IN THE COURT OF APPEAL

AT KISUMU

(CORAM: ASIKE-MAKHANDIA, KIAGE & OTIENO-ODEK JJA)

CIVIL APPEAL No. 108 OF 2016

BETWEEN

BENSON KAKAI NAMISI.....1ST APPELLANT

JOHNSON MUKASA NAMISI..... 2ND APPELLANT

AND

STUFFORD MUKASA NAMISI..... 1st RESPONDENT

REPUBLIC.....2nd RESPONDENT

(Being an appeal from the Ruling and Order of the High Court of Kenya at Bungoma, (S. Mukunya, J) dated 29th September 2016 In Bungoma Misc. Application No. 213 of 2004)

JUDGMENT OF ASIKE-MAKHANDIA, JA.

By Notice of Motion dated 13th October 2004, the appellants moved the High Court in an application for Judicial Review seeking an order to quash the proceedings and decision/award of the Western Provincial Land Disputes Appeals Committee in Appeal Case No. 58 of 2000 as adopted by the Bungoma Senior Magistrate's Court in Land Case No. 7 of 2004. The grounds in support of the application were *inter alia* that the Tribunal had no jurisdiction to order the appellant to surrender two (2) acres of land to the 1st respondent; that the decision of the Tribunal was unreasonable; and that the suit property, Land Parcel Ndivisi/Ndivisi/1117, did not form part of the estate of the 1st respondent's father.

On 17th March 2015, the parties by consent referred the dispute to Arbitration.

The terms of the consent were as follows:

> (i) The decree issued in Bungoma SPM's Court in LDTC No. 7 of 2004 and adopted as the judgment of the court on 15th June 2004 is hereby set aside with no order as to costs.
>
> (ii) The matter is referred to arbitration chaired by the sub-county Commissioner of Bungoma East who will sit with four elders, two to be appointed by each party, and the area chief to sit in the panel as a member.
>
> (iii) Parties to call witnesses to their case if they wish.
>
> (iv) The award to be filed within 60 days.

Pursuant to the consent order, an award was filed in court on 15th June 2015 together with the proceedings. The award was read to the parties. The appellant being dissatisfied with the award moved the High Court for an order to review and set aside the award. The ground in support of the application for review was that the proceedings as captured did not reflect what the appellants had said before thearbitrators.

Upon hearing the parties on the Judicial Review application, the learned judge declined to review and set aside the award. In declining to review, the learned judge expressed as follows:

> *An award filed by an arbitrator under Order 46 can only be set aside under Rule 16 of Order 46 only on the grounds of corruption,*

misconduct by the arbitrator or when either party has fraudulently concealed any matter which he ought to have disclosed or has willfully misled the arbitrator or umpire. This should be done by an application that must be served on the umpire or arbitrator. There is no such allegation here against the arbitrator or against the respondent. The mere saying that what the applicant said is not captured and not disclosing what he said does not satisfy Order 46 rule

16. It remains an unsubstantiated allegation. In any case, there is no application under Order 46 of the Civil Procedure Rules and an attempt to review the arbitration award under Order 45 of the Civil Procedure Rules has not met the parameters set under the said Order 45 rule 1. For those reasons, I am unable to set aside the order. The application is dismissed with costs and judgment entered in terms of the award.

Aggrieved by the ruling of the learned judge, the appellants have filed the instant appeal citing the following grounds in their memorandum of appeal:

(i) The judge erred in law in holding that the appellants had not met the basic principles for review to be allowed.

(ii) The judge erred in holding that the parameters set in Order 45 (1) of the Civil Procedure Rules had not been met.

(iii) The judge erred by disregarding the appellants' submissions.

At the hearing of this appeal, the appellants were represented by learned counsel **Mr. Kundu**. Whereas the respondent was represented by learned counsel **Mr Wekesa.**

The appellants did not file written submissions in the appeal. Nevertheless, counsel stated he relied on the submissions made before the learned judge of the Environment and Land Court "ELC". In the submissions made before the judge, it was urged that the proceedings captured in the award were not what the appellants stated; that the secretary of the meeting deliberately did not record what the appellants stated; that the proceedings do not capture the appellants' submissions that the respondent cannot challenge the gifts given to them by their father before he passed away; and that the Chairman of the Arbitration Committee ignored evidence arising from the meeting held on 27th December 1999.

In support of their submissions, counsel for respondent cited the case of **Partick Muturi –v- Keninida Assurance Company Limited, Meru Civil Suit No. 114 of 1990** where it was held that arbitral proceedings must be conducted in accordance with the Arbitration Act. That the Arbitration Committee denied the appellants their rights under the Arbitration Act. That the appellants attended the hearing for adoption of the arbitration award without having seen the award. That this denied the appellants the opportunity to make an application to set aside the award as contemplated in **Section 35 of the Arbitration Act.** For the foregoing reasons, the appellants urged me to review and set aside the arbitration award. I was urged to set aside the impugned ruling by the learned judge.

The 1st respondent filed written submissions in this appeal. Despites service of the hearing notice, the 2nd respondent represented by the State Law Office neither appeared for the hearing nor filed written submissions.

Counsel for the 1st respondent relied entirely on the submissions as filed. In the written submissions, counsel rehashed the background facts that led to the dispute between the parties. It was stated that the appellants and the 1st respondent are brothers sired by one father (Mr. Namisi Sifuna) but different mothers. During his life time, their father distributed and transferred his land to some of his sons but left some of the sons landless. That the action of leaving some sons landless is the root cause of litigation between the parties. The appellants' clan had to intervene to ensure that all sons of their father had a piece of land. In so doing, some of the sons who had been gifted land had to surrender part of their land to their brothers. The respondent was the only son who remained landless. The family and the clan negotiated a settlement to have the appellants relinquish three (3) acres each to the 1st respondent which they refused. The matter went before the Land Disputes Tribunal which entered a verdict that the 1st respondent be given two acres by each appellant. The appellants appealed to the Provincial Land Disputes Appeals Committee which upheld the Land Disputes Tribunal. The appellants refused to honour the award by the Provincial Land Disputes Appeals Committee and filed a Judicial Review application to the ELC. The instant appeal arises from the Ruling of the ELC in declining to set aside the award.

Having narrated the background facts, the 1st respondent submitted that the learned judge was correct in ruling that the appellants did not meet the basic principles for review to be allowed and that the parameters of **Order 45 (1) of the Civil Procedure Rules** had not been met; that the learned judge correctly held that **Order 45 rule (1)** deals with setting aside a decree or order of the court upon discovery of new and important matters of evidence after exercise of due diligence; and that the appellant did not lead an iota of evidence to come within the ambit of **Order 45 rule 1.**

Despite the foregoing, it was submitted that the applicable law for setting aside an arbitral award is **Order 46 of the Civil Procedure Rules**. That any application to set aside an arbitrator's award should be instituted under Order 46 and not under Order 45. That the appellants' failure to file an application under **Order 46** rendered their application incompetent. It was urged that under **sub-rule 2 of rule 18 of Order 46,** it is provided that no appeal lies from a decree except where the decree is in excess of the award. That the appellants' application before the ELC was neither anchored on Order 46 nor was it alleged that the award as approved was excess.

Counsel further submitted that the time limit of thirty days for challenge of an arbitration award had long lapsed. That four years had lapsed since the award was adopted by the court.

On the jurisdiction issue, it was submitted that the appellants consented to the dispute to be referred to arbitration and as such, they cannot challenge the jurisdiction of the arbitrator.

I have considered the grounds of appeal and the record of appeal in its entirety. I have also considered the written submissions by the parties. This being a first appeal, it is my duty to analyze and re-assess the evidence on record and reach my own conclusions. In **Selle -vs- Associated Motor Boat Co. [1968] EA 123,** it was expressed:

> *"An appeal to this Court from a trial by the High Court is by way of retrial and* We *the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally* (**Abdul Hameed Saif -v - Ali Mohamed Sholan (1955), 22 E. A. C. A. 270**)."

A key issue that stands out for consideration in this appeal is whether the learned judge erred in declining to review and set aside the arbitral award. Two issues ensue from this first; whether the Tribunal had jurisdiction to make the award; and second, whether the appellants properly moved the court to set aside the arbitral award.

The record shows that the parties consented to have their dispute resolved by way of arbitration. In the consent, the composition of the arbitration panel was determined by the parties. Likewise, the time for filing the award was fixed by the parties to be sixty (60) days albeit from the date of the award. In **Brooke Bond Liebig Ltd –v- Mallya [1975] EA 266 at 269** Law Ag P said:

> *"A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties."*

In **Purcell v F C Trigell Ltd [1970] 2 All ER 671,** Winn LJ said at 676;

> *"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."*

The position is again clearly set out in **Setton on Judgments and Orders** (7th Ed.), Vol.1 pg. 124 as follows:

> *"Prima Facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement."*

In the instant matter, the parties consented to have their dispute resolved by way of arbitration. The appellants have not demonstrated to me any ground that would justify this Court to set aside and overlook the consent of the parties to proceed to arbitration. For this reason, the appellants' contestation that the arbitrator had no jurisdiction to award two (2) acres to the respondent has no merit or basis. The parties through the consent order conferred jurisdiction upon the arbitrator to determine the dispute. I am comforted in my decision by the dicta in **Kihuni vs. Gakunga (1986) eKLR** where it was held that parties cannot be heard to challenge issues referred to arbitration especially in a case where the parties and their respective advocates drew the issues. Further, in **Kenya Shell Limited vs. Kobil Petroleum, Civil Application No. 39 of 2004** this Court stated "parties cannot challenge issues which they themselves have referred to arbitration." (See also **Trishcon Construction Company Limited - Mohamed Salim Shamshudin & another [2019] eKLR).**

Another contestation by the appellant is that the learned judge erred in failing to review and set aside the arbitrator's award. In **National Bank of Kenya Ltd v. Ndungu Njau, (Civil Appeal No. 211 of 1996**) this Court (differently constituted) stated thus with regard to review: -

> *"A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."*

In the instant matter, the appellants submitted that they met the parameters for review under the provisions of Order 45 rule 1 of the Civil Procedure Rules. That pursuant to Order 45 (1), they are persons aggrieved by the order of the court adopting the arbitration award. Conversely, the respondent submitted that the appellants did not meet the parameters for review under Order 45 rule I; that there was no discovery of a new and important matter or evidence which had been demonstrated to the satisfaction of the learned judge; that there is no mistake or error apparent on the face of the record; that the court simply adopted the arbitration award and there is no mistake on the part of the court in adopting the award.

I have considered the rival submissions. Even if Order 45 of the Civil Procedure Rules were applicable to this matter; the appellant has not demonstrated to me any error or omission that is self-evident from the arbitration proceedings that would justify review or setting aside of the arbitral award. The application by the appellants for review and setting aside of the arbitral award was grounded on **Order 45 (1) of the Civil Procedure Rules**. Order 45 of the Civil Procedure Act does not apply to setting aside or review of an arbitration award when the dispute was referred to arbitration by the court pursuant to **Order 46 (1) of the Civil Procedure Rules.** I therefore find that the appellants' application for review was incompetent. In addition, the limitation period for setting aside such an award had already lapsed.

For the foregoing reasons, I find that this appeal has no merit. I would affirm and uphold the ruling by the learned judge delivered on 29th September 2016 in Bungoma HC Misc. Application No. 213 of 2004. The upshot is that this appeal should be dismissed with costs.

As Kiage Kiage, J.A. concurs, it is so ordered.

This Judgment is delivered pursuant to rule 32(3) of the Court of Appeal rules since Odek, J.A passed on before the delivery of the Judgment.

Dated and delivered at Nairobi this 10th day of July, 2020.

ASIKE – MAKHANDIA

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

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JUDGMENT OF KIAGE, JA.

I have had the benefit of reading in draft the Judgment of my learned brother Makhandia, J.A. I wholly agree with his analysis and concur in his conclusions with nothing useful to add.

Dated and delivered at Nairobi this 10th day of July, 2020.

P. O. KIAGE

JUDGE OF APPEAL