REPUBLIC OF KENYA

Nyangau v Nyakwara

Court of Appeal, at Nairobi June 19, 1985

Hancox, Nyarangi JJA & Platt Ag JA

Civil Appeal No 33 of 1984

(Appeal from the High Court at Kisii, Schofield J)

June 19, 1985, Hancox J delivered the following Judgment.

I am of the opinion that the point taken in the second ground of the memorandum of appeal must succeed. The appellant indicated to the arbitrator, Mr Osoro, that he wished to call five witnesses, including himself. It is a reasonable inference that one of these witnesses was Onyando Bonuke, because he was named in the counterclaim as one of the original joint registered owners from whom the appellant said he purchased the suit land. It would follow from this that Jackton Ocharo might not have had sole authority to sell the land, as was implicit from the plaint, and that Onyando could have given material evidence on this issue.

The affidavit of Onyando stated that he was outside Mr Osoro's chambers during the hearing of the arbitration but that he was not called to give evidence. Unfortunately, the arbitrator's affidavit does not specifically meet the allegation that the denied the appellant the opportunity of calling the witness, but contains a general statement that he stood by the record of the proceedings which he had made. There is the further point which Mr Kivuitu made on behalf of the appellant that whereas the arbitrator had recorded the respondent as saying:

> "I close my case"
>
> he merely recorded' in the third person,
>
> "Close of defence case"

In these circumstances the probability is that the arbitrator did not permit the appellant to call Onyando. It is well settled that if an arbitrator does not permit a party to call evidence which is material to the issue and which he wants to call it amounts to misconduct on his part. See Phipps v Ingham 1835 3 Dowl: 669, 3 Digest (1978 Reissue) 973 in Re Maundek [1883], 49 La Times Report, 535, in which the arbitrator appointed by the landlord desired that the landlord should be called, but his request was refused, Grove, J said at page 537.

> "But the matter was not at an end either practically or legally when the landlord put in his claim to be heard. It is admitted that the landlord had a right to be heard by the umpire, if he made known his wishes, and it appears that about May 26, the umpire must have heard of his claim. There was ample time before June 5, the date of the publication of the award, to hear what he wishes to say. It seems clear to me that the arbitration was not fully concluded until

> the reserved points of law were determined, and, as the landlord made known his claim to be heard with respect to at least one of those points before their final decision, the umpire ought to have given him the opportunity.

In Williams v Wallis & Cox [1914] 2 KB 478, which involved a statutory arbitration with different procedure from that under the Arbitration Act 1889, and in which material evidence was rejected by the arbitrator, Lush, J said at page 484:

> "Misconduct is not necessarily personal misconduct. If an arbitrator for some reason which he thinks good declines to adjudicate upon the real issue before him, or rejects evidence which, if he had rightly appreciated it would have been seen by him to be vital, that is, within the meaning of the expression, "misconduct" in the hearing of the matter which he has to decide, and misconduct which entitled the person against whom the award is made to have it set aside.

In my view, therefore, the application to set aside the award dated June 18, 1982, should have been allowed by the learned resident magistrate, and the learned judge on the first appeal should so have held. As regards the point raised in the first ground of appeal, namely that the arbitrator embarked on the hearing and gave his evidence well after the time agreed between the parties had elapsed, I agree that there should have been a written agreement to extend the time in accordance with order XLV rule 8. This point was not raised in the court below, with regard to which is said in Kenya Commercial Bank v James Osebe , Civil Appeal No 60 of 1982:

> "The difficulty I have felt in acceding to Mr Soire's submissions is that in none of the cases in question did the point taken for the first time on appeal go to jurisdiction. In the recent case of Balchin v Buckle (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant) it was held that where the right of appeal is statutory it is to be confined to points of law raised before and decided by the trial judge.

Stephenson, LJ said:

> "It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of appeal had no jurisdiction to decide a point which had not been the subject of argument and decision in the county court.
>
> There were two exceptions to the case on considering a point not considered in the county court. If the county court had done something which was illegal or outside its jurisdiction, in either case whether or not the appellant took the point the Court of Appeal and must reverse the decision of the county court: Oscroft v Benabo [1967] 1 WLR 1087."

I am not, however, persuaded that the hearing of the arbitration over nine months after the reference, in which, as Mr Mainye, for the respondent said, both parties participated fully, went to the root of the arbitrators' authority, and was a matter of jurisdiction.

For these reasons I agree with Gachuhi, Ag JA whose judgment I have had the advantage of reading in draft, that this appeal should be allowed on the second ground. I would set aside the order of the learned judge dismissing the first appeal and that of the resident magistrate dismissing the application to set the award aside. I would remit the case to a magistrate's court of competent jurisdiction for hearing and determination according to law.

I would award the costs of this appeal, of the first appeal, and of the application to set aside the award, to the appellant.

As Platt and Gachuhi, Ag JJA agree in this result it is so ordered.

Gachuhi Ag JA.

The plaintiff by his plaint filed in the High Court at Kisii registry in civil suit No 52 of 1972 claimed from the defendant mesne profits, damages, possession and costs all these related to plot No 23 at Ramosha market in Nyaribari Masaba location. He claimed that he bought the said plot from one Jackton Ocharo on or about April 15, 1969. At the time the defendant was in occupation as tenant. In his defence and counterclaim the defendant denied that the plaintiff ever bought the said plot as claimed and further stated in the alternative that the said Jackton Ocharo held the plot in trust for the defendant. He further claimed in the counterclaim that the plot was in the name of Jackton Ocharo & Co which included the defendant and four others. The defendant had paid Kshs 3,000 to the other partners in or about May 1969 whereby the defendant developed the plot further. After a lapse of time the said suit was transferred to the senior resident magistrate's court Kisii for trial where it was re-registered as RMCC 586 of 1979.

On June 9, 1981, though it is not clear in the record whether it is the parties and their advocates or the parties themselves who were present, but when both were present an order by consent was recorded as:-

> "All matters in dispute referred to arbitration of JMK Osoro advocate who should file his award to this court within 90 days of this reference."

The arbitrator conducted the arbitration on March 28, 1982, April 18, 1982 and May 23, 1982 when the plaintiff's case was closed. The defence case then started and ended on the same day. After the fourth defence witness gave evidence, the record shows as "close of defence case." The arbitrator then recorded:

> "I will make the award and file it in court on June 5, 1982. Copies of the written award and disposition proved before me may be obtained from your advocates any time after the aforesaid date."

After the close of the plaintiff's case, the record shows that the defendant said:

> "I have 5 witnesses to call including myself."

The record of the arbitrator shows that only four witnesses including the defendant gave evidence.

The arbitration proceedings and award was filed as stated on June 5, 1982.

On June 18, 1982 the defendant filed a chamber summons under order XLV rule 15. The orders sought were:

> 1. That the award made by Mr JMK Osoro as arbitrator dated June 5, 1982 be set aside and the case be referred either to another arbitrator or court to dispose of it.
>
> 2. Costs of this application be provided.

This award was supported by the affidavit of the defendant and of three other witnesses two of whom gave evidence before the arbitrator and the one who did not give evidence and who is the core of the application. The plaintiff did not file a replying affidavit but his advocate Mr Mainye filed one. The application was heard by the learned Ag resident magistrate Kisii and dismissed it with costs.

The defendant appealed against the dismissal to the High Court at Kisii, on the same ground though split into four grounds. The learned judge of the High Court correctly accepted the proposition of the law that if the arbitrator refused the defendant an opportunity to call his last witness then the arbitrator was guilty of misconduct. He agreed with the decision of the learned magistrate and so dismissed the defendants appeal with costs. Hence the appeal to this court against that decision.

The appeal is on two grounds the first ground attacked the jurisdiction of the arbitrator and the second ground being the first ground filed for setting aside the award but this time elaborated into sub-grounds

embarrassing the affidavits and the evidence before the arbitrator. I shall deal with the second ground first.

The arbitration award was filed on June 5, 1982. Order XLV rule 16 provides that application under rules 12, 13, 14 and 15 may be made within 30 days of receipt of notice of the filing of the award in court. The defendant filed his application within the said period, on June 18, 1982. In his affidavit the defendant states:

> 2 I have read the award and believe that it had a big chance of being different in result had the arbitrator not treated me unfairly in denying me chance to call one Onyando Bonuke as one of my witnesses.
>
> 3. That Onyando Bonuke is one of the original owners of the plot in dispute as clearly accepted by both parties in this case and his evidence would have strengthened my case and would have I believe changed the result of this case.

Other paragraphs are also relevant to this as they deal with the record of arbitrator but others traverse to unrelated allegations. The defendant set out his intention in the affidavit to call Onyando Bonuke as the last witness. He stated that he was told that it was not necessary to call him as a witness since he would give similar evidence as the other witnesses. On insisting on calling him, the arbitrator accordingly closed the case denying the defendant that opportunity.

He was fully supported by Naftali Ombiro and Jafeth Bonda.

Onyando Bonuke also filed an affidavit in support of the defendant's application. He states in his affidavit that he attended the arbitration on May 23, 1982 to give evidence. All other witnesses were called to give evidence and he alone remained outside while all others were being called. When he was called in by Naftali Ombiro and before he could enter the room, he saw all the parties walked out with their witnesses, the defendant and Naftali Ombiro were complaining that the arbitrator had refused to allow the witness to give evidence.

The plaintiff admitted in his evidence that he bought the plot from Jackton Ocharo, Onyando Bonuke and Ombiro (Naftali). Jackton Ocharo also in his evidence stated that he was in partnership with Onyando, Ombiro and Gwonda.

In an application of this kind it would be fitting for the parties who were present and witnessed the incident to file affidavit in answer to the applicant's charge. In the present case the plaintiff who was present when this incident occurred never filed such an affidavit. Instead, it is the advocate who filed an affidavit to the effect that the arbitrators award was comprehensive. It does not appear on record that the advocate, Mr Mainye was at all present. This affidavit is not in answer to the charge that the arbitrator closed the defendant's case on his own or that he refused the defendant calling the last witness.

During the hearing of the application the court made an order for the service of the application on the arbitrator. The effect of this was that the arbitrator was to defend his action which could either be by filing a replying affidavit or volunteering oral evidence or by filing an affidavit and supplementing it by oral evidence of which he would be subjected to cross-examination. The arbitrator opted to file an affidavit.

The two allegations made by the defendant in his affidavit against the arbitrator are:

> 1. Arbitrators refusal to the defendant calling Onyando Bonuke as a witness.
>
> 2. That the arbitrator was somehow related to, or, his senior partner was related to Jackton Ocharo, who sold the plot to the plaintiff which relationship could have affected the outcome of the arbitration.

Surprisingly enough the arbitrator dealt with the allegation of relationship at a great detail in his affidavit but said nothing about the first and the main allegation in the application. What he states in his affidavit regarding the allegation is a categorical denial of the allegation and that he stands by the record of proceedings and deposition he took on the dates of arbitration.

Looking at the proceedings which took three days the first two days and part of the third day were in taking evidence on behalf of the plaintiff and his eight witnesses in all nine. At the close of the ninth witness it is recorded:

> Plaintiff : I close my case
>
> Defendant : I have 5 witnesses

At the end of the evidence by the fourth defendant it is recorded:

> Close of defence case

This is what the arbitrator stood by in his affidavit. It is the main complaint by the defendant in this application that he was denied the chance to call his last witness. Mr Kivuitu for the defendant/applicant has stressed that if it was the defendant who closed his case then the record would have been similar to the record made on behalf of the plaintiff. This allegation which is within the arbitrator's knowledge has not been answered. It has not been explained as to why the defendant did not call the last witness. It is not open for the learned magistrate to presume as he did in his ruling that the defendant might have decided to drop the last witness while the witness claim to have been waiting to be called in and when he was called, the parties walked out. This was for the arbitrator, and the arbitrator alone, to answer the allegation which he did not. The defendant has been firm throughout in his application and on appeal that he wanted to call all the partners who sold the plot to him. According to the arbitration proceedings, he took possession of the plot in 1954, he paid Kshs 3,000 to the partners and spent further sum of Kshs 3,163.35 in developing the plot. I find that Onyando Bonuke was a material witness. If the arbitrator was pressed by the time during that day, he could have adjourned the hearing to another day for taking the evidence of this vital witness. He had already allocated two and half days to the plaintiff why only half a day for the defendant. By his refusal he misconducted himself. Arbitration award could be set aside as provided by order XLV rule 15(1)(a) as for corruption, or misconduct of the arbitrator or umpire. In Halsbury's Laws of England 3rd Edition Volume 2 at page 58:

> "Thus misconduct occurs if the arbitrator or umpire as the case may be ….or where the arbitrator refused to hear the evidence of a material witness .."

The learned judge on appeal was seized within this preposition of the law as he stated in his judgment:

> "It is argued that if the arbitrator did refuse the defendant an opportunity to call his last witness then the arbitrator was guilty of misconduct and I agree with the preposition."

When this preposition of the law came to the knowledge of the learned magistrate or the learned judge on appeal and having read the supporting affidavits, could have set aside the award. In my view, there was a misconduct on the part of the arbitrator and this award should be set aside on this ground.

Reverting to the first ground, it is clear that arbitration started well outside the time set out by the court of 90 days. This goes to the root of the jurisdiction. It is true that the question of jurisdiction should be taken up at the first opportunity as a preliminary point before the trial. It is unfortunate that the lawyer for the defendant did not take this up in the application but this should have been detected by the learned magistrate or the learned judge on first appeal. The arbitrator himself is an advocate who should have known the provisions of the Civil Procedure and in particular the provisions or order XLV under which he was to conduct the arbitration as directed by the court. It does not matter when he was served with the notice. The provisions of rule 8 are quite clear that an extension of time could be made by the parties in writing or by order of the court. The arbitrator could have applied to court for an extension of time before

embarking on it. It has been argued that the parties participated. This does not cure the position. It was upto the arbitrator not to proceed with the arbitration outside the time allowed by the court. In the recent case of Kenya Commercial Bank Ltd v James Osebe CA No 60 of 1982 on the question of jurisdiction Hancox, Ag JA as he then was said:

> "The difficulty I have felt in acceding to Mr Soire's submissions is that in none of the cases in question did the point taken for the first time on appeal go to jurisdiction. In the recent case of Balchin v Buckle (Times) June 1, 1982 (a case relating to the (hitherto overlooked) non-registration of a covenant) it was held that where the right of appeal is statutory it is to be confined to points of law raised before and decided by the trial judge.

Stephenson, LJ said:

> It (has) been clear for nearly a century and perhaps more, that the litigant could not take a completely new point of law for the first time on appeal and the Court of Appeal had no jurisdiction to decide a point which had not been subject or argument and decision in the county court.
>
> There were two exceptions to the case on considering in the county court. If the county court had done something which was illegal or outside its jurisdiction, in either case whether or not the appellant took the point the Court of Appeal and must reverse the decision of the county court: Oscroft v Benado [1967] 1 WLR 1087."

In the case of Cleophus Wasike v Mucha Swala CA No 6 of 1983 of Nakuru, Nyarangi, JA said:

> "The award the subject matter of this appeal was filed in the senior resident magistrate's court on September 10, 1981. There is not evidence that an application was made pursuant to order XLV rule 8 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."

Though this was not taken up, it is a point that goes to the root of the matter as it could decide whether or not there was arbitration. If the point had been taken, it would well be that the appeal would not have been preferred which would have reduced the time wasted and expense. The crucial point here is that the arbitrator being a trained lawyer ought to have known that what he was supposed to embark upon was a nullity due to expiry of time. He could have gone to court for extension of time. Though this was not taken up and rejected earlier, this ground of appeal should also succeed in the light of the above authorities.

I would allow this appeal and set aside the dismissal by the learned judge and the learned resident magistrate and substitute an order for setting aside the award. I would further direct that the trial court shall supersede the arbitration and shall proceed with the trial of the suit. As the appellant has succeeded on the only original ground for setting aside the award the appellant should have the costs of this appeal and of the courts below.

Platt Ag JA.

I have had the advantage of reading in draft the judgments of Hancox, JA and Gachuhi, Ag JA. As far as the appeal on the second ground is concerned, I agree that that ground must succeed for the reasons given and I have nothing to add.

But I should like to state my opinion that ground 1 also succeeds because the award was out of time.

It is not in dispute that the authority of a arbitrator derives from the reference of the dispute to him. He may not exceed his jurisdiction, without the terms of the reference being enlarged. In this case the

reference was made in the presence of the advocates of the parties on June 9, 1981 in the following terms:

"Order by consent

> All matters in dispute referred to arbitration of JMK Osoro, advocate who should file his award in this court within 60 days of this reference."

On that basis the award had to be filed by September, 1981. But the arbitrator did not commence to hear the arbitration until March 28, 1982, and he dated his award June 5, 1982. The arbitration took place with only the parties present, they having excused their counsel." That being so, the arbitrator as an advocate of this court, had an added responsibility to deal with the proceedings before him fairly and in accordance with the law. His first duty was to see that he could act under the reference, the time having expired in September 1981. Order XLV rule 8(1) and (2) of the Civil Procedure Rules covered the time (under rule 8(10, or applications could be made by them or the arbitrator himself to the court for extension of time, even if the time had passed (Rule 8(2)). The court could then grant an extension of time or supersede the arbitration. It appears from the record that neither of these steps was taken.

In these circumstances, Mr Kivuitu argued that the arbitrator had no jurisdiction. The reference to him had lapsed. What could be the purpose of the rules for enlarging time, unless the reference lapsed without an enlargement. He referred to various authorities in support, and the statement of Lord Coleridge the Chief Justice in May v Harcourt [1884] volume LR QBD 688 at page 690 is particularly succinct.

> "In this case the parties agreed to submit certain matters to arbitration, and one of the terms of the submission was that the award should be made within a month from the time of the submission. The award was not made till later, and in the absence of any enlargement of the time by the court, the objection to the award would hold good."

There were cross-applications before the court one to set aside the award, and another to enlarge the time for making it. The learned Chief Justice decided that time could be enlarged, and thus the award was saved. A similar action was taken by Parker, J (as he then was) in Oakland Metal Co Ltd v Benaim (D) & Co Ltd [1953] 2 QB 261 exercising powers under section 13(2) of the English Arbitration Act. That is an agreeable result especially where the parties have continued wi9th the arbitration after time has lapsed, and this is further emphasized by the fact that the lapse can be cured after it has occurred.

But the position in Kenya under order XLV of the Civil Procedure Rules is that there must be either an agreement or an application to extend time. We allowed time for the parties to search for an agreement, but none has been forthcoming. It must be assumed that there was no agreement, and there was certainly no application. Therefore the award is a nullity.

Mr Kivuitu also canvassed the possibility of the parties waiving their objection a point of view culled from Vol 2 of Halsbury's Laws of England 3rd Edition at page 42. That was the most helpful material for Mr Mainye. He pressed the submission that conduct of the parties may show an agreement to extend the time. He also picked up another point made by Mr Kivuitu, that it is not known when the reference was served on Mr Osoro. But in reality, these matters are beside the point. Rule 3 of order XLV requires a time limit to be specified, and rule 8(1) requires the agreement to extend time to be in writing, and not witnessed merely by conduct. It is therefore necessary to use the English authorities on this point with care, because in some aspects, the Civil Procedure Rules have provided different rules to those which applied or apply in England.

Rule 8(1) clearly avoids conduct. It follows that whenever Mr Osoro was served with the reference, he had to see that he could act under it, and if the time had already expired he had to see that it was enlarged. To avoid doubt, it should perhaps be mentioned that there are differences of procedure under Order XLV of the Civil Procedure Rules and the Arbitration Act (cap 49). Nevertheless having taken account of the rules under order XLV, it is clear that Lord Coleridge's point of view in May v Harcourt (supra) is applicable to the present rule 8 in Kenya.

Consequently if the award must be set aside, that must be on the basis that the arbitrator had no power to act outside the terms of the reference. Therefore the objection goes to the jurisdiction of the arbitrator to enter upon the arbitration. It is incontrovertible, that whether or not this matter was raised only on this appeal, as it goes to the jurisdiction of the arbitrator, this court must take the point and declare that the award was a nullity and should have been set aside. Indeed even if the learned High Court judge had raised the matter himself, without any ground of appeal on the point before him, he must have set aside the award. As this court must now set aside the order of the High Court, it must follow that the award is set aside and that the suit must proceed to hearing under order XLV rule 15 of the Civil Procedure Rules.

Otherwise I agree with the orders proposed.