



IN THE COURT OF APPEAL

AT NYERI

(CORAM: HANCOX & NYARANGI JJ A, GACHUHI AG JA)

CIVIL APPEAL NO 4 OF 1985

RIMBIAPPELLANT

VERSUS

RIMBI & ANOTHER.....RESPONDENT

JUDGMENT

(Appeal from the Judgment of the High Court at Nyeri (J. S. Patel J) in Civil Appeal No 152 of 1983, dated 15th November, 1984)

May 24, 1985, the following Judgments were delivered.

Gachuhi Ag JA: The appellant has appealed to this court against the consent order made on 15th November, 1984 by the trial Judge of the High Court at Nyeri, thus:

“By consent the respondent/defendant to give all necessary documents to facilitate the transfer of land title No. INOI/THAITA/173 in default, Executive Officer of this court to sign all such documents. No order as to costs of this application”.

Though the appeal is expressed to be against the judge’s decision of the 15th November 1984 it is clear from the memorandum of appeal and appellant’s submissions in support of it that he is in fact attacking the judgment entered against him on 11th October, 1984 in terms of the arbitration award dated the 11th April 1984. He also attacked the proceedings before the panel saying that he was shouted down and that whatever he and his witnesses said was not recorded.

Briefly, the background of this dispute is that their parents died before the land consolidation and as the elder son in the family he was actively responsible for the family land, which the Land Consolidation Committee allocated to him as the head of the family. No doubt the appellant diligently took care of his young brothers. He developed the land and allocated to each of them 110 coffee trees which he had planted retaining 150 himself. He also allowed them to settle on the land.

A dispute arose whereby the respondents filed suit to determine whether there was a trust in their favour. By consent of the parties the dispute was referred to a panel of elders under the Chairmanship of the District Officer.

Baricho on 16th February, 1984. All parties together with their witnesses gave evidence before the panel.

The panel made the award that was signed by the panel and the parties and filed in Court. It was read and explained to the parties in Court on 17th May, 1984.

The arbitration award was:

“The elders found out that Mwai Rimbi was allocated the land in question as a trustee to the other young brothers. The defendant has been holding the land since demarcation in favour of the young brothers. He has never sold it. He allowed his two brothers to have cashcrops on the land. And in conclusion as the defendant has taken good care over the land he should obtain 2 acres and the other remaining 3 acres be divided between the plaintiffs. That is to say

Josphat Mugo Rimbi - 1.5 acres

Robert Kinyua Rimbi - 1.5 ”

Samuel Mwai Rimbi - 2.0 ”

There were two mention dates fixed. On the last one, the 11th October, 1984 both plaintiffs were present and Mr. C.C. Patel, Advocate for the defendant was present. The plaintiffs submitted that there was no application filed within 30 days under Rule 16 of Order 45, so they wanted judgment to be entered. Judgment was then entered as per the terms of the award.

Up to that time the plaintiff was represented by Mr. C.C. Patel, Advocate. On 15th October, 1984 the appellant himself filed an application to set aside the award. On 16th October, 1984 the respondents filed an application to authorize the Executive Officer to sign necessary forms to facilitate the transfer, so as to give effect to the court's judgment of the 11th October, 1984.

It is fitting to comment here, that any party wishing to set aside an arbitration award must file an application within 30 days of receipt of notice of filing the award in Court. If the appellant was not aware of the date of filing, then he became aware on 17th May, 1984 when the award was read and its effect was explained. Under Order XLV rule 16 of the Civil Procedure Rules the appellant had 30 days within/which to file an application to set aside the award. On expiry of the period of 30 days he must seek leave of the court to extend time within/which to file the application. Between 17th May 1984 and 11th October, 1984, no application was filed and judgment was accordingly entered in terms of the award. Under Order XLV rule 17, judgment having been entered, no appeal could be filed against the judgment except where judgment is not in terms of the award.

The appellant's application dated 15th October 1984 as well as the respondent's application of the same date came up for hearing on 15th November 1984. The record shows that the court only considered the respondent's application. No mention is made of the fate of the appellant's application. It is fitting to state here that the judge who heard the application ought to have either dismissed the appellant's application or have it withdrawn as it was out of time and had been overtaken by the entering of the judgment, or say something about it. I also do not see how the appellant could have consented to the order sought by the respondent while knowing that the application for setting aside the award was pending. The court record is not clear here and it may be probable that the consent order was not a consent order but an order of the court. The appellant's appeal is based on this order.

The appellant's submission in attacking the award has no basis. He has no chance to do so having been precluded from doing so by lapse of time and because his application to have the award set aside had not been dealt with. Again it is only fair to state that from the record, the arbitration was properly concluded, all parties were heard and the award was unanimous. The elders for the appellant signed the award. The appellant was awarded 1/2 an acre extra as “*Uramati*” while they all had to share the balance of the land equally.

Having heard the appellant on his submissions, the court took the view that the appellant could not appeal

on the order of 15th November 1984, and appellant was submitting on something completely different from the said order. He encroached on the award which he was not entitled to. As a result of this the court did not see fit to call on the respondents to reply.

I find that the appellant's point of view was well considered by the panel, and a person in his position could not have expected anything better from the panel while dealing with trust land of this nature than he obtained. He was well treated. There is no valid appeal before this court notwithstanding what I have stated above. This appeal should be dismissed with costs.

Hancox JA. I have also had the advantage of reading the judgment of Gachuhi Ag JA in draft. I agree with it and with the orders proposed by him. I would only reinforce his comment that the order made by the Judge on the 15th November, 1984, could not have been by consent, as the record states, in view of the appellant's submissions to us and his outstanding (though invalid) application to set aside the award of the arbitrators.

As Nyarangi JA also agrees the appeal is ordered to be dismissed with costs.

Nyarangi JA. I agree with the judgment prepared by Gachuhi Ag JA, which I have read in draft and with the order he proposes.

It is inconceivable that the order made by the Judge on the 15th November, 1984 which torpedoed the rights of the appellant in the property, and caused him a deep sense of grievance, could have been by consent. The appeal should be dismissed with costs.

May 24, 1985

HANCOX & NYARANGI JJ A, GACHUHI Ag JA