



IN THE COURT OF APPEAL

AT NYERI

(CORAM: OMOLO, JA)

CIVIL APPLICATION NO NAI 237 OF 1993

BETWEEN

GITAHI GATERU.....APPLICANT

RICHARD GATHUA GITAHU.....APPLICANT

AND

SIMON M. KIMONDO.....RESPONDENT

(NYR 36/93)(Appeal from the Ruling of the High Court of Kenya atNyeri (Tunoi, J) dated 17th March, 1992

in

HCC CaseNo 38 of 1981)

RULING

Gitahi Gateru and Richard Gathua Gitahi, the applicants herein, ask me for two orders under Rule 4 of the Court's Rules and those orders are:

1. that I be pleased to grant an extension of time to file notice of appeal against the judgment or orders of the High Court at Nyeri dated 17th March, 1992 in an application to set aside arbitration award dated 3rd December, 1992 in HCCC No 38 of 1981.
2. that the costs of and incidental to this application abide the result of the intended appeal.

The applicants and the respondent have been locked in a dispute over land known as Parcel No Mahiga/Munyange/1 since 1981. The dispute between the parties was, by consent, referred to arbitration by a panel of elders and after several abortive attempts, an award was eventually filed on 5th September, 1991 and was read out to the parties on 5th November, 1991. The applicants immediately moved the High Court under Order 45 Rule 15(1) of the Civil Procedure Rules for the setting aside of the said award. That application was heard by Tunoi J (as he then was) on 10th March, 1992 and by a ruling dated 17th March, 1992, the learned judge dismissed the application and proceeded to enter judgment for the respondent in terms of the award. It has not been alleged before me in this application that the judgment so entered or the decree which flowed therefrom was in excess of, or not in accordance with, the award of the elders. In

terms of Rule 17(1)(c) of Order 45, the learned judge, upon his refusal to set aside the award, should have waited for 14 days before entering judgment but that fact, as far as this application before me is concerned, is neither here nor there. The position as of now is that since 17th March, 1992, judgment was entered for the respondent and the applicants only had an automatic right of appeal under Order 42 rule 1(1)(bb) of the Civil Procedure Rules if they were alleging that the judgment and the decree consequent thereon were in excess of or not in accordance with, the award that was filed – see Order 45 Rule 17(2) and also the case of Jotham Gichuki Ruhara v Wangui Kabuga & Another Civil Appeal No 35 of 1986 (unreported) which Mr Kioga for the applicants cited to me and in which the court of Appeal explained the operations of Orders 42 Rule 1(1)(bb) and Order 45 Rule 17(2) which on their face would appear to be in conflict with each other. But as Kneller, JA, as he then was, points out in his judgment, there is really no conflict between the two rules in the Civil Procedure Rules. The automatic right of appeal conferred by Order 42 1(1)(bb) is only applicable where it is alleged that the judgment and decree entered after the refusal to set aside award is in excess of or not in accordance with the award. If that be the case then a person against whom such judgment and decree is passed has an automatic right of appeal under Order 42 Rule 1(1)(bb) of the Civil Procedure Rules. To my understanding, the applicants are not alleging that; they just want to appeal because they think Tunoi, J was wrong in refusing to set aside the award.

That being their stand, they could only appeal if they had the leave of the High Court to do so and counsel who acted for the applicants in the application before Tunoi, J correctly appreciated that position and correctly, in my view, applied to the judge for leave to appeal. The learned judge, after due consideration of the formal application for leave to appeal, rejected that application. The applicants and their then counsel thought, wrongly, that with the learned judge's refusal to grant leave to appeal, they had reached the end of the road. Of course they had not. Under Rule 39 (b) of this court's rules, the applicants were entitled to apply to the court for leave to appeal within fourteen days of Tunoi, J's refusal to grant leave. The applicants have not, upto this time applied to the court for leave to appeal. If they can only appeal to this court with leave and they do not have such leave, what is the point of granting them an extension of time to file a notice of appeal? That would be a futile exercise and no court is bound to grant futile orders.

On the question of delay in filing this application, the decision against which it is intended to appeal was made on 17th March, 1992 and the application was filed on 15th September, 1993, more than one year later. But it is obvious from the record that in between, various applications were filed, at least one application for review which was apparently withdrawn on 14th August, 1992. The applicants then instructed new advocates and on the question of delay, I would have been prepared to exercise my discretion in favour of the applicants. But as I have said, that would be an exercise in futility and that being my view of the matter, I order that this application be dismissed with costs to the respondent. Those shall be my orders.

Dated and delivered at Nyeri this 12 day of May, 1995

R.S.C OMOLO

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JUDGE OF APPEAL