



**REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI**

Civil Appeal 201 of 1996

**JOHN KAGO NDUNGU
APPELLANT**

AND

**JAMES WAMBUGU KARIMI
RESPONDENT**

**(Appeal from the whole of the Ruling of Mr. J. A. Osiemo dated the 10th day of the
December 1993 and his subsequent Decrees on the 8th February, 1995**

IN

MACHAKOS H. C. C. NO. 222 OF 1992 (O.S)

JUDGMENT OF THE COURT

This is an appeal against the ruling of the superior court (Osiemo, J) delivered at Machakos on 10th December, 1993 whereby the learned judge declined to set aside an award made by an arbitrator, Mr. Daniel Muia of Ndambuki & Associates. Mr. Muia is a certified Public Accountant.

The parties to the appeal were both farmers, at the material time, in a business known as Bora Bora Sunset Butchery. They fell out and by his letter dated 9th September, 1992 the appellant withdrew himself from the partnership with effect from 22nd day of August, 1992 and having unilaterally withdrawn a sum of Shs. 41, 100 from the partnership bank account for “his upkeep” The respondent followed up his letter of 9th September, 1992 by one of 16th September, 1992 in which letter he disclosed the reason for dissolution partnership and he put graphically as:

“I am sure you know that trust is like virginity and when you loose it, it is for sure lost and not to come back.”

After the de fact dissolution of partnership the appellant took out an originating summons in the superior court for de jure dissolution of the partnership and for taking of account and payment of goodwill.

On 12th March 1993 both parties agreed to refer to disputes between them to sole arbitration of Mr. Muia. Mr. Muia called the parties before him by his letter of 23rd March, 1993 and published his award on 9th September, 1993 by which award the parties was dissolved with effect from 22nd August, 1992 and the account were stated and settled for the period 1st may, 1990 to 31st August, 1992. The appellant was to be paid a sum of Shs. 98,246/- less the sum he had unilaterally withdrawn and the respondent was to get a sum of Shs.150,140/-. It was not in dispute that the appellant contributed Shs. 29,900/= as capital in the partnership and that the respondent contributed a sum of Shs. 150,140/=. The respondent was to continue the business as sole proprietor per the award.

The appellant applied to have the said award set aside on the grounds that (1) the consent order referring the disputes to the arbitration was recorded when the respondent had earlier opened a different business account in the name of Bora Bora Sunset Butchery which account was being operated by the respondent for the said for the said business and (2) the arbitrator had conducted himself corruptly and that there was fraudulent concealed of matters which ought to have been disclosed and that the arbitrator was willfully misled or deceived by the respondent.

The learned judge considered the consent order and concluded that there was nothing to justify setting the same aside as there was no mutual mistake, misrepresentation (acted upon) or any other ground which would justify setting aside of an agreement. The learned judge was right. There was no evidence that the consent order referring the disputes to arbitration was fraudulently entered into. It was quite voluntarily agreed, as we see it. What better person would there be to take accounts than an accountant?

As regards the double barreled allegations that the arbitrator misconducted himself on the one hand and that he was deceived or misled by the respondent, on the other hand, we find nothing to even remotely say that he had misconducted himself or that he was deceived or misled. The appellant had all the opportunity to put his case before the arbitrator. The arbitrator went into all documents presented to him by both parties and worked out the entitlement of each party, upon dissolution.

This appeal is totally unmeritorious and is hereby dismissed with costs. The award may not be turned into judgment of the court, on application to that effect, in the superior court.

Dated and delivered at Nairobi this 16th day of September, 1998.

R. O. KWACH

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

E. OWOUR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.