



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO.20 OF 2002

NJAU KIONO APPELLANT

AND

JAMES MAINA KIRAGU RESPONDENT

(Appeal from the judgment and order of the High Court of Kenya at

Nairobi (Shaikh M. Amin, J.) dated 28th May, 1998

in

H.C.C.C. NO. 147 OF 1993)

JUDGMENT OF THE COURT

This appeal has a long and somewhat unhappy history. The dispute between the appellant **NJAU KIONO** and the respondent **JAMES MAINA KIRAGU** can be traced back to a plaint filed by **JAMES MAINA KIRAGU** in the Resident Magistrate's Court Naivasha on 22nd November, 1991. In the plaint personally filed by the respondent herein contained inter alia, the following:-

“In the year 1983 the plaintiff entered into a sale agreement of 4 acres of land out of Plot No. 218 Njabini Scheme where the defendant agreed to sell the said land at a consideration of 14,000/= per acre. Total amount Kshs.56,000/= which amount is paid in full. The defendant has now refused/failed to transfer the 4 acres to the plaintiff despite several verbal request. The cause of action arose at Njabini Scheme and this Honourable Court has jurisdiction to try this suit.

WHEREFORE the plaintiff prays for:-

(a) The court to order the defendant to transfer the 4 acres alternatively the court so sign all documents on behalf of the defendant,

(b) Costs of this suit plus any other relief the court may deem fit to grant.”

In reaction to the foregoing, the appellant (*as the defendant*), through his advocate, filed a defence in which it was averred:-

“2. The defendant admits entering into a Sale Agreement with the plaintiff and receiving the said sum of Kshs.56,000/= as consideration but avers that the plaintiff refused to take the portion of land out of plot No. 218 Njabini as agreed in the sale agreement and insisted on taking another portion of the said plot but which was not subject of the sale and which the defendant had no intention of selling and thereby breaching the said contract.

3. That as a consequence of the aforementioned the defendant could not transfer the said 4 acres as the plaintiff refused the portion offered to him by the defendant.

4. The defendant has been willing to refund the said consideration and or transfer the portion of land that was a subject of the sale but the plaintiff has refused or ignored to accept the same.

5. The jurisdiction of the court is admitted.

REASONS WHEREFORE the defendant prays that the plaintiff suit be dismissed with costs.”

From the pleadings in the subordinate court as captured from the plaint and the defence, it would appear that there was no serious dispute between the parties since in the defence the appellant admitted entering into the sale agreement with the respondent. He admitted receiving the purchase price of **Shs.56,000/=**. The only area of difference was that the respondent was insisting on a different portion of the land from what was the subject of the sale agreement.

On 24th January, 1992 both parties appeared before the learned Resident Magistrate at Naivasha (D.K. Gichuki, Esq.,) who recorded as follows:-

“DEFENDANT: I have not refused to give or transfer the land to the plaintiff. The plaintiff was insisting that the land be subdivided the way he wants. I come from South Kinangop.

PLAINTIFF: I am willing to have the land. What I had said is that the outlet of the land to the road and the portion giving access to the water is narrow. I am ready to accept land as it is. I come from South Kinangop.”

In view of the foregoing, it is rather surprising that the parties are still in court to this day. From what was recorded by the learned Resident Magistrate on 24th January, 1992, it would appear that an amicable settlement was in sight. But that was not to be since the learned Resident Magistrate decided to refer the dispute to arbitration pursuant to his order stating as follows:-

“COURT: This is a land matter where this court has no jurisdiction in accordance with the Magistrate’s Jurisdiction (Amendment) Act 1981.

This case is referred for arbitration under the Chairmanship of the D.O. District Officer North Kinangop.

Each party to be allowed to appoint at least two elders and to summon a number of witnesses they may wish to call.

The award to be filed within 30 days from the date of this order. Parties to be informed accordingly.”

The parties were back before the learned Resident Magistrate on 23rd October, 1992 when the award was read and explained to the parties. It should be observed here that in his order referring the dispute to arbitration the learned Resident Magistrate specifically ordered that **“the award be filed within 30 days from the date of this order.”**

The record does not show when the arbitration award was filed but it can safely be stated that it was read out to the parties well after the expiry of thirty days. It is to be observed that from the record, the appellant failed to appear before the arbitrators but the elders proceeded to hear the evidence of the

respondent and gave an award in favour of the respondent. The decision of the elders was expressed as follows:-

“AWARD

The panel of elders in agreement pray the honourable court to issue orders as follows:-

- 1. That Mr. Njau Kiano should transfer 4 acres to Mr. James Maina Kiragu without any further delay. He should do it without other condition. This should be in accordance with a consent of sale given by Kinangop Land Control Board.***
- 2. That Mr. Njau Kiano should sign all documents to warrant the issue for the title deed for the 4 acres and on failure to do so the court should sign them on his behalf.***
- 3. That in accordance with Magistrates Jurisdiction amendment act, 1981 the panel of elders do hereby endorse the award.”***

After the foregoing, one would have thought that the dispute should have been brought to an end by allowing the respondent to get his **4 acres** of land as per the Sale Agreement. The appellant was somehow dissatisfied with the award and filed an application to have the award set aside on the ground that he had not been served with a notice to appear before the *District Officer (Chairman of the panel)* for the hearing of the matter. The respondent on his part asked the court to confirm the award. The learned Resident Magistrate considered the appellant’s application to set aside the award and dismissed it in a ruling delivered on *26th January, 1993*. It would appear that the appellant was not in court when that ruling was delivered. He therefore instructed his advocate to apply for a stay of the award. Following that application by the appellant, the learned Resident Magistrate delivered a ruling on *28th April, 1993*. In that ruling the learned Resident Magistrate stated:-

“Having considered the application herein, the award recorded in court on 23rd December, 1992, the circumstances in respect of the case herein, the ruling of court of 26th January, 1993, the replying affidavit, of the Defendant/Respondent, I find no sufficient cause raised herein that would make this court fail to confirm the award. It is apparently clear that the defendant/respondent herein is delaying the cause of justice. I see no merit to stay any court orders herein. I therefore confirm the elders award read in court on 23rd December, 1992. The defendant/respondent should transfer 4 acres to the plaintiff herein as provided in the award and without any further delay. Orders accordingly.”

It is to be observed that the subordinate court was confirming the arbitration award. It went on to order the appellant to transfer **4 acres** to the respondent.

Being dissatisfied by the learned Resident Magistrate’s decision dismissing the application to set aside the arbitrators award, the appellant instructed his advocate to file an appeal in the High Court.

The Memorandum of Appeal in the High Court contained the following six grounds of appeal:-

- “1. THAT the learned trial Resident Magistrate erred (sic) in law in that he referred the suit to the District Officer North Kinangop and the Elders under the Magistrate’s Jurisdiction (Amendment) Act 1981 when he knew or ought to have known that the suit had arisen from a sale transaction and that the subject matter was land registered under Registered Land Act.***
- 2. THAT the learned Resident Magistrate erred (sic) in law in that he failed to realise that the respondent’s claim was in respect of a registered land and that the value of the subject land exceeded the pecuniary jurisdiction of a Resident Magistrate and proceeded to confirm the award contrary to the clear provisions of Section 159(1) of the Registered Land Act.***
- 3. THAT the learned Resident Magistrate erred (sic) in law and in fact in that he refused to set***

aside the Elders' Award when he knew or ought to have known that the appellant had not been served with the hearing notice and that he was not heard contrary to the rules of natural justice.

4. *THAT the learned Resident Magistrate erred (sic) in law in fact in that he confirmed the award by the Panel of Elders when he knew or ought to have known that the sale agreement between the applicant and the respondent was void in law in that it had not specified the portion to be sold and that the said sale agreement had exceeded the statutory period of six months.*

5. *THAT the learned Resident Magistrate erred (sic) in law and in fact in that he confirmed the panel of Elders Award and gave the disputed land to the respondent when he knew or ought to have known that the parties had not sought nor obtained the Land Control Board's consent to transfer the disputed land.*

6. *THAT the learned Resident Magistrate erred (sic) in law and in fact in that he decided the suit before him against the weight of evidence.*"

That appeal went on for hearing before the superior court (Shaikh Amin, J. as he then was) and the learned Judge considered what was argued before him and eventually dismissed the appeal. In dismissing the appeal in his judgment delivered on 28th May, 1998, the learned Judge concluded that judgment thus:-

"I have perused the award of the tribunal and it is clear from the record thereto that the appellant did not on his own initiative attend the arbitration proceedings although he was notified "to attend" on three different occasions. I also note from the record of the court below that the appellant did not file his appeal within the prescribed time of 30 days allowed. I therefore, hold that the learned trial magistrate action was a proper one and that the decision of the tribunal was confirmed and not objected to. It relates to the question as to the claim to occupy or work on land and that it was not a challenge to the title. The defendant and appellant does not deny this state of affairs.

For these reasons I dismiss the appeal. I also rule that as this litigation relates to the sale of land in 1983, to order retrial now would perpetuate delay and further denial of justice to the plaintiff/respondent who had already paid full purchase price. Plea for retrial is therefore, also rejected.

Therefore, in view of the nature of the litigation I order each party to bear its own costs."

Still dissatisfied with that judgment, the appellant has finally come to this Court vide his **Memorandum of Appeal** filed on his behalf by his counsel in which the following six grounds are set out:-

"1. The learned Judge erred in law and fact in holding that the dispute between the appellant and respondent fell under Section 9(a), (c) of the Magistrate's jurisdiction (Amendment) Act 1998, and that the elders had jurisdiction to hear the same, when he knew or ought to have known that the sale had arisen from a sale transaction and hence the elders had no jurisdiction to try the matter.

2. The learned Judge erred in law and fact in not considering that there was no evidence to show that the appellant was notified of the hearing before the elders and thus the appellant was condemned unheard contrary to the rules of natural justice.

3. The learned Judge erred in law and fact in dismissing the appellants appeal and thus confirming the elders award when he knew or ought to have known that the sale agreement between the appellant and the respondent was void in law as no consent had been obtained from the relevant land control board for transfer of four (4) acres to the respondent.

4. The learned Judge erred in law and in fact in upholding the elders award when he knew or ought to have known that the said award was a nullity as the same was filed out of time.

5. The learned Judge erred in law and fact in holding that the appellant's appeal was filed out of time when he knew or ought to have known that the same was filed within twelve (12) days after the Resident Magistrate's order.

6. The learned Judge erred in law in not considering the submissions advanced in favour of the appellant and thus arrived at a wrong decision."

That is the appeal that came up for hearing before us on 8th May, 2008. Mr. Kinyua Muriithi appeared for the appellant while the respondent James Maina Kiragu appeared in person. In his submissions Mr. Muriithi referred to his grounds of appeal and emphasized that the elders lacked jurisdiction as the dispute related to specific performance of a contract for sale. The other ground taken up by Mr. Muriithi related to the time of filing the award. He submitted that the award was to be filed within **30 days** but the award in question was filed after **120 days**. In his view the award was rendered a nullity since there was no extension of time in which the award was to be filed.

The respondent in his address reminded us that there was a sale of land comprising **4 acres**. He paid the purchase price as per the agreement. He was shown the portion of land that he was purchasing and he took possession. He has been in possession since 1985. The respondent went on to tell us that when the appellant refused to transfer the 4 acres that is when the respondent took the matter to the Resident Magistrate's Court at Naivasha. He therefore asked us to dismiss this appeal with costs.

As we said at the commencement of this judgment, this appeal has a long and unhappy history. We have attempted to give a summary of the dispute right from the Resident Magistrate's Court at Naivasha before the elders under the chairmanship of the District Officer, the High Court, and finally, now in this Court. It would appear that the facts are not in dispute. The parties herein entered into a Sale Agreement in respect of four acres of land. It was agreed that the appellant would sell and the respondent would buy the 4 acres of land. The purchase price was **Shs.56,000/=** which the respondent paid in full. The respondent took possession of the four acres. What appeared a minor issue of identifying the portion sold to the respondent is what led to this unhappy long expensive and almost unnecessary litigation between the parties.

We have agonized over what has been urged before us and in view of the history of this matter, we are of the view that the appeal may be disposed of on one ground alone – the elders award being a nullity for being filed after the expiry of **30 days**. As we have already demonstrated the award was to be filed within **30 days**. The order referring the dispute to the arbitration was made on 24th January, 1992. The record is silent as to what happened thereafter until 23rd October, 1992 when the parties appeared before the learned Resident Magistrate for the reading of the award. Hence the contention by Mr. Muriithi to the effect that the award was rendered a nullity for being read after **30 days** without extension of time cannot be resisted. In **BAGWASI NYANGAU V. OMOLOSA NYAKWARA (1982-85) 1 KAR 806** Gachuhi Ag. JA (as he then was) said:-

"In the case of **CLEOPHAS WASIKE V. MUCHA SWALA** Civ.App 6 of 1983 of Nakuru, Nyarangi JA said:-

"The award the subject matter of this appeal was filed in the Senior Resident Magistrate's Court on 10 September 1981. There is no evidence that an application was made pursuant to Order 45, rule 8 for the court to extend the time for the making of the award. The senior resident magistrate accepted and acted on an award which had been filed in his court long after the elapse of the time fixed under Order 45, rule 4(2) for the making of the award. But the award was a nullity."

As regards the issue of jurisdiction of the Resident Magistrate to determine the issue, we are of the view that since the learned Resident Magistrate proceeded on the basis that the dispute fell within the Magistrate's Jurisdiction (Amendment) **Act No. 14 of 1981** this was an error since that Act had been amended by **Act No. 18 of 1990**. The respondent filed this suit in the Resident Magistrate's Court on 22nd November, 1991. (The suit was *Resident Magistrate's Court Civil Suit No. 124 of 1991*). Hence the Magistrates' Jurisdiction (Amendment) **Act 1981** had no application to the dispute between these parties.

Section 3(1) of the *Land Disputes Tribunals Act No. 18 of 1990* provides:-

“3.(1) Subject to this Act, all cases of a civil nature involving a dispute as to-

- (a) the division of, or the determination of boundaries to, land, including land held in common;**
- (b) a claim to occupy or work land; or**
- (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.”**

And that **section 4** of the *Land Tribunals Act No. 18 of 1990* provides:-

“4. (1) There shall be established a tribunal, to be called the Lands Disputes Tribunal, for every registration district.

(2) Each Tribunal shall consist of-

- (a) a chairman who shall be appointed from time to time by the District Commissioner from the panel of elders appointed under section 5; and**
- (b) either two or four elders selected by the District Commissioner from a panel of elders appointed under section 5.”**

In view of the foregoing, and not without regret, we allow this appeal, set aside the dismissal by the learned Judge and the learned Resident Magistrate and substitute an order for setting aside the award. We further direct that the Resident Magistrate’s Court shall proceed with the trial of the suit. In view of the conduct of the appellant and/or his advocates throughout this lengthy litigation, we order that the respondent shall be awarded the costs of this appeal and the first appeal to the High Court. **Those shall be the orders of this Court.**

Dated and delivered at NAIROBI this 6th day of June, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

E.O. O’KUBASU

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JUDGE OF APPEAL

J. ALUOCH

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR