



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: OMOLO, WAKI, J.J.A & DEVERELL, AG. J.A)
CIVIL APPEAL NO. 271 OF 1999
BETWEEN

IBRAHIM MAINA KARUKU

REPRESENTED BY KARIUKI MAINA APPELLANT

AND

1. CLEMENT GACHAU MURIUKI)

2. JAMES MUGO GACHERU) RESPONDENTS

(Appeal from the Judgment of the High Court of Kenya at Nyeri

(Tunoi, J.) dated 16th July, 1992

in

H.C.C.C No. 343 of 1982)

JUDGMENT OF THE COURT:

The suit, the subject matter of the appeal before us, started way back in 1982, when Clement Gachau s/o Muriuki, the first respondent herein, filed a plaint in the High Court at Nyeri. By that plaint, the first respondent had sought an order from the court against Ibrahim Maina s/o Karuku to the effect that:-

“(a) THE DEFENDANT TO BE ORDERED BY THE HONOURABLE COURT TO TRANSFER TO ME 8.83 ACRES FROM LAND PARCEL NO. KIRIMUKUYU/NGANDU/112 WHICH MEASURES 10.5 ACRES.”

Ibrahim Maina s/o Karuku died during the tortuous litigation and was substituted by his son John Karuku Maina, who is now the appellant before us. When served with the plaint, the late Ibrahim entered an appearance and followed it with a defence in which he denied the averments made in the plaint by the first respondent and went on to plead in paragraph 5 of the said defence that –

“The Defendant further avers that the plaintiff’s case is time barred and should be struck out.”

The matter eventually came before the late Patel, J. on 8th April, 1983 when an order was made as follows:-

“ORDER

By consent the dispute be arbitrated by District Officer, Karatina with the help of four elders – two from each side.”

That order was duly complied with and by their award dated 16th August, 1983, the District Officer and his panel of elders found as follows:-

“The plaintiff was a young man at the time of land consolidation and even during the transfer of the land from Karuku to the present proprietor. An element of fraud cannot be ruled out. The defendant at one stage agreed to give to the plaintiff his share if only it could be established. He now tells the plaintiff to ask Karuku for his land because what he has now is his own inheritance which he cannot part with.

The elders decided to abide by the clan’s decision which is very justified. The plaintiff deserves between 2 and three acres of the 10.5 acres now owned by Ibrahim Maina. The elders unanimously decided that the plaintiff get 3 Acres out of land parcel No. Kirimukuyu/Ngandu/112.”

We note that the award was signed by the District Officer and all the four elders who sat with him, which means that even the two elders chosen by the appellant’s late father agreed that the first respondent was entitled to three acres out of the disputed land. There is the reference in the award to abiding by the clan’s decision. It appears that before the matter was brought to court, the clan of the parties had arbitrated over the matter and awarded to the first respondent three acres. The late Ibrahim had apparently refused to comply with the decision of the clan and it was then that the first respondent instituted his suit in the High Court.

The appellant was, naturally, aggrieved by the award of the elders. So on 23rd March, 1992, after numerous other applications, one of which ended up in this Court, the appellant filed a notice of motion under **Order 45 rule** of the Civil Procedure Rules and the order sought in that motion was –

“THAT this Honourable Court may be pleased to set aside the arbitrators’ award dated 16.8.83.”

No grounds for setting aside the award were stated but the motion was supported by an affidavit containing some fourteen paragraphs. That affidavit was sworn by John Karuku Maina, the appellant, and in paragraphs 5, 6, 7, 8, 9, 10, 11 and 12 of the affidavit the appellant deponed as follows:-

“5. THAT the plaintiff lied to the arbitrators that the Defendant was his brother whereas the plaintiff’s father is MURIUKI GATHIGUA and the Defendant’s father is KARUKU MUHORO as per the family tree attached and marked “JMK 1”.

6. THAT the plaintiff has his own land NO. KIRIMUKUYU/ NGANDU/112 (annexed herewith is a certified copy of the register marked “JMK 2”).

7. THAT the plaintiff testified before the arbitrators on page 2 of the award that when he went to check in the Lands Office about “their” land No. 112 he was shocked to learn that there was another piece of land No. 111 in his name.

8. THAT by 1968 the plaintiff was working in Kirinyaga as he testified yet he never asked for his share of land from my grandfather who was still living by then.

9. THAT in his plaint the plaintiff never disclosed that he was the registered owner of Land Parcel No. KIRIMUKUYU/NGANDU/ 111.

10. THAT the arbitrator misconducted himself by failing to come to the conclusion as the plaintiff had now come to realize that he had his own piece of land he could not claim any land from the defendant.

11. THAT even at the time the plaintiff filed this suit in 1982, he knew that he had his own piece of land because as per the annexed copy of the register marked “JMK 2” he changed his name from NGATIA s/o MURIUKI to CLEMENT GACHUA MURIUKI.

12. THAT the arbitrator was biased against my father in view of the above and that is why he filed an award which was oppressive.”

As we have stated, the appellant’s motion to set aside the award was brought under the provisions of **Order 45 rule 15** of the Civil Procedure Rules and under those provisions, the court can set aside an award of an arbitrator only on two specified grounds, namely:

(a) corruption, or misconduct of the arbitrator or umpire and

(b) that either party has fraudulently concealed any matter which he ought to have disclosed, or has wilfully misled or deceived, the arbitrator or umpire.

It appears from the affidavit of the appellant, the relevant parts of which we have fully set out hereinabove, that the appellant was alleging that the arbitrator had misconducted himself and that the first respondent himself had fraudulently withheld from the arbitrators the fact that the first respondent had his own land known as parcel No. KIRIMUKUYU/NGANDU/111. As regards the misconduct of the arbitrators, the allegation appears to have been that because the first respondent had another piece of land registered in his name, the panel of arbitrators ought to have held that he was not entitled to the portion of land he claimed from the first respondent. The panel’s failure to so find, argued the appellant, amounted to a misconduct. Tunoi, J, (as he then was) who heard the motion did not think so. We also do not think so. The panel of arbitrators was perfectly aware that the first respondent had another piece of land registered in his name. In spite of that knowledge, they still came to the conclusion that the first respondent was nevertheless entitled to the portion he claimed from the appellant’s father. We do not see how that finding could ever amount to a misconduct. It cannot be reasonably argued that because a party has one piece of land elsewhere, he cannot, ipso facto, be entitled to another piece of land.

As regards the issue of fraudulent concealment, it is true the first respondent did not disclose in his plaint that he had another piece of land, but when the first respondent gave evidence before the panel, he disclosed that he had discovered that he was registered as the owner of KIRIMUKUYU/NGANDU/111. So the question of failure to disclose did not arise. The panel of elders stated that they would abide by the decision of the clan which they considered reasonable. It is very unlikely that even the clan would have been unaware that the first respondent had another piece of land. Yet both the clan and the panel of arbitrators, aware as they must have been that the first respondent had another piece of land, still found for the first respondent that he was entitled to the portion he claimed from the father of the appellant. Like the learned trial Judge, we can find no evidence of fraudulent concealment by the first respondent, which would warrant our interfering with the learned Judge’s decision.

In arguing the appeal before us, Mr. Mahan, learned counsel for the appellant, raised two issues. First, he contended that the order made on 8th April, 1983, and which referred the matter to arbitration was null and void *ab initio*. Mr. Mahan appeared to contend that because the issue of limitation was raised in the plaint, the panel of elders would not be able to deal with it and, therefore, they had no jurisdiction to determine the matter. For that proposition, Mr. Mahan relied on the case of **NELSON GITHINJI & ANOTHER VS. MUNENE IRANGI – Civil Appeal No. 133 of 1987 (unreported)**. In that case, the Court was dealing with the issue of consent of the land control board under **section 6(1) (a)** of the Land Control Act, **Cap 302** Laws of Kenya. The provisions of that section are absolutely mandatory, i.e. where there is no consent of a land control board, a transaction requiring such consent is absolutely void for all purposes. We do not think the question of limitation under the **Limitation of Actions Act Cap 22**, can be elevated to match the provisions of the Land Control Act. A party entitled to rely on limitation is entitled to waive it and that is why that issue has to be specifically pleaded.

True, the appellant’s late father pleaded limitation, but thereafter he consented to the matter going to arbitration and even in his application to set aside the award, he did not at all raise the issue of limitation.

The learned trial Judge did not deal with the matter it having not been raised before him. To raise that issue some twenty years later is, in our view, unwarranted and we have no hesitation in rejecting it.

Mr. Mahan next raised the issue that the award was really not the decision of the panel of elders as they said that they would abide by the decision of the clan. The panel did say so but they also added that the clan's decision **"is very justified."** Their final sentence was that:

"The elders unanimously decided that the plaintiff get 3 Acres out of land parcel No. Kirimukuyu/ Ngandu/112."

It was not unreasonable for the panel to say that they found the decision of the clan very justified. They then made their own decision agreeing with that of "the clan". We can find nothing in this, which would remotely amount to a misconduct on the part of the panel. Once again, that issue was never raised before the trial Judge and Mr. Mahan was raising it for the first time in this appeal. It cannot succeed.

We have said enough, we think, to show that this appeal is for dismissal. We accordingly order that the appeal be and is hereby dismissed with costs thereof to the second respondent. The first respondent, though served with the hearing notice, did not attend the hearing and is not entitled to any costs. Those shall be our orders in the appeal.

Dated and delivered at Nyeri this 29th day of October, 2004.

R.S.C OMOLO

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

W.S. DEVERELL

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AG. JUDGE OF APPEAL

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

DEPUTY REGISTRAR