



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPEAL 74 OF 83[1]

BETWEEN

THUMBI GIKIRA.....APPELLANT AND

GEORGE GATHIRUA

**MWARIRI GATHIRUARESPONDENTS (Appeal from
the judgment of the High Court of Kenya at Nyeri (Patel, J) dated 10th October, 1983 In Civil Case
No 186 of 1981) _____**

JUDGMENT OF THE COURT

The respondents, as plaintiffs, sued the appellant claiming that, on or about the year 1958, the appellant was registered as proprietor in land parcel No. Othaya/Itemeini/360 comprising 12.7 acres in trust for himself and the respondents, in particular, that the appellant was so registered to hold 8.47 acres in trust for the second respondent who was then, in detention and the first respondent who was a minor. The respondents complained that the appellant had refused them from being registered in their respective portions. The respondents sought the usual prayer for a declaration that the appellant held 8.7 acres in trust for them, an order for the sub-division of the 12.7 acres into three portions and in the alternative, a declaration that the respondents are entitled to be registered as proprietors of 8.47 acres in the material land.

In his defence, the appellant, as defendant, denied that he was registered to hold upon trust for the respondents, averred that the plaint was bad in law in that, no particulars of the trust were set out, and further that the suit was time-barred under the Limitation of Actions Act (Cap 22).

On 19th January, 1983, in the presence of all the parties and their advocates, the trial judge made an order by which the dispute was referred to District Officer, Nyeri for arbitration with the help of four elders, two each side, the award to be filed in court within 120 days.

The appeal is against the judgment entered on 9th August, 1983, in terms of the award, on the grounds set out in the memorandum of appeal.

The one issue raised by the pleadings was whether or not, the appellant held the material parcel of land in trust for himself and the respondents. The elders considered the evidence on behalf of the plaintiffs, that the land was registered in the appellant's name, although it belonged to his father, and that none of the parties was said to have bought the land. The record shows that the elders heard and considered the

defendant's (appellant's) evidence that he had purchased the land. The elders award reads:

“After examining the evidence given by the witnesses of both parties, the elders unanimously agreed that the land under dispute should be shared by the three brothers equally as the clan elders had decided when they met on 19th June, 1980.”

I am satisfied that the elders thoroughly dealt with the issues raised by the dispute which had been referred to them. No specific issues, such as those stated in the first ground of appeal, were framed for the elders. It would therefore be unreasonable to expect the elders to have confined themselves to what is described in the memorandum of appeal, as issues raised in the pleadings. The original record to which we have had access, shows that the elders' award was filed in court on 18th February, 1983, but there is no record of the parties being formally notified thereof as Order XLV, Rule 10 states. Nevertheless, the appearances before the court on 7th June, 1983, when the award was read out were the same as for 19th January, 1983. The plaintiffs and their advocates were again present in court on 9th August, 1983, and Mr Muchemi appeared for the defendant, on which day the trial judge entered judgment in terms of the award. In the circumstances of this case, we are satisfied that the parties had notice of the filing of the award and hence Rule 10 was, in effect, complied with.

It is not clear, from the record, when the parties were given notice of the filing of the award. However, all the parties and their advocates were present in court on 7th June 1983, when the award was read out. So, the appellant had thirty days from 7th June, 1983, within which to apply under Rule 16 by summons. No such application was made although the matter was fixed for mention on 9th August, 1983, some two months after the reading of the award. There is no evidence or any indication that the appellant's advocate raised any objection to the judgment being entered in terms of the award. The High Court record does not say that the plaintiff's advocate applied for judgment pursuant to the award. But then, the trial Judge could not have entered the judgment without a request to do so. In any case, the defendant's advocate who was present and could have objected to the judgment being entered. He did not object and could not have done so successfully because no application had been made within the time allowed by Rule 16.

There is no substance in the second ground of appeal. The award was read out in the presence of all the parties and their advocates. The third ground of appeal is frivolous. There is no merit in this appeal and it is dismissed with costs.

Delivered in Nyeri, this 27th day of August , 1984.

JUDGE OF APPEAL

AG JUDGE OF APPEAL