



REPUBLIC OF KENYA

Mairi v Ngonyoro “B”

Nyarangi, Platt & Gachuhi, JJA

November 18, 1986

**Nyarangi JA delivered the following Judgment.**

In Civil Suit No 2638 of 1980 of the High Court, Nairobi Porter J dismissed the application by notice of motion dated July 20 1983, before that court for orders that the arbitrator’s award filed in the High Court be set aside and that the suit be fixed for hearing in court in the normal way and against that decision the appellant has appealed to do this court.

The gravamen of the matters appears to me to be this: did the order made by the judge by the consent of the parties to refer the dispute to arbitration by elders under chairmanship of the District Officer Kandara on the three stated issues comply with order 45 rule 1 of the Civil Procedure Rules? Secondly, is the award made by the elders valid?

Order 45 rule 1 of the Rules provides:

***“1. Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.”***

***Order 45 rule (3) (1) states “The court shall, by order, refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.”***

***And rule (3) (2) states “Where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this order, deal with such matter in the suit.”***

In my judgment, the phrase, “any matter in difference between them in such suit” refers to all disputed matters in the pleadings. An application to the court for an order of reference therefore should encompass all matters in difference which a court by order refers to the arbitrator(s). It is in my opinion, non-compliance with order 45 rule 3(1) to restrict a reference to arbitration by the selection of a number of issues thereby actually omitting or running the risk of omitting, some matters of difference. I would say that compliance with order 45 rule 3(1) requires all matters in dispute to be referred to arbitration. That is reinforced by sub-rule 2 of rule 3 of order 45 which provides that where a matter is referred to arbitration to court,

***“shall not’, except as provided in the orde***

***r “deal with such matter in the suit”***

Upon a reference to arbitration the court may appoint an arbitrator or umpire as provided under order 45 rule 5 (2) if rule 5 (1) has been complied with, the court shall issue the same process to the parties and witnesses whom the arbitrators or umpire desires to examine [Order 45 rule 7 (1) ], the court may punish by its order [order 45 rule 7 (2) ] the court may extend the time for the making an award or make an order superseding the arbitration on an application by a party [order 45 rule 8 (2)], the court may direct an arbitrator or umpire to state the award as to the whole or any part thereof in the form of a special case for the opinion of the court (order 45 rule 11), the court may make proper order for costs of an arbitration, (order 45 rule 12) the court may modify or correct an award (order 45 rule 13); the court may remit an award to arbitration (order 45 rule 14, the court may set aside the award (order 45 rule 15), and lastly the

court shall on request enter judgment according to the award (order 45 rule 17).

As I understand rule 11 of order 45 a court may direct an arbitration or umpire.

***“to state the award as to the whole or any part thereof .....*”**

After a proper reference by the court ie consequent upon a reference to arbitration of all matters in dispute. There is no way an arbitrator or umpire could state the award as to the whole unless the reference is to the whole matter.

It follows that after a reference to arbitration by an order of court, the court could not hear the matter or any part thereof during the currency or pendency of arbitration. To select a few issues of a dispute for a reference to arbitration as if the remaining issues could be dealt with and determined by the court is to err.

On the evidence before the judge the award was filed out of time. The parties did not file any agreement in writing to extend time for the making of the award (order 45 rule 8 (1)) and the court was not moved to extend time etc (order 45 rule 8(2)). The award filed in court was therefore a nullity: Bagwasi Nyangau v Omosa Nyakwara civil Appeal No 83 of 1984 and Cleophas Wasike v Mucha Swala, Civil Appeal No 6 of 1983.

That being my view of the matter, I would allow the appeal, set aside the judgment and order of Porter J made on November 9, 1983 and order that the originating summons be remitted to the High Court for that court to deal with. No doubt the High Court will consider whether the procedure adopted is proper in the circumstances.

I would award the costs of this appeal and of the proceedings before the High Court to the appellant. Platt and Apaloo JJA agree. Therefore it is so ordered.