



**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL  
AT NYERI  
(CORAM: TUNOI, SHAH & PALL, J.J.A.)  
CIVIL APPEAL NO. 247 OF 1996  
BETWEEN**

**STEPHEN MURERWA ARACHI.....APPELLANT**

**AND**

**NTIBUKA M'MUCHEKE.....RESPONDENT**

**(An appeal from the Ruling and Order of the High Court of**

**Kenya at Meru (Ong'udi, J.) dated 24th July, 1995**

**in**

**H.C.C. APPEAL NO. 17 OF 1993)**

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**JUDGMENT OF THE COURT**

This is an appeal from the ruling and order of Meru High Court (Ong'udi, J.) in Civil Appeal No. 17 of 1993 made on 24th July, 1995.

Ntibuka M'Mucheke (the plaintiff) sued her elder brother M'Arachi M'Mucheke (1st defendant) and his son Charles K. Arachi (the 2nd defendant) claiming that at the time of land adjudication, land parcel No. Ntima/Igoki/3558 was registered in the name of the 1st defendant but the 1st defendant was to hold 1½ acres of it which was the plaintiff's portion of land in trust for the plaintiff. It had been given to her by her father as a gift way back in 1955. It was further claimed by the plaintiff that the 1st defendant without the knowledge of the plaintiff subdivided the said parcel of land into several portions and transferred one of the subdivisions namely Ntima/Igoki/3632 measuring 1½ acres to his son, the 2nd defendant, by way of a gift in order to defeat the plaintiff's right in respect of that portion of the land. The plaintiff further claimed that she had extensively developed her said portion of land and was at all amterial times in possession thereof.

Significantly, the 1st defendant did not file any defence but the 2nd defendant by his defence dated 13th March, 1987 averred that he did not have anyd ealing with the plaintiff in respect of Ntima/Igoki/3558 or Ntima/Igoki/3632 or at all and that the plaintiff's claim was time barred and should be dismissed with costs. He also contended sthat he did not subdivide parcel No. Ntima/Igoki/3558 and that even if he did so, he was exercising his rights as the proprietor of a freehold title.

It is noteworthy that the plaintiff's claim was that the 1st defendant and not the 2nd defendant, had subdivided the said land and then transferred 1½ acres being the plaintiff's portion to his son the 2nd

defendant. The 1st defendant has not formally denied this contention of the plaintiff.

On 14th May, 1987 with the consent of the parties to the suit, the dispute was referred to a panel of elders, under the chairmanship of the District Officer of North Imenti who were to file the award within 90 days. The award is dated 14th April, 1989 but the exact date on which it was filed cannot be determined from the record. Again, although it is not clear from the record as to when the award was read, yet it seems that it was read on 12th September, 1989. The award reads in material parts as follows:-

"The panel of the elders noted the following points:-

- 1.The plaintiff and defendant (sic the 1st defendant) are the children of the same father.
- 2.The land in dispute belonged to their late father.
- 3.That the plaintiff has planted coffee on part of this parcel since 1955.
- 4.Three of the four elders agreed that the plaintiff should be given by the defendant that part in the parcel that she has planted coffee.

One of the elders however felt that the plaintiff being a female has no right to inherit her father's land. I as the District Officer the Chairman of the panel cast my vote with the three elders and pass that the plaintiff should get a share of the land she has occupied since time immemorial. However the elders noted that the chief of the area together with elders will guide the survey to show where the plaintiff has planted coffee."

On 3rd November, 1989 the learned Magistrate entered judgment in terms of the award.

The defendants preferred an appeal in the High Court at Meru being Civil Appeal No. 11 of 1989 which was dismissed with costs.

Some important documents have not been included in the record of this appeal. For example, although no such application has been included in the record, yet it is obvious that Mr. Kariuki argued an application, supported by an affidavit of the 2nd defendant to file an objection to the award out of time. The said application was opposed by Mr. A. Mbaya for the plaintiff. The record further shows that the learned Magistrate deferred his ruling to be delivered on 30th January, 1990. That ruling also does not appear in the record.

In order to get a complete picture of the dispute, we requisitioned the original files of the subordinate court and that of the High Court.

The learned magistrate dismissed the said application with costs on the said 30th January, 1990.

Then, there was another application by the defendants asking for extension of time to apply for setting aside the award which was dismissed by the learned magistrate on 11th June, 1991 as judgment had already been entered in pursuance of the award.

It was followed by yet another application by the defendants for review of the said judgment of 3rd November, 1989 which was again dismissed on 25th June, 1991.

On 7th September, 1992 the learned Magistrate directed the executive officer of his court to execute all documents to transfer a part of Ntima/Igoki/3632 (0.18 hectares) to the plaintiff. It then transpired that on 28th March, 1991 the said portion of land known as Ntima/Igoki/3557 was transferred by the 2nd defendant his younger brother Stephen Murerwa Arachi (the appellant) by way of a gift.

On 12th January, 1993, the plaintiff applied for rectification of the record by nullifying and cancelling registration of the said portion Ntima/Igoki/3557 which the 2nd defendant had gifted in favour

of the appellant. By his ruling dated 13th January, 1993 the learned Magistrate while cancelling the said registration agreed with Mr. Mbaya that the registration on the part of the defendants was fraud and ordered that the said parcel be registered in the name of the plaintiff.

Then after the defendants had failed to succeed in their various efforts to set aside the said award and judgment of the court, the appellant, the younger son of the 1st defendant entered into the arena on 10th February, 1993 by filing a notice of motion for the following orders (paramateria):-

1. That the applicant herein be made a party 3rd defendant herein.
2. That the award dated 14th April, 1989 and confirmed as court judgment on 3rd November, 1989 and all subsequent orders be reviewed and or set aside and the applicant be allowed to defend his interests.
3. That an order of prohibition be issued to stop registration of any deal against (sic dealing) Ntima/Igoki/3557 and orders of 18th January, 1993 be stayed.

The said motion was brought primarily under O.44 rr. 1 and 2.

The appellant was represented at the hearing of that motion by Mr. D. Mbaya who held brief for Mr. Charles Kariuki who was the author of the said notice of motion. The learned magistrate dismissed the said motion on 10th March, 1993 holding that there was some fraudulent conduct involved in the transfer of the said land namely Ntima/Igoki/3557 in favour of the appellant during the pendency of the suit as the transfer, he remarked, was registered only on 28th March, 1991. The appellant then filed an appeal in the High Court at Meru being Civil Appeal No. 17 of 1993. A preliminary objection was raised by counsel for the plaintiff that the ruling delivered by the learned Magistrate on 10th March, 1993 was not appealable and that the appeal was therefore incompetent. The learned judge of the superior court dismissed the appeal saying "there was nothing to justify the learned magistrate to review or set aside an award which had subsequently become the decree of the Court".

The appellant now appeals to this Court against the order of the superior court dismissing the appellant's appeal from the said order of the learned magistrate refusing to review or set aside the said award.

The learned Magistrate had dismissed the appellant's application for review of the award under O.44 rule 3 of the Civil Procedure Rules. Order 42 rule 1(1)(aa) expressly gives the right of appeal from an order made under O.44 rule 3 of the said Rules. Also section 75(1)(h) of the Civil Procedure Act stipulates that an appeal shall lie as of right from any order made under the rules from which an appeal is expressly allowed by the said rules. Thus, the appellant exercised his right and appealed to the superior court. But does he have the right to appeal to this Court from an order passed in appeal under section 75 of the said Act? The answer is no. Section 75 (2) prescribes that no appeal shall lie from any order passed in appeal. We therefore hold that this appeal is incompetent. We accordingly strike it out with costs to the respondent.

Dated and delivered at Nyeri this 31st day of October, 1997.

P. K. TUNOI

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

G. S. PALL

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR