IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & J. MOHAMMED, JJ.A)

CIVIL APPEAL NO. 56 OF 2013

BETWEEN

CECILIA SITUMAI NDETI and MICHAEL KYENDE NDETI

Being the legal representative of

PROFESSOR KIBUTO NDETI (Deceased)…….……. APPELLANTS

AND

IDAH NDINDA NDETI

Being the personal representative of

PATRICK MUTHEKE NDETI (Deceased)…… RESPONDENTS

(Being an Appeal from the Ruling and Order of the High Court at Nairobi (Ang'awa, J) dated 12th March, 2008 in

H.C.C.C NO. 430 OF 1981

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JUDGMENT OF THE COURT

1. This is an appeal from the ruling of the High Court (Angawa J) in High Court Civil Case Number 430 of 1981 delivered on 12th March 2008 dismissing an application dated 11th October 2006 by Dr. Kivuto Ndeti (Dr. Ndeti). In that application made under Order 49 rule 5 and Order 45 rule 15 of the Civil Procedure Rules, Dr. Ndeti sought orders for enlargement of time within which to make the application and for the application to be deemed to be made in time; an order to set aside an arbitral award and judgment entered by the court consequent upon that award; an order for the case to proceed to hearing before the High Court and an order for provision of costs of the application. Dr. Ndeti is now deceased. The appellants, Cecilia Situmai Ndeti and Michael Kyende Ndeti, the personal representatives of his estate, represent him in this appeal.

Background

2. The litigation leading up to the present appeal goes back some 33 years. In 1981 Patrick Mutheke

Ndeti, (Mutheke) filed suit against his uncle Dr. Ndeti. Mutheke is also deceased. The Respondent, Idah Ndinda Ndeti, represents his estate in this appeal. In that suit Mutheke claimed that he was entitled, as lawful owner, to possession of a portion of approximately 3 acres of land being part of the property known as L.R. number 7149/9 (the land) comprising of approximately 100 acres registered in the name of Dr. Ndeti. Mutheke contended that under Akamba customary law the land belonged to and was to be shared by members a family called Ndeti family, of which he was part; that Dr. Ndeti was registered as owner of the land in trust for members of the Ndeti family and that in breach of that trust Dr. Ndeti was wrongfully seeking to dispose the land or portions or subdivisions thereof.

3. On those facts, Mutheke sought judgment against Dr. Ndeti for a declaration that any transfer of the Land or any portion or sub division thereof is void; an order to restrain the Principal Registrar of titles from transferring the land or any portion or subdivision thereof; a perpetual injunction to restrain Dr. Ndeti from selling the land or any portion or subdivision thereof; a declaration that the land belongs to Ndeti Family under Akamba customary law; a declaration that a portion of 3 acres of the land upon which Mutheke erected a dwelling house("the property") is Mutheke's exclusive property; an order for Dr. Ndeti to execute appropriate conveyances to transfer the land to the Ndeti family and the property to Mutheke. In the alternative Mutheke sought damages.

4. In his defence, Dr. Ndeti denied Mutheke's claims and averred that he solely bought the land in 1969; that the land is registered in his name under the provisions of the now repealed Registration of Titles Act; that to his knowledge no organization known as Ndeti family existed; that he was not registered as owner of the land as a trustee for the Ndeti family as alleged; that Mutheke occupied a residential house on the land as a licencee under a licence granted to him at the request a partnership in the name of P. N. Ndeti and Brothers; that that licence was lawfully terminated by notice dated 18th December 1980 and that Mutheke's suit should therefore be dismissed with costs.

5. On 14th January 1986, the Deputy Registrar of the High Court wrote to the District Officer Iveti (South) Division of Machakos district citing the provisions of Order XLV of the Civil Procedure Rules stating that the suit had "been ordered by the court to be referred to" the District Officer "for arbitration by elders" under his general supervision and direction and that each party was to appoint 2 elders and the District Officer was to act as umpire with a casting vote. The District Officer was required to forward the findings duly signed by the elders and countersigned by him to the court within 60 days.

6. After hearing the parties, the unanimous findings or award of the panel of elders made sometime in 1986 were that:

(a) Dr. Ndeti "be and is hereby restrained from selling, whole or part or otherwise parting with property L.R. 7149/ registered as I.R 1872/2 or evicting the plaintiff from it until such time that P. N. Ndeti and Brothers a limited liability company is dissolved and each afforded appropriate shares of the assets forming the family company some of which though registered under individual members of the family have been jointly sold…"

(b) "the house on this property and in which the plaintiff is residing is by all sufficient evidence on record the property of the plaintiff" and that

(c) "each party to bear its own costs incurred while attending the panel of elders arbitration."

7. That award was then filed in the High Court and judgment entered for Mutheke in accordance therewith.

8. On 12th October 2006, Dr. Ndeti presented to the High Court the application on the basis of which the impugned ruling was made. In his affidavit sworn on 12th October 2006 in support of the application, Dr. Ndeti deposed that after the findings of the panel of elders *"the parties…retreated from the case and each went his way…"*and that he had recently heard that Mutheke had obtained a court decree, which he confirmed from the court, on the basis of which the land was declared family

property and Mutheke given 3 acres of it; that the decree was set aside by the court on 28th September 2006 following his application; that the findings of the panel of elders and the award is contrary to law and the Registration of Titles Act.

9. In his replying affidavit to that application sworn on 30th October 2006, Mutheke deposed that both parties were satisfied with the elders award and that after the award was read by the court on 18th September 1986, no application was made to challenge it within the period of 30 days set under order 45 rule 16 of the Civil Procedure Rules; that there was no problem between the party following the award but that Dr. Ndeti had recently *"all over a sudden renewed his threats to evict"* him from the property; that following that threat he instructed his advocates to extract the decree; that the decree was subsequently set aside on a technicality as judgment had not been entered; that there was un explained inordinate delay in making the application by Dr. Ndeti which was prejudicial to him and the family in general as key witness had since died and that no reason had been shown why time for making the application should be extended after 20 years.

10. After hearing the parties, the learned judge of the High Court in the ruling that is the subject of the present appeal dismissed Dr. Ndeti's application. Dismissing the application, the learned judge of the High Court stated:

"***I decline to grant the application as prayed based on technicalities that Order 45 Rule 17 (1) Civil Procedure Rule be complied with. I further note that 20 years is on considerable (sic) time to have been taken to make this application which I do not made (sic) is correct. Application dismissed. I award costs to the respondent."***

11. Dr. Ndeti was aggrieved by that decision, hence the present appeal.

The appeal and submissions by counsel

12. The grounds of appeal as set out in the memorandum of appeal are that in dismissing the application the learned judge of the High Court erred in that she did not appreciate the nature of the application before her; that she did not consider the application for enlargement of time; that she failed to set aside the award for contravention of section 23 of the Registration of Titles Act; and that she failed to evaluate the totality of the material before her. The appellant also complains that the application was wrongfully dismissed on technicalities; and that the judge erred in finding that 20 years delay was considerable when it was properly explained.

13. At the hearing of the application before us the parties were represented by learned counsel. Mr. G. Gitonga Murugara appeared for the appellant. Mr. Eric Mutua appeared for the respondent.

14. According to Mr. Murugara the High Court ruling was rushed and not properly considered; the issues raised in the appellant's application before the High Court were not addressed; the appellants prayers before the High Court to enlarge time and set aside the award were refused on a technicality; the learned judge failed to take into consideration that the award was made by an arbitral tribunal that did not have jurisdiction; the land is registered under the Registration of Titles Act under which only the High Court had jurisdiction; the arbitral tribunal contravened section 23 of the Registration of Titles Act by defeating title without good reason; that the tribunal purported to vest the land in another entity which was not a party to the proceedings; that on the strength of decisions of this Court in **Moya Drift Farm Ltd vs. Theuri [1973] E A 114**; **Nairobi Permanent Markets Society and others vs. Salima Enterprises and other [19951998] 1 EA232** titles under section 23 the Registration of Titles Act are indefeasible.

15. Regarding the delay in presenting the application before the High Court, Mr. Murugara urged that both parties were guilty of delay as Mutheke did not take steps to enforce the judgment probably on account of appreciation that the judgment was not capable of enforcement; and that the matter should be referred to the High Court for disposal.

16. Opposing the appeal, Mr. Mutua for the respondent submitted that the ruling of the High Court is well reasoned and cannot be faulted; that the learned judge of the High Court analyzed the case and made findings; that the judge rightly held that the delay of 20 years by the appellant to make the application is inordinate delay.

17. Regarding the complaint that the ruling of the High Court was rushed and not reasoned, Mr. Mutua referred us to the decision of this Court in **Jamaica Nyaga Njoroge vs. Robert Wainaina Kibe Civil Appeal No. 169 of 2001** where this Court upheld a decision of the High Court notwithstanding that elaborate reasons were not given for the decision. Mr Mutu stated that this Court should uphold the decision of the High Court as the rationale of the decision is discernible.

18. Regarding the argument that the arbitral tribunal acted without jurisdiction, Mr. Mutua drew our attention to the fact that counsel represented both parties when the matter was referred to arbitration by the panel of elders and that it was as a result of consent that the entire dispute was referred to arbitration; that the question of jurisdiction was never raised by the appellant and it cannot be open at this stage to say tribunal acted without jurisdiction; that there is nothing preventing parties from going to arbitration under Registration of Titles Act; and that to open that issue now prejudices the respondent. In that regard counsel referred us to the decision of this Court in **Kihuni vs. Gakunga [1986] KLR 572.**

19. Considering the view taken by this Court in **John Ongeri Mariaria and others vs. Paul Matundura Civil Application No. NAI 301 of 2003** where the Court considered delay of three months delay as inordinate, Mr. Mutua submitted that the learned judges finding that the appellant was guilty of inordinate delay in presenting the application cannot be faulted.

20. Mr. Mutua also referred us to the decision of this Court in **Hinga vs. Gathara [2009] KLR 698** and submitted that as a matter of public policy arbitral awards are final; that there has to be finality to litigation; that the present dispute is over 32 years old; that the original parties are all deceased and that if the suit was to commence afresh there would be need for oral evidence which would occasion great injustice if the children of the deceased are subjected to the process.

21. According to Mr. Mutua, the award is not illegal and does not offend section 23 of Registration of Titles Act as trust over registered land can be implied. In that regard, Mr. Mutua referred us to numerous cases including the case of **Arumba v Mbega & Another [1988] KLR121**; **Mbothu &8 others vs. Waitimu & 11 others [1986] KLR 17**. With that Mr. Mutua urged us to dismiss the appeal with costs.

22. In his short reply Mr. Murugara submitted that the reference of the dispute was not by consent but a reference to arbitration by panel of elders under Act 14 of 1981; that the arbitral tribunal exceeded its powers by granting the reliefs that it did.

Determination

23. We have considered the record of appeal, the submissions by learned counsel and the authorities cited.

24. The reference of the dispute the subject of High Court Civil Case Number 430 of 1981 between Mutheke and Dr. Ndeti to arbitration by the panel of elders was made under the provisions of the then Order XLV that dealt with arbitration under order of a court. The letter from the Deputy Registrar of the High Court dated 14th January 1986 addressed to the District Officer Iveti (South) Division made reference to the order of the High Court for reference of the matter "*for arbitration by elders under…[his]…general supervision and direction*."

25. After hearing the parties, the panel of elders in its award given 1986 determined that:

"1. It would be most unfair to have the plaintiff vacate the property in issue whose common use was

granted by the defendant under family arrangements establishing P. N. Ndeti and Brothers, a limited liability company in which both are shareholders, and the company contributed 20,000.00 towards its full acquisition despite its registration in the name of the defendant. On the other hand allotment of the property by equal shares to the plaintiff is not fair unless this is along other properties some of which are not in dispute now. P. N. Ndeti and Brothers as a limited liability company still remains undissolved. In this case it is only most fair that the defendant be and is hereby restrained from selling, whole or part or otherwise parting with property L. R. 7149/9 registered as L.R. 1872/2 or evicting the plaintiff from it until such time that P. N. Ndeti and Brothers a limited liability company is dissolved and each afforded appropriate shares of the assets forming the family company some of which though registered under individual members of the family have been jointly sold, see 2 above.

2. The house on this property and in which the plaintiff is residing is by all sufficient evidence on record the property of the plaintiff.

3. Each party to bear its own costs incurred while attending the panel of elders arbitration."

26. We observe that the dispute that was referred to arbitration as captured in the pleadings in High Court Civil Case Number 430 of 1981 was between Patrick Mutheke Ndeti and Dr. Kivuto Ndeti. The interest of Patrick Mutheke Ndeti in L.R. 7149/9 was in the portion of three acres in his possession upon which his dwelling house was erected. In the award, the panel of elders appear to have gone beyond the scope of the dispute between the parties by pronouncing itself on matters that were not referred to it and which were therefore not before it. That is however not a matter before us and we say no more.

27. Judgment was then entered in accordance with that award by the High Court. The appellant then moved the High Court to set aside the arbitral award and consequent judgment. The appellant's application was under rule 5 of Order 49 of the Civil Procedure Rules (for enlargement of time) and rule 15 of Order 45 (to set aside the award).

28. The exercise of the powers of the court under rule 5 of Order 49 and rule 15 of Order 45 of the Civil Procedure Rules involve the exercise of discretion by the Court. That discretion must be exercised judiciously. This Court will interfere with the exercise of discretion by a lower court where the court has misdirected itself in some matter with the result that it arrives at a wrong decision or is manifest that the decision is clearly wrong. The famous words by Sir Charles Newbold P. in **Mbogo & Another V Shah 1968 EA** 93 at page 95 are worth repeating:

"…a Court of Appeal should not interfere with the exercise of the discretion of a single Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice……."

29. It is also trite that an appellate court should not substitute the trial judge's discretion with its own discretion and that in order to interfere it has to be shown that the lower court was clearly wrong because of misdirection or for failing to take into account matters that should have been taken into account or for taking into account matters that should not have been taken into account. [See **Matiba v Moi & 2 others, 2008 1 KLR 670**].

30. Can it then be said in the circumstance of this case that that the learned judge of the High Court misdirected herself in some matter with the result that she arrived at a wrong decision or that it is manifest that the learned judge's decision is clearly wrong? We do not think so.

31. To start with there can be no doubt that the reference of the dispute to arbitration by the panel of elders was made under the provisions of the then Order XLV of the Civil Procedure Rules.

Under rule 1 of that Order reference to arbitration could only be ordered, "*Where all parties…agree…*" An order for reference to arbitration under those provisions could only be made with the consent of the parties. There is no power under the then Order XLV of the Civil Procedure Rules to compel parties to arbitration. There is no suggestion that any party was under disability to agree to the reference to arbitration. Counsel represented both parties.

32. The Magistrates' Jurisdiction (Amendment) Act, 1981, Act No. 14 of 1981(subsequently repealed by Act 18 of 1990) provided for referral of cases of a civil nature involving beneficial ownership of land, division of or determination of boundaries, claims to occupy or work land and trespass to land which would have otherwise been under the jurisdiction of magistrate's courts to panel of elders. The Magistrates' Jurisdiction (Amendment) Act, 1981 did not affect the jurisdiction of the High Court. We do not see anything that would have prevented the parties in this case whose dispute was pending in the High Court from referring the same, as they did, to arbitration by a panel of elders. In other words, while the dispute between the parties was resolved by arbitration by a panel of elders that was constituted under the Magistrates' Jurisdiction (Amendment) Act, 1981, Act No. 14 of 198, that panel derived its authority and resolved the dispute in accordance with the mandate conferred by the parties pursuant to the consent order of reference to arbitration under order XLV of the Civil Procedure Rules. To put it differently the panel of elders in this case were not exercising jurisdiction under Section 9A of the Magistrates Judicature (Amended) Act, 1981. They were exercising jurisdiction conferred by the parties under an order made under the provisions of XLV of the Civil Procedure Rules.

33. We are not persuaded that the award of the tribunal offends the provisions of the Registration of Titles Act. There is no provision in that Act, which prohibits parties with a dispute over title over property from referring the same for determination by arbitration.

34. The learned judge of the High Court was also right in our view in taking the view that she did that the appellant was guilty of inordinate delay. She captured this in the Ruling when she stated "*that the respondent did nothing until 20 years later when in 2006 the Deputy Registrar on application entered judgment in favour of the applicants…"* The delay was not satisfactorily explained before the High Court or even before us. It is not enough in our view for the appellant to say that the parties went separate ways and did nothing after the delivery of the award. It was for the appellant who considered himself aggrieved by the award to proceed with diligence to seek the setting aside of the award under rule 15 of the then Order XLV of the Civil Procedure Rules.

35. We agree with the submission by counsel for the respondent that the broad principle of finality of arbitral awards is applicable under Order XLV of the Civil Procedure Rules. That is discernible from the limited grounds for setting aside an award under rule 15 which are restricted to corruption or misconduct of the tribunal, fraudulent concealment of matters, and willful deception. Reviewing the grounds upon which the appellant based his application before the High Court, we are not satisfied, quite apart from the inordinate delay in making the application, that the application met the threshold for setting aside an award.

36. We have said enough to show that there is no merit in the appeal. Further the original cast in the drama is no more. To reopen the matter in those circumstances would be oppressive to the descendants of the original cast. Let the appellants comply with the arbitral award and put to sleep this long outstanding matter.

37. As the dispute involves family members, we think each party should bear their own costs in the High Court and in this Court.

Dated and delivered at Nairobi this 11th day of July, 2014.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

J. MOHAMMED

…….……..

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

/ewm