REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: KWACH, OMOLO & BOSIRE, JJ.A)
CIVIL APPEAL NO. 159 OF 2000
BETWEEN
DANIEL MACHARIA KARAGACHA ..... APPELLANT
AND
MONICAH WATITHI MWANGI ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Kenya at Nyeri (Mr. Justice Osiemo) dated 13th November, 1996
in H.C.C.C NO. 94 OF 1992)

JUDGMENT OF THE COURT

This appeal arises in the following manner. On 22nd April, 1992, Monicah Watithi Mwangi, the respondent herein, sued Macharia Karagacha, the appellant herein, over land known as Location 2/Gacharage/330 which the respondent claimed had belonged to her late husband Mwangi Kieru but which she contended had been registered in the appellant's name as trustee for the late Mwangi Kieru. The appellant filed a defence denying those allegations but the suit never went to hearing before the superior court because on 9th February, 1993, the parties agreed before Mr. Justice Tunoi (as he then was) that: "By consent all matters in dispute are hereby referred to arbitration under the chairmanship of the D.C Murang'a or his nominee who will be assisted by four elders. Two to be appointed by each party to make four. Award to be filed within 150 days hereof. Mention on 12.7.93." The award was duly filed and read out to the parties. The appellant then moved the court under the relevant provisions for the setting aside of that award. The application to set it aside was heard by Angawa, J. and by her ruling dated the 9th November, 1993, she rejected the appellant's application to set aside the award. She then, correctly, gave the parties time to take whatever steps they thought were in their interest. The appellant, for one reason or the other, was unable to appeal from the decision of Angawa, J. The appellant was entitled to appeal from that decision as of right. On 27th October, 1994, Angawa, J. entered judgment in terms of the award and a decree followed that judgment. By Order 45 rule 17(2) of the Civil Procedure Rules, the appellant thereupon lost any right of appeal save on the ground that the decree is in excess of, or not in accordance with, the award. No such appeal was filed either. But undeterred by that provision, the appellant on 3rd July, 1996, nearly two years later, filed a notice of motion under Order 44 rule 1, section 7 of the Limitation of Actions Act, and Order 6 rule 13 Civil Procedure Rules, praying for orders that:"

1. this Honourable court may be pleased to review the judgment entered in this case.

2. the Honourable court may be pleased to declare the Respondent's claim to be staturory (sic) time barred;

3. the Honourable court may be pleased to declare the Respondent's claim to be defective in law for lack of grant of letters of administration;

4. ... the Honourable court may be pleased to strike out the Respondent/plaintiff suit;

5. the costs of this application and of the main suit be awarded to the applicant."

This motion was heard by Mr. Justice Osiemo and on 13th November, 1996 the learned Judge dismissed it with costs. It is against that order that this appeal is brought.

With respect to the appellant and his legal advisers, they were not entitled to any of the prayers which we have set out herein. As regards the prayer for review, there was no basis upon which it could have been done. There was no error of law apparent on the face of the record and none of the grounds set out in

prayers (2) and (3) were available to the appellant because they could not be treated as amounting to the discovery of new and important matter of evidence which the appellant could not by exercise of due diligence have placed in his pleadings, or before Angawa, J. when she heard the application to set aside the award. In any case the parties had, by consent, referred all the matters in dispute to arbitration and they had thus constituted the arbitrators the judges of law and facts. The court hearing the matter would, we suspect, have been very reluctant to interfere with the award on that basis.

As for prayer (4) the suit had finally been determined and there was in existence a decree of the court. There was accordingly no suit which could have been struck out with costs to the appellant. Osiemo, J. was clearly justified in dismissing the motion with costs and we can find no plausible excuse for interfering with him. We think the motion before the learned Judge was in fact an abuse of the process of the court. We order that this appeal be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nyeri this 18th day of May, 2001.

R.O KWACH
JUDGE OF APPEAL

R.S.C OMOLO
JUDGE OF APPEAL

S.E.O BOSIRE
JUDGE OF APPEAL