REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAKURU

Civil Appeal 141 of 2004

CHUMO ARAP SONGOK …….....……. APPELLANT

AND

DAVID KIBIEGO ROTICH …….....…….. RESPONDENT

(Appeal from the judgment of the High Court of Kenya at Eldoret (Lady Justice Gacheche) dated 12th May, 2004

in

H.C.C.C. NO. 6 OF 2002)

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JUDGMENT OF THE COURT

This is a second appeal. The first appeal from the decision of the subordinate court was partly allowed by the learned Judge of the superior court (Gacheche J) and partly dismissed. The genesis of the entire case was a plaint filed by the respondent in this appeal **David Kibiego Arap Rotich** against the appellant in the appeal **Chumo arap Songok** in the Chief Magistrate's Court at Eldoret, being *Civil Case No. 373 of 1982*. That plaint stated at paragraph 3 as follows:

"**3. The Plaintiff claims Kshs.720/= from the Defendant being in respect of damages for wrongful dismissal of the Plaintiff's Tractor which it was working for the Plaintiff thereby making the plaintiff to suffer damages",**

and it sought judgment against the Defendant for Kshs.720/=, interest at court rates and costs of the suit. It was dated 14th June 1982 and filed on 17th June 1982. Later on 7th July 1982, that plaint was amended. As that amended plaint was the one acted upon by the subordinate court and as we deem its contents important for the informed decision of this appeal, we reproduce it here below:

"**AMENDED PLAINT.**

1. The Plaintiff is an adult male of sound mind and his address for service for purposes of this suit is care of Messrs ANASSI & Company, Advocates, Bhogal House, Uganda Road Post Office Box

2340, Eldoret.

2. The Defendant is an adult male of sound mind and his address for service for purpose of this suit is care of Cheptiret School (service through plaintiff's advocate's office).

3. The Plaintiff claims K/Sh.720 from the Defendant being in respect of damages for wrongful dismissal of the Plaintiff's Tractor which it was using (sic) for the plaintiff thereby making the Plaintiff suffer damages.

4. <u>The Plaintiff also suffered other special damages by way of traveling amounting to Sh.620/=.</u>

<u>PARTICULARS OF SPECIAL DAMAGES:</u>

(a) <u>For wrongful dismissal of the Plaintiffs tractor whereupon the plaintiff paid Sh.720/= to owner of tractor.</u>

(b) <u>For traveling during the period of the dispute Sh.620/=.</u>

5. Despite demand and notice of intention to sue the Defendant has refused and/or neglected to pay.

6. The cause of action arose at Cheptiret within the jurisdiction of this Honourable Court.

<u>REASONS WHEREOF</u> the Plaintiff prays for judgment against the Defendant for:

(a) Principal sum of Kshs.1340/=.

(b) Interest at court rates.

(c) Costs of this suit.

Dated at ELDORET this 7th day of July 1982".

That plaint and amended plaint elicited a short defence which we also reproduce here below:

"**<u>DEFENCE</u>**

1. The defendant admits paragraphy (sic) one and two of the plaint.

2. The defendant deny's (sic) any liability claimed by the plaintiff in paragraphy (sic) three of the plaint.

3. The defendant put plaintiff strict (sic) proof thereof.

4. Whereas the defendant plays (sic) for disposal of suit with costs.

Dated at Eldoret this 10.7.82 day (sic) of (sic) 1982".

We pose here and observe that the pleadings we have reproduced in full herein above do not involve in their reading any beneficial ownership of land; division of or determination of boundaries to land including land held in common; a claim to occupy or work land; trespass to land or any issue relating to the same from matters set out above, as was spelt out in **Section 9 (A)** of the Magistrates Jurisdiction (Amendment) Act, 1981 No. 14 of 1981 which was then in operation but which is now repealed.

At the close of the pleadings in that case before the subordinate court, the suit came up for hearing before the then Senior Resident Magistrate (Mr. Osiemo) on 22nd October 1982 and the following is what

took place on that day as the record shows:

"**22:10:1982**

CORAM: Mr. Osiemo SRM.

Plaintiff: Mr. Anassi – present

Defendant: In person – present

C/I: Apollo

COURT: The claim involves a dispute in land.

Case referred to the Elders".

The record shows that the Elders heard a matter based on "acreage" at Chepterit Farm sometimes in 1984 and a letter dated 20th July 1984 was addressed to the Senior Resident Magistrate enclosing the award. The decision of the Panel was as follows:

"**DECISION OF THE PANEL**

The panel's decision was that the four shareholders namely Chumo Songok, Kipkosgei Moita, Chabawa Ngetich and Kipsugei Yator or their survivors for some of these shareholders are not alive should hire a surveyor of their own who will survey their plots and in doing so, check whether their acreage is correct. This same surveyor should also verify whether the complainant's acreage is per contribution. The four shareholders, (the respondent (Songok) and the other three others) should meet the payments of the surveyor".

The record shows that the Elders award was before the court on 8th March 1985. The parties were present and all that was recorded on that day apart from the Coram was as follows:

"**COURT: The Elders awards dated 20:2:1984 (sic) is made the order of this Court".**

It would appear that this was done without prior notice to parties in compliance with the provisions of Part IIIA, provision 9D (4) of the Magistrates Jurisdiction Amendment Act 1981.

On 2nd September 1985, the respondent in this appeal who was the plaintiff in the subordinate court filed Chamber Summons dated 1st August 1985 in the subordinate court seeking three orders which were:

"**1. THAT the Elders award dated the 20/7/84 made as the order of the court be set aside.**

2. THAT this case be listed for hearing.

3. THAT costs of this application be provided for".

Paragraphs 2, 3, 4 and 5 of the affidavit sworn by the respondent in support of the application for setting aside the elders' award state:

"**2. That on 7-7-82 the aforesaid plaint was duly filed in court claiming relief in the sum of Ksh.1,340/=.**

3. That on 28.6.83 the suit was without any consent referred to a panel of elders under the Magistrates Jurisdiction Amendment Act.

4. That I am informed by my advocate (Mr. J. K. Choge hereinafter referred to as my advocate) which information I verily believe to be true that the reliefs claimed in the plaint did not in law fall under the aforesaid Magistrate's Jurisdiction Amendment Act.

5. That I had never quarreled with the defendant over acreage of our respective plots and the aforesaid award was without justification.

6. That on 8th March 1985 this Honourable Court adopted the Elders award aforesaid purporting it to be a final settlement of my dispute.

7. That I honestly believe that suit filed herein by me has never been heard, adjudicated upon, determined and finalized in accordance with law".

And while on that application, it may also be observed that the appellant did not oppose that application and in fact in another affidavit he swore on 23rd March 2001 in opposition to another application on the same matter he also stated that the suit was wrongly referred to the panel of elders since the dispute was not over and none of the prayers sought in the plaint concerned land.

Before that application to set aside the elders award was heard, the respondent appeared before Acting Resident Magistrate at Eldoret (C.M. Rinjeu) in person and applied for an eviction order against the appellant on the strength of the elders' award which had been adopted as the order of the court. It is not clear on the record why he applied for the eviction order whereas he was the same person who had applied to set aside the very orders he was relying on to seek eviction of the appellant. There is however, no written application on record and we cannot fathom the basis of his application. Further the date when he appeared in court and made the application was not a date fixed for any action in the file. It is also to be observed that the appellant was absent and there is no evidence that he was served to appear in court on that day. Notwithstanding all that, an eviction order was issued and ordered to be served on the administrators for their necessary action. We are ourselves at a loss as to what orders were being executed by way of that the eviction order as the elders award which was made the order of the court and which we have hereinabove reproduced did not give the respondent the land on which the appellant was or any other land for that matter. All it did was to order that a surveyor be hired by the four shareholders to carry out a survey of the land and determine the correctness of their acreages and ascertain whether each shareholder's acreage was consistent with the respective contribution. Be that as it may, the eviction order dated 22nd August 1986 was issued to the District Commissioner, Uasin Gishu District, to evict the appellant from some unspecified land situate at Cheptiret farm, Cheptiret location. On 19th October 2001, the application dated 1st August 1985 and filed on 2nd September 1985 came up for hearing before Chief Magistrate, Solomon Wamwayi. Both counsel for both parties appeared and the record reads as follows:

"**19.10.2001**

Coram: Solomon Wamwayi (C.M.)

Mr. Omwega and Mr. Obutu present.

ORDER: By consent application dated 01/08/1985 is allowed. The orders dated 8th March 1985 and 20th July 1984 and 13th August 1986 are set aside".

Thereafter the appellant through his advocate filed an application seeking to strike out the amended plaint. That application was filed on 24th October 2001. On 22nd November 2001, the respondent filed an application seeking a stay of execution of the consent orders dated 19th October 2001 and further seeking the review and setting aside of the same consent orders on the grounds that there was an error apparent on the face of the record and that it was in the interest of justice that the consent orders be set aside. Both applications were set down for hearing on 14th December 2001 but apparently only the application for review was heard. It cannot escape our observation that the application seeking review of

consent orders was filed by the same respondent in whose favour the consent orders had been issued as the consent was made pursuant to his application for setting aside the elders' award. After hearing the application for review, the learned Chief Magistrate, dismissed it stating as follows in his ruling delivered on 21st December 2001:

"**It is cute (sic perhaps "trite") law that a consent order is similar to a contract and can only be set aside if fraud or misrepresentation is proved. Mr. Obuttu's contention is that he acceded to the consent which he do not (sic) clearly understand.**

There is a replying affidavit on record. Mr. Omwenga has opposed the application to set aside the consent order. I am unable to belief (sic) that Mr. Obuttu recorded a consent order without knowing what he was doing.

The consent orders recorded is clear and unambiguous and I do find that this application has no merit and is dismissed with costs".

That is the decision that triggered the appeal that was before the superior court i.e. High Court *Civil Appeal No. 6 of 2002* which was filed by the respondent **David Kibiego Rotich** against the appellant **Chumo arap Songok**. As we have stated above, that appeal was partly allowed and partly dismissed. It is however important to note the findings of the learned Judge of the superior court in so partly dismissing the appeal. She said, *inter alia*, in her judgment as follows:

"**At a glance, I am inclined to agree with the appellant that his suit was really based on breach of contract but having appeared before the tribunal where decision was adopted by the court, his later pleas to have his suit for damages determined can only be entertained through the aforementioned route namely, Order LIII of the Civil Procedure Rules as be would be required to obtain the prerogative orders first to nullify the decision of the tribunal. I need not reiterate that though the subordinate court did actually misdirect itself when it referred the matter to the Tribunal, it was incumbent upon the parties to follow the right procedure, and to adhere to the law, with a view to ensuring that the prerogative orders were issued in their favour, and having failed in the mode of procedure, the appellant is bound to fail in his grounds 1, 2, 4 and 5.**

I do otherwise find that the appellant has made out his case in his grounds 3, 7, 8 and 10 which he succeeds in.

The upshot of it all being that the Elders award, which was so adopted by the court remains the record of the court".

The appellant felt aggrieved by this decision and has come before us on appeal premised on eight grounds. These were in brief that the learned Judge erred in law in failing to find that as the pleadings before the subordinate court did not fall under any of the provisions of **Section 9A** of the Magistrates Jurisdiction (Amendment) Act 1981 (Act No. 14 of 1981), the action of the learned Senior Resident Magistrate in referring the suit to the Tribunal was an act without any juridical basis and the same was a nullity; that the learned Judge having found that grounds 1, 2, 4 and 5 of the grounds of appeal that were before her could not be sustained, erred in law, fact and logic in disturbing the consent orders duly recorded before the learned Chief Magistrate without any valid ground in law in allowing the appeal by holding that "*the elders' award was adopted by the Court remains the record of the court"*; that having found that the suit was based on a breach of contract and that the reference to the panel of elders by the subordinate court was a misdirection, the learned Judge should not have then held the award as adopted by the court was valid and would remain in the record of the court while the proper holding should have been that the order of reference and the award arising from it were both a nullity and the consent setting aside the award was in the circumstances valid and lawful; that the holding that the court recording the award became *functus officio* after the award was recorded as the order of the court, was in law a misdirection; that the learned Judge erred in law in holding that the application that gave rise to a consent order was in law fatally defective; that the learned Judge erred in law in holding that the award could only be challenged by way of the Provisions of **Order LIII** of the Civil Procedure Rules and the Law Reform

Act: and lastly that the learned Judge erred in interfering with the consent reached by parties notwithstanding the long line of cases as to the circumstances when the same can be done.

Mr. Machio, the learned counsel for the appellant argued all these grounds together. Mr. Otieno, the learned counsel for the respondent opposed the appeal maintaining that the application to set aside the award was improperly before the court as it was brought under **Order 9A rule 10** of the Civil Procedure Rules which in this case was not the appropriate rule as such an application can only be made by a defendant in a suit or application and further that that application was filed long after the award had been adopted. He stated further that under **Section 4 (4)** of the Limitation of Actions Act, the award could not be interfered with as the consent order was entered sixteen years after the award had been adopted. Lastly he maintained that as the advocate who represented the respondent and entered consent order had no instructions to do so, the subordinate court should have reviewed the consent order on that score.

We have gone into detailed aspects of this appeal because, in our view, this case is an example of where the courts in their actions can subject parties to suits to extremely costly proceedings and long delays simply because of lack of appreciation of the duty bestowed upon them to ensure not only justice but substantive justice to the parties at all times. Here is a simple claim for a very small amount of money based on contract which should have been finalized by the court on 22nd October 1982, but because of an obvious legal blunder, the decision on the actual issues that were before the subordinate court on that day have not been made to date about twenty four (24) years later and sadly, may not be made within the next one year from the date of this judgment.

The plain reading of the pleadings that were filed in the subordinate court i.e. plaint, amended plaint and defence do not suggest by any stretch of imagination that the claim fell under **Section 9A** of the now repealed Magistrates Jurisdiction (Amendment) Act 1981 (Act No. 14 of 1981). The claim was for refund of Ksh.1,340/= being the amount due for wrongful “dismissal" of the “plaintiff’s tractor” whereupon the plaintiff paid Ksh.720/= to the owner of the tractor and Ksh.620/= being the amount incurred during the period of dispute. The defence was short and was a mere denial. It did not raise anything to suggest there was a land dispute involved in the matter. Yet when the suit came up for hearing, it was referred to the elders apparently on the Magistrate’s assumption that it involved a dispute over land. Although this was done in the presence of both parties, there is no indication that any party applied for the matter to be referred to the elders, neither is there any indication that any party told the court that the matter involved land. Indeed, the entire record shows that when the respondent later applied to set aside the elders award he said that he never asked for the matter to be referred to the elders as he had no land dispute with the appellant. The appellant confirmed the same in his affidavit elsewhere in the record before us. We have no hesitation in stating that that decision to refer the matter to the elders was wrong in law and was a serious misdirection. That reference of the suit to the elders was in our view, not valid. Our view is confirmed by the fact that when at last the elders heard the alleged reference, the dispute they heard and made their decision upon had no bearing on the claim before the court. The decision which was itself not conclusive even on the acreage of land that they dealt with had no relevance at all to the claim before the court for Ksh.1,340/= with interest and costs such that even after their decision was incorporated, again wrongly in the record, it did not determine the case that was filed before the court and that after the date of that judgment, notwithstanding the elders award, the original case still stands out.

The law is now settled, that parties to a suit are bound by the pleadings in the suit and the court has to pronounce judgment only on the issues arising from the pleadings unless a matter has been canvassed before it by parties to the suit and made an issue in the suit through the evidence adduced and submissions of parties. In this matter, no matters were canvassed before the court on 22nd October 1982 when the case came up for hearing so one is at a loss as to how the learned Magistrate came to a conclusion that the claim involved a dispute in land. The illegality did not end with the reference of this matter to the elders. When the elders’ award was filed and placed before the learned Magistrate on 8th March 1985, the parties were present before the court but the same was made an order of the court without any evidence that **Section 9D** of the Magistrates Jurisdiction (Amendment) Act 1981 (supra) had been complied with and particularly that **Section 9D (4)** which required that before entering judgment, parties should have thirty days notice of the award. Further, there is no evidence that the order made on 8th March 1985 making the

elders' award an order of the court was requested by either party as was the requirement of **Section 9E** of the Magistrates' Jurisdiction (Amendment) Act 1981 (Act No. 14 of 1981). In our view, if the learned Senior Resident Magistrate had perused **Section 9D** of the same Act, he would have found it necessary to decline to make the award an order of the court for clearly the award did not affect or touch on the issues that were before the court.

The parties to the suit realized the flaw that was apparent in the orders made by the court on 22nd October 1982 referring the suit to the elders and on the 8th March 1985 making the award the order of the court and sought to remedy the same error by consenting to set the award aside pursuant to an application made as stated above. That was done, but interestingly thereafter, the respondent, perhaps on seeing an opportunity to use the award to remove the appellant from the land a dispute over which was not before court, reneged on the same consent, although it was to his benefit as he is the one who had applied to have the award set aside. He applied for review and in our view, the learned Chief Magistrate was plainly right in rejecting the application. The law as stated by the learned Magistrate is trite that a consent order is similar to a contract and can only be set aside on the same legal principles that would apply in setting aside a contract. In the case of **FLORA WASIKE V DESTIMO WAMBOKO [1982 – 88) 1 KAR 625 at page 626**, Hancox, JA (as he then was) stated as follows:

"**It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out, see the decision of this court in J. M. Mwakio v Kenya Commercial Bank Limited Civil Appeal No. 28 of 1982 and 69 of 1983. In Purcell vs. F. C. Trigell Ltd (1970) 3 All ER 671, Winn LJ said at 676:**

`It seems to me that if a consent order is to be set aside, it can really only be set aside on grounds which could justify the setting aside of a contract entered into with knowledge of the material matters by legally competent person, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract`."

(See also the case of **BROOKE BOND LIEBIG (T) LTD v MALLYA [1975] EA 266)**. That application to set aside the consent order recorded on 19th October 2001 was made on grounds that the advocate for the respondent had no instructions to enter into consent and did not know what he was doing when he entered that consent as he did so under misapprehension of the matters. The learned Magistrate considered the same and rejected them. In the same case of **FLORA WASIKE VS. DESTIMO WAMBOKO** (supra), it was also held as follows:

"**An advocate would have ostensible authority to compromise a suit or consent to judgment, so far as the opponent is concerned".**

Mr. Otieno, the learned counsel for the respondent submitted that the application upon which a consent order was made was in itself defective as it was brought under a wrong order and therefore no consent order could be based on it. Our response to that is that a mere irregularity which causes no prejudice to the other party cannot be used to defeat justice. In this case, that irregularity was in the application filed by the respondent himself and notwithstanding it, the appellant conceded to a consent judgment being entered on the application. With respect, we see no merit in that argument. The second point he raised on the consent entered by both parties was that it was barred by the provisions of **Section 4 (4)** of the Limitation of Actions Act. That provision bars actions being brought upon a judgment after the end of twelve years from the date on which the judgment was delivered or from the date of default in making payment or delivery of any property where judgment or subsequent order directs any payment of money or delivery of any property to be made to a certain date or at recurring periods. Again, with respect, in our view, that provision is not applicable in this matter as the application to set aside the award as made the order of the court was itself made within the twelve years provided under **Section 4 (4)** of the Limitation of Actions Act and that application having been made in time, a consent that was based on it could not be said to have been time –barred as there is no law directing that once an application to set aside a decision is made, it must be heard within a particular period. Our view of the matter is that the parties were plainly right in setting aside a non valid decision of the elders as the learned Magistrate erred

in law, as we have stated, in purportedly referring the suit to the elders and in failing to follow any laid down legal procedures in making the same elders' award an order of the court. It should be noted that in any event, the elders' award was not made a judgment of the court. It was made an order of the court. That is important as no decree could issue from the same. Further, as we have stated, the elders' award did not amount to a conclusive judgment even on the alleged acreage which was decided by the elders, for all the elders did was to direct that a surveyor be hired to verify the acreage of the shareholders, some of whom were not parties to the suit before the court.

The learned Judge of the superior court was alive to all the above and in her judgment part of which we have reproduced above, she made specific findings that the suit before the subordinate court was "*based on breach of contract"* and that the subordinate court "*did actually misdirect itself when it referred the matter to the Tribunal"*, but she felt that as the parties had not invoked the correct procedure in setting aside the elders' award, the same award had to remain on the record. It is not certain whether the award would remain in the record as the judgment of the court in a contract claim for specific amount of money that was the subject of the suit or to remain in record notwithstanding that the suit originally before the court could still proceed to its logical conclusion. Whatever the learned Judge meant, once she had found that the original order referring the suit to the elders was wrong and was a misdirection, then she was bound not to ignore that misdirection. She had to ensure that the record was put right. She was not powerless in the face of an illegality in law leading to an invalid order being made by the subordinate court. Hers was a court of justice and had to do substantive justice and set the record right by reversing a wrong order that existed on the record and resulted not only into delay but to other subsequent invalid decisions such as the invalidly making the elders' award an order of the court. The court's inherent jurisdiction could, in our view, have been used in a case of this nature to put right what was, in our mind, a clear injustice. Hancox, JA (as he then was) stated in the case of **WANGUHU VS. KANIA [1987] KLR 51** at page 59 as follows:

"**I do not, however, agree that this was a case where the courts' inherent jurisdiction under Section 3A of the Civil Procedure Act could be invoked. It is residual jurisdiction which should only be used in special circumstances (see Symbol Park-Lane v Steggler Polner (1985) Law Gazette 13th March) in order to put right that which would otherwise be clear injustice".**

That sentiment was echoed in the case of **KIBUTHA VS. KIBUTHA (1984) KLR 243** where this Court held as follows:

"**2. The inherent powers of the court under the Civil Procedure Act (Cap 71) Section 3A cannot be invoked so as to override other rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of such other rules, which was not the case here".**

The learned Judge did not take advantage of the inherent powers of the court to ensure justice to the parties, and it falls on us to do that.

From what we have stated, it must by now be clear that this appeal must be allowed. It is allowed.

The decision of the superior court dated and delivered at Eldoret on 12th May 2004 is set aside. The ruling of the Chief Magistrate delivered on 21st February 2001 is restored. The *Civil Case No. 373 of 1982* before the Chief Magistrate Court at Eldoret be set down for hearing on a priority basis. In view of what we have stated above, we order each party to bear his own costs.

Judgment accordingly.

Dated and delivered at Eldoret this 13th day of October, 2006.

R. S. C. OMOLO

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

……

JUDGE OF APPEAL

W. S. DEVERELL

……

JUDGE OF APPEAL

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

DEPUTY REGISTRAR