IN THE COURT OF APPEAL

AT KISII

(CORAM: MARAGA, GATEMBU, MURGOR JJ, A)

CIVIL APPEAL NO. 40 OF 2014

BETWEEN

SHEM SEGA MUSALA……APPELLANT

AND

WILFRED SAFAN MUNYONGE ……1ST RESPONDENT

ERIMA MWANIGA MUSALA ……2ND RESPONDENT

HENRY N. MUSALA ……3RD RESPONDENT

(Appeal from the Ruling of the High Court of Kenya at Kisii (Okong'o, J) read and delivered on 29th May 2014

in

Kisii H.C.C.C. NO. 251 of 1992)

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JUDGMENT OF THE COURT

This appeal concerns land parcel number Suna/East/Area B/KWA/851 (hereinafter called "***the suit property"***) which the respondents contended at all times belonged to one Mariko Musala Munyonge who was the husband of the 1st respondent and the father of the appellant, as well as the 2nd and 3rd respondents. On his part the appellant contended that at all times the suit property belonged to him having been purchased from one Richard Nyangweso.

Briefly, the facts are that, Mariko Munyonge, deceased, who was the 1st respondent's husband, and the father to the appellant, the 2nd and 3rd respondents purchased the suit property from one Andericus Amayo Gucha, but died before he was able to transfer the same into his name. It was the respondents' case that the appellant who is the eldest son of the deceased transferred and registered himself as the proprietor of the suit property in trust for his mother and brothers. The respondents further contended that in breach of trust the appellant had refused to apportion and transfer portions of the suit property to them, and instead had denied them access to the suit property.

In his defence, the appellant contended that he purchased the suit property from one Richard Nyangweso, who had purchased it from Andericus Amayo Gucha and that subsequently, he had registered it in his name. The appellant contended that he invited the 1st respondent to temporarily reside on the suit property as the 2nd and 3rd respondents were still young. In his counterclaim, he sought to have the respondents evicted and a permanent injunction issued to restrain them from entering, alienating, and cultivating the parcel of land.

On 9th February 1995, the parties by agreement recorded a consent in court to refer the dispute to arbitration before the District Officer, Migori who would be assisted by 4 elders for determination. On 9th August 1995, the District Officer filed an award in court where the District Officer, and the 4 elders found that the suit property was purchased by Mariko Munyonge who was the husband of the 1st respondent and father to the appellant, the 2nd and 3rd respondents had purchased the suit property from Andericus Amayo as their home.

On 16th October 1995, the award was read to the parties, and the matter was fixed for mention on 16th November 1995, when the court entered judgement in terms of the award in the presence of the 2nd respondent and the appellant. On 27th June 1996, the respondents filed an application for review of the judgment to have the suit property subdivided equally among themselves and the appellant, instead of having it registered in their joint names.

The application came up for hearing on 10th July 1996 and by consent of all the parties, it was ordered that the suit property be subdivided into four equal portions each measuring 0.40 hectares which were then allocated to the parties a as follows:

=land parcel no. Suna/East/Area B/KWA/1345 to the appellant

=land parcel no. Suna/East/Area B/KWA/1346 to the 2nd respondent (***the disputed portion"***)

=land parcel no. Suna/East/Area B/KWA/1347 to the 3rd respondent

=land parcel no. Suna/East/Area B/KWA/1348 to the 1st respondent.

The Green Card at the Land Registry Kitale in respect of the land shows that the disputed portion is registered in the name of the 2nd respondent as the registered proprietor.

On 25th April 2012, the 2nd respondent filed an application for eviction of the appellant from the disputed portion registered in his name. The 2nd respondent's application was heard by the Deputy Registrar on 13th September 2012, and in a ruling delivered on 26th November 2012, the Deputy Registrar ordered the eviction of the appellant from the disputed plot.

By notice of motion dated 14th December 2012, the 2nd respondent applied to court seeking police assistance for the eviction of the appellant from his plot.

By notice of motion of the same day, the appellant sought an order for stay of execution of the eviction orders of 26th November 2012, the setting aside of the judgement in terms of the award by the District Officer, Migori entered on 16th November 1995, and the relocation or annulment of the order of subdivision of the suit property. His application was on the grounds that the award of the District Officer, Migori was read in his absence without notice which denied him the opportunity to apply to have the award set aside, such that he was condemned unheard, and further that the 2nd respondent had since changed his name in the pleadings to Wilfred Safan Munyonge who was a different person from Wilfred

M. Masala.

In his ruling the learned judge declined to set aside the judgement of 16th November 1995 on the basis that, the judgement was entered in the presence of both parties, and the appellant at that time ought to have sought to set aside the award within 30 days from the date of receipt of the notice of filing of the award or 30 days from the date the award was read.

The learned judge also considered that in terms of ***Order 45 (10) (a)*** of the repealed ***Civil Procedure Rules*** no good grounds were advanced by the appellant to warrant the review of the court's judgement entered on 16th November 1995 as the lack or want of notice was not a new matter or evidence which was not within the knowledge of the appellant and as such, did not qualify as sufficient grounds for review.

With respect to the 2nd respondent's application the learned judge found that it was not in dispute that an order was issued by the Deputy Registrar on 26th November 2012 for the eviction of the appellant from the disputed portion. As there is nothing to show that the order had not been reviewed or set aside, the High Court could find no valid reason for declining to order police supervision of the appellant's eviction from the disputed portion. The learned judge also found no merit in the argument that the name of Wilfred Safan Munyonge differed from the person known as Wilfred M. Masala whom it considered was one and the same person. Consequently, the learned judge allowed the 2nd respondent's application and ordered that the OCS Migori Police station to provide security to evict the appellant from the disputed portion.

It is this ruling of which the appellant is aggrieved and against which he has appealed on the following grounds,

1. *The learned judge erred in law and fact in dismissing the appellant's application dated 25th July 2013 against the weight of points and facts deponed in the appellant's affidavits.*

2. *The learned judge erred in law and fact in not finding and appreciating that the appellant was not served with a hearing notice to attend court in the reading of the award on 16th October 1995.*

3. *The learned judge erred in law in dismissing the appellant application for delay while on the other hand allowing the respondents' application dated 14th December 2013 without considering the decree to be enforced was over 12 years and had expired and could not be enforced in law.*

4. *The learned judge erred in law and in fact is not appreciating that the court is dealing with a total stranger to the suit the second plaintiff in the main suit is Wilfred masala while he allowed the stranger Wilfred Safan Munyonge to reap participate in the court proceedings without seeking for leave to amend the pleadings to and enjoying the said stranger.*

5. *The learned judge failed to appreciate that there was an advocate on record for the plaintiff and that the party purporting to execute the decree did not find any notice of change or to act in person as required by law.*

6. *The learned judge erred in law and fact in not appreciating that the entire proceedings" record were marred and tainted that the best should have been set aside the entire proceedings and judgement Suo- Moto.*

When the appeal came up before us, ***Shem Sega Musala***, the appellant who appeared in person, stated

that he was denied the opportunity to be heard in the lower court, and was appealing for an opportunity to ventilate his case. He further stated that he was forced to sign the consent to subdivide the farm, against his will. He stated that he delayed in returning to court as he was waiting to be summoned. He conceded that the suit property was subdivided, but that no beacons had been placed. He insisted that the respondents should leave the suit property and take up residence on their father's land and not on the suit property.

On his part, ***Wilfred Safan Munyonge***, the 2nd respondent who also appeared in person, contended that the suit was originally between his mother and the appellant, and that his father had two wives. He stated that the land belonged to his father, but the appellant had registered the suit property in his name behind their back. It was his contention that, the suit property had since been subdivided, and the titles issued. Each party was allocated their portion, and nothing further required to be done. He urged the Court to evict the appellant from the disputed portion.

In this appeal we must remind ourselves that this Court is not minded to interfere with the findings of fact by the trial court unless they are not based on evidence or are a misapprehension of the evidence or that the trial judge is shown to have acted on a wrong principle in arriving at the findings. See ***Ephantus Mwangi & Another vs Duncan Mwangi Wambugu (1982-88) 1 KAR 278***.

The appellant's complaint in the main is that, he was not notified of the date for reading of the award, as a consequence of which, he was denied an opportunity to have his case heard.

From the ruling, there is no doubt that the learned judge addressed the question of service of the hearing notice for reading of the award on the appellant in detail, and declined to set aside the judgement of 16th November 1995 on the basis that, the judgement was entered in the presence of both parties, and the appellant at that time ought to have sought to set aside the award within 30 days from the date of receipt of the notice of filing of the award or 30 days from the date the award was read.

The issue for our consideration is whether the appellant was denied an opportunity to be heard when the award made by the District Officer and 4 elders was read and adopted as a judgment of the court in his absence.

The rules that appertain to arbitration under an order of the Court are covered under ***Order XLV*** of the previous ***Civil Procedure Rules***.

Order XLV rule 10 specifies

"Where an award in a suit has been made, the persons who made it shall sign it and cause it to be filed in court, together with any depositions and any documents which have been taken and proved before them; and notice of the filing shall be given to the parties."

Rule 10A (1) and (2) then specify**,** that when one or more parties are not represented by an advocate, notice of the filing of the award given under rule 10 shall specify a date and time for reading the award giving not less than 30 days' notice of the reading, and on the date and at the time fixed by the notice the award shall be read to such of the parties as are present.

Order XLV rule 16 stipulated,

"Application may be made under rules 12, 13, 14, and 15 within thirty days of receipt by the applicant of notice of the filing of the award under rule 10 or, where a date for reading of the

award has been fixed by the court under rule 10A within thirty days of that date."

The manner in which the award is to be read is couched in mandatory terms. Once the award is filed, the parties are to be notified, and where the parties are unrepresented, they must be issued with a 30 days' notice specifying the date and time the award will be read. It is a requirement that the award be read on the date and time specified on notice.

In compliance with the provisions, the court ordered that the requisite notice be issued to the parties. It is difficult to ascertain whether or not the appellant was served with the notice, but on 8th July 1995, in the presence of the respondents the record states,

"***Order: Case fixed for mention on 13/9/95 with a view of reading the award. Notice to issue."***

When the matter came up on 13th September 1995, the appellant did not attend. On account of his absence, the court ordered that the notice be extended by a further 60 days. On 16th October 1995 when the matter was mentioned again, the appellant was still absent, but this time, the award was read by the court, and thereafter a mention was fixed for 16th November 1995. On that date, the appellant was present in court, during which, the award was entered as a judgment of the court.

Order XLV rule 17 (1) of the ***Civil Procedure Code*** provides,

"The court shall upon request enter judgment according to the award-

a. ***When no application has been made within the time allowed by rule 16; or***

b. ***When an application under rules 12 or 13 has been heard and determined and no other application has been made within the time allowed by rule 16; or***

c. ***When every application under rules 14 and 15 has been heard and refused and no leave to appeal against such refusal has been granted within fourteen days of that refusal."***

Rule 17 (2) stipulates,

d. ***"Upon the judgment so entered a decree shall follow and no appeal shall lie from such a decree except in so far as the decree is in excess of, or not in accordance with the award."***

As can be discerned from the record, by the time the appellant came to court on 16th November 1995, the award was yet to be entered as a judgment of the court. At this point, having been absent when the award was read, he still had the opportunity to object to judgment being entered on that date, to enable him file an application either under ***Order XLV rule 13*** to have the award modified or corrected, or under ***rule 14*** to seek to have the award remitted back to arbitration, or under ***rule 15*** to seek to have the award set aside for corruption or misconduct of the arbitrator or for fraud on account of concealment or failure to disclose any matter that ought to have been disclosed or deceiving of the arbitrator. He did not. He has himself to blame for his inertia, and he cannot now turn around after 18 years, and state that the judgment must be set aside since he was not notified that the award was to be read.

The matter does not end there. On 10th July 1996, the appellant entered into a consent in court for the subdivision of the suit property into equal portions. There is nothing on the record to show that he objected to, or was coerced into signing the consent for subdivision. In effect, the totality of his actions must then be construed as acquiescence to the award, the proceedings as they took place in court, and the resultant judgment. We find that the application is time barred, and the High Court was right to decline to set aside the award. Accordingly, this ground fails.

The appellant's other complaint is that the High Court dismissed his application for delay, while allowing the respondent's application dated 14th December 2013 without considering that the decree from the date of issue had expired since over 12 years had lapsed, and therefore, it was not capable of enforcement.

It will be recalled that the 2nd respondent's application of 14th November 2013 was not to enforce the judgment, but to seek police assistance for the eviction of the appellant from the disputed portion following the subdivision and apportionment of the various portions, and upon obtaining orders for eviction of the appellant from the disputed portion on 26th November 2012.

There is no doubt that the 2nd respondent's Notice of Motion dated 14th December 2012 was as a consequence of the eviction order obtained on 26th November 2012, and not as a result of the judgment of the court issued 18 years earlier. It is this order that the 2nd respondent seeks to enforce. By all standards, we find this to be well within the 12 year limitation period stipulated by ***section 4 (4)*** of the ***Limitation of Actions Act, Cap 22 Laws of Kenya.*** As such, the question of enforcing a court order outside of the statutory period cannot be held to arise.

In contrast, we find that the appellant's application to set aside the judgment of 16th November 1995, to be out of time, overtaken by events and an afterthought on the appellant's part, coming 18 years after the suit property had ceased to exist and after completion of subdivision and allocation of the various portions of the suit property. We find that this ground lacks merit and consequently fails.

Finally, as to whether the names Wilfred M. Musala and Wilfred Safan Munyonge were with reference to different persons, it is clear from 2nd appellant's further affidavit filed in the High Court on 9th December 2013 that the names, Wilfred M. Musala and Wilfred Safan Munyonge were his, and that they referred to one and the same person. We are satisfied that, the names indicated were with reference to the same person, namely the 2nd respondent herein, and we see no prejudice that will be suffered by the appellant. Consequently, this ground fails.

In conclusion, we find no reason to interfere with the ruling of the court below. Accordingly, this appeal is dismissed, with costs to the 2nd respondent.

Dated and delivered at Kisii this 25th day of November, 2015.

D. K. MARAGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR