



IN THE COURT OF APPEAL

AT NYERI

(CORAM:GICHERU, PALL & BOSIRE, JJ.A)

CIVIL APPEAL No 74 of 1997

BETWEEN

NYAMIRU MATHAI.....APPELLANT

AND

MWANGI HINGA RAPHAEL MAINGI.....RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Nyeri (Lady Justice M.A. Ang'awa) given 30th June, 1004

in

H.C.C.C NO. 136 OF 1974)

JUDGMENT OF THE COURT

This is an appeal against an order of the Superior Court (Ang'awa, J) given at Nyeri on 30th June, 1994, in which she declined to set aside and arbitration award which had been filed in her court on 11th March, 1993. The application to set aside the award was brought by Nyamiru Mathai (the appellant) and named Mwangi Hinga (the respondent) as the respondent.

Litigation between the parties started on 26th August, 1974, when one Mathai Hinga, since deceased, filed a plaint in the High Court at Nyeri, naming the respondent as defendant. In paragraph 4 of that plaint Mathai Hinga, whom we shall hereinafter refer to as the deceased averred that a parcel of land known as Othaya/Ihuririo/71 was during the process of land adjudication and consolidation in Ihuririo sub-location of Othaya Location, registered in the name of the respondent to hold the same in trust for him. In subsequent paragraphs of the plaint the deceased averred, inter alia, that the respondent in breach of that trust had threatened to evict him, was harassing him and his family and had refused to transfer the aforesaid parcel of land to him as the beneficial owner thereof. He therefore prayed that the court issue him with a declaration that there existed a trust respecting the parcel of land, that he was the beneficial owner of the land in question and that the respondent be ordered to transfer the same to him.

The respondent filed a defence on 23rd September, 1974, bearing the same date, in which he denied the existence of any trust in favour of the deceased respecting the suit parcel of land and that the deceased had any beneficial or other interest in it.

The deceased died some time in or about December, 1974, and upon application the appellant was substituted as legal representative on 4th November, 1977. Since that date this matter has had a chequered history. On 10th August, 1983 it was by consent of the parties referred to arbitration by the District Officer, Othaya, with the help of 4 elders. The award he rendered was however set aside on 25th February, 1987, when a fresh reference was made, this time to the District Commissioner, Nyeri District. That award, too, was set aside on 24th May, 1991, and on the same day a fresh reference to the District Officer, Othaya, was made. The District Officer would be assisted by the four elders with each party nominating two of them. The District Officer's award was read to the parties by the court on 4th November, 1993. It is that award which by her application dated 16th November, 1993, the appellant wanted set aside. It is that application which Ang'awa, J. disallowed and thereby provoked this appeal.

In her home made application of 16th November, 1993, the appellant cited basically four grounds of misconduct to challenge the award, namely, that the award was filed in court out of time, that the District Officer misconducted himself in failing to find that during land adjudication and consolidation nobody was entitled to be registered as proprietor in more than one parcel of land, that he misconducted himself in failing to appreciate that the respondent's witnesses in the arbitration were not from the parties' clan and therefore knew nothing about the land dispute, that he did not give a fair hearing to her witnesses, and that the award was not an award having not been signed by the elders who assisted in the arbitration exercise.

Before the application came for hearing the appellant engaged counsel, Mr. J.S. Mwangi, who after looking at it thought that it required amendment. He duly amended the motion and filed it in court on 3rd May, 1994, without any leave of the Court. Ang'awa, J. eventually struck it out because in her view the leave of the Court was necessary before such amendment would be effected. With due respect to the learned Judge, we do not think such leave was essential and the motion was improperly struck out. Our conclusion notwithstanding, because the prayers in the original and amended motion were the same, we do not think the striking out of the motion worked any prejudice to the appellant and is curable under section 79 A of the Civil Procedure Act.

Ang'awa, J. heard the application to set aside the award which was read to the parties on 4th November, 1993, and pronounced her decision on 30th June, 1994. In her ruling she did not think the appellant established any of the grounds of misconduct she had cited and proceeded to dismiss the application with costs.

In her grounds of appeal the appellant has basically raised two grounds. Firstly, that the learned judge erred in law in holding that no misconduct had been proved without giving any or sufficient reasons for so holding. Secondly, that she erred in failing to find that the award was not signed by all the members of the arbitration panel. Mr. Mwangi for the appellant in his submissions before us in effect made a rehash of those grounds. On the other hand, Mr. Mahan for the respondent submitted that the appellant merely made generalized allegations but failed to adduce evidence to establish misconduct. Furthermore, and we think rightly, that the reference having been made to the District Officer, Othaya, only he was entitled to sign the award. From the wording of the order of reference it is quite clear that the role of the four elders who were to assist him in the arbitration was merely advisory and their failure to sign the award was inconsequential.

We have no difficulty coming to the conclusion that the appellant did not establish by evidence that the arbitrator had misconducted himself. The arbitrator received evidence, which he accepted, that the suit land was, before land adjudication and consolidation, owned by the deceased. The deceased owned two other pieces of land to wit Nos 63 and 78, which he caused to be registered in the names of the respondent's father and himself respectively. After his death parcel No. 78 transmitted to this appellant alone under Othaya 3rd class Magistrate's Court Succession Cause No. 24 of 1975. No dispute has ever arisen regarding parcel No. 63, which as we stated earlier was registered in the name of the respondent's father. It should be noted that the respondent's father was the deceased's son by his first wife who survived him but died sometime later in 1975. As the appellant's co-wife of the deceased, she never got

any share of that parcel of land. The arbitrator was told that she was not supposed to get any part of it because the portion which was registered in her son's name was intended to be her house's share of the deceased's landed property. The appellant did not dispute that fact.

The arbitrator considered the manner in which the deceased had caused his property to be registered and came to the conclusion that the suit land had been gifted to the respondent and he did not think the latter held the land in trust for the former. On the evidence which was before him that conclusion was inevitable. The complaint by the appellant that the arbitrator did not properly evaluate the evidence before him is unjustified. Too, that he did not give the appellant's witnesses a fair hearing. We have gone through the proceedings before the arbitrator and we cannot discern any unfairness.

Heavy weather was made on a policy which allegedly was current during land adjudication and consolidation that nobody was entitled to be registered as proprietor in more than one parcel of land. No evidence was placed before the arbitrator to establish the existence of such a policy, nor are we aware of it. If the alleged policy was the basis for registering the respondent as proprietor of the suit parcel of land, which we do not accept, we do not understand why the appellant has not laid any claim to part or the whole of the parcel of land which was registered in the name of the respondent's father.

For the foregoing reasons we are satisfied that the Superior Court came to the correct conclusion that the appellant had failed to establish any misconduct on the part of the arbitrator. We therefore, dismiss the appellant's appeal and award the costs of it to the respondent.

Dated and delivered at Nyeri this 15th day of May, 1998.

J.E. GICHERU

JUDGE OF APEPAL

G.S. PALL

JUDGE OF APPEAL

S.E.O BOSIRE

JUDGE OF APPEAL