



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 217 of 1995

M'REWAKIOME.....

APPELLANT

AND

STEPHEN MARONCHA KIOME.....

.....RESPONDENT

(Appeal from the judgment and Decree of the High Court of Kenya (Justice Kuloba) dated 17th November, 1993

IN

H.C.C.C. NO. 46 OF 1993)

JUDGMENT OF THE COURT

M'Rewa Kiome (the appellant) filed a claim in the Principal Magistrates' Court at Meru against Stephen Maroncha Kiome (the respondent) claiming parcel of land No. MWIMBI/CHOGORIA/1218 (the suit land), registered in the name of the respondent, but which the appellant claimed the respondent held in trust for him. The respondent filed a defence in which he denied the appellant's claim in its entirety. This dispute was in due course referred to arbitration by the District Officer, Nithi, assisted by 4 elders, 2 for each party. This reference was made under the provisions of the Magistrates' Jurisdiction (Amendment) Act, 1981 (now repealed). The panel heard evidence and filed an award which was signed by two only out of the four elders, and by the District Officer. As it turned out, the other two elders who did not sign, or who refused to sign the record were those appointed by the appellant.

The appellant made an application to set aside the award alleging misconduct on the part of the District Officer claiming that the District Officer had sided with the elders appointed by the respondent. The Principal Magistrate found no substance in the allegation and dismissed the application holding that as the chairman of the panel the District Officer was entitled to cast his vote one way or the other. He did not consider that the refusal by the elders aligned to the appellant to sign the record was a ground for setting aside the award.

The appellant appealed against this decision to the superior court having obtained leave from the Principal Magistrate. That appeal was heard by Kuloba, J., who in a lengthy judgment held that the award was valid notwithstanding the refusal by the two elders to append their signature to it and he

accordingly dismissed the appeal. The appellant has now filed this second appeal raising the same points.

At the commencement of the appeal Mr. Riungu, raised a preliminary objection as to the competency of the appeal arguing that the appeal did not lie because leave to appeal had not been obtained from the superior court as required by law. As we have already said this claim was dealt with under the now repealed Magistrate's Courts Act (Cap 10) (the Act) the relevant provision there being section 9E (1)(c) which states:-

"9E(1) The court shall on request enter judgment according to the decision of the panel of elders where -

(c) Every application under subsection (2) or (3) of section 9D has been heard and refused, or the court has not of its own motion remitted or set aside the record under either of those subsections."

Section 9D (3) of the Act deals with an application to set aside the record on grounds of corruption or misconduct on the part of any member of the panel. Unlike Order 45 rule 17(1)(c) of the Civil Procedure Rules, section 9E (1) (c) of the Act makes no reference to any right appeal against a refusal by the court to set aside the record. That is not surprising because the whole purpose of the Act was to limit the jurisdiction of the subordinate courts in disputes involving land.

Since the Act did not expressly provide that there was a right of appeal against a refusal to set aside the record, we have to fall back on section 75 of the Civil Procedure Act (Cap 21), which so far as material states.

"75 (1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted"

(underlining ours)

An application to set aside the record under section 9E (1) (c) resulted in an order within the meaning of section 75 of the Civil Procedure Act. But not being one of the orders specified in subsection 1(a) to (h), it is any other order from which an appeal lies only with the leave of the court. In this case no leave was obtained either from the superior court or this Court as could have been done. The appeal having been filed without leave is obviously incompetent. The preliminary objection is accordingly upheld and the appeal is struck out with costs to the respondent. Having arrived at this conclusion it is not necessary to deal with the submissions made by counsel on the merits of the appeal.

Dated and delivered at Nairobi this 20th day of June, 1996.

R.O. KWACH

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JUDGE OF APPEAL

R.S.C. OMOLO

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR