



REPUBLIC OF KENYA

IN THE COURT OF APPEAL
AT NYERI
(Coram: Gicheru, Shah, J.J.A & Bosire, Ag. J.A.)
CIVIL APPEAL NO. 26 OF 1996

BETWEEN

JOSEPHAT MURAGE MIANO

JAMLECK WAWERU MIANO.....APPELLANTS

AND

SAMUEL MWANGI MIANO

DOUGLAS KARIUKI MIANO.....RESPONDENTS

(Appeal from the Ruling of the High Court of Kenya at
Nyeri(Tunoi, J.) dated 5th November, 1992

in

H.C.C.C. NO. 154 OF 1987)

JUDGMENT OF THE COURT:

By an Originating Summons wrongly expressed to have been taken out under **Order XXVI Rules 1 and 7**, instead of **Order XXXVI rule 3D, of the Civil Procedure Rules** and dated 13th May, 1987 the respondents **inter alia** sought orders of the superior court that the ownership of land parcel NO. KIINE/KIBINGOTI/NGUGUINI/492 vests jointly in them by virtue of their having been in adverse possession of the same for over a period of 12 years and that on account of this the appellants be required to transfer the said parcel of land to them. When the Summons came up for hearing on 23rd October, 1990, by consent of parties, all matters in dispute in the said Summons were referred to arbitration under the Chairmanship of the District Officer, Ndia Division of the Kirinyaga District with each of the disputing parties being required to nominate two elders who were to assist the District Officer in the deliberation of all the issues in question whereafter an award was to be filed in the superior court. Subsequently, the award was so filed and read out to the parties on 8th October, 1991. Thereafter, the appellants applied under **Order XLV rule 15 of the Civil Procedure Rules** to have the award set aside and the Originating Summons mentioned above heard in court. Amongst the grounds upon which the appellants sought to have the award set aside were that it did not show any deliberations by the arbitrators and contrary to the rules of natural justice no reasons were given for their award. Besides, that award did not represent what was said and decided at the arbitration proceedings and the umpire unilaterally drew up his own award in total disregard of what was canvassed in the said proceedings which amounted to technical misconduct.

At the hearing of their application to set aside the award in the superior court, their counsel inter alia

submitted that the evidence before the arbitrators was not clearly recorded and the issues in dispute were not adjudicated upon. The response thereto by counsel for the respondents was a bare denial.

In his ruling dated 5th November, 1992 the learned trial judge, Tunoi, J. (as he then was) had this to say:

"Concealment and misrepresentation have not been proved and so is misconduct.

The applicants have not proved that there was corruption or misconduct on the part of the panel and their umpire, and, in my view, this application has no merit and is accordingly dismissed with costs."

Against the dismissal of their application to set aside the award the appellants have appealed to this Court and their principal ground of appeal which was canvassed by their counsel at the hearing of this appeal on 12th May, 1997 was that in failing to hold that it was a misconduct on the part of the arbitrators in not adjudicating the real dispute before them and in not giving reasons for their award, the learned trial judge was in error.

According to counsel for the appellants, failure by the arbitrators to adjudicate the real dispute before them constituted an error of law on the face of the award and that amounted to misconduct by the arbitrators on account of which their award should have been set aside. In this regard, counsel for the respondents submitted that if the issue of adverse possession which was the real dispute referred to the arbitrators was not canvassed before them, then their award would not stand.

As indicated at the beginning of this judgment, the real issue in controversy between the respondents and the appellants concerned the former's entitlement to land parcel NO. KIINE/KIBINGOTI/ NGUGUINI/492 by adverse possession of the same for over a period of 12 years and therefore their seeking the order of the superior court to have their joint ownership of the said land transferred to them. It was this issue that was by consent of parties referred to the arbitration of elders under the Chairmanship of the District Officer, Ndia Division of the Kirinyaga District.

The record of the proceedings before the arbitrators indicate that some witnesses for the disputing parties did testify in the said proceedings but their names are not shown in that record. Thereafter the record concludes with the award reading as follows:

"After deliberation of this case the plaintiffs should be given 4.1 acres and the defendants should retain 4 acres. Court to issue an order to this effect."

The basis of this award is unexplained and it is apparent on the face of it that the real issue in controversy between the respondents and the appellants was not adjudicated upon by the arbitrators. As cited with approval the observation of Lush, J. in **William v. Wallis and Cox**, [1914] 2 K.B. 478 by this Court in **Bagwasi Nyang'au v. Omosa Nyakwara**, (1982-88) 1 KAR 805 at page 807:

"Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, 'misconduct' in the hearing of the matter which he has to decide, and misconduct which entitles the persons against whom the award is made to have it set aside."

It would appear to us therefore that failure by the arbitrators to adjudicate the real dispute before them amounted to misconduct in the hearing of the matter they had to decide and that entitled the appellants to have the arbitration award set aside.

This is where, we think, the learned judge was in error when he dismissed the appellants' application to set aside the said award holding that there was inter alia no proof of misconduct on the part of the

arbitrators. In the result therefore, we allow the appellant's appeal, set aside the order of the superior court dismissing their application to set aside the arbitrators' award and substitute therefor an order setting aside the said award. We also order that the Originating Summons referred to at the beginning of this judgment do proceed to hearing in the superior court. The appellants shall have the costs of this appeal.

Dated and delivered at Nyeri this 15th 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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JUDGE OF APPEAL

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

DEPUTY REGISTRAR