



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: GACHUHI, KWACH & AKIWUMI, JJ.A.)
CIVIL APPEAL NO. 40 OF 1991

BETWEEN

LAZARO MUTAHIAPPELLANT

AND

NDURURI KIGOTHORESPONDENT

(Appeal from a Ruling of the High Court of Kenya at Nyeri
(Justice Tunoi) dated 8th November, 1990

in

H.C.C.C. NO. 68 OF 1989)

JUDGMENT OF THE COURT

On 19th May, 1989, lazaro Mutahi (the appellant) filed a suit against Ndururi s/o Kigotho (the respondent) in the High Court at Nyeri seeking among other reliefs an order transferring to him the respondent's parcel of land Ruguru/Karuthi/798, which he claimed the respondent had agreed to sell to him way back in 1967 or 1968 and for which he had paid the respondent Shs.2,700/=.

The respondent filed a defence on 15th June, 1989 in which he denied the appellant's claim and in particular he denied having agreed to sell the parcel of land to, or receiving any money from, the appellant.

On 4th September, 1989 an order was made by the Judge referring the dispute to arbitration in the following terms:

"Status quo to be observed. Land may not be transferred until final disposal. The dispute between the parties is referred to

the arbitration of D.O. Mathira and 4 elders, two each to be appointed by parties. Award to be filed within 90 days. Mention on 7th December, 1989."

An award was filed in court on 6th December, 1989 and was read on 7th December, 1989. The operative part of the award was in the following terms:

"The elders unanimously awarded that land parcel No.

Ruguru/Kiamariga/798 be transferred to Lazaro Mutahi Kigotho." (Underling ours)

On 3rd January, 1990, the respondent applied to set aside the award under Order 45 rule 15 of the Civil Procedure Rules alleging misconduct among other grounds.

The Judge heard the application and found no misconduct established. Nevertheless, he allowed the application on a different ground which he stated in his ruling as follows:

"However, one matter has caused me grave concern. The plaintiff has sued for land parcel number Ruguru/karuthi/798

and the sale agreement is in respect of it. The arbitration proceedings were over land parcel number Ruguru/Kiamariga/798. This is not in my opinion a small error. It is so fundamental that it would affect the award. On this score alone I allow the application as prayed. There will be no order as to costs."

The Judge then made an order setting aside the award and preventing the respondent from transferring the land until final disposal of the suit.

The appellant in whose favour the award had been made was naturally dissatisfied with the Judge's decision and has appealed to this Court. Mr. Wachira, for the appellant, submitted that the error in the award stating that the disputed parcel was Ruguru/Kiamariga/798 instead of Ruguru/Karuthi/798 was a minor typographical error which could have been corrected by the Judge under Order 45 r 13(3) of the Civil Procedure Rules. He referred us to a letter dated 7th September, 1990 which the District Officer, Mathira, wrote to the Deputy Registrar, in which he attempted to explain the error. What we find most puzzling is that although both counsel who appeared before the Judge appeared to be aware of the error and also knew that the District Officer had written to the court about it, none of them alluded to the matter in the course of their submissions. The two parcels of land are in different sub-locations and reading the entire record of proceedings before the arbitrators, reference is made to parcel No. Ruguru/Kiamariga/798 SIX times without a single reference to parcel No. Ruguru/Karuthi/798 which was the subject matter of the suit.

The confusion arose from the fact that the order referring the dispute to arbitration was vague and did not comply with the mandatory provisions of Order 45 rule 3(1) of the Civil Procedure Rules in that it did not identify the parcel of land in dispute nor is there any evidence that copies of pleadings were sent to the arbitrators. In the event the arbitrators were made to deal with a dispute over a different parcel of land which was not the subject matter of the suit. In our view, therefore, the arbitration proceedings were a nullity and the award was invalid and the Judge was obliged to quash it.

The result is that this appel fails and it is dismissed with costs to the respondent. The case is remitted to the superior court to be heard in the normal way. The dispute is not to be referred to arbitration again. It is to be dealt with as if the award had been set aside under Order 45 rule 15 of the Civil Procedure Rules.

Dated and delivered at Nyeri this 13th of May, 1994.

J.M. GACHUHI

.....

JUDGE OF APPEAL

R.O. KWACH

.....

JUDGE OF APPEAL

A.M. AKIWUMI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR