



REPUBLIC OF KENYA
IN THE HIGH COURT OF APPEAL NYERI
CIVIL DIVISION
CIV APP 12 OF 1985[1]

MURIITHI KIRII.....APPELLANT

AND

NGARI KIRIIRESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at Nyeri (JS Patel, J) dated November 21, 1984 In Misc Civil Case No. 31 of 1979)

JUDGMENT OF PLATT, AG JA

While the settlement of land disputes by arbitration is well-known, what is less wellknown is that by entering into arbitration, the parties have chosen arbitrators to decide their dispute rather than the court, with the consequence that except in limited circumstances there is no appeal. That will be seen very clearly from the terms of order 45 rule 17 of the Civil Procedure Rules. If the process of setting aside the arbitrator's award is either not available or not resorted to, then the only help the court can give the parties is to make sure that the judgment given by the court is in exact accord with the terms of the award. This is based on the free consent and choice of the parties to prefer their dispute to be settled by arbitration.

In this case, the parties referred their dispute to arbitration. The award was filed. No application to set aside the award was made, although ample time was allowed. Finally judgment was entered in terms of the award. The result was that the appellant, as registered owner of the land, was held to be under a duty to his half brother to share the registered land with him. The registered owner was required to enter into a new relationship with his brother so that both brothers should be registered as common proprietors in equal shares. It was found that the respondent had a right to inherit a part of the land from their common father.

Now the appellant protests against that reasoning. He says that the land was allocated to him alone at the time of demarcation. It was not his father's land in the sense of giving the respondent an inalienable right to share in the land as an inheritance. The appellant says that the District Officer, who acted as umpire because the arbitrators were unable to come to any majority decision, reached the wrong conclusion. One witness entirely shifted his evidence to suit the respondent. The District Officer was biased against him. There are other cases pending. Extraneous matters were taken into account. In a word, the umpire's decision was quite wrong.

I must say quite firmly that these are not matters to which this court can now listen. Rule 17(2) provides for no appeal on these matters. That is the price one pays for the privilege of arbitration.

However, I notice one error on the record. The learned judge entered judgment in terms of award. The decree does not say that the brothers shall be registered as proprietors in common in equal shares. It purports to divide the land between the parties. That is not a step permitted by the award, whatever the parties may later do with their common proprietorship.

I would dismiss the appeal with costs, but remit the record to the High Court for the High Court to exercise its consequential powers to see that the decree conforms to the terms of the award, and the judgment passed upon it.

Dated at Nyeri this 24th day of May, 1985.

H G PLATT

AG JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NYERI

(Coram: Hancox, JA, Platt and Gachuhi, Ag JA)

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JUDGMENT OF HANCOX, JA

I have had the advantage of reading the judgment of Platt, Ag JA, in draft. I agree that the arbitrator's decision, as expressed in the casting vote of the District Officer Ndia Division, as umpire, cannot now be challenged by way of appeal in view of order 45 rule 17(2) of the Civil Procedure Rules. The decree must, however, conform precisely with the award dated the January 6, 1984, which, as Platt, Ag JA, has said, it does not do. I therefore agree that the appeal should be dismissed with costs, and with the other orders proposed by Platt, Ag JA.

As Gachuhi, Ag JA also agrees those are the orders of this court.

Dated at Nyeri this 24th day of May, 1985.

A R W HANCOX

JUDGE OF APPEAL

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JUDGMENT OF GACHUHI, A JA

I agree with the judgement of Platt, Ag JA which I have read in draft. I have nothing to add.

Dated at Nyeri this 24th day of May, 1985.

J M GACHUHI

AG JUDGE OF APPEAL

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

SENIOR DEPUTY REGISTRAR