



**IN THE COURT OF APPEAL OF KENYA**  
**AT NYERI**

**Civil Appeal 161 of 2003**

**BENJAMIN KIIRU WANJAU.....APPELLANT**

**AND**

**SAMUEL NELSON MWANGI WANJAU**

**JONES GIBSON MWANGI KAMAU.....RESPONDENTS**

*(Appeal from Judgment of the High Court of Kenya at Nyeri, (Juma, J) dated 12<sup>th</sup> July, 1999.*

**in**

**H.C.C.C. NO. 5 of 1995**

\*\*\*\*\*

**JUDGMENT OF THE COURT**

This is an appeal from the ruling of the superior court (Juma, J) delivered on 12<sup>th</sup> July, 1999 in which the learned Judge dismissed the application for review by the appellant herein one **Benjamin Kiiru Wanjau**.

The dispute herein involved family land. The respondents, **Samuel Nelson Mwangi Wanjau** and **James Gibson Mwangi Kamau** as plaintiffs filed High Court Civil Case No. 5 of 1995 against the appellant (as the defendant) seeking judgment for:-

- “(i) That there be a declaration that land parcel LOC/2/Kinyona/222 and LOC/2/Kinyona/140 are registered in the name of the defendant in trust for himself and both plaintiffs in equal shares.**
- (ii) On determination of trust the plaintiffs be registered in the parcel LOC/2/Kinyona/222 in equal shares.**
- (iii) Parcel NO. LOC/2/Kinyona/140 village plot registered in the name of defendant be registered in the plaintiffs names jointly**
- (iv) That parcel No. LOC/2/Kinyona/128 sold by the defendant be declared as his portion.**
- (v) Cost of the suit**
- (vi) Interest on (iii) above at court rates**

**(vii) Any other relief the court deems fit.”**

The appellant filed a defence in which he sought dismissal of the respondents’ suit. The record of the superior court shows that the suit was placed before Osiemo, J on 21<sup>st</sup> March, 1996 when the appellant was represented by Mr. Waiganjo. The court made the following order:

**“This is dispute shown (sic) involves land. The same is referred to the lands Disputes Tribunal for arbitration Muranga District”.**

The award of the Tribunal was read to the parties on 2<sup>nd</sup> November 1996 and it would appear that the appellant was not satisfied with the award and he sought it to be set aside. That application to set aside the award was heard by Osiemo J who dismissed it on 4<sup>th</sup> June 1997. The award was finally adopted and made a judgment of the court on 9<sup>th</sup> July, 1997.

The appellant was still dissatisfied with the award and filed an application for review. It was that application for review that came up for hearing before Juma J. According to the ruling of Juma, J, the reasons given for the review were:-

**“(a) The Tribunal had no jurisdiction to entertain this matter which is a matter of title to land.**

**(b) There is an error apparent on the face of the record.**

**(c) The award did not address the issue as framed and agreed by the parties in the summons for directions”.**

The learned Judge considered the application for review by the appellant and dismissed the same. In his ruling dismissing the appellant’s application for review the learned Judge observed as follows:

**“Under O. 45 Rule 17 (2) of the Civil Procedure Rules no appeal shall lie from a decree arising out of a judgment entered in terms of the award except in so far as the decree is in excess of or not in accordance with the award. In Civil Appeal NO. 188 of 1996 STEPHEN MUKIRA NYAMU VS. MISHECK NGUKU the Court of Appeal held that as judgment had been entered in terms of the award the court has no jurisdiction to entertain the appeal.**

**In the instant case not only has judgment been entered in terms of the award but the decree has already been executed in that the land has already been subdivided and new titles issued in accordance with the award.”**

The appellant being dissatisfied with that ruling has filed this appeal and through his counsel cited the following grounds of appeal:-

**(1) The Honourable Judge erred in fact in finding that the suit had been referred to the Muranga Land Disputes Tribunal at the request of counsel for the defendant (appellant) whereas the proceedings of 14/2/96 and 21/3/96 show that no such request was made and that the court actually proceeded SUO MOTTO.**

**(2) The Honourable Judge erred in fact and law in finding that the matter was referred to the Land Dispute Tribunal under order XLV of the Civil Procedure Rules because:-**

**(a) The procedure under order 45 rules 1 & 9 require that the litigants should apply formally by summons for an order of reference. No such application was made either orally or as prescribed.**

**(b) The procedure under order 45 gives the litigants the right of choosing their own arbitrator instead of imposing an already constituted Tribunal on them as was done there.**

- (c) The referral contravened the mandatory provisions of Order 45 r.3 which requires the court to fix a reasonable time for the referral and SHALL specify such time in the order. The order made on 1/3/96 does not meet these mandatory requirements.**
- (d) The High Court cannot refer a matter before it for arbitration to a court subordinate to it like the Land disputes tribunal obviously for reasons of Jurisdiction and then purport to adopt the findings of the inferior court as judgment of the High Court.**
- (e) The procedures under the Land Disputes Tribunal Act and that under Order 45 of the Civil Procedure Act are not only disparate and distinct but mutually exclusive because under the former the case must start at the tribunal and not the other way round.**
- (3) The Honourable Judge erred in law in finding that the issues as framed under Order LI of the Civil Procedure Rules were overtaken by the Tribunal because the said issues as framed before the High Court evinced that the suit concerned the issue of trust of and title to land, an issue which the Tribunal had no jurisdiction to deal with in the first place.**
- (4) Even assuming that the referral was made by consent, which is not the case here, the Honourable Judge erred in finding that such consent would confer jurisdiction on a Tribunal created by statute with an explicit and well-defined jurisdiction which does not include the matter referred to it.**
- (5) The Honourable Judge erred in law in treating the application for review before him as an appeal under order 45 Rule 17(2) and finding therefore that he had no jurisdiction to handle it. The courts have unlimited jurisdiction to review decisions when there is an error on the face of the record or where there is an excess of jurisdiction as herein.**
- (6) The Honourable Judge erred in law in finding that an award made by a Tribunal which had no jurisdiction to deal with the matter, and therefore a nullity, could become a valid judgment of the High Court.”**

We have deliberately set out the above in a bid to show that what is stated as grounds of appeal did not conform with the provisions of **rule 84(1)** of the Court of Appeal Rules which states:

**“84(1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the court to make.**

**(2) The grounds of objection shall be numbered consecutively.**

**(3) A memorandum of appeal shall be substantially in the form F in the First Schedule hereto and shall be signed by or on behalf of the appellant.”**

The foregoing is merely for guidance but we must now come to the appeal before us. When the appeal came up for hearing on 26<sup>th</sup> October, 2006 at Nyeri Mr Karago appeared for the appellant while the respondents appeared in person. In his submission Mr. Karago sought to rely on the Memorandum of appeal and went on to stress that the issue before the Court was whether the tribunal had jurisdiction to deal with the dispute. It was Mr Karago’s contention that the order referring the dispute to arbitration was not made by consent.

As to how the dispute was referred to arbitration we have already reproduced the record of the superior court which shows that the appellant was represented by Mr. Waiganjo on 21<sup>st</sup> March, 1996 when the dispute was referred to the land Disputes Tribunal Muranga District. The appellant, whether by himself or counsel, should not be heard complaining about the matter being referred to the Tribunal when he was actually represented by counsel and he later took part in the arbitration proceedings. Additionally, the Members of the Tribunal from our reckoning were picked as arbitrators. It was not because the Court

thought the dispute was within the tribunal's jurisdiction. Consequently the issue of jurisdiction of the Tribunal does not arise. The superior court was within its powers to refer the matter as it did.

As we have already stated, an award was filed and the appellant filed an application to set it aside but his application was dismissed. The superior court then entered judgment in terms of the award filed.

The 1<sup>st</sup> respondent in his submission before us stated that the matter had been concluded by the time Mr. Karago, who according to 1<sup>st</sup> respondent, is the fourth counsel for the appellant, came on record. The 1<sup>st</sup> respondent prayed that this appeal be dismissed. The 2<sup>nd</sup> respondent on his part adopted what had been stated by the 1<sup>st</sup> respondent.

The dispute herein was referred to arbitration. The elders who were conversant with the local circumstances deliberated over the matter and filed their award. The appellant made all efforts to set aside the award but he was unsuccessful.

**Order XLV rule 17(2)** of the Civil Procedure Rules provides:-

***“Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with the award”.***

In the present case the judgment has been entered in terms of the award filed. It has not been shown that the decree was in excess of or not in accordance with the award.

We are in entire agreement with the ruling of the superior court (*Juma J*) and we decipher no fault with his reasoning and conclusion. It is time the appellant was told that this dispute must come to an end. He has reached the end of his journey as far as this dispute is concerned.

In view of the foregoing we find no merit in this appeal and we order that the same be, and, is hereby dismissed with costs to the respondents.

***Dated and delivered at Nyeri this 9<sup>th</sup> day of February, 2007.***

***S.E.O. BOSIRE***

.....

***JUDGE OF APPEAL***

***E.O. O’KUBASU***

.....

***JUDGE OF APPEAL***

***W.S. DEVERELL***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**