for the delay, is really an unreasonable delay.

Moreover, I am not persuaded, considering the award made by the elders, that the grounds advanced by counsel for the applicant are covered by those stated in Order XLIV (1) of the Civil Procedure Rules to warrant the grant of an order for review by this court.

I dismiss this application with costs.

Delivered and dated at Nairobi this 12th day of June, 2002.

D.K.S. AGANYANYA

JUDGE