IN THE COURT OF APPEAL

AT MALINDI

(CORAM: VISRAM, KARANJA & KOOME, JJ.A)

CIVIL APPEAL NO. 59 OF 2016

BETWEEN

ANANIAS N. KIRAGU……APPELLANT

VERSUS

ERIC MUGAMBI…….……..…1ST RESPONDENT

FRANKLIN MWIRIGI…….....2ND RESPONDENT

MARTIN NJERU…….…….....3RD RESPONDENT

(Being an appeal from the Ruling/Order (Angote J.) delivered on 1st April, 2016

in

Malindi Environment and Land Court (ELC) No. 101 of 2015)

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RULING OF THE COURT

[1] This ruling seeks to determine the single issue of whether this Court should refer to the High court for it to adopt an award by the **National Supreme Council of Njuri Ncheke Ya Ameru Elders** dated 21st February, 2017. First, a brief background is that on 20th June, 2015 **Ananias Kiragu** (applicant) filed suit being Environment and Land Court (ELC) Malindi No. 101 of 2015, against his three sons who are the respondents herein. The dispute is over occupation of the appellant's parcel of land by his sons. The land is situated at La Marina area, Mtwapa Township known as Subdivision No. 655 (Original No 539/39) **Section 111** MN (hereinafter referred to as the suit property). In the said suit, the applicant sought an order of permanent injunction restraining the respondents from interfering with his occupation, access or entry upon the suit property and an order that the respondents do vacate and handover vacant possession of the suit property.

[2] Before the main suit which is still pending in the High Court was heard, the applicant filed an interlocutory application dated 25th June, 2015 seeking a temporary order of injunction restraining the respondents either by themselves or their agents from interfering with access or entry upon the suit property.

[3] The respondents filed a defence denying interfering with the applicant's peaceful occupation or at all and claimed that they have occupied the suit land as of right since their childhood. In response to the application for interlocutory injunction, Franklin Mwirigi swore an affidavit on behalf of his brothers and also filed an application dated 20th August, 2015 seeking to restrain their father or his agents from destroying the suit property, transferring it or from threatening the respondents with eviction. Both applications fell for hearing before Angote J. who dismissed the applicant's application and allowed the one by the respondents thereby maintaining the prevailing status quo in respect of the suit property.

[4] The aforesaid order aggrieved the applicant and he filed an appeal before this Court against the order. When the appeal came up for hearing on 23rd November, 2016 before a Bench of this Court differently constituted, the following order was recorded at the request of both parties;

> **"Being a dispute involving close family members who desire to resolve it through an alternative forum- Njuri Ncheke-, we order that the appeal be and is hereby taken out of today's hearing list to enable the parties explore this out- of –court alternative within the next 90 days. The appeal shall be listed in the last part of the new term for mention."**

[5] The matter was arbitrated before the Njuri Ncheke forum and an award was filed in Court on 3rd February, 2017, however the respondents declined/refused to sign the said award or to consent to the same being adopted as a final order of the Court disposing of the appeal and the suit pending before the High court. That being the case, the appellant filed a Notice of Motion under **Article 159 (2) (c)** of the Constitution, **Sections 3, 3A, 3B** of the Appellate Jurisdiction Act among other statutory enactments seeking;

> **"That the appeal herein be deemed to adjusted and wholly disposed of by virtue of the order of 23rd November, 2016 and the determination resultant thereto."**

[6] The application is predicated on the grounds that both parties submitted themselves to alternative dispute resolution forum which heard and determined the entire dispute thereby resolving it in entirety and filed an award in Court. The respondents were faulted for changing their minds at the last minute instead of challenging the award or contesting the arbitral award within the provided avenues under the Arbitration Act. According to Mr. Moses Mwakisha, learned counsel for the applicant, it did not matter that the respondents were not happy with the final award, their remedy lay in challenging it before the High court as the suit before the High court is still a live.

[7] The application was opposed by the respondents, Franklin Mwirigi swore an affidavit dated 30th August, 2017 faulting the elders' award for what he described as misapprehension of key facts and matters of law and for exhibiting bias in favour of their father, the appellant. Ms. Tonia Mwania learned counsel for the respondents also filed written submissions which she relied on in opposition of the application. According to counsel, the proceedings before the *Njuri Ncheke* failed to find a common ground but instead engaged in finding fault with the respondents who were ordered to slaughter a he goat to appease the applicant for exposing him in court while ignoring the fact that the applicant was also a plaintiff before the High court and he too had sued the respondents. Further, the decision by the elders made final orders in a matter that is still pending in the High Ccurt whereas the appeal was an interlocutory one.

[8] We have considered the application, the annexures thereto, submissions by both counsel and the relevant provisions of the law. We must state at the outset this is a unique application which is not provided for under any specific rule of the Court of Appeal Rules. Nonetheless, it is brought under the omnibus provisions of **Article 159 (2) (c)** of the Constitution, **Sections 3, 3A, 3B** of the Appellate Jurisdiction Act and other provisions of the law. Ordinarily when an appeal is filed, the Rules provide for the hearing, dismissal or withdrawal of the appeal. This is understandable because in dealing with an appeal the Court is supposed to correct the mistakes or affirm the decision or orders appealed against **Rule 96** (**1) (2)** and **3** of this Court's Rules makes provisions of how an appeal can be withdrawn as follows:-

"96. (1) An appellant may at any time after instituting his appeal and before the appeal is called on for hearing lodge in the appropriate registry notice in writing that he intends to withdraw the appeal.

(2) The appellant shall within seven days after lodging the notice of withdrawal, serve copies thereof on each respondent who has complied with the requirements of Rule 79.

(3) If all the parties to the appeal consent to the withdrawal of the appeal the appellant shall file, in the appropriate registry, a consent letter signed by the parties or their advocates and thereupon the appeal shall be struck out of the list of pending appeals."

[9] Parties are generally free and indeed courts have a Constitutional mandate vide **Article 159 (2) (c)** to encourage parties to explore alternative avenues of dispute resolution. However we are of the view that if the alternative forum is facilitated by court, parties thereto must adhere to an agreement/or consent to refer the matter to the alternative forum and to be bound by the outcome. Alternatively in the event that a matter is settled by consent of the parties on their own (which is done in many cases) the practice that is provided under this Court Rules is that the terms of settlement are recorded in the High court and the appeal is withdrawn. The terms of settlement are usually recorded before the High court.

[10] What happened in the instant appeal was different as the parties who submitted themselves to an alternative forum did not agree to be bound by the outcome by signing a consent. Moreover, this alternative forum was not a Court aided arbitration or mediation, thus the central question is, whether this Court can compel the respondents to accept the award as argued by the applicant under **Article 159 (2) (c) ** of the Constitution. The record of appeal before us shows it is the parties who indicated to the Court when the appeal came up for hearing that they wished to have the appeal subjected to an alternative forum. Of course as the matter involved family members it made good sense to allow them explore alternative forum. Can this Court adopt the said award? We are of the view this cannot happen in the face of the appeal that is pending before us. We say so because even if the parties had accepted to adopt the award by consent, it can only be filed in the High court and the appeal before us is withdrawn by consent or we dismiss it as per the Rules or hear it and determine it one way or the other.

[11] We think it is necessary for us to emphasize from the outset that parties are at liberty to sort out their matters and indeed Courts encourage settlement of cases outside the court as parties may deem fit. Indeed, as evidenced by submissions, and it is discernable from the elders' award, there is no indication of an arbitration agreement that was executed by both parties which would compel the respondents to abide by the arbitral award. **Order 46** of the **Civil Procedure Rules** gives very elaborate procedure of arbitration that is conducted under an order of a court. Also under the Arbitration Act, an arbitral award becomes binding to the parties if the parties have agreed to submit the dispute for resolution or the matter under dispute contained an arbitration clause. The process that resulted in the present award was not initiated by Court. There was no arbitration agreement and the alternative forum was not conducted under the Civil Procedure Rules or the Arbitration Act.

[12] For the aforesaid reasons, we do not see how the orders sought by the applicant can be granted in the face of a pending appeal before this Court. If parties desired to withdraw the appeal, as provided for in the above Rules, the appeal would be struck out or withdrawn. The Court of Appeal exercises appellate jurisdiction which entails correction of errors or affirmation of the orders appealed against. This therefore explains why the Rules are couched as they are, as the Court's jurisdiction is appellate and if an appeal is compromised, the award of the elders which is not by consent of the parties cannot replace a determination of an Appeal. Similarly, this Court cannot refer the matter to the High court for adoption as it was not a court aided arbitration, and nor did the reference emanate from the High court.

[13] We think we have said enough to demonstrate the Notice of Motion by the applicant dated 30th June, 2017 lacks merit. We order it dismissed with no order as to costs as unfortunately this is a family dispute between a father and his sons. The parties are at liberty to proceed with the hearing of the appeal which should be fixed for hearing at the Registry.

Dated and delivered at Malindi this 7th day of December, 2017.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

…….

JUDGE OF APPEAL

M.K. KOOME

……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR