



**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE NO.105 OF 2014**

**TERESIA WANYONYI KHISIA (through**

**FLORENCE AUMA WEKESA**

**holder of power of Attorney).....PLAINTIFF**

**VERSUS**

**REPUBLIC.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR BUNGOMA.....2<sup>ND</sup> DEFENDANT**

**LUCY NANZUSHI ADVOCATE.....3<sup>RD</sup> DEFENDANT**

**COSMAS CHAKA & 2 OTHERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

On 14<sup>th</sup> November 2017, the late **MUKUNYA J** made the following consent order in relation to the dispute herein;

***“By consent, the matter to be referred to the sub-county Commissioner KIMILILI to preside. He will be assisted by***

***(1). Chairman clan of Babichachi clan Mr. WEBI WILSON***

***(2). The area Chief Maeni location***

***(3). Assistant Chief Skendu sub-location***

***(4). Each party shall select 2 elders to sit with the panel who shall not be witnesses.***

***The panel shall hear the evidence of the parties and file their award in Court within 60 days from the date hereof. Mention on 17.1.2018”***

The award was not filed by 17<sup>th</sup> January 2018 and by consent of the parties, the panel was given upto 8<sup>th</sup> March 2018. The award was eventually filed on 2<sup>nd</sup> February 2018 but as is clear from the proceedings of 15<sup>th</sup> February 2018 before the Deputy Registrar **HON. MWENDA**, the late Judge retained the award and from my perusal of the record, the same had not been read to the parties and adopted as a judgement of the Court even by the time the 4<sup>th</sup> defendant filed his notice of motion dated 19<sup>th</sup> June 2018 seeking to set it aside. That lapse was only discovered in November 2018 and I read the said award to the parties on 15<sup>th</sup> November 2018 and adopted it as a judgement of the Court so that the said application, which is the subject of this ruling, could be properly canvassed because a party cannot purport to set aside what has not yet been adopted as a judgement or order of the Court.

The 4<sup>th</sup> defendant’s Notice of Motion dated 19<sup>th</sup> July 2018 seeks the following prayers:

**1. That the Honourable Court be pleased to set aside the findings of the panel chaired by the Deputy County Commissioner**

**Kimilili Sub-County and proceed to hear the parties herein.**

**2. Costs of the application be provided for.**

The application is founded on the grounds set out herein and supported by the affidavit of **JAMES WAFULA WANYAMA** who describes himself as the Attorney to the 4<sup>th</sup> defendant and therefore competent to swear the supporting affidavit.

The gravamen of the application is that the report of the panel chaired by the Sub-County Commissioner Kimilili Sub-County is biased against the 4<sup>th</sup> defendant and failed to consider the issues in contention being the ownership of the land parcel **No. KIMILILI/SIKHENDU/1350**. That the findings of the panel are one sided and did not mention land parcel **No. KIMILILIL/SIKHENDU/1033** which belongs to the plaintiff's father one **WANYONYI MWASAME NAMUYU**. That the panel not only lacked the jurisdiction to determine the dispute but also failed to take into consideration the fact that the suit had already been determined.

The plaintiff who is acting in person filed grounds of opposition to the application describing it as a delaying tactic and therefore in contravention of Article 159 of the Constitution. I must confess I could not comprehend what the other grounds of opposition were all about. The plaintiff also filed a Notice of Preliminary Objection without indicating what the objection was about.

The 5<sup>th</sup> and 6<sup>th</sup> defendants, through their Counsel **MR. ONYANDO**, were satisfied with the report while the other defendants did not file any responses.

It was agreed that the plaintiff's Notice of Preliminary Objection and the 4<sup>th</sup> defendant's Notice of Motion be canvassed simultaneously by way of written submissions which have been filed both by the plaintiff and **MR. JUMA** Counsel for the 4<sup>th</sup> defendant.

There is really no Preliminary Objection filed by the plaintiff to the plaintiff to the 4<sup>th</sup> defendant's application and so there is none to consider.

The only application that therefore falls for my determination is the 4<sup>th</sup> defendants Notice of Motion dated 19<sup>th</sup> July 2018 which seeks the main prayer that the award filed herein on 2<sup>nd</sup> February 2018 be set aside for, among other reasons, bias on the part of the Deputy County Commissioner Kimilili who chaired the panel that determined the dispute between the parties. As I have already indicated above, only the 4<sup>th</sup> defendant seeks the setting aside of the said award.

When the parties herein recorded the consent order dated 14<sup>th</sup> November 2017, they resolved to remove this suit from this Court and to have it determined in a different forum. In doing so, they properly invoked the provision of **Article 159 (2)(c) of the Constitution** which encourages the Courts to promote;

***“alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms...”***

Indeed the focus now is to encourage parties to solve their disputes through mediation and the programme is being piloted in several Courts. And although the consent order referred to above did not specifically refer to the **Arbitration Act 1995**, the parties were essentially submitting themselves to arbitration under the chairmanship of the Deputy County Commissioner Kimilili and his team including two elders selected by each of the parties who were then required to file an **“award”**. Therefore, all the matter relating to the dispute herein were to be determined by the said panel.

The main reason set out in the application to set aside the award is:

***“That the report by the Sub-County Commissioner is biased”.***

It is not clear whether the bias is being alleged against the Sub-County Commissioner as the chair or against the panel as a whole. Either way no single allegation of bias has been levelled either against the chairman or the panel as a whole. The term **BIAS** is defined in **THE CONCISE OXFORD ENGLISH DICTIONARY 12<sup>TH</sup> EDITION** as follows:

***“Inclination or prejudice for or against one thing or person”***

In **FRANKLIN V MINISTER OF TOWN AND COUNTY PLANNING 1984 A.C. 87 Lord THANKERTON** defined the term in the following words;

***“I could wish the use of the word ‘bias’ should be confined to its proper sphere. Its proper significance, in my opinion, is to denote a departure from the standard of even – handed justice which the law requires for those who occupy Judicial Office or those who are commonly regarded as holding a quasi – Judicial Office such as an arbitrator”.***

Apart from alleging bias, no evidence has been placed before me to prove the same. The 4<sup>th</sup> defendant has deponed in paragraph 4 of his

supporting affidavit that the award is one sided and did not consider his evidence and document. I have looked at the award. It is quite detailed and the record shows that the 4<sup>th</sup> defendant addressed the panel before it arrived at its award. The complaint that the panel did not mention parcel No. **KIMILILI/SIKHENDU/1033** is also not supported by the record.

It is clear from page 3 of the award that the panel considered that parcel. The 4<sup>th</sup> defendant has also deponed in paragraph 8 of his supporting affidavit that the panel failed to take into consideration the fact that the suit had been determined. If indeed the suit had been determined, the 4<sup>th</sup> defendant ought to have raised that as a Preliminary Objection before the consent order was recorded. There is no evidence that he did so. In my view, the panel chaired by the Deputy County Commissioner Kimilili Sub-County **MR. REUBEN B. LOYOTAMAN** conducted the proceedings fairly and exhaustively including visiting the land in dispute on 12<sup>th</sup> January 2018. There is no merit in the protest raised by the 4<sup>th</sup> defendant who did not even find it appropriate to enjoin the said Chairman having alleged bias.

The up-shot of the above is that the 4<sup>th</sup> defendant's Notice of Motion dated 19<sup>th</sup> June 2018 is dismissed with costs to the plaintiff. There shall be judgement in terms of the award dated 2<sup>nd</sup> February 2018 and filed herein on the same date.

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**

Ruling delivered, dated and signed in open Court this 22<sup>nd</sup> day of November 2018 at Bungoma.

Plaintiff – present

Mr. Wekesa for Mr. Onyando for the 5<sup>th</sup> and 6<sup>th</sup> defendants – present

Ms. Nanzushi for 3<sup>rd</sup> defendant – Absent

Mr. Juma for 4<sup>th</sup> defendant – Absent

A-G for 1<sup>st</sup> & 2<sup>nd</sup> defendants – Absent

**BOAZ N. OLAO**

**JUDGE**

**22<sup>ND</sup> NOVEMBER 2018**