



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 3257 OF 1978

ERIC PETER WANJAUPLAINTIFF

AND

GEORGE MUNDETDEFENDANT

R U L I N G

On 26th of March, 1993 this court entered a judgment pursuant to an Award filed and read in court on 2nd December, 1992, in the presence of Mr. Igeria, counsel for the plaintiff, respondent herein. The court stated as follows:-

"There has been no application to set aside the Award nor has there been an objection to this application in terms of Order 50 rule 16. I hereby grant the application and enter judgment in terms of the Award".

On 24th August, 1993 the respondent filed an application seeking to have the document of transfer executed by the Registrar of the High Court. In that the applicant had either refused or neglected to sign the mutation forms for the exercising of the five (5) acres from the suit land to facilitate the transfer of the property to the respondent. Counsel for the respondent's position was that the application had been served and the applicants had not responded to it. Once more this court stated as follows:

"Upon consideration of the matters deposed to in the supporting affidavit sworn by Wanjau, and in view of the fact that the respondent has been served and not complied with Order 50 rule 16. In addition no appeal having been filed, I hereby grant the application filed herein on 24/8/93.

Thereafter the decree was executed and the respondent obtained his title to parcel No. NG'ONG'/NG'ONG'/15933. On 8th September, 1994 the respondent filed yet another application under Order 21, rule 30 and Order 39 rules (1) (2) and (3) of the Civil Procedure Rules as well as section 27 & 28 of Registered Land Act Cap 300.

He sought that the applicant be restrained from interfering in any manner with his property land Title No. NGONG/NGONG/15933. More important that the applicant be evicted from the property. The applicant having become the registered owner of the land with effect from 9th of June, 1994. The application was served on the applicant himself, in accordance with the law on 9th of September, 1994. On 20th October, 1994, having now engaged a different advocate the applicant filed an application under a certificate of urgency seeking orders that the respondent be restrained from dealing with the suit land in any manner, taking possession, included, pending the hearing of this application.

Secondly that the decree issued herein on 26th March, 1993 be reviewed on grounds inter alia:-

"a. There has been discovery of new and important matters which after exercise of due diligence was not within the plaintiff's knowledge.

b. That there is a mistake apparent on the face of the record.

c. There is sufficient cause for seeking a review."

On 14th February, 1995, once more another application was filed in this matter this time round by the respondent herein under the provisions of Order 46 rule 8 (2) and 19 of the Civil Procedure Rules seeking orders inter alia:

"a. That the court do enlarge the time for filing of the award in this matter to cover from 6th July, 1982 up to and including 20th November, 1990.

b. That the Award filed and recorded herein on 2nd December, 1992 be deemed duly filed and recorded".

The ground upon which the application was granted being mainly that the respondent's lawyer who had come on record long after the matter had been referred to arbitration had not realized that the Award had not been filed within time, time had expired and no application for extension of time had been made. Moreover the applicant had been served with numerous notices and applications in this matter and yet he had not pointed out this omission since it was equally his responsibility.

The dispute in this matter had been referred to arbitration by Nyarangi J. (as he then was) as far back as 6th July 1982. It is important to reproduce the order:

"Order: By consent the issue raised in the pleadings and the question of costs are referred to arbitration. Each side to have two elders. DO Ng'ong', Kajiando District shall be the umpire with a casting vote. Award to be filed on or before 30.9.82. For mention on 7.10.82 at 9.30 a.m".

The record indicates, and it is not disputed by any of the parties, that nothing else happened in this matter till the 21/11/90 when now counsel for the respondent came on record and for reasons not clear on record the arbitration proceedings were resurrected after a period of eight years of inactivity. The Award filed eventually shows that the proceedings were held on:

"Kesi ya George Montet na Eric Wanjau Terehe 17/8/1990". Thereafter the respondent began following the matter culminating in the entering of the judgment in issue to the exclusion of the applicant. The respondent depones and it is not denied by the applicant that all the applications in the matter and notices for reading the Award in court were served on Gachomba & Co. Advocate, counsel on record for the applicant.

On 21st February, 1995 faced with all the three applications, counsel for both parties agreed that all the three applications namely: application for eviction filed on 23rd August, 1994, application for review filed on 26th October, 1994 and application for enlargement of time for filing of the Award, filed on 14th February, 1995, be heard altogether. Application for review being of course the main application in that if granted there would be no need for hearing the application for eviction or the application for enlarging of time.

The applicant's main ground for seeking review of the judgment and thereafter vacating judgment in issue were laid out in his affidavit in support of the application and they are mainly as follows: He had been let down by his counsel; he was kept in the dark as to all that went on in this matter after the order referring the matter to arbitration on 6th July, 1982. He did not hear from his advocate at all. He only came to know what had happened the time he was served with the application for eviction on 23rd August, 1994. Secondly, the purported arbitration proceedings presided over by BulBul Assistant Chief Benson were null and void, in that the proceedings were held in contravention of the order of this court which stipulated that the District Officer Ng'ong' District should be the umpire of the arbitration in that:-

"i.The order of 6th July, 82 appointed the District Officer Ng'ong' to be arbitrator.

ii.The District Officer Ng'ong' or any other officer has no power in law to delegate a duty imposed on him by the Court.

iii.The purported delegation would be ultra vires the order of the court.

iv.The award to be filed and be read on 30th September, 1982.

v.There was no extension of the time for reading of the award either by consent or otherwise".

Indeed a copy of the arbitration proceedings annexed to the affidavit clearly show that it was the Assistant Chief that took charge of the proceedings and "gave judgment" and accordingly signed the Award.

I have reviewed the facts that are necessary for me to decide this application. I am of the view that the application cannot succeed on the basis that the applicant has discovered any new and important fact which was not in his knowledge at the time of entering of the judgment. He never took part in the proceedings after the Award had been filed. The reason he has given as to why he was not present or did not participate in any manner in the two periods, one from 1982 when the order referring the matter to arbitration was made up to 1990 when the matter laid in obedience, then from 1990 when the arbitration proceedings eventually commenced up to 1994 when the application for eviction was served on him. He says Mr. Gachomba did not communicate with him. This to my mind is not a good enough reason to warrant exercising my discretion in his favour.

A man who valued his land as the applicant claims cannot in all seriousness not even make a single inquiry from his advocate in the form of a letter or a visit to find out what had happened to the arbitration that the court had ordered. There is no evidence of any communication nor does the applicant assert that he ever did so. I am satisfied on the facts of this case that counsel's error is not sufficient reason for me to interfere with the judgment that I entered. See *Mungai Mathanga & Others* [1976] KLR 61. Furthermore I am not convinced that the applicant is being candid with the court. He has stated in his affidavit that there was indeed another arbitration, para (5):

"That in 1983 and 1984 the plaintiff and myself were severally summoned to appear before the District Officer Ngong for arbitration on 18/12/84. The District Officer after hearing both parties ordered me to refund through his (District Officer's) office Ksh.35,000/= to the plaintiff. I presented a cheque on the said date, 18/12/84 but was instructed to pay cash.

I paid 35,000/= in cash as instructed... It was my understanding that this was the end of the matter as I had done what was required of me".

Either he did not take part in the proceedings because he was not notified by Gachomba Advocate or he had finished the case as he claims. It cannot be for both the reasons. Hence there is no merit in the story that there were two arbitrations. No Award was filed by the DO Ngong if he indeed conducted any arbitration proceedings. I would not review or vacate the judgment on this ground either.

To my mind the main ground upon which this application has been canvassed is; was there valid arbitration proceedings which resulted in a valid Award upon which judgment was entered? It was not disputed that in terms of Order 45 rule 4(2) the order referring the matter to arbitration appointed the District Officer Ngong as the umpire and not as it turned out to be the Assistant Chief of Bulbul Location. It therefore follows that whatever proceedings and the subsequent Award that was filed by the Assistant Chief in court was annuity. They were not in accordance with the order of the court. The D.O had no power to change, vary or vacate the order of the court and delegate his powers to the Assistant Chief. On this ground alone, this application should succeed. In that the purported Award, based on a properly conducted arbitration in accordance with the order of this Court, as stated in the supporting affidavit for the application to enter judgment, upon which I relied and entered judgment was afterall not correct. I acted on mistaken facts. This to my mind is a mistake in terms of Order 45 rule 2(2). I therefore allow the

application filed herein on 26th October, 1994 only in terms of Prayer (2) & (3). As to the costs in this matter, the applicant has indicated that he is willing to pay all the thrown away costs. There shall be an order in those terms.

Dated and delivered at Nairobi this 22nd day of August, 2000.

E. OWUOR

JUDGE OF APPEAL