



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 55 OF 2015
(FORMERLY HCCC NO.430 OF 1981)

ESTHER NGONDU NDETI

ALEX KIILU NDETI (legal representatives of IDAH NDINDA NDETI
(Deceased).....PLAINTIFFS

VERSUS

CECILIA SITUMAI NDETI

MICHAEL KYENDE NDETI (Legal representatives of DR KIVUTO NDETI
Deceased).....DEFENDANTS

RULING

This case has been pending for the last 36 years. It has been to the Court of Appeal and back. The original parties to the suit are all deceased. It is sad that the present parties to the suit have not seen the need to resolve this long standing family dispute amicably. On 14th January 1986, the dispute in this suit was referred to a panel of four elders under the chairmanship of the District Officer, Iveti South Division for arbitration. The elders conducted the arbitration exercise as had been directed by the court and rendered an award which was filed in court sometimes in September 1986. From the record, the said award was read to the parties on 18th September 1986 pursuant to Order XLV rule 10A(2) of the repealed Civil Procedure Rules. On 26th October 2005, the plaintiffs applied to the Deputy Registrar through a letter of the same date for judgment to be entered in their favour in accordance with the award aforesaid on the ground that the defendants had not made an application to vary or set aside the said award. On 9th February 2006, the Deputy Registrar purported to enter judgment in favour of the plaintiffs in accordance with the award aforesaid. Following the entry of the said judgment, a decree was issued on 23rd March 2006 for execution against the defendants. The defendants were aggrieved with the said judgment and decree and applied to have the same set aside on among other grounds that the Deputy Registrar had no jurisdiction to adopt an arbitration award as a judgment of the court. The said judgment and decree were set aside by Osiemo J. on 28th September 2006. After the setting aside of the said judgment, the defendants moved the court with an application under Order XLIX rule 5 and Order XLV rule 15 for enlargement of time to make an application to set aside the said award and for an order to set aside the same. The defendants’ application was heard by Ang’awa J. who dismissed the same on 12th March 2008. Following the dismissal of that application, the plaintiffs brought an application dated 17th March 2008 on 18th March 2008 under Order XLV rule 17(1) for judgment to be entered in their favour

in accordance with the said award dated 13th May 1986 which was read to the parties on 18th September 1986. In the meantime, the defendants were dissatisfied with the decision of Ang'awa J. aforesaid and appealed against the same to the Court of Appeal. The defendants' appeal was heard and dismissed on 11th July 2014.

Following the dismissal of the defendants' appeal to the Court of Appeal, the plaintiffs amended their earlier application for judgment dated 17th March 2008. In the amended application dated 4th August 2014 which was filed on 18th August 2014, the plaintiffs sought the following orders against the defendants:

1. *That if deemed necessary, the period for making this application and or for enforcement of the award and or judgement be extended.*
2. *That judgement be and is hereby entered in favour of the plaintiff as against the defendant in accordance with the arbitrators award dated 13.5.1986 which was filed in court and read to parties on 18.9.1986*
3. *That cost of this application be provided for.*

This is the application which is the subject of this ruling. The application was brought under Part III and section 45 of the Limitation of Actions Act, section 1A, 1B and 3A of the Civil Procedure Act and Order 46 rule 18 of the Civil Procedure Rules. The application was brought on among other grounds, that the defendants' application to set aside the elders award was dismissed and that the plaintiffs were under disability and as such could not file the present application for judgment earlier. The application was opposed by the defendant through grounds of opposition dated 10th September 2014. The defendants opposed the application on the following grounds;

1. The application is an abuse of the process of the court in that the same is barred under section 4(1)(c) and (4) of the Limitation of Actions Act and that the purported judgment is time barred.
2. The court has no power to extend time limited by a statute.
3. Section 45 of the Limitation of Actions Act and Order 46 rule 18 of the Civil Procedure Rules, 2010 on which the application was brought are not applicable since the award is time barred.

The application was argued by way of written submissions. The plaintiffs filed submissions dated 29th September 2014 and further submissions dated 17th January 2017. On their part, the defendants filed submissions in reply dated 14th October 2014 and supplementary submissions dated 13th October 2016. I have considered the application and the grounds of opposition by the defendants. I have also considered the submissions by the parties and the authorities that were cited in support thereof. The following is my view on the matter. The following facts are not disputed. The dispute between the parties herein was referred by the court to arbitration under Order XLV of the repealed Civil Procedure Rules. The court appointed the District Officer of Iveti South Division and four elders as arbitrators. The arbitrators rendered an award which was filed in court and read to the parties on 18th September 1986 pursuant to Order XLV rule 10 and 10A of the repealed Civil Procedure Rules. The defendants did not move the court within the prescribed time set out in Order XLV rule 16 of the repealed Civil Procedure Rules to set aside the said award. On 26th October 2005, the plaintiffs requested for judgment to be entered in their favour in accordance with the arbitration award. On 9th February 2006, judgment was entered for the plaintiffs against the defendants by the Deputy Registrar in accordance with the award. The purported judgment was found to be irregular and was set aside on 28th September 2006. After the setting a side of the said judgment, the defendants filed an application to set aside the arbitration award which application was dismissed on 12th March 2008. An appeal to the Court of Appeal by the defendants against that dismissal was also dismissed on 11th July 2014.

I am of the view that after the judgment that was entered in favour of the plaintiffs irregularly was set aside on 28th September 2006, the parties reverted to the position in which there was an arbitration award which had been filed in court and read to the parties but in respect to which there was no pending application under Order XLV rules 12, 13, 14 and 15 or a request for judgment under Order XLV rule 17 of the repealed Civil Procedure Rules. This explains why the defendants moved the court on 12th October 2006 to set aside the said arbitral award under Order XLV rule 15 of the repealed Civil Procedure Rules. Order XLV rule 16 of the repealed Civil Procedure Rules provided for an application to set aside an award to be made within 30 days of the filing of the award. This is the reason why the defendants had to seek enlargement of time within which to file the application. As I have stated above, the defendants' application to set aside the arbitral award was dismissed by this court and the court of appeal.

What is now before this court is the plaintiffs' application brought under Order 46 rule 18(1) of the Civil Procedure Rules 2010 which is the equivalent of Order XLV rule 17(1) of the repealed Civil Procedure Rules for judgment to be entered in their favour in accordance with the arbitration award. Unlike Order 46 rule 17 of the Civil Procedure Rules 2010 which is the equivalent of Order XLV rule 16 of the repealed Civil Procedure Rules which has provided for a time limit within which an application to set aside an award has to be made, neither Order XLV rule 17(1) of the repealed Civil Procedure Rules nor Order 46 rule 18(1) of the Civil Procedure Rules 2010 has provided for a time limit within which a request has to be made for judgment to be entered in accordance with an arbitration award. I have carefully considered the grounds which have been put forward by the defendants in opposition to the present application.

I find no merit in the defendants' argument that the application is time barred. As I have stated above, the Civil Procedure Rules has not imposed a time limit within which a request for judgment on an arbitration award should be made. It is my finding that the provisions of the Limitation of Actions Act cited by the defendants are inapplicable in the circumstances. As rightly submitted by the plaintiffs, the arbitral award under consideration was made pursuant to the provisions of Order XLV of the Civil Procedure Rules and not under the Arbitration Act, Chapter 49 Laws of Kenya. I am in agreement with the plaintiffs that the award the subject of these proceedings is not an award contemplated by section 4 (1)(c) of the Limitation of Actions Act. Section 2(1) of the Limitation of Actions Act defines an award as "an award of an arbitrator for the purposes of the Arbitration Act or a foreign award within the meaning of the Arbitration (Foreign Awards) Act". I am in agreement with the decision of Munyao J. in the case of Republic vs. Ndaragwa Division Land Disputes Tribunal Ex-parte Muricho Ranching Co. Ltd. & 2 Others [2015]eKLR in which he held that the provisions of section 4(1) of the Limitation of Actions Act applies only to the awards made under the Arbitration Act.

The other limb of the defendants' objection was based on section 4(4) of the Limitation of Actions Act which provides for limitation period for execution of judgments. I am in agreement with the submissions and authorities cited by the defendants that no action can be brought on a judgment after the end of 12 years from the date when the judgment was delivered. As I have stated earlier, the judgment that was entered for the plaintiffs herein was set aside. There is therefore no judgment on record and the application before me is not seeking to enforce judgment but entry of judgment in accordance with the arbitral award. I find no merit in the defendants' objection anchored on section 4(4) of the Limitation of Actions Act.

For the foregoing reasons, it is my finding that the plaintiff's application is not time barred either under the Civil Procedure Rules or the Limitation of Actions Act. It was therefore not necessary for the plaintiffs to seek extension of time within which to bring the application. In view of this finding, it is not necessary for me to determine the issue that was raised by the defendants as to whether or not the court can extend time limited by a statute.

In conclusion it is my finding that the objections raised by the defendants to the plaintiffs' application have no basis. Save for prayer 1, the application is well founded and I hereby allow the same in terms of prayer 2 thereof. The plaintiffs shall have the costs of the application.

Delivered and signed at Nairobi this 26th day of July, 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Musyoki h/b for Mutua for the Plaintiffs

Mr. Ochieng h/b for Murugaru for the Defendants

Catherine Court Assistant