REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 261 OF 1993

JAMES NJOROGE WAINAINA ……………………………APPELLANT

VERSUS

NYATRIO NJOROGE ……………………………………RESPONDENT

J U D G M E N T

This dispute has a somewhat intriguing history. The appellant had sued the respondent in the court of the Resident Magistrate Naivasha on 9th November 1988 to claim from the latter 5 acres out of a parcel of land known as No. 816/Ndemi scheme Kipipiri which he alleged had been sold to him by the said respondent at Kshs.8,330/=. I was told the number of the land was later changed to No. 1231/Ndemi scheme Kipipiri Division.

The magistrate who initially handled this case, a Mr. J.E. Ashioya, Resident Magistrate, referred the dispute to a panel of elders twice, firstly on 13th March 1989 and secondly on 15th December 1989.

The first arbitration award dismissed the appellant's claim while the second award allowed his claim of 5 acres out of Ndemi scheme/1231 subject to appellant paying to the respondent a further Kshs.16,670/= on top of Kshs.8,330/= already paid to make a total of Kshs.25,000/= for 5 acres.

This award was read to the parties on 11th May 1990 and since no application was made by any aggrieved party to set it aside within the period allowed, this award was confirmed as a judgment of the court on 14th September 1990. It would appear after the confirmation the case took a strange turn.

Ashioya was transferred, probably, and another Resident Magistrate, D.K. Gichuki took over the station.

On 30th December, 1991, more than one year after the order of confirmation, the parties came back to court with the respondent saying the District Commissioner had sent them to the court for further orders after she had lodged a complaint there.

The magistrate then mentioned the case before him on 3.1.92 when he made what he called "***a ruling*** " making certain observations of the entire case highlighting what he considered as discrepancies in the proceedings and remitting the same to the District Commissioner Nyandarua to investigate the matter and forward a comprehensive report to the court before further steps were taken. It is not clear on the record if such report was forwarded to the court.

There was also a suggestion that fingerprints and signatures of some people be authenticated but there is no record as to what happened in this regard either.

The learned magistrate even suggested that he would hold a preliminary hearing of the summoned people

but there is no record of this hearing on the lower court file. Then on 22nd October 1992 there is a "ruling" on the file thus:-

> ***"After a careful study of the case herein, the cause that the same has taken since the same was filed in court I find that with all the respect to what has transpired herein, the actual position of the law regarding arbitration before a panel of elders under the magistrates jurisdiction (amendment) Act No. 14 of 1981 or any other arbitration known by our law, it is the findings of this court that the only option open to the plaintiff herein is to claim a refund of his money and any further deposits that may have been deposited in court. That way justice may be seen to be done. There should be an end to litigation. Equity demands justice. Equity cannot assist a litigant to commit a wrong. There is no doubt that which ever way this matter be considered it would be an exercise in injustice to allow the plaintiff herein to get any land from the defendant.***
>
> ***Orders accordingly.***
>
> ***Signed D.K. Gichuki***
>
> ***Resident Magistrate***
>
> ***22.10.92"***

A very tricky situation indeed. From where was this ruling? I thought under Section 2(9E) of the magistrates jurisdiction (Amendment) Act – No 14 of 1981 now repealed, once the award of elders had been adopted as the judgment of the court and decree drawn, there were no further applications except an appeal made from the decree which must have been made in excess of or not in accordance with decision of the panel of elders.

The presumption here, I think, is that the aggrieved party filed an application for setting aside the elder's award which application was refused, hence this provision for appeal.

In the case subject to this appeal, however, there was no such application which implies that the respondent consented to the adoption of the elders award as the judgment of the court. No appeal was preferred except the respondent went to complain to the District Commissioner, Nyandarua who referred the parties back to the court and instead of the learned magistrate advising them to seek legal counsel on what appropriate action to take, he purported to place upon himself revisionary powers; which I think the ruling subject to this appeal was meant to be. This was a serious misdirection on the part of the learned magistrate.

Of course there were a number of flaws in this case the main one being that the appellant was seeking an order of court to either subdivide titled land registration number 816 (1231)/Ndemi scheme/Kipipiri division so as to allote him part of it or the transfer of the whole portion of it to him on ground of a sale agreement. This did not fall within the perview of the panel of elders.

I am also not quite sure this sale complied with the provisions of law relating to the sale of land more so those relating to consents of the Land Control Board – which actually boils down to the fact that whatever the learned magistrate did giving rise to this appeal was an exercise in futility.

My observation and perusal of the reply of counsel for the respondent in this application gave the impression that he too acknowledges there were flaws in the lower court proceedings and that there is no alternative for this court but to allow this appeal and make an order that the case be remitted back to Naivasha Law Court for it to be heard on merits if the parties so insist. Each party to pay his/her own costs of this appeal.

Delivered and dated this 24th day of October, 2002.

D.K.S. AGANYANYA

JUDGE