IN THE COURT OF APPEAL

AT NYERI

(Coram: Kneller, Nyarangi, J J A and Gachuhi, Ag J A)

CIVIL APPEAL 35 OF 1986

BETWEEN

JOTHAM GICHUKI RUHARA ……..…….. APPELLANT

AND

1. WANGUI KABUGA

2. WAMUYU IREGI ……..……...…. RESPONDENTS

(Appeal from the judgment and order of the High Court of Kenya at

Nyeri (J S Patel, J) dated January 16, 1986

In

Civil Case 70 of 1980)

JUDGMENT OF GACHUHI JA

This appeal rises from the refusal by the High Court (J S Patel J) to set aside an arbitration award, made under the order of the court on June 14, 1983.

The facts of the case are that the appellant is grandson of Gichuki Ruhara deceased. The deceased who died in 1956 had no male child but was survived by three daughters who were already married. All daughters have children by their respective husbands. They have land where they are married and live there. The appellant is the son of the first daughter, while the respondents are the other two daughters.

Before his death, the deceased had apportioned his land KONYU/ BARICHO/97 into three portions and allocated them to each of the daughters. The appellant occupied the portion for his mother. All the parties planted coffee in their respective portions and continued to cultivate them until this dispute arose.

In 1971, Succession Proceedings were instituted at Karatina. All the parties appeared before the court. The elders recommended that the land be inherited by the daughters.

To their surprise the appellant started harassing them and in 1978 the respondents filed a caution claiming beneficial interest in the land. The appellant gave notice to respondents in May 1980 to the effect that

they were illegally entering the land which the appellant claimed to belong to him alone and the notice gave the respondents fourteen days to desist committing such acts and also threatened to sue on failure to comply with the notice. The respondents made a search at the Land Registry, found that their names did not appear in the register and that the appellant had taken a loan on the security of this land. The respondents instituted these proceedings in March 1980 under order XXXVI rule 30 of the Civil Procedure Rules – claiming adverse possession under the operative section 38 of the Limitation of Actions Act (Cap 22).

On June 14, 1983 by consent of the parties the dispute was referred to arbitration of four elders with the District Officer Karatina as the Chairman. The award was filed in court within the time of 90 days. The award was unfavourable to the appellant and so he made an application under section 3A of the Civil Procedure Act and Order XLV Rule 15 of the Civil Procedure Rules. The application was heard and dismissed on January 16, 1986 and on the same day judgment was entered in terms of the award, hence this appeal.

This court has expressed the effect of the operation of Rules 15,16 and 17 of Order XLV in Nyeri in *Samuel Mwai Rimbi v Josphat Mugo Rimbi & another* Civil Appeal No 4of 1985 (unreported). The proceedings based on arbitration under Order XLV are terminated on judgment being entered under rule 17 of the order to which there is no appeal. Unless other proceedings are commenced under a different provision of the law, there is no competent appeal that can be filed against that judgment.

I would, however mention, that it came out during the arbitration proceedings that the deceased had already shared his other pieces of land to his daughters. In all those pieces there is no dispute.

The dispute there is, is caused by the appellant. The arbitration award made by the elders is one of the best awards I can think of. The fear expressed by the appellant that if the land is shared, his brothers will claim shares that belong to them from the portion given to her mother from his land, is unfounded. This fear cannot be the basis for filing this appeal and the court cannot entertain it. The position now is that this is an incompetent appeal and it is struck out. The appellant will pay costs of the appeal to the respondents.

Kneller JA. I agree. The appellant's application to set aside an arbitration award under Order XLV rule 15(1) of the Civil Procedure Rules was dismissed with costs by Mr Justice J S Patel on January 16, 1986 and judgment in terms of that award was entered by the learned judge on the same date.

A decree followed upon that judgment so entered and, to continue in the words of Order XLV Rule 17(2) (*ibid*)

> " …… no appeal shall lie from such decree except in so far as the decree is in excess of, ornot in accordance with, the award."

Stepping aside from orders and rules for one moment, it is important to note that this appeal is not on the grounds that the decree is in excess of, and not in accordance with, the award.

Returning to the orders and rules, there would seem to be some difficulty in reconciling Order XLV rule 17 (2), which was set out in the preceding paragraph but one, with Order XLII rule 1(1) (bb) which states that an appeal lies as of right from Order XLV rules 13 and 15 (modification and setting aside of arbitration awards) and, it will be remembered, Mr Justice J S Patel refused to set aside this arbitration award.

Add to this the terms of section 75(1) (h) of the Civil Procedure Act which reads thus-

"An appeal shall lie of right from the following orders, and shall also lie from any other with leave of the court making such order or of the court to which an appeal would lie if leave were granted.

(a) ……..

(b) ……..

(c) ……..

……..

……..

(h) any order made under rules from which an appeal is expressly allowed by rules."

and it might seem that there is conflict or confusion or both in all this.

But, beginning at the end, it can be seen that Mr Justice Patel's refusal to set aside the award was an order made under Order XLV rule 15(1) from which an appeal is expressly allowed as of right under Order XLII rule 1(1) (bb), but only if it is an appeal based on the complaint that the decree that followed upon the judgment entered as a consequence of that refusal to set aside the award was in excess of, or not in accordance with, the award, which this appeal is not based on.

Note that Order XLV rule 15(1) comes after Order XLII rule 1(1)(bb) and so cuts it down.

Returning to section 75(1) (h), there is also a right of appeal *with leave* of the High Court or this Court any order made under rules from which an appeal is expressly allowed by the rules. Mr Justice J S Patel had, it has to be repeated, made an order under rules from which an appeal is allowed by the rules (again) only if the grounds of appeal are that the decree is in excess of, or not in accordance with, the award upon which the judgment was entered, and the decree issued after an application to set aside the award is dismissed.

It is right to assume that the draftsman knew what he was doing and to try and make these orders and rules and the section fit and work. Furthermore, a decree that is in excess of or not in accordance with such an award cannot be allowed to go forth and will have to be the subject of a right of appeal. Once, however, an award survives an application to set aside there would seem to be no compelling need to provide for an appeal on any grounds other than that the decree reflecting the judgment was in excess of or not in accordance with the award for the reasons I have already set out.

This point was not argued in full but it must be taken for it affects the jurisdiction of this court to hear the appeal.

The appellant was not represented in this appeal but Mr A J Kariuki appeared for him before Mr Justice J S Patel on January 16, 1986 at Nyeri to urge his application. Here, the appeal is not based on the grounds that the decree (that followed the judgment entered upon the dismissal of the application to set aside the award) is in excess of or not in accordance with the terms of the award. And, if it were needed, leave to appeal was not sought and so not obtained from the High Court or this court. The appeal is incompetent and must be struck out with costs. Over and above that, as Gachuhi Ag JA states, the award was a just one. It should not in my view be altered.

Nyarangi JA agrees, so the order of the court is that the appeal is struck out with costs.

Orders accordingly.

Nyarangi JA I am entirely of the same opinion as Kneller JA and Gachuhi Ag JA that the appeal is incompetent and that the award was a fair one. The view that underlies the contention of the appellant was, as it seemed to me that the respondents have land elsewhere and that Mathenge Kanuru was not allowed to sit as one of the arbitrators in the arbitration panel. However, the appellant's case was not prejudiced by that circumstance because Mathenge Kanuru gave evidence for the appellant and the elders held that the three daughters are the lawful heirs. I agree with the order which Gachuhi Ag JA proposes on costs.

Dated and Delivered at Nyeri this 9th day of October, 1986

A.A.KNELLER

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JUDGE OF APPEAL

J.M.GACHUHI

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JUDGE OF APPEAL

J.O.NYARANGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR