IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox, JJA and Chesoni, Ag JA)

CIVIL APPEAL NO 54 OF 1983

BETWEEN

KAMAU KIBUTHA……..…..……. APPELLANT

AND

MACHARIA KIBUTHA...……..……...……RESPONDENT

(Appeal from the ruling and order of the High

Court of Kenya at Nairobi (Aganyanya, J) dated 3rd March, 1983 In

Civil Case No 2599 of 1975) _____

JUDGMENT OF HANCOX, JA

This is an appeal from the decision of Aganyanya, J dismissing an application to set aside an arbitration award dated 5th July, 1982, whereby, 10.6 acres of the suit land at Location 19/Kiambogo/861, were given to the original plaintiff (the present respondent), and 20 acres were given to the original defendant (who is the present appellant). Both of them were at that time deceased and their legal representatives were consequently, made parties to the suit. Nevertheless, the appeal is entitled in the names only of the original parties to the suit.

The award was filed in court on 26th November, 1982, nearly seven years after the filing of the suit. The motion to set it aside did not specify which of the grounds in Order 45 Rule 15 of the Civil Procedure Rules, were relied on for this purpose, and although the affidavit in support of it contains lengthy complaints about the conduct of the arbitration, in his submissions before us in this appeal, Mr Gaturu narrowed down the allegations of misconduct (corruption not being alleged) under Rule 15 as follows:

1. That there was a failure to record all the evidence given by the appellant.

2. That the defendant was given an inadequate hearing

3. Matters were brought into the arbitration which were not part of the terms of reference, and

4. That there were discrepancies. Mr Gaturu was not quite clear as to what he meant by discrepancies, and during the course of the argument, it appeared that this was really part of the first three allegations and that there were no discrepancies in the proceedings or award, properly so called, which he was able to draw to our attention.

Accordingly, Mr Gaturu's submission, on the appeal, were directed to showing that the learned judge had exercised his discretion improperly in refusing to set aside the award on the grounds of the misconduct alleged. Moreover, he had erred in law in confining himself within the ambit of Rule 15(1)(a), and in failing to apply section 3A of the Civil Procedure Act (Cap 21) and exercise his inherent powers to make orders necessary for the ends of justice under that section.

As regards the exercise of the court's inherent powers, Mr Gaturu first cited Rawal v The Mombasa Hardware Ltd [1968] EA, 392, in which it was held, that the remedy of dismissal of the suit by the court under Order 16 Rule 6, if no step in it has been taken for three years, was not intended to be exhaustive, and did not exclude the inherent jurisdiction of the court under Section 97 of the Act (the forerunner of section 3A). But the following passage from the leading judgment of Law J A in that case, shows that it is distinguishable from a situation arising under the rules relating to arbitration. He said at page 393 letter E:

"I have no reason to doubt that those cases were correctly decided in relation to the provisions of the Indian Code and Rules with which they were concerned. But the provision with which we are concerned, ie O 16, r 6, is a very special provision which finds no counterpart in India. Mr Inamdar has referred us to other instances, for instance, under O 9, in which the remedies open to a party whose suit has been dismissed are laid down. In all those cases the party affected had notice of what was done, in the case now under consideration he had no such notice and that is why O 16, r 6 stands in a very special position." "I personally consider that in the special circumstances of this case the remedy provided for in r 6, that is of bringing a fresh suit, was not intended to be exhaustive and that the inherent jurisdiction vested in the court by s 97 of the Civil Procedure Act is for that reason not excluded."

Under the rules relating to a reference to arbitration, there is ample provision protecting a party who has reason to complain of the award or the procedure leading to it. First, the court may modify or correct an award under Rule 13. Secondly, it may remit an award to the arbitrators under Rule 14. And thirdly, it may set aside the award, inter alia , on the grounds of corruption or misconduct under Rule 15. It cannot therefore, in my opinion be said that there exist, in this case, special circumstances requiring the application of the court's inherent powers under section 3A. As Sir Charles Newbold, P said in the same case at p 394:-

"what we are concerned with construing is whether O 16, r 6 has taken away the jurisdiction of the court in regard to the control of its own order when to do so may result in injustice. I do not wish to be understood to be saying that it would result in injustice in this case, but the argument applied in every case as it goes to a question of jurisdiction. I do not think that r 6 should be so construed. I would agree entirely with the very clear and able judgment of Rudd, J to which my brother Law has already referred as showing that this rule shall be construed in a way which would not take away the jurisdiction of the court to remedy an injustice should it be satisfied that such an injustice exists."

There is no injustice caused in this case by the application of the appropriate rules and I would, accordingly, agree with Aganyanya, J that Section 3A has no application to the present circumstances. Indeed, a citation in another authority, cited by Mr Gaturu, reported in the same volume, Saldanha v Bhailal & Co [1968] EA at p 30, shows that even in the converse situation, not complying with Order 16 rule 6, that is to say, where the applicant is seeking to have a case dismissed, it is doubtful if section 3A could be invoked. Dalton, J said:-

"Can the inherent jurisdiction of the court under S 97 of the Civil Procedure Act be invoked so as to override the rules to which I have just referred? I do not think xxxxxxxxxxx in the case of Ahmed Hassa Malji v Shirinbhai Jadavji [1963] EA 217). In his judgment, Sir Ralph Windham, said (ibid at p 219):-

"That being so, the applicant cannot invoke this court's inherent jurisdiction as preserved by S 151 of the Indian Civil Procedure Code, since another remedy was available to her: Vide Mulla's Civil Procedure Code 912th edn) Vol 1, p 660. In Ajodhya v Mussamat Phal Kuer ([1922], ALR Pat 479), a case where, similarly, no application under O 9, r 13 had been filed in time, it was held that: 'Moreover a definite period of limitation has been prescribed by art 164 of Schedule 1 of the Limitation Act for an application to set aside an ex parte decree and the court would not be entitled, by purporting to act under S 151 in

effect to extend that period.'

A definite period has been laid down in the Civil Procedure (Revised) Rules after which suits may be dismissed for want of prosecution and I do not think that I would be entitled by purporting to act under S 97, in effect to shorten that period."

I turn now to the more specific allegations of misconduct enumerated by Mr Gaturu. The record of the arbitration proceedings shows that, each party to it was given full opportunity of stating his case, that the opponent was given an opportunity of questioning him and that witnesses were called. At the end of the proceedings, the panel, which consisted of two elders appointed by each side with the District Officer, Kangema, as umpire, reached a conclusion on the facts which contained brief written reasons showing that, it had given consideration to the case of each party and had adjudicated thereon. Mr Gaturu drew our attention to various parts of the proceedings before the panel which he claimed were irregular, for instance at one stage a witness is shown as questioning his father and not as giving evidence on his behalf. Moreover, no submissions were made after the close of the evidence, the panel proceeding straight to the delivery of the award. These and other instances, he said, showed misconduct on the part of the members of the panel. Finally, there was a real discrepancy as to the quantity of the land left by the deceased to the original parties to the suit, the plaintiff, or rather his representative, putting it at 65 acres and the defendant at 80 acres, whereas the total acreage of the suit land is stated to be 30.6 acres.

Mr Gaturu informed us that, this was partly accounted for by the fact that some of the land had been sold to strangers, outside the family, and was therefore "lost", as it was expressed in one part of the proceedings.

I do not regard it as essential in arbitration proceedings, on a reference, that the procedure at the hearing should be in technical conformity with that followed in the courts, for if that were so, the reference would in that respect, be superfluous. As it stated in Russell on Arbitration, 19th Edn at p 268:

"Generally, the inquiry before an arbitrator is assimilated as near as may be the proceedings on a trial in the courts. In the ordinary course, at the appointed time and place, the parties appear with their witnesses to support their respective cases."

"The ordinary course of procedure on a reference, as at a trial in court, is that the party upon whom the burden of proof lies in the first instance begins, and he or his counsel opens his case and produces his evidence. When his case is closed the opposite party, if he adduces any evidence, proceeds by himself or his counsel to open his case and comment upon that of the other party; and at the conclusion of his evidence he sums up the whole case, and the party who began, or his counsel, has the right to reply."

The general attitude of the courts of arbitration proceedings, is illustrated by the following respective passages from Scrutton, L J's judgment in Naumann v Nathan [1930] 37 Lloyds List reports at p 250; and from Duffus J A's judgment in Rashid Moledina v Hoima Ginners [1967] EA 645 at p 650, as follows: "We lawyers think, and have some justification for thinking, that the procedure of the courts, and the way they investigate questions, is excellently calculated to arrive at a true result; but there is no doubt that it does arrive at that result in a somewhat lengthy and expensive manner. During the last 30 or 40 years business men have formed the view that, it is possible to be too accurate in investigating disputes and that it is better, on the whole, for business to have a rough and ready way of getting at the truth than the more accurate, expensive and dilatory method of the courts." Then Duffus JA:-

"Generally speaking, the courts will be slow to interfere with the award in an arbitration having regard to the fact that, the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision, but the courts will do so whenever this becomes necessary in the interests of justice, and will act if it is shown, as it is alleged in this case, that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law."

In the instant case, there was, as I had said, an opportunity given to both sides to be heard, to question the other party and to call witnesses. There was then a valid, if not a very full adjudication upon the matters

in issue, in which the panel very correctly treated the land in dispute as being 30.6 acres and not one of the larger acreages mentioned by the witnesses. This was in conformity with the subject matter of the court action. Furthermore, a very telling point was made by Mr Punja, on the respondent's behalf, which was that, had there been any misconduct or unfair procedure, it would be expected that the two elders appointed on behalf of the appellant, would have protested and even, possibly, withdrawn. Far from doing this, they participated in the award and subscribed their names to it.

In these circumstances, I am personally left in no doubt that the arbitration proceedings, if not in literal compliance with court procedure, were fairly conducted and that the result, if not to the liking of the appellant, cannot be described as amounting to misconduct. In may judgment, the learned judge was correct in exercising his discretion not to set aside the award of the arbitrators, and I would dismiss the appeal with costs.

Dated at Nairobi, this 20th day of November, 1984.

A R W HANCOX

JUDGE OF APPEAL

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JUDGMENT OF KNELLER, JA

I agree with the judgment of Hancox, JA and as Chesoni, Ag JA does too, the orders proposed in it now become the orders of the Court.

Dated and delivered at Nairobi, this 20th day of November 1984.

A A KNELLER

JUDGE OF APPEAL

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JUDGMENT OF CHESONI, AG JA

I have had the advantage of reading the draft judgment of Hancox, JA in which he had meticulously set out in detail, the facts of the case and the grounds of appeal with the counsel's arguments thereon.

There was no dispute that the land in question was family land and the appellant is the respondent's elder brother, a position that placed onto his shoulders the responsibility of looking after the family land, upon their father's demise. It was not for the respondent who had been living in the Rift Valley, away from home, to explain what had happened to the land left by their father, for the members of the family who were entitled to inherit it, unless there was admissible evidence that the respondent had already had his share and was trying to grab more, which was not the case here. The elders, including those nominated by the appellant, after hearing the parties and their witnesses correctly decided that, the appellant should retain 20 acres and his respondent brother gets 10.6 acres of the family land.

There were no irregularities in the proceedings of arbitration and if there were any they did not amount to misconduct under Order XLV Rule 15(1)(a) of the Civil Procedure Rules, and I would not say the appellant established any misconduct in his application to set aside the award. The learned judge exercised his discretion properly. I agree with the judgment of Hancox, JA and to the orders proposed therein and would, in the result, dismiss this appeal on the lines proposed.

Delivered at Nairobi, this 20th day of November, 1984.

Z R CHESONI

AG JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR