REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

CIVIL APPEAL 305 OF 2000

JOHN NG'ANG'A KANINI ……. APPELLANT

VERSUS

NAOMI WAITHIRA CHEGE ……. RESPONDENT

J U D G E M E N T

A suit filed in this court on 27th March, 1995 and amended on 13th February, 1996 sought a declaration that the registration of L.R No.GATAMAIYU/GACHOIRE/285 in the name of the defendant was done through misrepresentation and fraudulent means and an order to nullify the registration and direct that the District Land Registrar Kiambu to restore the records relating to that land in the name of the plaintiff.

The case has never been heard except that there have been numerous applications filed and heard from one or the other of the parties.

However, on 19th September, 1997, counsel for both parties recorded a consent order to refer the dispute to the District Land Disputes Tribunal, I suppose, in Kiambu, for arbitration and that the award was to be filed in court within 90 days.

But for almost two (2) to three (3) years no such award had been filed and on 18th April, 2000 the respondent herein filed an application for setting aside of the order of 19th September, 1997 referring the dispute to the Tribunal for arbitration. The application was supported by the grounds set out thereon and the supporting affidavit. But when it came up for hearing on 12th May, 2002, counsel for the respondent raised a preliminary objection stating the same was res judicata, a similar application, having been filed by the applicant and disposed off by dismissal in 1998.

That since the order of referral was made on 19.9.97 by consent of the parties, it could only be set aside by another consent.

Counsel for the respondent countered that the order of reference could not confer jurisdiction upon the Tribunal where none existed.

The learned Resident Magistrate wrote a ruling on the matter on 16th June, 2000 disallowing the preliminary objection and this is why this appeal was filed with leave of that court on 22nd June, 2000. The memorandum of appeal has listed 3 grounds of appeal.

These grounds urged that the learned Magistrate should have dismissed the application filed in court on 18th April, 2000 because it was resjudicata, or because the order made on 19.9.97 had been made by consent of the parties and that it was premature because the award already filed in court had not been read.

The appeal was placed before this court on 15th May, 2002 when counsel for both parties appeared to either present or oppose it. Counsel for the appellant repeated his first ground of appeal taking the court through the previous application heard by the same lower court on 14th April, 1998 and dismissed on 17th April, 1998.

Counsel stated that he drew the lower courts attention to this point in the application subject to this appeal but he was overruled.

According to counsel the award was filed in court on 4.1.2000 and that despite his efforts to have it read, or have notices to the parties that the same had been filed in court, nothing happened and blamed the Magistrate for being bias. That since the award had not been read to the parties, though filed, the application for setting it aside was premature, hence the learned Magistrate should have upheld the appellants' preliminary objection. He prayed that the appeal be allowed with costs.

Counsel for the respondent opposed the appeal and said the Magistrate rightly disallowed the preliminary objection. According Counsel the application of 17.4.2000 was for review, of the order made on 19.9.97 under order XLIV Rule. That this was a proper application since the case had been removed from court to the Land Disputes Tribunal without allowing parties to consent to this.

That there were no terms of reference to arbitration hence this could not be said to have been reference by consent of the parties.

Counsel disputed that an award filed in court well after the 90 days allowed in the Order of 19.9.97 was a valid award at all as there was no extension of time. According to him, an arbitration cannot deal with a criminal case. That what parties were intended to do was to withdraw the case from the court and institute proper proceedings in the Land Disputes Tribunal which did not happen in the case subject to this. That the remedy to this anomaly was to have the order of 19.9.97 set aside and that is why the application of 17.4.2000 was made.

Counsel submitted that the doctrine of Res Judicata could not arise where the court ruled the case be heard in court. Counsel urged the court to dismiss the appeal with costs.

I have heard and recorded submissions of Counsel for both parties and perused through the record of proceedings in this matter including the ruling subject of this appeal. In the first place, Magistrates and advocates need to differentiate orders of arbitrations under order 45 of the Civil Procedure Rules and those under the Land Disputes Tribunal Act No.18 of 1991.

In the former, with consent of the parties to any suit pending in court, it can be referred to arbitration to an umpire either alone or with assistance of another person or persons. In this case, the litigants choose those to arbitrate over their case and that a time limit is usually set when the award should be filed in court and if that time limit is not met, then an extension of time should be sought. On the other hand, the Land Disputes Tribunal Act sets out specific land cases which should be deliberated upon or heard by Land Dispute Tribunals from the Division to the Province. The Act lays down its own procedure on how these cases should be instituted, heard and by who.

The Act has stages of hearing of land cases from the Divisional Land Disputes Tribunal to the Provincial Land Disputes Appeals Committee with a second Appeal to the High Court on points of law within 60 days.

In the case subject to this appeal where the Magistrates court purported to remit the case to the Land Disputes Tribunal for arbitration, there was clearly a failure of understanding of roles of Order XLV of

the Civil Procedure Rules and that of the Land Disputes Tribunal Act. The best way out was for the parties to withdraw the case from the court and then institute proceedings at the Divisional Land Disputes Tribunal in accordance with the Act. And if the court was making an order under Order XLV aforesaid, which it did not, then the time limit of filing award within 90 days should have been complied with which was not done.

The award here was filed about 2 years after the order of reference and this was certainly of no effect.

That the referral was made with the consent of the parties in the circumstances of the case makes no difference. The whole thing turned out to be in valid. Of course when the applicants counsel raised a preliminary objection to the application dated 17/4/2000 he had a valid point given that a similar application had been filed in the same court on 1st April, 1998 and dismissed on 17/4/1998.

It was certainly an error on the magistrates part to ignore this point and to go on to disallow the preliminary objection. After all this doctrine is provided for under Section 3 of the Civil Procedure Act.

Counsel for the appellant even drew the magistrate's notice to this point during submissions on the preliminary objection and it was encumbent upon him to take that point seriously and to decide the application differently. Never the less, the preliminary objection was not meant to cure anything because counsel for the applicant wanted the application dismissed so as for the award filed in court to be read and adopted as an order of the court. It would appear his client had gained under the arbitration.

But I am told two awards had been filed, one by the Divisional Land Disputes Tribunal and the other by the Provincial Land Appeals Committee; and it was difficult to know which one to be read by the court.

In view of what has been started herein, particularly that the application dated 17/4/2000 was resjudicata, the learned magistrate should have upheld the preliminary objection. I allow this appeal with costs, set aside the court order of 16.6.2000 and since I have found that the order of referral was flouted by exceeding the time limit for filing the award in court and/or that the said order of referral was defective from the start, I direct that the case subject to this appeal be heard on merit at Kiambu Senior Principal Magistrates Court.

These shall be the orders of this court.

Delivered this 3rd day of July, 2002.

D.K.S. AGANYANYA

JUDGE