REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL APPEAL 98 OF 1993

MUNYAMBU MWENDWA..... APPELLANT

VERSUS

MULWA KIMWELE..... RESPONDENT

JUDGEMENT

The facts of the case and appeal are very scanty. A perusal of the record shows that the appellant Munyambu son of Mwendwa filed land case No.56/86 in the District Magistrate's Court at Mwingi against the Respondent /defendant Mulwa son of Kimwele. The brief facts of the claims are that the plaintiff/appellant was claiming land from the defendant/respondent which the defendant/respondent entered in 1975 without the plaintiff/appellant's consent. It is further indicated in the home made plaint that the cause of action arose at Mbuu sub-location, Ikosi location in Kitui district where the court has jurisdiction. It is noted from the plaint that the description of the title number of the land and the size is not given. It is also to be noted that the entry into the land was said to have been in 1975 while the action was being filed on 17th November, 1986 a period of over 10 years.

The defence is not traced on the file since the case was filed in 1986 the magistrate's court amendment Act No. 14 of 1981 was in force.

The proceedings as to who moved the court to refer the matter to the elders are missing from the court. It is not also known in what period of time the ward was to be filed in court. There is an entry on 14th February, 1989 to the effect that the parties were present and the elders decision read to the parties on 14th February, 1989 and the parties were given right of appeal within 28 days. The order extracted from the court order made by the learned District Magistrate referring the matter to the elders is not in the lower court file. The hand written proceedings of the lower court are also missing. The court has however, traced a communication from the office of the president from the office of the District Officer Kyuso reference No.KYS/VolIII/89 dated 8th April, 1987, another communication reference No.KYS 117/Volll/57 dated 13th July, 1988, another communication ref. KYS117/VollV dated 9th August, 1988. They were all addressed to the appellant/plaintiff through the chief ukasi location inviting him to appear on 21st April 1987 21st july 1987 and 31st August 1988 for the hearing of land case no 561/ 1986 . The appellant was also notified that each party was to appoint two elders to preside over the case each party was to bring along two witnesses who knew the case and can give evidence . these witnesses were not to be clan elders.

The elders Each party chooses should be from within the location of the land in dispute but should not be from their clan.

This court has not traced any similar communication which was addressed to the defendant inviting him to attend the hearing of the case with his witnesses and elders.

At page nine of the record there is what appear to be proceedings before the elders filed in court on a date not visible from the court stamp. It appears they are proceedings before the elders. The date on which the case was heard before the elders is not given, only the plaintiff/appellant and his two witnesses testified. The elders gave a judgement whose contents are that the elders find

That since the respondent has failed to turn up then he has no claim over the land in dispute. It was therefore, recommended that the land belongs to the plaintiff and he be paid the expenses he has spent when coming to the court. There is no date when the judgment was given. There is no indication that the said judgement was ever signed by the elders who were indicated to be:-

1. Andrew K. Mwangi.

2. Jeremiah M. Kilungya

3. D. C. Amdany - Chairman.

A revisit to the proceedings availed an appeal shows that the elders award read to the parties on 14th February, 1989 was not confirmed within 30 days of the reading as was required by Act No.14 of 1981. Instead of explaining to the parties the right of applying to set aside the elders award before the expiry of 30 days from the date of the reading of the award, the learned District Magistrate gave a right of appeal.

The record also shows that on 2nd May, 1989 the plaintiff/appellant made an oral application to the lower court seeking orders that the respondent do move out of the said land because the elders had awarded it to him. It is noted that the respondent was present and he replied that he cannot move from the land because it is his. There appears to have been no formal application made by the applicant/appellant.

The court then made an order that the respondent is given 30 days to move out of the suit land or be formally evicted by the D.O. and the local chief. When making the said order the learned trial magistrate failed to appreciate the fact that the basis on which that application for eviction was being made was the award which was read to the parties on 14th February, 1989. The learned trial magistrate also failed to appreciate the fact that that award had not been made a judgement of the court upon confirmation. The learned trial magistrate also failed to appreciate the fact that it is only after confirmation of the award is when any legal process can emanate there from such as drawing up of the decree and then setting the execution process in motion. In the absence of the above outlined steps having been taken the eviction order purported to have been issued was granted in vain and was a nullity and of no consequence at all.

A further revisit to the court record shows that an application was made by consent for the respondent herein to have the elders award read to the parties on 14th December, 1989 and the eviction orders made on 2nd May, 1989 be set aside principally on the ground that the matter involves land which is very sensitive and the applicant/respondent was not heard because she had not been notified to appear and so he was denied a right to be heard, that he had no way of knowing the proceedings were going on as he was not notified of the same, that the respondent/defendant had been snatched his land without being heard and that the court to note that land matters are very sensitive and the respondent/defendant should be given an opportunity of being heard on his land before his land is taken away from him. That they had shown sufficient grounds to warrant the award being set aside. These proceedings were on 17th April, 1990 one year later after the award had been read to the parties. It is noted that the current appellant/plaintiff who was a respondent to that application made representations opposing that application to the effect that he respondent/defendant who was the applicant had been notified severally to appear for the hearing severally but he failed to do so and so the panel of elders was entitled to proceed in

his absence.

The counsel appearing for the applicant/defendant who is the respondent herein then informed the learned trial magistrate that the representations of the plaintiff/respondent who is the appellant have confirmed that indeed the defendant/respondent was not given an opportunity to be heard and so the matter should be reopened for him to be heard before his land is taken away from him.

The matter was adjourned to 7th June, 1990 when counsel for thedefendant/applicant who is the respondent herein was to bring anauthority he had cited to court in his submissions. On 7th June,1990 the court noted on the record that counsel for the applicanthad phoned saying that he was engaged in the High Court and herequested for the matter to be marked S.O.G. and it was so marked S.O.G.

On 8th January, 1990 the defendant and his counsel were absent and the matter was fixed for hearing on 19th March, 1991. It is noted that counsel for the defendant appeared later in the day and noted the hearing date. On 19th March, 1991 it is observed by the learned lower court magistrate that Mr. Musili and the defendant

Were absent and the application was dismissed for want of prosecution.

In making this dismissal order the learned trial magistrate failed to appreciate that representation to the application for setting aside the elders award read to the parties on 14th February, 1989 had been closed by both parties on 17th April, 1990 and all that was left was for the court to write its ruling as to whether to set aside the elders award or not. The dismissal order by the lower court in the light of what had gone on previously on record was therefore erroneous.

A further perusal of the record shows that on 21st June, 1991 counsel of the defendant/applicant appeared in court and applied for stay of execution pending appeal following the dismissal of their application for want of prosecution on 21st march, 1991.

On the same date counsel for the defendant abandoned the application for stay pending appeal and applied for review and setting aside of the order of 19th March, 1991 because other application was wrongly dismissed for want of prosecution when it had already been argued and all that the court was required to do was to write a ruling.

Upon hearing the defendant's counsel on that basis the learned magistrate in the lower court then seized of the mater made an order to the effect that upon perusing the record the applicant had substantially prosecuted his case. What was remaining was for counsel to produce authorities in support of his case. That the order made on 19th March, 1991 dismissing the application is herein is hereby reviewed and set aside. The applicant's lawyer is at liberty to bring his authorities in order for the court to write judgement and decide the case fairly and justly. The application filed that day was withdrawn. The order was ordered to be served on the respondent/plaintiff and counsel for the applicant.

There is a ruling on the record dated 17th September, 1991 the contents are set out as hereunder: - "It appears that the arbitration before the D.O. proceeded exparte in the absence of one party. The D.O. observed that the party had refused to appear several times despite having been notified. In such a situation the D.O. should have informed the court of the negligence of one party to appear for the court to make orders for exparte proceedings to proceed or not. I will therefore, set aside the award and remit the same to another panel of elders for arbitration. The award was to be filed on or before 19th November, 1991".

The only error noted in those contends is that it was not true that the earlier arbitration had been done by the D.O. as the record read D.C.

The learned magistrate complained that the D.O. did not warn the court that there was negligence on the

part of one party who failed to attend the arbitration proceedings. This was misdirection and misapprehension on the part of the learned trial magistrate as the D.O. was not obligated to warn the court. All the court was required to do was to read the proceedings before the elders which were plainly clear that the proceedings were exparte. it was upon the court to read the same and make the necessary orders. This court has judicial noticed of the fact that under the provision of Act No. 14/1981 the court had the power to read or go through the proceedings before the lower court and then remand or remit them back to the same panel of elders for reconsideration on its own motion. It was therefore the fault of the learned magistrate's predecessor in office that that option was not taken.

It is further noted that the learned magistrate then seized of the matter did not take note of the fact that the award which had been read to the parties on 14th February, 1989 had not been confirmed. Further the same learned trial magistrate failed to note that under Act No. 14/81 once an award had been read to the parties the aggrieved party had 30 days within which to apply to have it set aside on reasons to be given based on the grounds set out under that Act for setting aside an elders' award.

The application for setting aside in this matter which gave rise to that ruling had been filed more than 30 days after the award had been read to the parties. There was no leave sought to extend the 30 days time within which to apply to set aside an award as in this case. The application as well as that ruling were therefore invalid.

The learned trial magistrate failed to note that Act No. 14/1981 had been repealed and Act No. 18 of 1990 the Land Disputes Tribunals Act was now in force which Act had divested the magistrate's courts of jurisdiction in land matters. It follows therefore, that reference made on 17th September, 1991 under the repealed Act was an error void and null and void and without jurisdiction.

It was ordered that the award was to be filed in court on 29th November, 1991

At page 16 of the record there is an award in respect of land case No. 14 of 1988 while the land case under consideration was No.56 of 1986. It is also worth noting that the parties in this land case No.14 of 1988 were the same as those in land Case No.56/1986. there are no court proceedings in respect to land Case no. 14 of 1988 showing that such a case was ever filed in court and that there was a reference in respect to the same by the court referring the same to the elders.

It is also noted that the date on which the proceedings were taken is not given.

The parties were however, heard together with their witnesses. The judgement of the elders appears at page 17 of the record. The ward was filed in court on 9th June, 1993 being one year and seven months beyond the date of 29th November, 1991 when it was ordered *to* be filed. The said award was therefore, filed outside time and under the provision of the Act which had been repealed any award filed out of time without extension of time for filing the same was a nullity and void abinitio. There are no court proceedings to show what transpired in court after the order of reference of 17th September, 1991 in order to know whether time for filing the award had been extended from time to time or not.

The contents of the judgment of the elder’s award filed in court on 9th June, 1993 are "after listening to both parties the panel of elders recommended that the land belongs to the respondent Mulwa Kimwele. The four elders hail from the area and are neighbours. Many years ago people used to practice shifting cultivation. The respondent's father was first to cultivate the land but left briefly for Syekuyu hills where they were forced to move out by the colonial D.C. Kitui Mr. Kelly. That is when the respondent's father came back. The respondent's father had not demolished his house in the land in dispute. The panel therefore, agrees that the land belongs to the respondent's father and therefore, Mulwa Kimwele (Respondent).

The proceedings for the reception of the award and reading of the same to the parties is missing. It is therefore, not known when the award was read to the parties. The ruling of the learned trial magistrate dated 5th November, 1993 relates to land Case No. 14 of 1988 (D.O.). It does not relate to land case

No.56 of 1986. It is in respect of an application by the plaintiff/appellant seeking to set aside the elders' award filed in court on 13th July, 1993. In the absence of the record showing when the award was read to the parties it is not possible for the court to know whether the application for setting aside by the appellant was filed within the 30 days or not. The contents of the ruling dated 5th November, 1993 are that "This is a ruling on application by the plaintiff seeking to set aside an award filed in this court and pronounced on 13th July, 1993. His main ground of objection is that he was never allowed to cross-examine the respondent's witnesses. He further said that he does not cultivate the disputed land and the respondent also does not cultivate it. I have looked at the award as a whole and I find no irregularities the plaintiff and his witnesses testified before the D.O. and the panel of elders and decision arrived at was a unanimous one. I find no merits in plaintiff's application to set aside the panel of elders award and the application is dismissed with costs. I equally confirm the award pronounced by this court on 13th July, 1993 which ordered the disputed land to the defendant to be the judgement of court."

This is the ruling which gave birth to this appeal which had aggrieved the appellant/plaintiff counsel for he appellant sought leave of court to amend the grounds of appeal which leave was granted but I have failed to trace amended grounds of appeal. The grounds of appeal on record are those which were filed by the appellant in person and these are four in number. They *are to* the effect that the learned magistrate erred and misdirected himself in law by confirming an award without any party applying for it, erred and misdirected himself by failing to note that there was first judgement which awarded land to him, erred and contradicted himself in law that there is ruling dated 2nd May, 1989 ordering respondent to vacate the land, erred in law and fact in giving a ruling to the case which had been decided and determined by another panel of elders.

In consequence thereof, the appellant prayed for the ruling of 5th November, 1993 by the lower court to be set aside and second D.C.'s award to be null and void, that the appellant be awarded costs of the suit.

In his oral representations to the court counsel for the appellant stressed the following points:-

There is no record to show when the dispute was referred to the elders in the first instance but we have proceedings of 14th February, 1989 when the award was read to the parties in court, that no action was taken to that *award* within the 28 days which award had given the land to the appellant, that the application for setting aside was made nine months later after the reading of the award to the elders, the first award was set aside in the absence of the applicant which was irregular, that the ruling of 17th September, 1991 does not state which award was being set aside, there are no proceedings to show what happened in court between March and September, 1991, that there is another award which was filed in court and pronounced on 13th July, 1993. There is no record to show what happened on 13th July, 1993 and the same thing applies to 5th November, 1993 when the ruling subject of this appeal was read, that when the ruling was made on 5th November, 1993 Act No. 14/81 had already been repealed and so the court had no jurisdiction to deal with the matter and if there were any proceedings the court should have referred the same to be dealt with under Act No. 18 of 1990 which was in force then, it is on this basis that they state that it was wrong for the learned trial magistrate to confirm the award as a judgement of the court, that proceedings go to show that the magistrate proceeded exparte in the absence of the parties. On the basis of the foregoing counsel urged the court to allow the appeal with costs.

The respondent who appears in person submitted that the submission of counsel for appellant are absolute lies because the case started before the sub-chief, chief, D.O., D.C. and all along the decision was in his favour to the effect that the land in dispute belongs to him, that the appellant was present throughout in all the proceedings either before the elders or before the court. He therefore, urges this court to consider the matter carefully.

I have re-evaluated the proceedings before the lower court in the light of the submissions of both sides and the findings of this court is that in addition to the errors and irregularities pointed out the record herein relates to two case file numbers that is land Case N0.56 of 1986 and Land Case No. 14 of 1988 between the same parties over the same subject matter and there is no explanation on how this came to be.

It is evidently clear that the record has been vandalized deliberately by unknown persons.

The original record is also missing. The proceedings are therefore distorted.

The numerous errors and irregularities make the entire proceedings a mockery of justice.

I agree with counsel for the appellant that as at 1993 Act No. 14 of 1981 had been repealed and it was no longer in existence and so the second reference of the dispute to the elders under the repealed Act was null and void and without jurisdiction.

For this reason and many others mentioned in the judgement earlier on, the entire proceedings are a nullity and void abinitio and any orders issued by the lower court are of no consequence. The appeal is therefore allowed and the lower court proceedings declared a nullity and set aside together with any consequential orders emanating there from.

The errors leading to the appeal were made by the court officers who misapprehended the law and failed to follow the correct procedure. There is no need therefore to punish any party to pay costs in void proceedings. Each party will pay his/her own costs.

Dated, read and delivered at Machakos this 11th Day of December 2002.

R. NAMBUYE

JUDGE