



IN THE COURT OF APPEAL

AT KISUMU

(Coram: Hancox, Gachuhi JJA & Masime Ag JA)

CIVIL APPEAL NO. 167 OF 1986

BETWEEN

KHAYADIAPPELLANT

AND

HERBERT AGANDA.....RESPONDENT

JUDGMENT

(Appeal from the Judgment and Order of the High Court at Kakamega, Aganyanya J)

April 29, 1988, **Hancox JA** delivered the following Judgment.

These proceedings seem to have originated from an agreement made on 28th December, 1979, between the present appellant's father, Jacob Mulovi, and the respondent, Herbert Aganda, under which the former agreed to sell that/which was situated at Nzoia Sisal Estate for Kshs 18,500. Of this sum Shs 16,750 was paid by way of deposit, and it was expressed that "the balance of Shs 250/= will be paid within three months". This of course could not be correct, but the matter is elucidated by the recording of a further payment of Shs 1,500 on the 30th August, 1980 which, with the balance of shs 250/= there stated to be outstanding agreed with the recorded purchase price of shs 18,500/=.

Unfortunately this transaction received less than enthusiastic approval from the present appellant, who is the elder son of the original vendor. In that which I presume was his statement before the elders of the area concerned the appellant recounted that after his father had sold a piece of land in Mahalia Village, he then purchased the eight acres in Nzoia Sisal Estate, which was adjacent to ten acres the appellant already owned. Since he was receiving financial assistance from the appellant, apart altogether from family considerations, he considered that the five acres Jacob had purported to sell to the respondent should have remained within the family. Ngolo Oronje, one of the elders in the village, stated that he had remonstrated with Jacob in 1979 regarding his intention to sell the land, but that the latter remained adamant that the land was his and that he could do whatever he wished with it. Ngolo Oronje was later disbelieved by the panel of elders, who made their award relating to the land on that which appears to be the 1st August, 1983.

The remaining three acres, from the original eight acre plot, were divided equally between the appellant's three stepbrothers. It appears further from the statement which went before the elders, and from the summary of facts by Aganyanya, J, who was the first appellate judge, and from whose decision this appeal is brought, that the transfer of the land to the respondent was not by way of an outright sale, but took the form of a transfer of the appropriate number of shares standing in the name of the vendor with

the company which held the title to the land.

The respondent was then given the share certificate representing the five acres, and this appears in the Record of the proceedings. This, then, forms the background of events to the submission, I sue that word advisedly, of the dispute to the panel of elders in Land Dispute No 12 of 1983. They found that the appellant had been promised a share of the land by his father, and that the matter had really arisen by way of a family dispute rather than as a conflict over the plot of land. The panel ordered that the appellant should permit the Respondent to develop the land without interruption and should seek a compensation gift of property from his father.

The parties then filed two separate applications to the Resident Magistrate's Court at Kakamega, the Respondent applying on 3rd April, 1984 to confirm it, and the appellant over a month later applying to revoke or set aside the elders' award.

Unfortunately the date stated in the second application as being the date of the elders' award, 15th May, 1984, does not agree with the one stated in the Award included in the Record which is, as I said, 1st August, 1983. That date however is the one appearing as the date of the delivery of the magistrate's Ruling, which, as was said in the Ruling of this court dated 25th March, 1987 (Platt, Gachuhi and Apaloo, JJA) adopted the elders' award, declared the respondent in this appeal, (who was the applicant before the magistrate) to be the legal owner of the portion of the land comprised in Share Certificate Number 1934.

The Magistrate had further held that the fact this transaction was a transfer of shares meant that it did not attract the provisions of the Land Control Act Cap 302, so as to require the consent of the local land board under that Act.

The appellant appealed against the magistrate's decision to Aganyanya, J, who set out the facts and recited the appellant's case that he had never been a party to referring the decision to the elders and had never submitted to their jurisdiction. He, however, held that it was the appellant and not the respondent who had referred the matter to the elders. He rejected appellant's contention to the contrary and held, in effect, that he was thereafter estopped from objecting to their jurisdiction, which he had himself invoked. In the result he confirmed the magistrate's decision, which he held was not appealable under Order 44 (I think he must have meant Order 45) Rule 17 (2) of the Civil Procedure Rules.

It is of course correct that if there was a valid reference to arbitration under Order 45, then if there is no objection to it, or the award is not set aside under any of the Rules 13 to 15 of that Order, no appeal lies to a Court superior to the one which entered judgment upon the award.

The appellant filed his first application in this Court on the 18th February, 1987, as it was expressed, to stay the execution of the Judgment of Aganyanya J. This court in the decision I have already mentioned, said that there was in reality no execution threatened against the land and, accordingly, that an order of a stay was inappropriate. The most for which the appellant was at risk was the costs which he had been ordered to pay.

In my judgment there was no valid suit in existence at the time this matter was purportedly referred to the elders, or when they delivered their award, whichever was the correct date thereof. If that was so there were no proceedings in being in which there could be a valid reference to arbitration, by the elders or by anyone else, under Rule 1 to 3 of Order 45. Neither have I been able to find any valid arbitration agreement (which would have the effect of staying court proceedings) under the Arbitration Act Cap 49.

In these circumstances I cannot see that the matter ever properly came before the court. It is true that there appears to be a valid land dispute, since the proceedings are described as "Land Dispute No. 12 of 1983" at the District Officer's Office Lumakanda, but they do not purport to be under any statutory provision such as, for example, section 12 of the Land Adjudication Act Cap, 284. Even if this was so the procedure to be followed regarding appeals to the Minister under Section 29 of that Act is entirely different from that which is applicable to entering judgment in the terms of an award made by arbitrators.

For these reasons, I would hold that the Ruling of the Magistrate dated 15th May, 1984 was made without jurisdiction, and I would consequently allow the appeal, set aside that Ruling and also the Judgment of the High Court which followed it. I would order that the appeal should be allowed with costs to the appellant in this Court, in the High Court and in front of the magistrate. As Gachuhi JA and Masime Ag JA agree it is so ordered.

Orders accordingly.

Gachuhi JA. I have read the judgment of Hancox JA in draft form and I agree with it.

However, I would add that, it appears that the parties appeared before the District Officer Lumakanda where proceeding proceeded before a panel of elders presided over by the District Officer in Land Dispute No. 12 of 1983. It is not clear as to which party or by whose authority was the dispute referred to the panel of elders. If the reference was under the Magistrates' Court Act Cap 10 then the suit should have been filed in the court first and then the Magistrate would refer, the dispute to the panel of elders under the provision of the Act. Section 9A of the Magistrates' Court Act provides.

(1) Notwithstanding the provisions of sections 5 and 9 or of any other written law conferring jurisdiction but subject to the provisions of this part, no Magistrate's court shall have or exercise jurisdiction and powers in cases of a civil nature involving:

(a) the beneficial ownership of land;

(b) the division of, or the determination of boundaries to, land including land held in common;

(c) a claim to occupy or work land;

(d) trespass to land;

(e) an issue relating to any matter set out in paragraphs (a) to (d) of subsections (1) shall be referred to a panel of elders to be resolved.

The suit has to be filed in court for the Magistrate to determine the issues involved and then be referred to the elders who should file their award in court. Only by this procedure would the court have jurisdiction. If the award was filed in Court and then the magistrate having perused it and has suggestions to make, he can then refer it to the panel of elders; only then would the panel be seized with the jurisdiction. But as the reference was referred to the elders before coming to court, and without the court order, the panel of elders had no jurisdiction to hear and determine the matter. The magistrate had no jurisdiction to grant the order as he did.

I would agree with the order Hancox JA proposes for allowing the appeal.

Masime Ag JA. The appellant complained to the District Officer Lumakanda against the Respondent who had purchased five acres of land comprised in share No 1394 in Nzoia Sisal Estate Ltd. That D.O registered the complaint as Land Dispute No 12 of 1983 and proceeded to hear it with a panel of elders between 14.7.83 and 1.8.83 made an award.

Thereafter the respondent on 3.4.84 applied to the Senior Resident Magistrate's Court to adopt the award and enter judgment in terms thereof while the appellant on 18.4.85 applied to the same court for revocation and or setting aside of the award. Both the applications were supported by affidavits. In his ruling read in court on the 15th May 1984 the learned Senior Resident Magistrate allowed the respondent's application and adopted the award with costs and entered it as a judgment of the court and declared the present respondent as the legal owner of the share No. 1934 comprising five acres of land. The appellant herein was also permanently restrained from interfering with the suit premises.

From that ruling the appellant appealed to the High Court at Kakamega. In that appeal the jurisdiction of the elders to determine the dispute was challenged and it was averred that the elders' award was a nullity for that reason and could not therefore be made into a judgment of the court.

Despite these objections the appeal was dismissed. It is from that dismissal that this appeal arises. In this Court too the appellant has taken *inter alia* the point about the jurisdiction of the elders in the following terms.

“The learned judge erred in failing to observe that the elders had no jurisdiction to award title to land to anyone and the submission (if any) to elders' jurisdiction (which does not exist) cannot confer jurisdiction to the elder”

Under the Magistrates' Courts Act as amended by the Magistrates' Jurisdiction Amendment Act the courts role in land disputes was limited to referring them to panels of elders for arbitration. Consequently panels of elders derive their jurisdiction to deal with land disputes was from references by the courts see section 9A; they cannot of their own deal with such disputes merely because parties submit to them. The appellant's challenge of the elders' award on the basis of lack of jurisdiction is therefore well taken. I therefore agree with my lords Hancox and Gachuhi JJA that this appeal should be allowed and that the appellant should have costs of the suit before this and all the lower courts.

Dated and delivered at Kisumu this 29th day of April 29, 1988

A.R.W HANCOX

.....

JUDGE OF APPEAL

J.M GACHUHI

.....

JUDGE OF APPEAL

J.R.O MASIME

.....

AG. JUDGE OF APPEAL