



IN THE COURT OF APPEAL

AT NYERI

(Coram: Hancox & Nyarangi, JJ A & Gachuhi, Ag J A)

CIVIL APPEAL NO 61 OF 1985

BETWEEN

IRUNGU KIHUNI APPELLANT

AND

WAMBUGU GAKUNGA

MOSES NDUMIA KING'ORI RESPONDENTS

(Appeal from the judgment of the High Court of Kenya at Nyeri (Patel J)

dated June 14, 1984

in

Civil Case No 110 of 1983)

JUDGMENT OF NYARANGI J A

The present contest in these proceedings has arisen from the preliminary objection which was taken by Mr Wamae on behalf of the respondents. The facts which lie behind the case can be expressed with brevity. The respondents as plaintiffs sued the appellant as defendant in connection with plot number 10, Mweiga Trading Centre, Nyeri of which according to the plaintiffs, the appellant was the allottee from the commissioner of lands. In or about the year 1951 the deceased father of Wambugu Gakunga (the first respondent) one Harun Kibuka and the appellant entered into an agreement to construct commercial premises on the plot on the understanding that the appellant would apply for a lease in the joint names of the two parties to the agreement. For the purpose of the proposed construction, the first respondent contributed Shs 4,416.15, the father of the second respondent Shs 3,657.00, the father of the first respondent Shs 7,000,000.00 and the appellant Shs 3,222.50. According to the respondents the construction of the building was completed in 1960. However, in breach of the agreement between the parties, the appellant applied for a lease in his name. The respondents claimed an interest in the premises and prayed for joint application for a lease. Alternatively, the respondents sought compensation from the appellant. The appellant's defence was that he did not enter into any agreement as claimed by the respondents, that he never undertook to apply for a lease in joint names, was issued with a licence on his own name as an allottee, denied the averment about contributions and contended that in any case breaches of agreement if any were timebarred under the Limitation of Actions Act, the building having been

completed in 1977, the appellant requested for particulars and the respondents supplied them on June 9, 1977. On March 21, 1983, the hearing day, the advocates for the parties informed Abdullah J, that they had agreed to refer the matter to arbitration in terms as under:

“By consent,

the matters in issue be referred to the arbitration of 4 elders, two to be appointed by plaintiff and two by the defendant under the chairmanship of the District Officer, Mweiga, in Nyeri District to arbitrate on the following issues:-

1. Whether there was an agreement between parties that in consideration of the 4 persons named in paragraph 5 of the plaint, to construct a commercial building on the land in dispute, the defendant would apply to the Commissioner of Lands for lease in the joint names of parties to the said agreement
2. If there was such an agreement, whether persons named in para 5 of the plaint contributed towards the construction of the building.
3. If so, what was the contribution of each party.
4. The share in the property to which each party is entitled.
5. Whether a declaration be made that the parties make a joint application for lease from the Commissioner of Lands.
6. If parties not entitled to a declaration, are plaintiffs entitled to compensation, and if so, the amount of compensation.”

The award was read out on July 8, 1983. However, on August 11, 1983 an application was made on behalf of the applicant, for the High Court to set aside the award. On June 14, 1984, J S Patel J dismissed the application with costs to the respondents. This appeal challenges the decision of the High Court (J S Patel J) on the following grounds:-

- 1.The learned judge erred in law in dismissing the application whilst the award was not in accordance with the law.
- 2.The learned judge failed to see the legal issues involved in the case.
- 3.The learned judge failed to note that the respondents’ case was time barred.
- 4.The learned judge erred in holding that the respondents had proved their case.
- 5.The award and the ruling are against the weight of evidence.

Arguing the preliminary objection, Mr Wamae for the respondents referred first to ground 3 of the memorandum of appeal, and said the six issues which were referred to arbitrators were framed by the parties’ advocates and the arbitrators were expected to arbitrate within the issues framed none of which mentioned limitation although limitation was taken in the defence. Mr Wamae observed that the issue of limitation was not argued during the hearing of the application to set aside the award, there is no reference to that issue in the affidavit of the appellant in support of the application to set aside the award filed, and that issue was not urged upon the judge who therefore was not expected to decide on limitation. Mr Wamae’s other objection related to an oral application by Mr Gatimu, the appellant’s advocate, for leave to amend ground two of the memorandum of appeal to argue on *res judicata* because, according to Mr Gatimu, there was a decision in a case between the same parties about the same plot way back in 1950/51.

Replying Mr Gatimu contended with regards to limitation, that the High Court should have remitted the award under rule 14(1) (c) of order XLV and that the appellant should be allowed to amend his

memorandum of appeal to include a ground on *res judicata* for the fair determination of all issues.

The issues framed by the parties were within the pleadings, it would not have mattered even if those issues went beyond the pleadings: *Diarcy vs Jones* [1959] EA 121. The parties knew what were the real questions between them and evidence was taken on the issues and the arbitrators duly considered that evidence. Limitation was not one of the issues and so no evidence was adduced on it. The appellant raised limitation as part of his defence but did not base his case before the arbitrators on limitation. He must be deemed to have abandoned that aspect of his defence in so far as the arbitration proceedings are concerned. The respondents did not concern themselves with that particular matter and a Mr Wamae observed, the judge did not deal with limitation in his ruling. Of course, failure, deliberate or otherwise, to frame a particular issue cannot be construed as an admission: *Oriental Dairy vs Souza* (1948) 23 KLR 4. It is a different matter when a party, whose advocates have been a party to a formal agreement which is drawn up and signed, seeks leave to rely for the first time on a part of his defence which was not urged in the relevant proceedings. It seems to me that to permit the appellant to argue, at this stage, that breaches of the agreement the subject matter of the consent order upon which the issues were framed are time-barred would be to destroy the entire basis of the consent order thereby to nullify all the issues framed. To argue that the matters before the arbitrators were timebarred is tantamount to saying that the reference to arbitration was invalid. But the position in law is that where in any suit all the parties who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration – as was the case here – the court shall, by order, refer to the arbitrator the matters in difference which the court is required to determine (order XLV rules 1 and 3). The court therefore has no discretion in the matter once the parties apply to the court for an order of reference and the parties are estopped from attacking the order of reference which was made on their application. An estoppel can arise from silence or inaction if a party is under a duty to speak or to act in a particular way: *Moorgate Mercantile Co v Twitchings* [1977] AC 890, 903 per Lord Wilberforce. Also, the case of the respondents would be prejudiced if the appellant were to be at liberty to argue his appeal against the award on limitation. There is no objection to the legality of the award which is so apparent on the face of it that the judge should or ought to have remitted the award to the reconsideration of the arbitrators (order XLV rule 14 (1)(c)). I would accordingly rule that ground three of the memorandum of appeal should be struck out.

The next question for consideration is whether the appellant should be allowed to amend his memorandum of appeal to include an extra ground of *res judicata*. *Res judicata* is a matter of pleading and can be only properly raised at the trial: *Mandavia v Rattan Singh* [1965] EA 118. The appellant did not plead *res judicata* in his written statement of defence. So, how can he include it in his memorandum of appeal? I have had access to the record of Civil Appeal No 27 of 1967 of the resident magistrate's court Nyeri. Mr Gatimu cited the judgment in that case to argue that the Resident Magistrate's judgment constitutes *res judicata*. The parties in the Resident Magistrate's case are different from the parties in the appeal before this court. The subject-matter in the resident magistrate's case was partnership accounts. In a proper case, the court has power on appeal to give leave to a party to amend his pleading: *Jupiter General Insurance Co Ltd v Rajabali Hasham & Sons* [1960] EA 592 and *G P Jani Properties Ltd v Dar-es-Salaam City Council* [1966] EA 281. But such leave would seem to be given where there has been an inadvertent omission and where all the material necessary is before the court and there is no need for further evidence to be taken. It appears that leave is very rarely given.

The appeal is against an award by arbitrators. Further evidence could have to be taken on *res judicata*. It is difficult to tell whether any such evidence would have to be taken by the arbitrators or by the High Court or by this court as additional evidence. If the appellant were to amend his pleadings at this stage and in these circumstances, it would unsettle foundations.

I would refuse leave to amend. I would give the costs of the preliminary objection to the respondents. I would order that the appeal be listed for hearing at Nyeri in the May 1987 sessions.

Hancox JA I have had the advantage of reading in draft the judgement of Nyarangi JA. I agree with it entirely and there is nothing which I wish to add. As Gachuhi Ag JA also agrees it is ordered that ground 3 of the memorandum of appeal is dismissed. Leave to amend ground 2 of the memorandum of appeal is refused. The remainder of the appeal is to be set down for the next Court of Appeal sessions at Nyeri.

Gachuhi Ag JA I agree with the judgment prepared by Nyarangi JA. There is nothing useful to add.

Dated and delivered in Nyeri this 9th day of October 1986.

J.O.NYARANGI

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

J.M.GACHUHI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR