REPUBLIC OF KENYA

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REPUBLIC OF KENYA
Wakahihia & 4 others v Thiongo

Court of Appeal, at Nyeri October 9, 1986
Hancox, Nyarangi JJA & Gachuhi Ag JA

Civil Appeal No 58 of 1985
(Appeal from the High Court at Nyeri, Patel J)

Cases
Ruithibo v Njingi Civ Appellant 21 of 1982
Roboi Holdings Limited v Sita Civ Appellant 50 of 1982

The appellants in person
A T D Ghadialy for the respondent

<u>October 6, 1986, Gachuhi Ag JA delivered the following Judgment</u>

The appellants have appealed to this court against the ruling of the High Court (J S Patel Ag J) in dismissing the application for review. The appellants were respondents in an originating summons filed by the respondent in this appeal (Mwangi Thiongo) requiring the respondents to the summons to transfer four acres from a parcel of land Mahiga/kihome/9, which was held in trust for the applicant by the respondents.

The appellants were registered as proprietors of the said piece of land on succession to the title Mahiga/Kihome/95 in place of their father who died on August 10, 1974. It was in 1979, when Succession Case No 3 of 1979 was instituted at Othaya by the land registrar Nyeri under section 120 of the Registered Land Act (Cap 300)to determine the heirs. The appellants were cited as the claimants while the applicant/respondent was cited as the objector. After the hearing the district magistrate appointed the appellants as heirs and determined their respective shares as:

Adolf Gitonga Wakahuhia to get 7 acres

Zakaria Karanja Wakahuhia to get 8 acres

Peter Muraguri Gitonga to get 7 acres

Gichuki Wakahuha to get 3 acres

Adolf Gitonga Wakahiha as trustee for himself and the other two to get 2.5 acres

The names of the other two were not given. Charles Gitonga seems to have not been allocated any share of land though a party to these proceedings. The objector having got nothing filed this originating summons. In his affidavit in support of the summons, he stated in the following paragraphs as:

‘4. That sometime in 1964 or thereabout the said Wakahihia Gitonga agreed to sell to me a portion of land approximately four acres out of his said parcel of land at an agreed price of Kshs 4,200

more or less at 1,050 per acre.

5. That pursuant thereto I paid to the said registered owner a sum or price of Kshs. 1,900 and I have been ready and willing to pay the balance of purchase price being Kshs 2,300.

6. That upon receipt of the said sum of purchase price, I was put into possession of the said four acres and have carried out considerable improvements thereon and I have also constructed a permanent building thereon where myself and my family are staying.'

In reply to this affidavit the appellants denied paras 4, 5 and 6 above and stated that there was no agreement to sell any portion of the land or at all and that there was no money paid to the deceased. In answer to para 6 they said that if there was any agreement for sale, the same became null and void for lack of the Land Board consent. They also said that the respondent came into the land in 1970 through his mother who was allowed by the deceased to cultivate, and build a semi-permanent building there. The record does not contain any other affidavit. Those affidavits constituted the pleadings in this matter. On November 12, 1982, the matter came before (O'Kubasu) where a consent was recorded referring the dispute to two advocates Mr Mahan and Mr Mukunya who were to appoint an umpire. On October 13, 1983 the matter came before V V Patel J whereby the order made on November 12, 1982 was cancelled and a fresh order made referring the dispute to arbitration by the District Officer Othaya assisted by four elders two to be appointed by each side. Mention date was fixed for February 9, 1984.

On the mention date, the award was read and explained in the presence of parties. There is no date mentioned when the arbitration took place but there is nothing that turns on this. There is a further mention date on March 13, 1984. It does not appear the matter had been mentioned on March 13, 1984 but when the matter came up the advocate for appellants asked for an adjournment to April 17, 1984. Before the mention date, application to set aside the arbitration award was filed on April 2, 1984. The affidavit in support sworn by Adolf Gitonga Wakahihia complained that they were not afforded a chance to cross-examine the respondent herein or his witnesses, the arbitrators did not consider whether the applicant (respondent) was entitled to land as purchaser for over 12 years and that the award did not specify the acreage the respondent was to get and further that the arbitrators were imposing a sale on the appellants.

It is worthwhile to note that at the time the matter was heard by the arbitrators, only two of the five defendants, namely Adolf Gitonga Wakahihia and Peter Muraguri Gitonga first and third defendants and the Plaintiff as parties were present. Zakaria Karanja the second defendant must have arrived later since his name does not appear on the first page. Gichuhi Wakahihia and Charles Gitonga the fourth and fifth defendants do not appear anywhere in the proceedings.

On April 17, 1984, the application to set aside the award was abandoned by the then counsel for the appellant, but no reasons were stated in court for doing so. Immediately the counsel for the respondent applied for the judgment to be entered in terms of the arbitration award, which the court did. The court then proceeded to give an order that the defendant to execute the necessary documents to affect the sub-division and transfer of the portion of land occupied by the plaintiff and in default the executive officer of the court do sing all necessary documents. Further order was directed to the land registrar to register the sub-division and transfer. At the time of the order only three defendants were present whose names were not given.

On January 2, 1985 two of the appellants Gichuki Wakahika and Charles Gitonga Wakahihia filed an application through an advocate seeking for review of the judgment and prayer for consequential orders after the judgment to be set aside and the case to be heard on merit. The application was grounded on the fact that they being some of the defendants they were not summoned to appear before the arbitration panel and that judgment was given against them and were made to pay costs in a matter in which they had not been heard. At the same time the respondent filed an application seeking further orders that the land registrar be ordered to register the sub-division and that the respondent be issued with a separate title and that the appellants be at liberty to apply to court for their titles and a further order for costs. Both applications were listed for hearing on the same day April 10, 1985. For reasons only known to the

appellants, all five appellants according to a notice filed in court on February 20, 1985, dropped their advocates Messrs Kaburu & Company and decided to act by themselves. One of the appellants Zakaria Karanja Wakahihia filed another motion on February 1985 which was also to be heard on February 10, 1985 seeking for the review of the judgment entered in terms of the arbitration award and also seeking the restoration of the order made in Othaya DM's court succession case. The affidavit in support of the motion sworn by him details their grievances in the manner the arbitration was conducted as their witnesses and two appellants were not summoned to attend.

On April 10, 1985, the appellants appeared in person when the three motions were adjourned to be heard on April 19, 1985. In the meantime Zakaria filed a supplementary affidavit in which he stressed that two of the appellants were not present before the DO and that their affidavit of protest had already been filed.

The appellants elected to pursue the motion filed by them stressing the irregularities of the arbitration and requested the arbitration to be conducted by another District Officer. Mr Ghadialy for the respondent argued that review could only be based on discovery of new and important matters or evidence. In spite of the appellants complaining that they were unaware how their advocate conducted case which led to withdrawal of instructions, their motion was dismissed with costs.

Then the respondents motion was heard but the appellants maintained their stand that the matter should be reheard. The respondents application was heard and allowed with costs.

In their appeal to this court against the refusal to review the judgment, the appellants through Zakaria stated that the DO Othaya did not give them audience. They maintain that the matter should be heard again. To this Mr Ghadialy in supporting the judges ruling stated that the application for review did not contain any material and that the decision of the DO was within the knowledge of the appellants.

With due respect, here is a claim of a piece of land in the name of six people five of whom are parties to the suit. When the hearing went on before the arbitration, they were not present and yet the District Officer proceeded to hear the matter in their absence, giving away a piece of land to the claimant. When judgment was delivered, all defendants including those who were not present were condemned to pay costs to the plaintiff. As a matter of law, is it just that judgment should be imposed on them without being heard? Their complaint was laid before the judge on an application to review the judgment but the court overlooked this vital allegation that vitiates the judgment. It was up to the court, when it was pointed out in an application for review that judgment was entered against some defendants without being heard, to hold that the whole arbitration proceedings were a nullity in the interest of justice and the judgment should be set aside. Setting aside an award under Ord 45, r 15 is where there is misconduct and corruption. To conduct arbitration without all the parties present, and while some had no notice of the hearing is also a misconduct of the arbitrator under the same order and rule. On the face of it the legality of the award was questionable because all the parties were not present. The award could have also been set aside under r 15(1)(b) as the arbitrator misconduct themselves by allowing the proceeding to commence and in the end made an award that affected parties who were not before them to give evidence.

The judge was able to observe this when he heard the application and was able to investigate by looking at the award to see whether all parties were present and as to why they claimed that the DO was biased to them by not allowing them to direct question to the respondents and his witness.

It is basic law that no one should be condemned, to a judgment passed against him without being afforded a chance of being heard: *Ruithibo v Nyingi* Civ Appellant 21 Appellant of 1982 unreported. The chance is by being summoned but if he is served and chose not to attend, then he should be bound by the judgment unless he can show cause why he failed to attend. *Roboi Holdings Ltd v Sita* Civ Appellant 50 of 1982.

Mr Ghadialy argues that application for review should be on fresh facts which were not available at the time. The point here is not of fresh evidence but the point of law which underlie the proceedings the effect of which render the proceedings a nullity.

It is my view that this appeal should be allowed with costs and also costs in the proceedings in the High

Court on April 19, 1985. I would order that the judgment of the High Court be set aside and the proceedings before the arbitrators are also set aside. I would also order that the suit be remitted to the High Court at Nyeri to be proceeded according to law.

Hancox JA. I have had the advantage of reading in draft the judgment of Gachuhi Ag JA I agree that the application for review by the High Court of its earlier judgment of April 17, 1984, where judgment was entered in terms of the arbitrator's award, should have been allowed for the reasons stated by Gachuhi Ag JA. It is manifest that all the parties were not given a proper opportunity of being heard at the arbitration.

As Nyarangi JA also agrees the order of this court is that the order of the High Court dated April 19, 1985, is set aside, the order for review is granted and the judgment of the High Court dated April 17, 1984 is, accordingly, also set aside. The case is remitted to the High Court for hearing and determination according to law. Costs of the appeal and of the proceedings on April 19, 1985, before the High Court, are to be the appellant's in any event.

Nyarangi JA. I concur.