



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 292 of 1996

FRANCIS MAINA MATHII
.....APPELLANT

AND

PETER NGURU BEDANRESPONDENT

**(Appeal from the judgment and order of the High Court of Kenya at Nyeri (Tunoi, J.) dated 6th
March, 1992**

IN

H. C. C. NO. 36 OF 1988)

JUDGMENT OF THE COURT

This appeal is against the decision of the superior court (Tunoi j. as he then was) by which the superior court declined to review the non-setting aside of an award made and given by the arbitrators which was read to the parties on 18th October, 1990. The appellant and supplied, earlier, to have the award set aside on basis, inter alia, that the award was not base on the evidence, just and fair, adduced before the panel of arbitration.

The appellant then applied to have the learned judge's ruling reviewed. We need not go at Length into the matters then raised by the appellant.

The crucial aspect of this appeal is that the panel of arbitrators proceeded to give and make the award in favour of the respondent on the alleged factual basis that the appellant's father had sold the land in question to the respondent as the appellant's father needed money for medical treatment. The fact of the matter however remains that the panel of the arbitrators, without there being any evidence to that effect, found that the appellants' father purported to sell the land to obtain school fees for the children of the appellant's father.

When the issue of the alleged need for payment of school fees was never canvassed before the panel

of arbitrators, it was quite wrong for the arbitrators to decide the issue of such basis. The crux of the appeal therefore is and must be that the arbitrators misconducted themselves when they decided that the appellant's father must have sold the land for the sake of school fees. This factors alone, to our minds, is sufficient to say that the arbitrators' panel misconducted itself.

Even on the issue of the consent of the relevant board the issue of sale of land fails as the consent was obtained some five years later.

We have expressed our concern in another appeal only few days ago in the manner in which some panel of arbitrators conduct such proceedings.

It is also clear that the panel of arbitrators did not answer the issues that arose from the pleadings. The issue of trust was before the arbitrators but not that of adverse possession.

In all the circumstances of this appeal we are of the view that the appeal should be allowed and that the suit in superior court be heard by that court de novo. We so order. As the appellant acts in person we would allow his costs for preparing the record of appeal and his out of pockets which we assess at Shs. 5, 000/=. The respondent will pay this sum of shs. 5,000/= to the appellant.

Dated and delivered at Nyeri this 16th day of May, 1997.

J. E. GICHERU

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

S. E. O. BOSIRE

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR