Muhindi & another v Mugendo

REPUBLIC OF KENYA

Court of Appeal at Kisumu

January 15, 1991

Hancox, CJ, Masime & Kwach JJ A

Civil Appeal No 171 of 1989

(Appeal from the Ruling of the High Court at Kisumu, Omolo J,

dated 12th April 1989 in HCCC No 87 of 1978)

Civil Practice and Procedure *– arbitration – composition of arbitration panel - arbitration panel not permitting one of the panelists to sit in the arbitration - whether procedure proper.*

Arbitration *– award – elders not signing the award – whether omission goes to the root of the awards - whether arbitration proceedings must strictly conform with the rules of procedure followed in courts of law.*

The respondent who was the plaintiff in the High Court claimed a plot of land from the respondent/ defendant.

After close of the pleadings the parties entered into a consent in which their dispute was referred to arbitration under the chairmanship of the District Officer Vihiga Division assisted by two elders nominated by himself.

Upon conclusion of the arbitration the panel filed its award in court and notified the parties. In due course the defendants filed an application to set aside the award on various grounds including the complaint that the panel was not constituted in accordance with the Court order, that the elders nominated by the defendants were not allowed by the Chairman to sit in the arbitration and that the award was not signed by the elders. After hearing the application the trial judge found these complaints well founded but nevertheless ruled that no failure of justice was occasioned by them.

Held:

1. Signatures of the members of the panel gives the award the authenticity it should have, being as it is a statutory delegated decision of the court.

2. It is misconduct in the arbitration to refuse to permit a party to call a material witness, and how much more is this so if one member of the panel is not permitted to sit or to take part?

3. A strict technical conformity with rules and procedure followed in the court is not essential for if that were so the reference to arbitration would be supeflous. However, there must be some observance of the

normal rules of justice and fairplay.

4. In this case there was insufficient comformity with the principles of justice for the award to be upheld.

Appeal allowed.

Cases

1. *Wachira v Ndanjeru* [1987] KLR 252

2. Nyangau v *Nyakwara* [1986] KLR 712

3. *Kibutha v Kibutha* [1984] KLR 243

4. *Kipketer, Samuel Keny v Kiptanui arap Chirchir & another* Civil Appeal No 55 of 1987

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order XLIX rule 5; order XLV rule 10

2. Arbitration Act (cap 49)

3. Land Control Act (cap 302)

January 15, 1991, the following judgments were delivered.

Hancox CJ. Although the members of the Court are no strangers to cases coming before them in which there have been lengthy delays, particularly in land and accident cases, the instant appeal must surely be a contender as one of the longest case histories on record.

The original plaint filed on May 12, 1978 merely recited the transaction between the original vendor (Agnes Muhindi) who is now the first appellant, and the original purchaser (Joash Mjugedo) who is now the respondent, and that that transaction had received Land Control Board consent on September 5, 1977. The letter of consent is, though partially illegible, included in the record of appeal at page 84. That consent makes it clear that it was in respect of a portion only of the parcel of land which was then known as Maragoli/Vivalo/976, and which, as stated in the subsequent pleadings, amounts to order 16 of a hectare.

In the original sale document dated July 25, 1974, which formed the basis of the transaction, the delineation of the portion then to be sold is stated in fair detail. It says that the length of the portion of land sold is 45 (one) yard strides up to the cypress trees, and the width is 70 (one) yard strides up to a markhania plant. The agreed price was Kshs 1,900 of which Kshs 400 was paid there and there, and it does not seem to be a matter of dispute that the balance was paid before the end of 1974. It is also not a matter of dispute that the respondent began to construct business premises on that which he contended was his portion, but to which the first appellant objected – maintaining that the respondent had encroached thereby on to the portion of land which she had retained.

The opposing contentions on the pleadings, as amended, were, by the plaintiff, that the original land 976 had been subsequently subdivided into Maragoli/Viyalo/1426 and 1427, that the latter was further subdivided into 1456 and 1457, of which 1427 and 1457 constituted the portion originally sold to the plaintiff, and that those two subdivided plots were fraudulently transferred by the first defendant to the second defendant. He alleged that the second defendant had unlawfully enclosed those two plots with a barbed wire fence, those depriving the plaintiff of access to and the benefit of the building which he had erected thereon. He accordingly sought appropriate declarations, a mandatory injunction to the first defendant to execute the sale and a prohibitory injunction to the second defendant to remove the illegal fence.

The contentions of the first defendant included a denial of most of the plaintiff's allegations, an averment that the purported consent of the Land Control Board, and consequently the sale agreement, was void, and tendered the refund of the Kshs 1,900 which the plaintiff had paid. She further denied that any fraudulent or wrong transfer of any of the land to the second defendant took place, stated that there was a mistake in the survey during the land adjudication process comprising 0.08 of a hectare belonging to the second defendant, and that the consent of the Board on September 5, 1977 related to her own subdivision, with the result that the second defendant obtained registration of the portion of land wrongly surveyed with the original plot 976. Subsequently she became absolute owner of 1426, while she subdivided and transferred 1457 to the second defendant for a consideration of Kshs 2,000 in 1984. She claimed that the plaintiff had forcibly taken possession of the portion which had been transferred to the second defendant, and in consequence the land registrar had removed the caution lodged by the plaintiff in respect of that particular piece of land.

The second defendant denied any knowledge of the original transaction between the plaintiff and his co-defendant, reinforced the first defendant's contention that a mistake had occurred on adjudication and sub-division of his previously owned land at plot 398, averred that the plaintiff had taken advantage of this mistake, and confirmed that 1457 had been transferred to him by the first defendant for valuable consideration. The Land Board had subsequently consented to that transfer in December, 1983.

Against that tangled background the matter came up before successive judges in the High Court, and it was on one of these appearances that Schofield J gave leave to join the second defendant, in view of the allegations which concerned him, hence the filing of the second defendant's defence on May 2, 1984, the amendment of the first defendant's defence (so as to take account of the allegations concerning the dealings between them), and the plaintiff's very lengthy reply in June of that year. A cross order was made by Schofield J on May 28, 1984 keeping matters in status quo between the parties but the matters dragged on until December 10 1986, when Omolo J made the order of reference to arbitration, and it is from his ultimate dismissal of the second defendant's objection to the award made after that reference that the appeal is brought.

The award was directed to be delivered within sixty days of service on the District Officer (who, as is usual, was the Chairman), but the matter did not come before court again until July 15, 1987, when it was postponed until December 5, 1988, and again to January 19, 1989 when the application to enlarge time for the objection to the award was finally heard. Omolo J allowed that application and treated the application to set aside the award, which was filed on June 23, 1987, as having been itself filed within time.

This is the first time in my experience that the time for an objection to an arbitration award has been enlarged, but it would seem that the judge had jurisdiction to do so under the general power contained in order 49 rule 5 of the Civil Procedure Rules. He then proceeded (by this time it was March 16, 1989) to hear the objection and, as I have said, to dismiss it.

It cannot be gainsaid that there were serious defects in the arbitration proceedings and I note that there was an attempt to set them aside by consent in the letter from Azangalala and Co on May 31, 1988. The elders were stated to be Mr Javan Opati, Mr Reuben Kagai and Mr Ezekiel Muhindi. Four other persons were in attendance and the Chair was taken by Mr Were, the District Officer. So there is the first defect: three elders instead of four as ordered by the judge. This corroborates paragraph 11 of the second defendant's affidavit dated June 9, 1987 and that of David Ng'alwa Dali of the same date. In paragraph 12 of the same affidavit he alleges that the named elder who was present, Reuben Kagai, was not allowed to participate, and this is also borne out by Reuben Kagai's affidavit of the same date.

The third difficulty which emerges is that whereas order 45 rule 10 of the Civil Procedure Rules that requires, that the persons who make it shall sign it, in the instant case only the Chairman signed the award. The learned judge, apparently relying in the dissenting judgment of Apaloo JA in *Ndegwa Wachira v Ricarda Wanjiku Ndanjeru* (1987) 7 KCA 93 (which was presumably a case arising under the Magistrates' Jurisdiction (Amendment) Act, 1981), thought that the failure to sign an award was a procedural defect which did not occasion any failure of justice. Apaloo JA had said in that case that

nobody has a vested right in procedure and that the court must strive to do substantial justice to the parties, undeterred by technical rules of procedure.

It might be desirable to have some amendment to the Act and to the Rules which would save a decision from being completely invalidated by the refusal or failure to sign it by one of the members of the panel, but in the instant case not one, or two, but all of the members failed to sign it. It could also be argued contra that the signature of the members of the panel gives the award the authenticity it should have, being, as it is, a statutory delegated decision of the Court.

At all events I am far from being satisfied that the elders' failure to sign is a mere procedural defect in this case, but even if it were, here are the other fundamental errors in principle regarding the failure to allow one elder to sit, and another to participate. As Masime JA has said in his judgment, which I have had the advantage of reading in draft, this Court has held in Bawasi Nyangau v Omosa Nyangwara (1985) 4 KCA 117, that it is misconduct in the arbitrator to refuse to permit a party to call a material witness, and how much more is this so if one of the panel is not permitted to sit or to take part? As we said in *Kamau Kibuthia v Macharia Kibuthia* (1984) 3 KCA 188, a strict technical conformity with the rules and procedure followed in the Court is not essential, for if that were so the reference to arbitration would be superfluous, but there must be some observance of the normal rules of justice and fair play, and if one side's arbitrator or elder is excluded then justice even if done, will not be seen to have been done.

In these circumstances, even though the allegations in question were made in affidavits, and therefore not cross-examined, they should not, in any view, have been rejected but at least considered and, very probably, the deponents called so that each could be cross-examined thereon. It might well be that an arbitration under an order of or reference by the Court would need stricter conformity with judicial principles and rules than would an arbitration under an agreement regulated by the Arbitration Act cap 49 *(Mwambura Makiba v Ruga Makiba* High Court Civil Case 116 of 1976), but at all events I am of the opinion in this case that there was insufficient conformity with the principles of justice for the award to be upheld.

Of course, everyone regrets and deprecates the necessity to reopen a matter which is thought to be settled, and to put the parties through the expense, and stress and strain, of having the matter reheard, particularly in this case where the dispute has stretched over sixteen years since the original agreement was made. However these considerations, important though they are, cannot take precedence over the principles I have earlier endeavoured to state.

For these reasons I would allow the appeal, set aside the judgment of Omolo J dated April 12, 1989, and, though there is no formal order on record entering judgment in terms of the award, I would allow the objections to the award as stated in the affidavits in support of the chamber summons dated June 9, and filed on June 23, 1987. I would, accordingly remit the matter to the High Court for hearing and determination according to law.

As Masime and Kwach JJ A agree it is so ordered.

Masime JA. By an amended plaint filed in court on 17th April, 1984 Joash Mugedo (hereinafter referred to as the plaintiff / respondent) claimed some plot of land from Agnes Muhindi and Jackson Indunwa (hereinafter called the defendants / appellants). The defendants filed separate written statements of defence and the plaintiff filed replies thereto. After the close of the pleadings the High Court at Kisumu at the instance of the parties made an order as follows on 10th December, 1986:

> "Order by consent: matters in dispute herein referred to the arbitration of the District Officer Vihiga Division. The said elders two nominated by the plaintiff and two by the two defendants jointly the DO to be the Chairman. The said arbitrators to file their award within 60 days from the date of the service of the order upon the DO costs to abide the award."

On 26th February, 1987 the award was filed in court and the parties were notified thereof. In due course an application was filed by the defendants to set aside that award on various grounds including

complaints that:

> (a) that the arbitration panel was not constituted in accordance with the Court order;
>
> (b) the elders nominated by the defendants were not allowed by the Chairman to sit in the arbitration.
>
> (c) The award was not signed by the elders;
>
> (d) The panel failed to have regard to the provisions of the Land Control Act.

After hearing the application the learned judge found these complaints to be well founded but relying on the dissenting judgment of Apaloo J.A. (as he then was) in *Ndegwa Wachira vs Ricardia Wanjiru Ndanjeru* CA No 44 of 1984 (unreported) held that no failure of justice was occasioned thereby to the defendants. He put it as follows:

> I am satisfied that failure to sign the award and that kind of thing (?) is really not a failure which can be said to have occasioned to this appellant any failure of justice unless he was able to show that in fact there were no elders sitting with the District Officer which would in effect make the award a forgery. I am satisfied that the elders did sit with the District Officer and that they did decide the matter reasonably and there is no reason for me to either set aside the award or to remit it to them as sought in the Chamber Summons. That being my view in the matter, I order the applicants application to be dismissed with costs to the respondent.

In this appeal against that ruling the following complaints have been made:

> 1. That the learned judge erred in ;aw in holding that a panel of arbitrators had properly been constituted when it was clear on the face of the record that the panel consisted of members to whom no referral had been made.
>
> 2. That the learned judge erred in ;aw in holding that the panel of elders were entitled to ignore provisions of the Land Control Act in making their decision.
>
> 3. That the learned judge erred in law in failing to hold that as no valid consent to the transfer in favour of the plaintiff/respondent had been obtained the orders proposed by the panel of elders were incapable of taking effect.
>
> 4. That the learned judge erred in law in not holding that the award as filed was not in accordance with the provisions of order XLV of the Civil Procedure Code.
>
> 5. That the learned judge erred in ;aw in holding that the affidavit sworn by one Reuben Kagai in support of the appellants application to set aside the award was false without taking evidence.
>
> 6. That the learned judge erred in ;aw in relying on a dissenting judgment and in doing so offended against the use of precedent.

Taking the first and fifth grounds of appeal first, I would say, with all due respect to the learned trial judge, that the constitution of the arbitration panel is not a mere matter of procedural technicality but a fundamental matter going to the jurisdiction of the arbitrators. In *Samuel Kipketer Keny vs Kiptanui arap Chirchir & Another* CA No 55 of 1987 (unreported) this Court said this:

> “This reference was given on certain terms by the Court order under order 45 of the Civil Procedure Rules. If major changes had to be made it would have been right to return to the court and seek the Court’s blessing. It is quite unlikely that any court would agree that the (assessors) should be reduced to two all on one side. The Chairman should not have entered

on this arbitration at all.

This is an obvious case in irregularity in carrying out the term of the reference, which is called misconduct in Rule 15 of order 45 of the Civil Procedure Rules. The learned judge ought to have set aside the award and arbitration and superseded it."

It was the defendants complaint that one of the elders nominated by him was prevented from sitting and the other though he sat was prevented from participating in the arbitration. As regards this complaint the learned trial judge rejected the unchallenged and only evidence on the matter, the affidavit of Reuben Kagai. I have considered that evidence and find it was open to the learned judge to find that the elder was prevented from participating in the arbitration.

It is well settled that it is misconduct for an arbitrator to prevent a party from calling evidence material to issues in dispute which the party wishes to call: (See – *Bagwasi Nyangau vs Omosa Nyakwara* CA No 33 of 1984 - unreported) a fortiori it is misconduct to prevent an elder nominated by a party from taking part in the arbitration!

As regards the fourth ground of appeal the learned trial judge was fully aware that order 45 rule 10 requires all persons who make an award to sign it but thought that failure to do so is not fatal to the award. The provisions of order 45 rule 10 are mandatory and failure to sign the award by all persons who make it fatal and consequently in this case no valid award was made. In view of what I have said in respect of the three grounds of appeal which I have considered above, I find it unnecessary to consider grounds 2,3, and 6 save to say that the learned judge erred in relying on a dissenting judgment of this Court in arriving at his decision.

For the above reasons the purported award was in my view clearly invalid and should have been declared to be so and been superseded. I would accordingly allow grounds 1,4, and 5 of the Memorandum of Appeal. I would concur in the orders proposed by the Honourable the Chief Justice.

Kwach JA. I have had the advantage of reading the judgments of my noble and learned brothers Hancox CJ and Masime JA in draft. I entirely agree with them and have nothing useful to add.