REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 3401 OF 1989

FRANCIS GACHANJA …… 1ST PLAINTIFF

EDWARD MACHARIA …… 2ND PLAINTIFF

VERSUS

MWANGI KAMAU …… DEFENDANT

RULING

This is an application by chamber summons dated 6th April, 1993 for orders:-

(a) That the award filed in this court and read on the 19.3.93 be set aside.

(b) That the matter be heard by this court.

The application is said to have been brought under Order XLV Rule 14 of the Civil Procedure Rules, but as pointed out by Mr. Muguku, Counsel for the plaintiffs/respondents, the correct Rule should be 15. The respondents, Francis Gachanja and Edward Macharia oppose the application. The applicant is the defendant in the matter Mwangi Kamau.

The three are brothers and the gist of the matter is that their father, before his death, personally gave a piece of his land to the applicant. That piece of land was subsequently on 16.3.1962 registered in the name of the applicant under the Registered Land Act on a first registration as parcel No. LOC. 9/KANYENYAINI/206 measuring approximately 2.5 acres and the nature of the title is described as absolute. See a copy of the relevant land register in the case file.

Some 25 years after that First Registration, the respondents begun claiming that parcel of land; first before their father died and later after the death of their father.

Before their father died, he refused to give the land to the respondents who claimed the land from their father and the applicant at the same time. The applicant also refused.

Their father died and there is evidence that he left a Will containing the distribution of his piece of land among his sons. The disputed piece of land was included and shown as having been given to the applicant.

The respondents petitioned for the grant of letters of administration to the estate of their father. It is clear from copies of the documents filed in this case file that the petition was in High Court Probate and

Administration Cause No. 342 of 1987 at Nairobi and that in that succession cause the respondents, as petitioners in that cause, claimed that the disputed piece of land was part of the estate of their deceased father at the time their father died.

That claim was resisted by the applicant and the dispute was referred to a Panel of Elders for arbitration. They sat four elders under the chairmanship of the District Officer, Kangema. The elders award was as follows:-

> ***"According to the evidence adduced by both parties it is clear that the deputants are brothers. During the demarcation the land in dispute which is part of the deceased estate was registered, in the name of the respondent. The applicant had on several occasions taken the deceased to Kangema Land Control Board but the deceased did not agree to give them land. The respondent has maintained that he is not ready to share the land in dispute with the applicants because it was given to him by deceased and that he is not a Trustee. The Panel of Elders established that there was a will left by the deceased indicating the manner of distribution of his properties. In view of the foregoing it is felt that the wishes of the deceased expressed in the will should be upheld. However, the elders would recommend that if the distribution is found by court to be unfair it may be adjusted".***

The respondent referred to in that decision is the applicant/defendant in this application before me. The people referred to in that decision as applicants are the respondents/plaintiffs before me.

The court did not adjust the distribution. The award having been filed, the petitioners in this succession cause, the aforesaid applicants, applied to the court to set aside the award. A.M. Cockar, J, as he then was, on 24.5.89 dismissed that application saying there was no merit in the application to set aside arbitrator's award.

That was a clear decision following on the award of the elders. Apparently there was no appeal against that decision. Instead the respondent waited for two months and on 3.8.89 came back to this court to file the case now before me against the same defendant claiming the same piece of land relying on a Trust which the elders had rejected in the Probate and Administration Cause No. 342 of 1987 – a rejection which still subsists to date as Cockar, J, as he then was, did not disturb it.

I am not seeing the plaint in this case filed before me. But I am seeing the defendant's written statement of defence. Advocate have been handling this matter but I am afraid to say, with due respect, that they do not appear to have been keen enough. Civil case No.3401 of 1989 now before me was also referred to a panel of elders. The parties appeared before a Panel of Elders also of four members plus the then District Officer at Kangema Mr. A.A. Adan as the Chairman. This time no Will appears to have been mentioned and nothing was said about proceedings in Probate and Administration Cause No. 342 of 1987.

This was a different panel of elders and there was ample evidence to show that there was nothing to change what obtained at the time of Cause No. 342 of 1987. However, the decision of the panel was as follows:-

> ***"All witnesses of both parties have given facts which shows that the 2.5 acres appearing in the name of the first son of the late Mr. Kamau Wanguru belong to their father".***

Throughout the proceedings before the elders, no evidence was adduced to give sufficient particulars of the disputed parcel of land it being referred to simply as

"a shamba 2.5 acres"

so that if the court subsequently adopts that award it may be difficult to execute the resultant order especially at the Land Registry. Learned counsels in this matter do not seem to see all these.Counsel for the applicant is only complaining at the Arbitrator's misconduct. He submitted that the Arbitrator misconducted himself in disregarding the Will of the deceased and in failing to appreciate the first

registration of the applicant. The learned counsel fails to realize that there was no evidence of a Will before this new panel of elders. There was no evidence of a first registration. How could the Arbitrator appreciate the Will and the first registration when he was not aware of their existence?

Moreover, the learned counsel speaks as if there was only one arbitrator. This was a panel of elders of five members. Whose misconduct is the application complaining about if the complaint is against one member only?

Furthermore, the application was not served upon the said Arbitrator as required under Rule 19.

I note that a rejection of the applicant's application here does not constitute a judgement of the court in terms of the award. A specific request to that effect has to be made under the provisions of Rule 17 of Order XLV.

I also note that no such a request may have been made following Judge Cockar's dismissal of the application to set aside the award in the Probate and Administration Cause No. 342 of 1987.

I further note that if there will be judgement in accordance with award in each of these two cases, those two judgements will be inconsistent and there is likely to arise a question of the legality of one of the judgements.

I am not in this application asked to do more than what I have so far said. In fact I have said a lot more than what the application before me wants me to say.

To close the matter, it is my humble opinion that since I have not found any evidence of the alleged misconduct of the Arbitrator, even if there were evidence of his failure (which has not been proved) to appreciate a first registration, this application must fail.

Accordingly the defendant's application herein dated 6.4.93 be and is hereby dismissed with costs to the respondents.

Dated this 30th day of September, 1996.

J.M. KHAMONI

JUDGE

Present:

The applicants and respondent

Mr. Momanyi for the defendant/applicant