



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
CORAM: OMOLO, J.A. ONYANGO OTIENO & RINGERA, AG. J.J.A.
CIVIL APPEAL NO. 197 OF 1999

BETWEEN

JOSEPH MWANGI MACHARIA APPELLANT

AND

1. ANDRIANO MUGO WANJOHI

2. AGATHA WANGECHI GACHIBO RESPONDENTS

(Appeal from the ruling and order s of the High Court of Kenya at
Nyeri (Juma, J) dated 23 rd October, 1998

in

H.C.MISC. APPL. NO. 26 OF 1997)

JUDGMENT OF THE COURT

The brief history of this case shows that prior to 2nd April, 1964, a piece of land registered as *CHINGA/GIKIGIE/185* was owned by **MIATU KARIMI**, the father of the Second Respondent **AGATHA WANGECHI GACIBO**. The said Miatu Karimi died on 2nd April, 1964. In the year 1991, the first Respondent, **ANDRIANO MUGO WANJOHI**, a nephew of the deceased Miatu Karimi, applied for grant of letters of administration intestate and the same was issued by the Principal Magistrate's Court at Nyeri in Succession Cause No. 201 of 1991. On 25th March 1992, the same grant was confirmed and certificate of confirmation of a grant was issued on 9th April, 1992. On 24th February 1997, the Appellant **JOSEPH MWANGI MACHARIA** together with the second respondent took out Summons for revocation or Annulment of Grant under rule 44(1) of the Probate and Administration Rules and section 76 of the Law of Succession Act Chapter 160 Laws of Kenya. This was filed in the High Court at Nyeri as *Misc. Civil Application No. 269 of 1997*. They claimed as their grounds for taking the same summons that the proceedings to obtain the grant were defective in substance and that the grant was obtained fraudulently by the making of a false statement and also by means of untrue allegation of a fact essential on a point of law to justify the grant. That application came up for hearing before Osiemo J on 12th June, 1997 and in the presence of all parties the following consent order was entered:

“ORDER

By consent the dispute is referred to arbitration by D.O. Othaya Division to be assisted by the 4 elders 2 to be nominated by either party. The issue to determine is who among the parties JOSEPH MWANGI MACHARIA & AGATHA WANGECHI GACIBO and ANDRIANO MUGO WANJOHI is entitled to the estate of the deceased MIATU KARIMI.

The award to be filed within 90 days. Mention on 24.9.1997”.

On 24.9.1997, the award had not been filed. Parties appeared before Osiero, J, and the time was extended by 30 days. The matter was fixed for mention on 24.10.1997 with further order that a reminder be issued. There was also a remark made by the learned Judge of the superior court and that was that:-

“Parties were heard in August”,

Thereafter, the matter was mentioned several times till 8th July, 1998 when Mwera J. is recorded as having asked the parties what they wanted on that day and all parties replied as follows:-

“We want the award filed there on 17.2.1998 read”.

and the award filed on 17th July 1998 was read to parties. The court granted 30 days to each party for objection. By a notice of motion dated 4th August, 1998, the appellant applied to the superior court seeking orders that the award filed and read out on 8th July, 1998 be set aside and the matter be heard in court on merit. That application came up before Juma J, on 1st October, 1998 who after full hearing, dismissed the application stating in conclusion as follows:-

“This applicant has failed to satisfy me that he is entitled to the order sought. His application dated 4th August, 1998 to set aside the award is hereby dismissed with costs”.

The appellant was aggrieved by the same ruling and has now come to this Court on appeal against the same ruling of the superior court. He filed an amended memorandum of appeal. The grounds of the same appeal were as follows:-

“1. The learned Judge erred in law and fact in not finding that the award was a nullity as the appellant was no (sic) heard by the arbitrators which is contrary to the rules of natural justice while there is nothing on record to show that he chose not to be heard. A miscarriage of justice was thereby occasioned.

2. The learned Judge erred in law and fact in confining the grounds to set aside to a narrow interpretation of Order XLV, Rule 15(1) and rejecting the ground that the award is erroneous on a point of law which is a ground that goes to the root of the award. A miscarriage of justice was thereby occasioned.

3. The learned Judge erred in law and fact in finding that the time for filing the award was extended and that the provision of order XVV (sic) rule 8 was complied with by the mere taking of a mention date and the award was not nullity. A miscarriage of justice was thereby occasioned.

4. The learned Judge erred in law and fact in not finding and holding that the award filed was ipso facto a nullity as the grant sought to be revoked by the summons for revocation of grant and (sic) not been revoked first before referring the matter to arbitration and as such there are two conflicting decisions on record. A miscarriage of justice was thereby occasioned.

5. The learned Judge erred in law and fact in not finding and holding that the award and the entire proceedings were a nullity from the referral order as the Court was enjoined by statute to determine the summons for revocation of grant but abdicated the same by referring the matter to arbitration. A miscarriage was thereby occasioned”.

At the hearing of this appeal, Mr. Wahome Gikonyo the learned counsel for the appellant, addressed us at length confining his submissions to grounds 4 and 5 of the appeal. After the respondents who were both in person had addressed us, in reply, Mr. Wahome Gikonyo addressed us on grounds 1 and 2 as well. The thrust of his argument was that as the subordinate court had already confirmed the grant to the first respondent and that was on record, the application for revocation of the grant should have been dealt with

by the court and should not have been referred to the arbitration as that resulted in the distribution being revisited while the confirmation of grant was still alive and the award on record which dealt with distribution was therefore a nullity as it resulted in two conflicting decisions being on record at the same time. Further, it was also his argument that the arbitration award was a nullity on grounds that it was filed outside the time given by the court, which time was extended only once. He relied on the case of **Bagwasi Nyangao vs. Omosa Nyakwara CA Application No.33 of 1984** (Appeal from the High Court at Kisii), which was followed in the case of **Macharia Munua vs. Jerusha Wanjiku CA Appeal No. 8 of 1984** (NBI). Lastly, Mr. Wahome Gikonyo, in reply to the respondents also urged us to accept that the appellant was not heard by the arbitrator and although he did not say so in so many words, he was on that point urging us to find that the arbitrators misconducted themselves and urged us to allow the appeal on that score. The first respondent in his address to us said that all parties were given a chance to be heard and their witnesses were heard by the arbitrator and elders assisting him. Appellant was present at the hearing and his witnesses gave evidence. The 2nd respondent said the appellant was given a chance to be heard and his witnesses were heard. His elders were also there and took part in the arbitration.

We have perused and analysed the record in respect of this appeal as we are enjoined to do as the first appellate court. On whether the award is a nullity by dint of the existence of the confirmation of the grant on record, we think the starting point is the provisions of Order 45 rules 1, 2 and 3 of the Civil Procedure Rules. These rules state as follows:-

“1. Where in any suit all parties interested who are not under disability agree that any matter in difference between them in such suit shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the court for an order of reference.

2. The arbitrator shall be appointed in such manner as may be agreed upon between the parties.

3. (1) The court shall, by order, refer to the arbitration the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the making of the award, and shall specify such time in the order.

(2) Where a matter is referred to arbitration, the court shall not, save in the manner and to the extent provided in this order, deal with such matter in the suit.”

In this case, it is clear from the record that on 12.6.97 all parties appeared, before Osiemo J. and an order (extract of which has been reproduced above) was entered referring the dispute to the arbitrator and that the same District Officer would be assisted by four elders, two to be nominated by either party. The issue that the parties wanted determined was who among the parties, **Joseph Mwangi Macharia & Agatha Wangechi Gachibo** on the one hand and **Andriano Mugo Wanjohi** on the other hand was entitled to the estate of the deceased **MIATU KARIMI** and arising from that issue, whether the letters of administration which had earlier been made to the first respondent should or should not be revoked. It was also agreed by all parties that the award would be filed within 90 days. Thus the requirements of Order 45 rules 1 and 2 were satisfied and the reference was by consent of all parties including, Andriano Mugo Wanjohi in whose favour the grant sought to be revoked had been made. In our view, there was no need at that time to first revoke the grant and then refer the question of distribution to the arbitration as the application that was before the court was for revocation of the grant and that would in the end lead to fresh distribution. If the parties identified the matter in difference between them that necessitated the application for revocation to be who was entitled to the estate of the deceased Miatu Karimi and decided by consent to refer the same to arbitration, we cannot fault the superior court for accepting to refer the same to arbitration as was done here. The award itself did not become the judgment of the court. It would not be a judgment of the court until Order 45 rule 17 of the Civil Procedure Rules is satisfied. In our view, it would not be correct to state that the mere existence of an award on the record would be a nullity on account of the existence of the earlier grant on the record; nor would there be two conflicting decisions on the record. The award is not in itself a judgment of the Court. It only becomes a judgment after the Court enters a judgment upon it and in this case that stage had not yet been reached. When it is reached, and if the court decides, then the Court will enter judgment upon the award and that judgment will not in itself revoke the grant confirmed by the subordinate court as it will only deal with the distribution which is only

a schedule of that grant so that at no time will there exist two conflicting decisions on the record. We therefore see no merit in this ground of appeal which in any case was not canvassed before the superior court.

The next main ground of appeal canvassed by the learned counsel for the appellant was that the award was a nullity on ground that it was filed out of time. This point was taken in the superior court and Juma, J. decided it as follows: -

“I have carefully perused the records. The parties have been unrepresented till recently. The record shows that on the 12 th June, 1997 the parties agreed to refer the matter to arbitration for determination as to who among the three was entitled to the estate of the deceased MIATU KARIMI. The award was to be filed within 90 days. On the 24 th September, 1997 the matter came up for mention and the order for filing the award was extended for 30 days to 24 th October, 1997.

On the 24 th October, 1997 the parties attended the registry and by consent agreed that the matter be mentioned on the 3 rd December, 1997. They attended in September, 1997 and by consent stood over for mention in February, 1998. They continued extending the dates by consent till the award was read. They signed the court record to indicate their willingness to extend the time for filing the award. The provision of order 45 rule 8 was therefore complied with.”

We have, on our own, perused the record and we are in full agreement with the sentiments of the learned Judge of the superior court. We also agree with the conclusion he reached on this point. We need to add here that as we had observed above, the record shows that on 24th September, 1997 when the matter came up for mention before Osiemo, J the learned Judge in extending the time by 30 days by consent of the parties also stated that the parties were heard in August. That means that arbitration proceedings started before the 90 days originally granted had expired and within that period of 90 days parties were heard. We do accept the law as clearly stated in the case of Bagwasi Nyangao vs. Omwa Nyakwara Court of Appeal Civil Appeal No. 33 of 1984 that failure to file the award within the stated period in the absence of an agreement or order to extend it, renders the award a nullity. However, two aspects distinguish that case from this case. These are first that in this case, as the learned judge of the superior court rightly pointed out, there was a first extension of 30 days ordered by the Court and that was subsequently followed by extension by parties which visited the registry on various dates and extended the dates for mention for filing the award. We do not think the parties needed to write consent letter every time and file it with the court as evidence of their intention. They visited the registry all of them and did by consent extend the time for filing the award. As the learned Judge said, they signed the record to indicate their willingness to extend the time for filing the award. Further, on 8th July, 1998 all parties appeared before Mwera J, and on being asked what they wanted on that day’s mention, they all replied that they wanted the award filed on 17th February, 1998 to be read. This was significant as it shows that in any event, none of the parties objected to the award being filed later on the date it was read and thus confirmed that the extensions were by consent of all parties. The award was filed on 17th February, 1998 so that in fact the further extensions after 30 days given on 24.9.97, was only to cover the period between 24th October, 1997 upto 16th February, 1998. The second aspect that distinguishes Bagwasi case (supra) from this case is that in the Bagwasi case, the arbitrator did not embark on the arbitration proceedings until well after the period within which he was to file the award had expired. The arbitrator was requested to file his award within 90 days from 9th June 1981, but he never embarked on the arbitration proceedings until 28th March, 1982 without any extension having been obtained. It will be readily seen that, by the time the arbitrator in Bagwasi’s case started his arbitration proceedings, he no longer had any powers to do so as the time given had lapsed before he started the proceedings and the same time had not been extended. In the case before us, the time given was 90 days from 12th June, 1997 and by August of the same year the record shows the arbitrator had started the proceedings so that the main problem was the date for filing the award.

We have considered this ground carefully, and we are not satisfied that anything turns on it.

The last ground that was argued by Mr. Wahome Gikonyo was that the appellant was not given an opportunity to be heard. The record shows that the appellant was together with the second respondent and they were before the arbitrator on all occasions when the matter was heard. The record also shows that their witnesses gave evidence. He apparently did not prefer to give evidence. That being the case, he has only himself to blame. We find no merit in that ground of appeal.

Second and third grounds in the memorandum of appeal were not argued, but as Mr. Wahome Gikonyo rightly pointed out, the submissions he made covered them. We feel that what we have stated above has taken care of the same grounds as well.

In conclusion, this appeal must fail. It is dismissed. The respondents will have the costs of the appeal.

Dated and delivered at Nairobi this 21 st day of May, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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AG. JUDGE OF APPEAL

A.G. RINGERA

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AG. JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR