



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 160 OF 2013**

**JOHN KARIUKI MAINA.....APPELLANT**

**VERSUS**

**MESHECK GATHERU.....RESPONDENT**

*(Appeal against the ruling and order of Hon. W.N Nyarima (MR.) delivered on 12<sup>th</sup> November, 1991 in Thika Resident Magistrate's Court Case No. 8 of 1981)*

**JUDGEMENT**

1. The Appellant filed this Appeal on 25<sup>th</sup> November, 2013 pursuant to leave granted to file the Appeal out of time. The Appeal is against a ruling issued on 12<sup>th</sup> November, 1991. The ruling being appealed against related to an application which sought to have an arbitration award set aside and have the case heard in Court as the Appellant alleges that the award was not truthful and it lacked merit. The Respondent did not file a Response to that Application, however, his counsel submitted on the same. The trial magistrate heard the parties and dismissed the Application noting that the Appellant intentionally boycotted the arbitration proceedings and the award was not arrived at through corruption.

2. Aggrieved by the said decision, the Appellant sought leave of the court and filed the instant Appeal on 25<sup>th</sup> November, 2013. Being a layman, he urged the court not to consider procedures and formalities in the Appeal. True to the Appellant's word, the Memorandum of Appeal is a lengthy one consisting of 28 paragraphs. I have read through the paragraphs and I note that the Memorandum of Appeal consists of the Appellant's grounds of Appeal, annexures the Appellant relies on, as well as submissions, all in one. None the less, this court is empowered by Article 159 of the constitution to dispense justice without due regard to procedural technicalities and therefore, in determining this Appeal, I will dwell on the substance of the Appeal only.

3. The disputed arbitration in this matter took place on 26<sup>th</sup> July, 1991 at Thika District Officers office. This was in accordance with an order which had been issued by the High Court on 4/2/1991 setting aside a judgment that had been entered in favour of the Respondent after an award of the District Officer, Thika. Whilst setting aside the judgment, the Court directed that the dispute be placed before another District Officer and the Award be filed in the lower court at Thika.

4. In compliance with the orders of the court, the District Officer (D.O) at Thika called the parties on 3/5/1991 when the Respondent appeared with his two elders. The appellant appeared alone and sought to have his submissions in writing. The D.O adjourned the hearing to 6/5/1991 so that the Appellant could bring his elders/witness on which date the Appellant came alone. The hearing was further adjourned to 16/5/1991 when the Appellant again attended alone and refused to talk as well as refused to answer questions from the D.O. and as noted by the D.O he walked away. The D.O sought directions from the court noting that despite several adjournments, the Appellant did not bring elders. At the same time, the Appellant wrote to the Senior Resident Magistrate, Thika on 27/6/1991 seeking that the matter be referred back to Court as he had lost confidence in the arbitration process and that the Respondent had a lot of money to buy people. The Magistrate directed that the High Court Orders be complied with and the matter be arbitrated accordingly.

5. The D.O therefore summoned the parties for arbitration on 26/7/1991 but even then the Appellant appeared without elders while the Respondent attended with two elders as directed. The D.O heard the parties and awarded the respondent Kshs. 2,100 together with costs of the suit. During the hearing the Appellant kept quiet, did not answer questions and walked away at some point.

6. The applicant's arguments in support of the application to set aside the orders are that during the hearing he walked away after three minutes and the decision was made in his absence, that he was served with the hearing notice late, he was sickly and also that he requested the D.O to refer the matter to court to be heard there. The Appellant also stated that the hearing notice was short. The award was later on filed in court.

7. The Court is therefore called upon to determine whether the trial magistrate erred in not setting aside the arbitral award in order to refer the matter to Court. In his ruling, the trial magistrate held that *"The defendants ...want the matter heard by court. This is in contradiction with*

the High Court order. The Defendant is clearly abusing the process of the court. Without any prejudice, I am of the inclination that the defendant is out to involve the courts in endless litigation. If he wants the Court to hear the matter, it is incumbent upon him to move the High court to reverse its earlier orders.’

8. The Appellant filed written submissions which I have considered. The respondent did not file submissions.

9. As it was held in the case of **Ephantus Mwangi and Geoffrey Ngugi Ngatia Vs. Duncan Mwangi Wambugu [1982]-88 1KLR 278** the principle is that a Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence, or on a misapprehension of the evidence or the judge is shown to have acted on wrong principles.

10. I have re-evaluated the evidence tendered before the lower Court and from the chronology of the events, I find that the trial magistrate did not err in dismissing the Application. The Appellant had challenged an earlier award in the high court and the presiding judge set aside the award and directed that the arbitration proceed before a different D.O. After the orders, the D.O Thika then summoned the parties. On the various dates scheduled for the arbitration, the Appellant failed to comply with the direction to bring elders. The D.O had to seek directions of the Court which directed that the orders of the High Court had to be complied. None the less, on the date the matter was arbitrated the Appellant was present and the D.O proceeded. The Appellant objected to having the matter arbitrated and wanted it referred to the court for determination.

11. On the issue of the Appellants illness, the Appellant brought it to the attention of the D.O, however the D.O proceeded with the process. The Appellant was able to attend when the matter was scheduled to be heard before the D.O but he refused to participate. He walked out not because he was sick but because he did not want the arbitration to proceed and this explains why the Appellant wanted the matter referred back to Court. The Appellant did not substantiate his claim that he did not have confidence in the process since he had the opportunity to bring his two elders. He also did not substantiate the allegation that the respondent had a lot of money to buy people. This was just an allegation which was not founded on any facts or evidence. It appears to me that he was just frustrating the process in order to slow down the wheels of justice.

12. The power to set aside a decree or order is a discretionary one which must be exercised judiciously and in accordance with the law. There is no evidence that the award was obtained fraudulently, with undue influence or that there was coercion. I find that the learned Magistrate did not err in not setting aside the award. In the circumstances, the Appeal lacks merits and it is dismissed with no orders as to costs.

**Dated, Signed and Delivered at Nairobi this 3<sup>rd</sup> Day of May 2018.**

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**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....*For the Applicant*

..... *For the Respondent*