REPUBLIC OF KENYA

# Ndegwa v Ndegwa

**Court of Appeal, at Nyeri** **May 22, 1986**

**Kneller, Hancox JJA & Gachuhi Ag JA**

**Civil Appeal No 76 of 1984**

May 22, 1986, **Kneller, Hancox JJA and Gachuhi Ag JA** delivered the following Judgment.

Njuki Ndegwa, the appellant, entered appearance to an originating summons of Peter Njuki Ndegwa, Githaiga Ndegwa, Ndirangu Ndegwa,, Wanyaga Ndegwa, Maina Ndegwa, Wambui Ndegwa and Njeri Ndegwa, the respondents in this appeal, which was filed in the High Court at Nyeri on January 21, 1980.

The originating summons was expressed to be brought under the relevant provisions of the Registered Land Act (cap 300), the Limitation of Actions Act (cap 22) and Order XXXVI rules 1,2,3 and 4 of the Civil Procedure Rules.

The respondents in this appeal applied by that summons for a declaration by the High Court that they had acquired title by adverse possession of Kirimukuyu Mbogoini 297 and an order that together they be registered as proprietors of it.

They alleged in their affidavit in support that their brother the appellant, was registered as its proprietor in 1959 to hold it in trust for them. This was after the land there had been consolidated and marked out. They had all lived on it, built on it and cultivated it from the time they were born because it was their father’s land.

The appellant filed an affidavit in reply in which he admitted each respondent appellant was a step-brother or step-sister but denied that that parcel had ever belonged to the father of any respondent or that any of them had occupied, built on or marked it long enough to have acquired any interest in it by adverse possession. That parcel was registered in his name because he had purchased fragments of land round about it which were replaced by this one when the process of land consolidation was complete. His mother, Rahab Nyawira Ndegwa, had tried to recover it from him in her action in the court of the Nyeri senior resident magistrate which was Civil Suit 168 of 1979 which she lost and she did not appeal from that decision

The matter came for hearing on June 9, 1982 before Mr Justice Gicheru in Nyeri but was stood over generally because the respondents were eager to have their claims referred to the local elders for arbitration and the appellant respondent refused to agree to such a reference. The originating summons should have been heard and determined then.

One June 16, 1983 the originating summons came before Mr Justice VV Patel for hearing when only Peter Njuki Ndegwa and Wanyaga Ndegwa and the appellant with his advocate appeared before him.

The learned judge then wrote the following order:

> "By consent, the dispute he referred to the district officer Karatina to arbitrate with the help of 4 elders – two from each side. Award within 90 days. Mention on 20th September 1983"

The second respondent applicant selected two elders and the appellant respondent only one. The district officer Mathira division Karatina was umpire. Among those who spoke about the history of this parcel to the elders was Rahab Nyawira Ndegwa, the mother of these parties and now a respondent. There is nothing in the record to indicate whether or not the other respondents were present.

The award was signed by the three elders and the umpire. They found the parcel had been acquired by Rahab Nyawira Ndegwa, the present first respondent, and the appellant had been registered as its owner but he held it on trust for himself and his mother, his stepbrother and step-sisters.

The award was dated August 3, 1983 and field in the High Court at Nyeri on September 1, 1983.

Mr Justice VV Patel read it out on September 20, 1983 to the appellant, his advocate and some of the plaintiffs. (He did not specify which ones). He then made an order that the originating summons should be mentioned before him on January 11, 1984 but that does not seem to have happened.

Meanwhile on September 9, (1983) the appellant wrote to the Deputy Registrar of the High Court Nyeri for a copy of the award and proceedings relating to the originating summons all of which he received on September 19.

Then on October 27 of that year he filed a summons in chambers in the same court to set aside the award. The application was not drawn by an advocate. His affidavit in support sets out the grounds for the application which were that the district officer ignored the fact that the same issues were canvassed I the action in the court of the Nyeri senior resident magistrate and they were resolved in his favour and the district officer rejected his objections to the award as soon as it was made by the elders and the umpire.

Now this summons also bore a stamp of the court of the district magistrate Karatina showing it passed through his registry on November 9, (1983).

It was listed before Mr Justice JS Patel in Nyeri on May 21, 1984 when the appellant was present in person and so were all the respondents save for Ndirangu and Njeri Ndegwa. There is no record by the learned judge of any submissions by the appellant or any respondent. He dismissed it, however, with costs to the respondents because it was:

> "…. Filed on 4.11.83 that is 34 days after on 20.9.83 when the award was read and explained. So application is out of time ….."

So now the appellant complains to this court that in this memorandum of appeal his application was not filed on November 4 but on October 27, and in that he is correct. It is just the sort of point that a layman would pick up.

October 27 is, however, still more than thirty days after his receipt of notice of filing this award (which was at least on September 23 which was when he heard it read out and so did his advocate).

The learned judge, having dismissed the application to set aside the award, went on to enter judgment according to the award. And a decree followed.

Now no appeal lies from such a decree except in so far as the decree is in excess of, or not in accordance with, the award. Order XLV rule 17(2).

The appellant submits that the delay is only one of 3 days and that he was not represented by an advocate after September 20 when he heard the award read out by Mr Justice VV Patel and he did not know that he then had only 30 days to apply to the High Court to set it aside according to Order XLV rule 16.

Instead he wrote to the Attorney-General on October 3, 1983 complaining about the result of the arbitration. He copied this letter to the provincial commissioner, central province, Nyeri and to the High Court in Nyeri. The last sentence of the letter asks the High Court to set aside the award. He knew then what he wanted the High Court to do with the award.

His only complaint in that letter is that his mother Rahab having failed in her suit in the court of the senior resident magistrate Nyeri had then stirred up the step-brothers and step-sisters to file their originating summons in the High Court. Here is no mention of any misconduct on the part of the umpire (the district officer).

The respondent who now include Rahab, the mother of some of the parties as we have pointed out, insisted that as no appeal lay from the decree which was not in excess of or not in accordance with the award the appellant's appeal was incompetent and should be struck out. They were echoing some of the court's questions to the appellant. None of them wanted any costs save for the second respondent, Peter Njuki Ndegwa.

And none of them has taken any point about the reference to arbitration being (apparently) without the consent of at least six of them or that some of them may not have been present at the proceedings before the elders and umpire. The appellant with his advocate consented to it and the appellant was present and heard in the arbitration and so were his witnesses. It seems clear to this court that the result of the claim by their mother Rahab to this same parcel in the civil suit in the senior resident magistrate of Nyeri's court was not relevant to the claims of these (other) respondents in their originating summons, so it is doubtful that there was misconduct on the part of the arbitrators or umpire which would have been the only ground for the High Court to set aside the award. Order XLV rule 15(1).

This parcel of land is only 1.5 acres in area and to have nine members of the same family entered on the register as co-owners of it may seem to be an odd or unfortunate result of their originating summons but if that is what the arbitrators and umpire found was a fair result and the appellant did not apply in time to have it set aside with the consequence that, according to law, he cannot appeal from the decree that followed the judgment (and faithfully reflected it) was cannot circumvent it and we have not been persuaded that we should even think of doing so.

The appeal was incompetent and must be struck out so far as all the respondents are concerned save for the fourth, Ndirangu Ndegwa, who was not served with the hearing notice by the appellant and therefore did not attend the hearing of it. There will be no order as to the costs of the appeal.