



IN THE COURT OF APPEAL  
AT KISUMU

(CORAM: BOSIRE, GITHINJI & NYAMU, J.J.A.)  
CIVIL APPEAL NO. 91 OF 2005

BETWEEN

JOSEPH MOSE AKUMA .....APPELLANT

AND

PASKARIA MOIGE ONTITA .....RESPONDENT

*(Appeal from the ruling of the High Court of Kenya at Kisii (Wambilyangah, J.) dated 18<sup>th</sup> July, 2003*

in

H.C. Succ. C. No. 209 of 2000)

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JUDGMENT OF THE COURT

This is an appeal from a judgment of *Wambiliangah, J.* delivered on 18<sup>th</sup> July, 2003 in which he adopted an elders' award and entered it as a judgment of the High Court.

In the memorandum of appeal the appellant has challenged the judgment on the following grounds:-

1. **THAT the learned trial Judge erred in law and in fact in dismissing the Appellant's application to set aside the Panel of Elders' award.**
2. **THAT the learned trial Judge erred in law and in fact in not addressing the issue of Customary Law (Gusii) that a married lady does not inherit at her maiden home.**
3. **THAT the learned trial Judge erred in law and in fact in not finding that the Panel of Elders was not constituted as per the Court Order hence ultra vires.**
4. **THAT the learned trial Judge erred in law and in fact in not finding that the Panel of Elders' award was not in conformity with the Court Order hence ultra vires.**

In the appeal the appellant was represented by **Mr. Masese** advocate and the respondent was represented by **Mr. Momanyi**, advocate.

In his submissions Mr. Masese highlighted that the arbitrator had failed to restrict or confine herself to his mandate or the terms of the reference in that the reference had directed that each party would appoint two elders each but there is nothing to show that the parties did pick them as per the terms of reference and for this reason the appellant was denied the right of hearing and that the arbitrator had for the same reason misconducted herself; and finally that the arbitrator had stepped out of her mandate by making a

determination that half of the land belonged to the respondent yet the issue of ownership was not covered by the terms of reference.

On his part Mr. Momanyi submitted that the arbitrator was within her mandate because the grant of the half share was within the arbitrator's power to distribute the estate and the objector was the only surviving issue of the late Maria Kemunto; that the elders chosen by the parties were described in the proceedings as witnesses and that the appellant did take part in the proceedings and did in fact cross-examine the elders and therefore the right of hearing was accorded to him and finally that the application was incompetent in that no leave was sought prior to the bringing of the appeal contrary to **Order 45 rule 17** of the Civil Procedure Rules.

In our view the critical issue is whether the arbitration was within the terms of the reference. We consider that the answer to the question is that the arbitration was in accordance with the court order which constituted the reference. In this regard the order by consent was recorded on 1<sup>st</sup> October, 2001 in these terms:

***“The matter in dispute for administration and distribution are hereby referred to the D.O. Mosoch Division for arbitration and specifically to determine the interests of the late Maria Kemunto Nyangine and the late William Akuma in respect of parcel No. West Kitutu/Mwamanwa/34.***

***The DO to be assisted by four elders each party to appoint two of them. ....”***

In dealing with that point the learned Judge stated:-

***“The court's order which referred the dispute to the D.O. for arbitration specifically required ‘the D.O. to be assisted by four elders and each party would be entitled to appoint two elders’.***

***The notes of the D.O. show that each of the parties had only 2 elders and the applicant Joseph Mose Akuma fully participated in the proceedings by cross-examining the witnesses called by the opposite party apart from having testified as to his own version of the matter.”***

It should be appreciated that the D.O. who was the arbitrator was a lay person, and it is clear she understood that the elders to assist her would be acting as the parties' respective witnesses. The trial Judge considered that he was to consider substantial justice without undue regard to technicalities of procedure.

It is therefore clear to us that the arbitrator was within his mandate in that she acted within the terms of the consent order as recorded above. In addition the right of hearing was fully accorded as is apparent from the proceedings.

With regard to the contention that the grant of half of the share went beyond the reference, the order constituting the reference specifically included a determination of the interest of the two persons named and therefore the grant was in our view within the terms of the reference.

In the result the challenge to the award cannot be sustained for the reasons set out above and the appeal is hereby dismissed with costs to the respondent.

It is so ordered.

***Dated and delivered at Kisumu this 29<sup>th</sup> day of July, 2011***

**S. E. O. BOSIRE**

.....  
**JUDGE OF APPEAL**

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**J. G. NYAMU**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**