IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Nyarangi Ag JA)

CIVIL APPEAL NO. 26 OF 1984

BETWEEN

EZEKIAH M'IKIARA.....APPELLANT

AND

EDWARD M'INIU M'IKIANDI.....RESPONDENT

(Appeal from the High Court at Meru, Patel J)

JUDGMENT

Ezekiah M'Ikiara (the appellant) is dissatisfied with a judgment of Mr Justice V V Patel in the High Court at Meru, of September 29, 1983.

The judgment was that the appellant should pay Edward M'Iniu M'Ikandi or M'Ikiandi (the respondent) Kshs 23,000 in full settlement, inclusive of costs and interest to date, and the appellant was confirmed as the owner of the tractor.

The pleadings provide some of the introduction to that judgment. The respondent was the plaintiff in the High Court and he prayed, at the end of his plaint, for orders directing the appellant/defendant to give him access to a tractor, KML 087 (which he alleged they purchased together on August 29, 1979), for taking an account of the 'business and earnings of the tractor', (which he said the appellant took sole possession of on July 1, 1980, on the understanding that he would work with it, keep an account of his earnings and profits with it and share them with the respondent at the end of every month), costs and interest.

The appellant, in his defence, pleaded that the claims were vexatious and the plaint should be struck out, and denied, in general terms, everything in it. Affidavits in support of and in reply to the respondent's application by summons in chambers to attach the tractor, add to these allegations.

The respondent claims the tractor cost Kshs 38,000 and they each contributed half the purchase price. Their joint business with it collapsed by July 1,1980. Then came their agreement that the appellant would take over the tractor, work with it and share the profits he made with it. He did none of that but, instead, tried to sell it to someone called M'Mwongera. The appellant swore he paid for it in full. He exhibited four cheques drawn on his account at the Narok branch of Barclays Bank to support this. The tractor was damaged in an accident in February, 1980. He could not repay the bank's loan to buy it and his brother, Francis Muthomi Zakayo M'Tuerandu did when the bank moved to attach his land. So in August, 1980,

he handed over the tractor to his brother who repaired it for Kshs 17,000 and sold it to M'Mwongrera at Makinya for Kshs 25,000.

On June 29, 1983, in the presence of the parties and their advocates, the judge recorded a consent order which was this:

"….. the plaintiff ….." [the respondent] ….. "do take customary oath saying that he contributed Shs 19,000 towards the purchase of a tractor, registration number KML 087.The oath to be administered by Ag Chief, Mangi Mutiga of Nyaki location, within 20 days from today. Upon taking this oath, the defendant ……" [the appellant] …… "to pay Shs 23,000 to the plaintiff ……" [the respondent] …. "In full settlement, and tractor be then, of the defendant ….." [appellant] …. "Should the plaintiff ….." [the respondent]…. "refuse to take the above oath his claim in the case will be dismissed with costs."

The parties came back to the judge three times: twice to fix the date for the taking of the oath and once to approve the words of the oath to be administered.

On September 29, 1983, according to the notes of the judge, the appellant admitted the respondent had taken the oath in the prescribed form and he would have to fulfil his part of the consent order but only if the respondent suffered no ill effects before six months had passed. The learned judge refused to countenance this delay and entered judgment in the terms set out earlier in this judgment. The appellant asks for the High Court result to be declared null and void, and the suit to be remitted to the High Court for trial according to law.

The grounds of appeal are:

1) The High Court has no jurisdiction to dispose of suits by requiring a party or parties to take an oath according to their customary law, even by consent.

2) Alternatively, the consequence of a Kimeru customary oath is not known or to be implemented, until 6 months from the date of its administration has elapsed.

If it were lawful and appropriate in the circumstances to dispose of a civil action for such a declaration and the taking of accounts by a consent reference of it to an oath administrator versed in the customary law form for the parties' tribe, it is clear that by the customary law of the Wa-Meru, no implementation of the result may occur before 6 months have passed. The result has an incubation period. And, even then, the order or orders that follow should be agreed by the parties and or be the subject of submissions to the magistrate or the judge and, in either event, approved by him and not imposed by him on his own notion of what it or they should be.

Years ago, it was recognized by both the former Court of Appeal and the Supreme Court that civil actions might lawfully be resolved by an oath, according to the customs of the community of the parties, offered and taken in court or at the request of the other party, and on his paying for the expenses of it, in the mosque or temple or at the *locus in quo*, and this was not confined to African litigants. The reported cases concern Muslims and Hindu parties and their disputes range from damages for removing a neighbour's landmarks to recoveries of loans or debts, including those due to the estate of a deceased. See *Bibi binti Saleh v Salim bin Khamis* [1906] 2 EA 16 (K); *Naradlah Sadashiva Dave v Valji Kalianji* [1910], 2 EA 66 (K) (CA-K); *Famao bin Shekue v Mwana Shana* [1911) EA 23 (K), *Ahmed bin Ali v Athman bin Mohamed* [1912], 4 EALR 95 (K). This was provided for in section 9, 10 and 11 of the Indian Oaths Act 1873 (X of 1873) and that Act was applied to Kenya by article 11(b) of the East Africa Order in Council, 1897, but in its application repealed by section 3 of the Oaths and Statutory Declaration (Amendment) Ordinance, 1954 on October 18, 1954. It is a method of decision that has not been resuscitated yet.

There are provisions in the Constitution of Kenya, which militate against this procedure. Section 77(9) and (10) prescribe that:

"(9) A court or other adjudicating authority prescribed by law for the determination of the existence or

extent of a civil right or obligation, shall be established by law and shall be independent and impartial; and where the proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing, within a reasonable time.

(10) Except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public."

The oath administrator, though still a valued respectable member of the community in some areas, is not a court or an adjudicating authority, established by law to determine the existence or extent of any civil right or obligation. The respondent in this appeal, instituted his proceedings in the High Court and thereafter he and the appellant, were entitled to a fair hearing (and decision) within a reasonable time and all this, should have taken place in public. If they wanted their dispute resolved by the oath administrator, they should not have begun or continued it in a court established by law. There are, however, some proceedings which can be referred to another place eg arbitration, under the Civil Procedure Act (cap 21) order XLV of the Civil Procedure Rules and the Arbitration Act (cap 49), but these are prescribed by law for such determination.

It is also lawful for an African, not being a Christian or Muslim required by the law to take an oath, to take it in the form common among and held binding by the members of the tribe to which he belongs, or if there is no such oath, he is required to make solemn affirmation in the form now in use. Section 13 and 16 of the Oaths and Statutory Declaration Act (cap 15). Such oaths and affirmations are, however, the prelude to the giving and receiving of evidence, the swearing-in of officials and the taking and making of statutory declarations and not the foundation for the determination or extent of a civil right or obligation in proceedings instituted in a court, or other adjudicating authority prescribed by law for this purpose. So the learned judge, in my respectful view, had no jurisdiction to approve of the reference, whether by consent or otherwise, to an oath administrator. The proceedings were null and void. *Ndeto Kimomo v Kavoi Musomba* [1977] KLR 57 (CA-K).

I am of the view that the appeal should be allowed, the judgment of the High Court set aside and the suit remitted to the High Court to try according to law. The Kshs 23,000 paid into court by the appellant should remain there until the suit is decided. Each party should bear its own costs of the appeal and in the High Court. Hancox JA and Nyarangi Ag JA agree, so these are the orders of the court.

Hancox JA. This in my opinion was an abdication of the High Court's responsibilities to hear and determine the case according to law. I do not see how a suit before the court can validly be relegated to an oath administrator, even if it is not the administration of an oath in the sense previously understood by the people of Kenya, and of the Meru District, but, as Mr Kiome for the respondent says, a method of swearing an oath before (in this case) Senior Chief Botania, and then waiting a season of crop planting and harvesting to see if some calamity befalls the recipient of the oath. This period was stated, by Mr Kiome, to be at least six months, because the calamity could, of course, strike at the crops, and until the harvesting is complete, no one could say whether the calamity had befallen the crops or not. Moreover, the sole arbiter of whether that which has happened amounts to the necessary qualifying calamity seems to be the recipient of the oath.

This brings me to the third ground of appeal, or I think it is this third ground of appeal, which is that the necessary period for the oath to take effect had not elapsed before the purported consent order was made. An examination of the record of the High Court proceedings for September 29, 1983, reveals that though the defendant (the appellant) protested that though he had to pay the Kshs 23,000 (the figure claimed) (which we are told by Mr M'Ringera has been paid into court) he could not do so, until the necessary six months had elapsed. Thus, even though, as Mr Kiome has submitted, the catastrophe could occur before the six months had elapsed (because a child could die for example, after even a day), it is clear that the defendant (appellant) did not consent to the entering of the judgment in the terms then proposed. There was never a valid consent to the judgment which VV Patel J, then proceeded to enter, because at least, one condition of the supposed reference, had not been fulfilled.

Mr Kiome valiantly sought to argue that all the court did in this case was to apply African customary law as is, indeed, recognized by sub section (2) of section 3 of the Judicature Act (cap 8); secondly, that this was in effect, a reference to arbitration to which both parties consented and, since they are fairly sophisticated people, the court was perfectly entitled to enter a consent order, or judgment, on the authority of this court's predecessor in *Ndeto Kimomo v Kavoi Musomba* [1977] KLR 57 and in particular, the judgment of Mustafa JA, at page 61 of that report. Thirdly, Mr Kiome submitted that under the said sub-section (2), the court is enjoined to decide all cases according to substantial justice without undue regard to technicalities, and that this was not an abdication of by the court of its authority; it was merely making use of an instrument, namely, the taking of a customary oath in furtherance of its authority.

I say, emphatically, that I would not regard the question as to whether the mode of trial was proper, as a technicality. With the utmost respect to Mr Kiome, I think there is a confusion between the application of African customary law in a regular trial in the course of being held, and trial by African customary law. I would not preclude the latter if the parties wish to resort to it but not as part of the trial, the procedure for which had already been embarked upon. This is made clear, in my opinion, by Wambuzi P in *Kimomo v Musomba* (supra) at page 60, when he said:

"In this case, the effect of the consent order is not to record a judgment but to record the agreement of the method of deciding the matter in dispute, in complete disregard of the merits of the case. In the first place, it was the plaintiff's elder brother, Paul Muthama Kimomo, and not the plaintiff himself, who was to take the Kithitu oath. He was to say "If the disputed land is not mine through my father, may the oath strike me." On the face of it, the plaintiff's brother would be claiming to be the owner of the disputed land, but as I understand these proceedings, it was the plaintiff and not his brother who was claiming the land. It may well be that this course was taken under the guise of applying customary law. If so, I do not think that the High Court should have agreed to this procedure involving the taking of an oath by a third party and other ceremonies, known only to customary law, being imported into an appeal, conducted in accordance with the Civil Procedure Rules. The judge could not prevent the parties from deciding the appeal in the manner selected by them, but before giving his approval, he should have insisted on the appeal to him being withdrawn. The procedure selected by the parties was not capable of being controlled by the High Court in the event of a dispute arising, as it did here, as to the implementation of the agreed procedure."

It is true that was a case of an appeal from the magistrate's court in which the case was heard regularly on evidence and a sketch plan, having been decided by the High Court on the basis of the result of the taking of a Kithitu oath, but the judgments of the three members of the court are just as relevant as if that had been a trial by the High Court, as here, at first instance. The parties cannot, in my judgment, even by consent, oust the jurisdiction of the High Court, once invoked, except by a method sanctioned by an Act or the Civil Procedure Rules.

An instance of the application of the Civil Procedure Rules in this respect is, of course, the frequently employed arbitration procedure under order XLV, for which there must be a valid reference, under rule 1 of that order. But there are certain in-built safeguards to that procedure. In the first place, as is shown by authority, there has to be semblance of legal procedure, with the obligation to allow both sides to be heard and to call witnesses and to give brief reasons for the conclusion at which, the arbitrators arrive. Further safeguards exist in the fact that, in the normal course, arbitrators are appointed by both sides to the dispute, and there is the elaborate objections procedure laid down by rules 13 to 16 of order XLV. In this instance, the procedure which was adopted before Assistant Chief (not senior Chief) Botania was as follows:

"ADMINISTERED BY ASSISTANT CHIEF BOTANIA

HIGH COURT CC NO 67 OF 1982

EDWARD M'INIU M'IKANDI ALIAS M'IKIANDI – PLAINTIFF

versus

EZAKIA M’IKIRARA - DEFENDANT

Plaintiff to take oath to say as follows:-

1. Plaintiff gave defendant - 18,000

2. Plaintiff gave defendant - 2,500

Total - 20,500

Both parties have agreed to take oath.

2.30 p.m. on 28th September, 1983, is when both parties started taking oath.

The plaintiff carried the he-goat at his shoulders. The defendant started cutting part of the he goats and giving to the plaintiff. The oathing continued between the two parties concerning the above mentioned amount. The oathing was administered properly by Asst. Chief Rafael Botania witnessed by Asst Chief.

(1) Stephen Kiria - signed

(2) John Mungania - signed

(3) Maingi Mutiga - signed

Also, in presence of the, oathing there were elders from both parties. The most concerned elders, we have the following:.

Plaintiff’s elders:-

(1) M’Mugwika M’Rintaiga - signed

(2) M’Ruteere M’Kurichia - signed

Defendant’s elders:

(1) Simon Maingi - signed

(2) Sibiriano M’Ithinji - signed

Witnessed and signed by both parties

Plaintiff - Edward M’Iniu M’Ikandi

Signature - signed

Defendant - Ezekiah M’Ikirara

Signature - signed

In presence of Assistant Chief, Mr Rafael Botania

Signature - signed

NYAKI LOCATION CHIEF’S CAMP:

28/9/83”

It will be seen that in no sense could that which took place before the Assistant Chief, be regarded as a procedure by way of arbitration as Mr Kiome claimed.

As Nyarangi Ag JA has said, the importance and value of the customary law cannot be overstated, and it is often valuable in determining civil matters in cases where it is applicable. But it cannot be used as a substitute for the established procedure in a court of law. In this respect, I cannot do better than quote again from *Kimomo v Musomba* this time from Law VP’s judgment, at para 59 where he said:

“In my view, when the parties agreed to have their case decided by the taking of an oath, they were to that effect withdrawing the appeal from the High Court’s jurisdiction and involving another jurisdiction involving procedures such as slaughtering a goat beyond the control of the High Court. The parties were, of course, entitled to have their case decided in any lawful way they wished by consent. For instance, to take an extreme and improbable example, it would be open to the parties to an appeal to say to the judge “we have decided that this appeal is to be decided by the toss of a coin. The judge would surely say: “In that case, you must either withdraw this appeal, or come before me in due course with a consent order, that the appeal be allowed or dismissed.” It would be wrong in principle, in my view, for the judge to adjudicate on whether the coin had been properly tossed or not, and to decide the appeal on that basis. Where procedures unknown to the rules governing the hearing and disposing of appeals are applied by the consent of parties to an appeal, the courts should not, in my view, participate in those procedures, or dispose of an appeal according to the result of those procedures, in the absence of a clear and unambiguous agreement as to that result on which, a consent decree can be based. In my view, the proceedings in this appeal since the filing of the consent order on 5th October, 1973, have been a nullity involving, as they do, the application of two separate jurisdictions to the same appeal.”

It therefore follows that this case was not, as Kneller JA, with whose judgment I am in complete agreement, has said, determined by a court or an adjudicating authority established by law. Accordingly, I would also allow the appeal, set aside the judgment and decree of the High Court and order that the case be remitted to the High Court to hear and determine the case according to law. I would also order that the Kshs 25,000 remain in court until the suit is decided. I agree with the order as to costs proposed by Kneller JA.

Nyarangi Ag JA. On June 29, 1983, the trial judge made the following order:

“By consent, it is ordered that the plaintiff do take customary oath saying that he contributed Shs 19,000 towards the purchase of a tractor, Reg No KML 087. The oath to be administered by the Ag Chief, Maingi Mutiga of Nyaki Location, within 20 days from today. Upon taking the said oath, the defendant to pay Shs 23,000 to the plaintiff in full settlement and the tractor be then of the defendant. Should the plaintiff refuse to take the above oath, his claim in this case will be dismissed with costs. A certified copy of this order be supplied to the said Ag Chief, who should inform, in writing to the court, whether or not the plaintiff took the oath, M on 26.7.83.”

The plaintiff, his advocate, the defendant and Ag Chief Maingi, were present in court on July 26, 1983, when another consent order was recorded. The order was as follows:

“By consent – the date for taking the oath is firmly fixed for 12.8.83.”

The form of the oath was altered, once again by consent, as per the consent letter drafted by Mr Kariuki (the plaintiff’s advocate) and signed by the parties. On September 29, 1983, the defendant, who confirmed having taken “the customary oath”, said:

“I have to pay him the sum of Shs 23,000 in full settlement. I will pay it to him when six months are over, because I have to wait and see the effect of the oath on the plaintiff.”

The court records continue to read as follows:

Court: The order made on 29th June, 1983, by consent, is clear. In it was stated that upon plaintiff taking the oath, the defendant to pay Shs 23,000 to the plaintiff. The plaintiff has taken the oath and the defendant must now pay the money. I now ask the defendant if he would like to pay the amount by reasonable instalments. Defendant: I cannot pay it by instalments according to the *Kimeru* custom.

Order: Judgment for the plaintiff for Shs 23,000 in full settlement, inclusive of costs and interest to-date. The tractor to be the property of the defendant."

Aggrieved by the judgment of the High Court (VV Patel J) Ezekiel M'Ikiara appeals to this court on the following three grounds namely, that the judge erred in law in:

(1) Erroneously assuming jurisdiction to decide the dispute according to customary law.

(2) Recording and imposing judgment on the parties without there having been a consent order on the part of the parties finally disposing of the dispute in agreed terms, or a hearing on the merits.

(3) Failing to enquire into the legal validity of the appellant's (defendant's) statement that under *Kimeru* Customary Law, a party who takes the oath must be watched for six months before any action which is required to be taken pursuant to the oathing ceremony is implemented.

The court's order dated June 29, 1983 could not have been made pursuant to order XLV of the Civil Procedure Rules. There is no mention of a reference to arbitration in the order and the subsequent proceedings cannot be accommodated within the rules of order XLV, ie rules 10, 16 an 17 which specifically govern the procedure to be adopted after arbitration proceedings.

The order dated June 29, 1983, was not made under any procedure known to the law. The trial judge handed over the suit to an oath administrator and subsequently entered judgment for the plaintiff after the oath had been administered to the plaintiff. That was contrary to sub-section 9 of section 77 of the Constitution of Kenya. The person who administered the oath was not an adjudicating authority and the taking of an oath could not constitute a fair hearing. It is apparent from the record of the High Court proceedings that the judge intended the oath administrator to apply the customary law to which the parties were subject. Mr Ringera for the appellant argued that the court should have enquired if there was a customary rule applicable to partnerships. In reply, Mr Kiome for the respondent argued that the parties were at liberty to choose their method of dealing with their dispute and that it was proper for the oath to be administered under customary law.

Sub-section 2 of section 3 of the Judicature Act (cap 8), provides:

"(2) The High Court, the Court of Appeal and all subordinate courts shall be guided by African customary law in civil cases in which one or more of the parties is subject to it or affected by it, so far as it is applicable and is not repugnant to justice and morality or inconsistent with any written law, and shall decide all such cases according to substantial justice without undue regard to technicalities of procedure and without undue delay."

This court does not hesitate to be guided by African customary law, which is a part of the law of the land, in civil cases within the terms of section 3 and having regard to the relevant case law. However, the order by which the judge surrendered his powers to the oath administrator was in breach of section 3 of the Judicature Act, contrary to order XLV of the Civil Procedure Rules and therefore inconsistent with written law. Consent of parties to some unknown procedure for settlement of a given dispute does not oust the jurisdiction of a court properly seized of a suit.

There was disagreement between the parties as to when the Kshs 23,000 was to be paid. The defendant (appellant) said:

"I will pay it to him when six months are over because I have to wait to see the effect of the oath on the plaintiff."

But the judge held that the defendant had to pay the sum of money to the plaintiff as the latter had taken the oath. The defendant replied that, he could not pay the money by instalments according to the *Kimeru* custom. That was a substantial divergence of views as to the period within which, the administered oath would take effect. Mr Kiome suggested that there was no fixed period and that it was common for the effect of the oath if any, to be looked for or expected after one season, which period of time is determined by the planting and harvesting of food crops. Mr Ringera did not comment. In view of the disagreement on an important aspect of the oath, it was necessary for the trial court to ask for proof by evidence of the customary law rule applicable to effect of an oath. Such a step would have been within the decision in the case of *Ernest Kinyanjui Kimani v Muiru & Another* [1965] EA 735, where Duffus JA (as he then was) said at page 738:

"To summarize the position, this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The court has a wide discretion as to how this should be done, but the onus to do so must be on the party who puts forward the customary law. This might be done by reference to a book or document of reference and would include, a judicial decision but in view, especially, of the present apparent lack in Kenya of authoritative text books on the subject, or of any relevant case law, this would in practice, usually mean that the party propounding the customary law would have to call evidence to prove that customary law, as he would prove the relevant facts of his case."

I do not think it was necessary for the trial judge to summon, to its assistance any competent assessors (section 87 of the Civil Procedure Act). The fact is that the oath which had been administered under the aegis of customary law resulted in a dispute as to when it would be deemed to have effect, if any, thus revealing a situation which might cause some amusement to a reasonable Meru man travelling in a Meru '*matatu*' within Meru District or outside it. I have formed the view that the parties mutually consented to adopt a customary procedure whose full terms and conditions they had no knowledge of. To question as to the manner in which the judge sought to apply customary law is not to say that the parties could not properly have settled their cases by taking the *Kimeru* oath. It would have been perfectly proper if after the plaintiff had taken the oath, the parties had appeared before the judge and recorded a clear consent order, on which a decree could be based and by which the suit would be settled once for all. The court would then not have participated in the procedure of oath administration and the court would not have entered judgment, as was the case here, according to the result of the oath. That procedure is supportable on the decision in *Ndeto Kimomo v Mavoi Musoma* [1977] KLR page 57 at page 60, as per the judgment of Law VP (as he then was) with which the two other judges agreed. So, this court is prepared to let parties to a suit adopt customary law procedures alien to the rules governing the hearing of civil cases, provided that there is consent between the parties and on condition that a court is kept out of the procedures and a definite order on which a consent decree can be based is recorded. I would say that is as clear evidence as one needs, showing the importance and value of customary law where it is relevant in determining civil cases. Also, it proves that this court applies customary law with relish, even according to substantial justice, without being tied down to technicalities of the Civil Procedure Rules.

In the circumstances, the proceedings between June 29, 1983 and September 29, 1983, were a nullity.

I agree that the appeal be allowed, the judgment of the High Court set aside and the suit remitted to the High Court for trial according to law by some other judge. I concur in the order proposed by Kneller JA.

Dated and Delivered at Nairobi this 8th day of June 1984.

A.A.KNELLER

.....

JUDGE OF APPEAL

A.R.W.HANCOX

.....

JUDGE OF APPEAL

J.O.NYARANGI

.....

AG. JUDGE OF APPEAL

I certify that this is a true copy of the

original.

DEPUTY REGISTRAR