



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
(CORAM: GICHERU, KWACH & OWUOR, J.J.A.)
CIVIL APPEAL NO. 157 OF 1998
BETWEEN

1. SAMUEL GITHITU

2. MWANGI WA NG'ARUAPPELLANTS

AND

DUNCAN NYAGA KARIUKIRESPONDENT

**An appeal from the Ruling/Judgment of the High Court of
Kenya at Nairobi (Mr. Justice Ole Keiwua) delivered on 1st
August, 1995**

in

WINDING UP CAUSE NO. 17 OF 1991)

JUDGMENT OF THE COURT

This is an appeal from the decision of Ole Keiwua J given on 1st August, 1995, by which the learned Judge dismissed with costs, an application filed by Samuel Githitu and Mwangi Ng'aru (the appellants) to set aside an ex parte judgment and decree issued against them on 3rd May, 1995. The application was made pursuant to Order 9B of the Civil Procedure Rules.

Duncan Nyaga Kariuki (the respondent) and the appellants were shareholders and directors in a company called Kirinyaga Printing Press Limited (hereinafter called "the Company"). The respondent was the minority shareholder. In 1991, he felt the appellants were running the company in a manner oppressive to him and presented a petition in the superior court seeking all manner of reliefs but not including the winding up of the company. He sought orders reinstating him as a shareholder and member of the company; that his exclusion from the running of the affairs of the company was ultra vires; that the company do disclose to him where the company's funds were being banked etc.

Not much happened after the presentation of the petition but on 25th February, 1993, the matter came before Aluoch J when the following order was made by consent -

"All matters in dispute be and are hereby referred to arbitration by Charles Mwangi Ruita, Certified Public Accountant, who shall file his award to this court within 90 days from today. Arbitration fees to be borne equally by the petitioner and the respondents. Mention on 24th May, 1993 for On 24th May, 1993, the matter came before Pall J (as he then was) in the presence of counsel for both parties and the following order was recorded -

"The proposed arbitrator has declined the appointment. The parties will look for a new arbitrator. Matter be mentioned on 21st September, 1993 for further orders."

It is to be noted that the matter was referred to arbitration by the court with the consent of the parties under the provisions of Order 45 of the Civil Procedure Rules . Once that is done, rule 3 (2) of the Order comes into play, that is to say -

"3(2) Where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this Order, deal with such matter in the suit."

For some inexplicable reason, notwithstanding the order of Pall J (as he then was), to which we have already alluded, and the order of Aluoch J referring the matter to arbitration, the case was subsequently dealt with and disposed of in total disregard of those orders. There was an interlocutory application filed on 28th September, 1994, which Hayanga J dealt with partly on 30th November, 1994, and the hearing of the petition itself by Ole Keiwua J on 8th February, 1995. The petition was heard without notice to the appellants and in their absence. And it was the refusal of the learned Judge to set aside the ex parte judgment and decree obtained by the respondent that triggered off this appeal.

It is not necessary in this appeal to decide whether or not the learned Judge was right in rejecting the appellants' application for the reasons he gave. The point we have to decide is whether he was clothed with appropriate jurisdiction to hear the petition on 8th February, 1995. The matter had by consent been referred to arbitration by Aluoch J on 25th February, 1993. Although the arbitrator appointed by the parties had declined the appointment such refusal could not, and did not, affect the consent order by which the matter had been referred to arbitration. It was because the order was still extant that Pall J (as he then was), when informed that the person chosen by the parties had declined the appointment, straightaway made an order that the parties would look for a new arbitrator.

Since the order for arbitration was still in force the matter could not be disposed of otherwise than by the process of arbitration. Before it could be dealt with in the manner in which Ole Keiwua J did on 8th February, 1995, it had to be demonstrated that the consent order made by Aluoch J on 25th February, 1993, had been set aside, either by consent of the parties or by an order made on an application by either party.

It must therefore follow from what we have said so far, that the learned Judge had no jurisdiction to hear the petition, the same being in a state of suspended animation as long as the order for arbitration remained in force. That is why we accept Mr Mahan's submission that the proceedings before the learned Judge were a nullity.

Since the arbitrator had refused to act, an order should have been made under Order 45 rule 5 (2) of the Civil Procedure Rules superseding the arbitration. We accordingly allow this appeal, set aside the ruling and order of the learned Judge dated 1st August, 1995, and substitute therefor an order allowing the appellants' application dated 16th June, 1995. Consequent upon this, we also set aside the judgment and decree dated 5th April, 1995 and reinstate the petition. The order for arbitration is superseded and the petition is to be heard de novo. The appellants will have the costs of the appeal. As regards proceedings before the learned Judge each party will bear his own costs.

Dated and delivered at Nairobi this 18th day of December, 1998.

J. E. GICHERU

JUDGE OF APPEAL

R. O. KWACH

JUDGE OF APPEAL

E. OWUOR

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR