REPUBLIC OF KENYA

Wasike v Swala

Court of Appeal, at Nakuru May 30, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Civil Appeal No 6 of 1983

(Appeal form the High Court at Eldoret, Mabaya J, Civil Appeal No 2 of 1982)

May 30, 1985, Nyarangi JA delivered the following Judgment.

By his plaint filed at the resident magistrate court Kitale on April 24, 1978, the appellant as plaintiff averred that on July 15, 1977 he purchased a 16-acre plot No 81 Kabuyetwe Scheme from the defendant, that he paid the purchase price of Kshs 30,000 to the defendant, who vacated the property but that on March 29, 1978, the defendant returned and re-occupied the plot making it impossible for the appellant to carry out cultivation. The plaintiff prayed that the defendant be ordered to transfer the parcel of land to him, be ordered to vacate the land and pay costs of the action plus interest at court rates. A written statement of defence filed on June 9, 1978 stated inter alia that the defendant could not continue with the sale because the transaction became null and void for lack of consent of the relevant divisional land control board. At the plaintiff's request the suit was fixed for mention before the senior resident magistrate Kitale on March 19, 1981 when the senior resident magistrate on his own motion and without the consent of the parties made an order under Order XLV rule 1 of the Civil Procedure Rules referring all matters in dispute between the parties regarding the ownership of the material parcel of land to the district commissioner Bungoma with the assistance of elders. The award of the district commissioner and the elders was to be filed in court within 3 months from the date hereof, therefore not later than June 19, 1981. As a matter of fact the award by which the disputed land was given to the plaintiff/appellant was filed in court on September 10, 1981 and the parties were given 30 days within which to apply for the award to be set aside. On October 8, 1981 (within time) the respondent applied to the senior resident magistrate's court under rule 13 of Order XLV Civil Procedure Rules for the court to modify or correct the award. The learned senior resident magistrate dismissed the respondent's application, entered judgment for the plaintiff/appellant and ordered the respondent to transfer the land to the appellant within one month and to vacate within three months of the date of the order. The respondent's appeal to the High Court (Mbaya J) was allowed.

Aggrieved by that decision, the appellant, Cleophas Wasike, appeals to this court on eight grounds which may be summarized as follows: That the judge erred in not appreciating that the appeal was incompetent and did not lie, in failing to consider that the parties did not consent to the reference to arbitration, in holding that the appellant had waived his right to agree to the reference, in taking into account matters which were not raised during the arbitration proceedings, in finding that there was no land control board consent and in deciding that the magistrate, district commissioner had in effect been appointed the chairman/umpire. However, the district commissioner did not chair the material proceedings and did not attend. On his own admission, vide his letter to the senior resident magistrate dated August 25, 1981: The elders were chaired by the assistant chief of the area"

.and the only extent to which the district commissioner took part was to write to the resident magistrate Kitale on August 25, 1981 to state that he:

> "fully endorsed the elders decision that the plot be awarded to Mr Cleophus Wasike …"

With respect to the district commissioner it was not sufficient for him to merely endorse the decision of the elders. That decision alone was not a decision of the arbitrators. The order of the court was for the district commissioner to arbitrate with the assistance of the elders. Alone he could not arbitrate. Nor could the elders. The district commissioner as the chairman/umpire was duty bound under the order of reference to personally conduct the arbitration proceedings making sure that the rules of natural justice are adhered to and that the parties are accorded equal hearing. The irregularity to conduct the arbitration proceedings under order of the court coupled with the failure of the district commissioner to sign the award as is mandatory requirement of Order XLV rule 10 cap 21 is in my view fatal and renders the entire arbitration proceedings null and void and of no effect. No valid award could therefore be made or filed in court. Besides, the award had to be filed in court not later than June 19, 1981. The award the subject matter of this appeal was filed in the senior resident magistrate's court on September 10, 1981. There is no evidence that an application was made pursuant to Order XLV rule 8 Civil Procedure Rules for the court to extend the time for the making of the award. The senior resident magistrate accepted and acted on an award which had been filed in his court long after the elapse of the time fixed under Order XLV rule 4(2) for the making of the award. But the award was a nullity.

It is common ground that the land board for the division in which the land is situated did not give its consent in respect of the transaction. No application for consent was ever made. The transaction was therefore void for all purposes by virtue of section 6(2) of the relevant Land Control Act (cap 302) as the transaction was not transmission of land by virtue of a will and did not involve the government or the Settlement Fund Trustee or the area County Council (see section 6(3).

To sum it, there was no valid award made an filed in court and there was no consent given for the transaction. The appellant is entitled to refund of the money paid in the course of the dealing. In the result I would dismiss the appeal with costs.

Platt Ag JA. The learned judge reached the right result. There were three broad principles at stake. The first was the consent of the Land Control Board. The second was that the judgment had been entered upon the result of arbitration proceedings to which the parties had not consented. The third was that there was no award, and no record of any arbitration being held.

Judgment upon it should not therefore have been entered.

It may be that the transaction was void for lack of consent. No final view can perhaps be expressed as the ambit of section 6(3)(b) of the Land Control Act (cap 302) was not raised or considered. If, of course, the Settlement Fund Trustees were still a party to the transaction, consent might not have been strictly necessary.

But there is no doubt that the appellant was wrong in arguing that arbitration can be ordered against the wishes of a party. The words of Order XLV rule 1 are;-

> Where in any suit all the parties interested who are not under disability agree that any matter in difference between them in the suit shall be referred to arbitration, they may … apply to the court for an order of reference.

Unfortunately the matter was not so referred.

It is then abundantly clear from the record that no arbitration was held and no award made. The matter was not put before a panel of elders, but before the Land Control Board. The district commissioner's letter of August 25, 1981 could not count as an award because he asks that the court decide the matter.

It is also said that the resident magistrate had no jurisdiction to entertain the suit and so to refer it to arbitration. In that event, the proceedings were a nullity. That leaves the appellant plaintiff with the opportunity of taking his matter further in the right court if he so please. I would order that the proceedings in the resident magistrate's court be declared to be a nullity but otherwise the appeal should be dismissed with costs.

Hancox JA. I agree that in this case there was no valid reference to arbitration, for which, under Order 45 rule 1 of the Civil Procedure Rules, all parties interested must agree. Even in the case of an arbitration clause in an agreement bilateral rights of reference by both parties must be given, otherwise the clause is invalid see Tote Bookmakers Ltd v Development and Property Holding Co Ltd [1985], Law Society's Gazette p 924. It is thus the essence of an arbitration that the reference thereto is made with the express agreement of all parties interested, in this case the appellant and the respondent, formerly the plaintiff and defendant. Here the record shows that there was no such agreement by either side.

Moreover, as the learned first appellate judge said, the Magistrate's Jurisdiction (Amendment) Act No 14 of 1981 requiring the reference of land disputes to a panel of elders, did not come into force until December 31, 1981.

Apart from the foregoing, the resident magistrate, as he then was, did not have jurisdiction to hear the case, or any part of it, since the value of the subject matter was, at the least Kshs 30,000, and possibly as much as Kshs 45,000. His powers were increased from the then statutory maximum of Kshs 6,000 under section 5(1) of the Magistrate Courts Act, cap 10, to Kshs 20,000 with effect from January 5, 1981 by Gazette Notice 70 of 1981 dated January 9, 1981.

I agree, therefore, for these and the other reasons stated by Nyarangi JA, and Platt Ag JA, that the appeal from his decision should be dismissed with costs.

These will be orders accordingly.