



IN THE COURT OF APPEAL FOR EAST AFRICA

AT NAIROBI

(Coram: Wambuzi P, Law V-P & Mustafa JA)

CIVIL APPEAL NO. 29 OF 1976

BETWEEN

NDETO KIMOMO.....APPELLANT

AND

KAVOI MUSOMBA.....RESPONDENT

JUDGMENT

Law V-P This appeal concerns a small plot grazing land, consisting, we were informed, of a mere three or four acres. The appellant (to whom I shall refer as “the plaintiff”) filed a “home-made” plaint in the District Magistrate’s Court at Kangundo, in which the cause of action was described as follows: “I want the Court to demarcate our land. Which was occupied by my father”. No defence was filed. When the suit was called on for hearing, on the 18th June 1970, the two defendants were present. The plaint was read out and explained to them and they orally stated their defence as follows: “We do not admit the claim, there is already an old boundary.” Evidence was called on both sides, which made it clear that the plaintiff’s cause of action was in trespass. He alleged that the defendants had encroached on his land and occupied some land on his side of the common boundary. After hearing the evidence, the magistrate visited the land, with all the parties. He came to the conclusion that the existing boundaries were clear. He drew a sketch plan which he attached to his judgment, awarded one piece of the disputed land to the second defendant, and confirmed the plaintiff’s right to the other piece as against the first defendant. He gave judgment for the plaintiff against the first defendant and dismissed the claim against the second defendant.

The first defendant instructed an advocate to appeal to the High Court and an appeal was duly filed on 16th July 1970. The plaintiff also instructed an advocate. The appeal was set down for hearing on 18th June 1971, but was taken out of the hearing list by consent. Then followed a series of further adjournments by consent. On 5th October 1973 a consent order, signed by the parties and their advocates, was submitted to Miller J and approved by him. It is a most peculiar order, and it reads as follows:

Consent order.

- 1.[The plaintiff’s] elder brother Paul Muthama Kimomo to take the *Kithitu* oath which the [defendant] shall provide within three months from today.
- 2.The taking of the oath shall be supervised by the Chief of Matungulu location, Machakos district, who

shall submit a written report to the Court on the matter.

3.The words of the oath shall be – ‘if the disputed land is not mine through my father may the oath strike me’.

4.If the [plaintiff’s] said brother takes the oath the appeal shall be dismissed with costs.

5.If the [plaintiff’s] said brother fails or refuses to take the oath when provided this appeal to be allowed with costs.

6.Liberty to apply.

From the chief’s report, submitted in accordance with paragraph 2 of the consent order, it appears that he attempted to supervise the administration of the oath on an unspecified date, apparently in December 1973 or January 1974, but was unable to do so because “there was chaos” and a breach of the peace was feared. He adjourned the matter to 18th January 1974, so that the district officer could be present. On 8th January 1974, the chief, the district officer, the parties, the plaintiff’s brother who was to take the oath, and some 300 persons “mostly elders of Kamba tribe” were on the scene. They “followed the sisal boundary which was placed by the Court” and the plaintiff’s brother was invited to take the oath but refused to do so. The district officer forwarded the chief’s report to the High Court accompanied by an affidavit sworn by him (ie the district officer) in which he deponed, *inter alia*, that:

3.On 8th January 1974, I attended the oathing ceremony at the piece of land purported to be in dispute.

4.At the said ceremony the said chief followed the Kamba customary way of administering such oath but the [plaintiff’s] brother Mr Paul Muthama Kimomo who was to take the oath refused to do so without any significant reason.

5.The said chief followed all the right procedure.

On 7th February 1974, the plaintiff and the first defendant’s advocate appeared before Miller J. The plaintiff explained that his brother had refused to take the oath because the wrong procedure had been followed and because he had been told he would be handcuffed if he did not take the oath. The judge described this as a matter of importance and directed that the evidence on oath of the district officer and the chief should be taken before him on 7th March 1974. On that day the district officer and the chief duly appeared, but the proceedings were yet again adjourned. Another series of adjournments followed. On 2nd April 1976, the matter came again before Miller J. Mr Malik, advocate for the defendant, submitted that the appeal must be allowed in terms of the consent order, the plaintiff’s brother having refused to take the oath. Mr Thimba, advocate for the plaintiff, contended that the plaintiff’s brother had not taken the oath because the wrong procedure had been followed and that the plaintiff’s brother was “not free [because] officers in authority over him”. The order that the district officer and the chief should be examined on oath was not referred to at all, and seems to have been forgotten with the passage of time. On 9th April 1976, Miller J delivered judgment. He found on the material available to him that the plaintiff’s brother had failed and refused to take the oath; and he accordingly allowed the appeal, in terms of paragraph 5 of the consent order, with costs in the High Court and below.

The plaintiff, represented this time by Mr Gautama, has appealed to this Court. The defendant was represented by Mr Lakha, who took the preliminary objection that the judge’s decision in the appeal before him was an order, and as such only appealable with leave. As leave had not been sought or obtained, the appeal was in Mr Lakha’s submission incompetent and must be struck out. Mr Lakha pointed to the definition of “decree” in section 2 of the Civil Procedure Act as being “the formal expression of an adjudication” and submitted that there had been no adjudication of the appeal conclusively determining the rights of the parties. We ruled against Mr Lakha on this preliminary submission, being of the view that by allowing the appeal, Miller J had set aside the judgment appealed from, and his judgment in our view gave rise to a decree from which an appeal lay to this Court: see *Bhagat Singh v Ramanlal P Chauhan* (1956) 23 EACA 178.

In argument before us, Mr Gautama for the plaintiff submitted that the judge should have held an inquiry into the question whether the oath was properly administered or not, before ruling that the plaintiff's brother had failed or refused to take the oath. Alternatively, Mr Gautama submitted that the appeal should not be decided on the taking of an oath by a person who was not even a party to the original suit, but that the appeal should be remitted to the High Court to be decided on its merits. Mr Lakha argued that the parties had consented to their rights being determined in a certain manner and that the judge had no alternative but to decide the appeal as he did.

The state of affairs disclosed by this appeal is unique in my experience. When the parties came before the judge with their consent order that the dispute should be decided according to customary law, in my opinion the judge should not have agreed to this course except on the basis that the appeal to the High Court was withdrawn, or on the basis that the customary law proceedings should be followed by an unambiguous consent order disposing of the appeal one way or the other. As it is, the customary law proceedings have ended in disagreement.

In my view, when the parties agreed to have their case decided by the taking of an oath, they were in effect withdrawing the appeal from the High Court's jurisdiction and invoking 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 improbably 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. For this sorry state of affairs the parties and their ten advocates are in my view primarily responsible. I would allow this appeal, so that the judgment of the High Court can be set aside. I would declare that all the proceedings in the High Court since 5th October 1973 are null and void. I would order that the parties bear their own costs from that date, including the costs of this appeal. It is open to first defendant, if he so wishes to proceed with his appeal in the normal way, and have it adjudicated on the merits. I express the hope, however, that the parties will now agree to withdraw the appeal to the High Court and to have their dispute resolved under the Land Adjudication Act.

Wambuzi P read the following Judgment. I agree with the judgment of Law V-P which I had the benefit of reading in draft. I can see nothing wrong with a Court making a consent order in respect of some matter before it; but in this case the consent order was most peculiar. The usual practice of consent orders disposing of claims is for the parties to agree on the subject-matter of the claim, with or without conditions, and then to ask the Court to give judgment giving effect to the agreement. 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.

I think in this case justice requires that the appeal be heard on its merits and as Mustafa JA also agrees there will be an order in the terms proposed by Law V-P.

Mustafa JA read the following judgment. The circumstances giving rise to this appeal are very unusual. After the appeal was filed and the parties appeared before the judge, the advocates for the parties informed the judge that they had agreed to have the matter in dispute decided in accordance with some ceremonial oathing. The judge agreed to this course of action. At the ceremony disputes arose concerning the administration of the oath, with the result that the judge held that one party was at fault in not taking the oath, and decided the appeal on that basis.

It seems that the Court on first appeal in effect divested itself of jurisdiction when it referred the decision of the matter to some procedure reminiscent of a trial by ordeal. I agree with Law V-P that if parties appearing before a Court wish their dispute to be decided in accordance with customary law, the Court should agree to such a course only on the basis that the appeal shall first be withdrawn or that such customary law proceedings should be followed by a clear consent order on the part of the parties finally disposing of the matter in controversy.

In the circumstances I agree that the proceedings, subsequent to the filing of the consent order on 5th October 1973 by the parties, are a nullity. I agree that the appeal be allowed and concur in the order proposed by Law V-P.

Appeal allowed.

Dated and Delivered at Nairobi this 30th day of March 1977.

S.W.W.WAMBUZI

.....

PRESIDENT

E.J.E.LAW

.....

VICE PRESIDENT

A.MUSTAFA

.....

JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR

