



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: OMOLO, TUNOI & GITHINJI, J.J.A)
CIVIL APPEAL NO. 216 OF 2000

BETWEEN

- 1. JAMES NGUNU GIKARIA**
- 2. DOUGLAS GACHU MURAGE**
APPELLANTS

AND

- 1. EPHRAIM MAINA MURIUKI**
- 2. KARIRA NDEREMANO KIBUCHI**
RESPONDENTS

**Appeal from the ruling and order of the High Court of Kenya at
Nyeri (Juma, J) dated 17th**

February, 1999

in

H.C. C.C No. 192 “B” of 1992)

JUDGMENT OF THE COURT

This is an appeal against the ruling of the High Court of Kenya at Nyeri (Juma, J) delivered on 17th February, 1999, by which decision the learned Judge refused to review a judgment entered in terms of an award by the District Surveyor, Kirinyaga.

The facts of the case giving rise to this appeal can be stated in stark simplicity. By a plaint dated 22nd June, 1992, the appellants, the plaintiffs in the superior court, averred that they are the registered proprietors of land parcel No. Mwerua/Kagio/630/241 at Kagio Market, the suit land, and that in or about 1991, the respondents, the defendants in the superior court, without any reasonable cause or claim of right trespassed onto the suit land and constructed buildings on it. It is further averred that the respondents had

prevented the appellants from making use of the suit land and had in consequence occasioned them great loss and damage. The appellants then sought general damages and an order for removal of the respondents from the suit land. The defendants in their defence contended that they were not trespassers but were developing their own land allocated to them by Kirinyaga County Council.

On 15th February, 1993, the suit was by consent referred to arbitration. The order remitting the suit to arbitration read as follows:- “Order:

By consent all matters in dispute are hereby referred to arbitration under the Chairmanship of the District Surveyor, Kirinyaga. The Surveyor’s report to be filed within 90 days hereof. Mention on 17.5.1993”.

By 20th September, 1993, no award had been filed and by consent, time for filing it was extended to 20th December, 1993. This date, too, passed without the award having been filed and once again time for filing it was extended by another 60 days. It is apparent from the record that the award was read to the parties on 10th March, 1994 and on 11th April, 1994, the appellants applied to set it aside. Surprisingly, the appellants thereafter did virtually nothing and did not set down their application for hearing until 19th February, 1997. However, on this date, neither the appellants nor their advocates attended court and their application was dismissed. Judgment was accordingly entered on 11th June, 1997 in terms of the award under **Order 45 Rule 17(1)** of the Civil Procedure Rules.

On 23rd June, 1997, the appellants sought an order for review of the orders made on 19th February, 1997 and on 11th June, 1997, on the ground that they and their advocates had genuine reasons for failure to attend court and that they had done all that a prudent man could have done in the circumstances. In a reserved ruling, the learned Judge held that the appellants’ advocates had been unreasonably dilatory. He was of the view that a prudent advocate would have known in advance what cases he had on a given date and would have contacted the advocates on the other side well in advance if he had other engagements. Moreover, a prudent advocate would not take two years to set down such an application for hearing, the learned Judge observed. He thought that the application for review lacked merit and dismissed it with costs.

Mr. Karago for the appellants has submitted in the main that the learned Judge ought to have found that there were grounds to review the order of 19th February, 1997, as there was an error on the face of the record since the purported award which was filed way out of time is a nullity and cannot be adopted as judgment of the court. With respect, this argument is misplaced. It is manifestly clear from the record that the parties had consented to the time for filing the award being extended and the award so read to them was filed within the time limited by the parties themselves. **Order XLV Rule 8(1)** permits the parties to extend the time for the making of the award, whether or not at the date of the agreement time has expired, and whether or not an award has been made since the expiry of the time allowed. In our view, the award was perfectly valid and there is no reason to interfere with it. This ground of appeal must, therefore, fail.

Mr. Karago has further argued that the arbitration itself was an error on the face of the court record for being irregular, premature and hence a nullity as the mandatory provisions of **Order LI** pertaining to Summons for Directions had not been complied with. Upon the appellants’ application to set aside the arbitration award being dismissed and judgment in terms of the award being entered, a decree followed. Under **Order XLV Rule 17(2)** –

“.....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.”

However, it is important to note that this appeal is not on the grounds that the decree is in excess of, and not in accordance with the award. On our part, we have been unable to find any error or irregularity on the award nor have we been able to find any breach of procedure. This ground of appeal, too, fails.

The appellants were unable to show any errors on the face of the record or any other reason

whatsoever so as to entitle the learned Judge to grant them an order for review. In our view, their application for review was correctly dismissed and we find no fault on the part of the learned Judge.

In the circumstances, this appeal must fail and we order it dismissed with costs.

Dated and delivered at Nyeri this 14th day of May, 2004.

R.S.C. OMOLO

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JUDGE OF APPEAL

P.K. TUNOI

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JUDGE OF APPEAL

E. M. GITHINJI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR