



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 32 OF 1990

KIBIWOT CHERUIYOTAPPELLANT

KIPKERING BIWOT.....APPELLANT

VERSUS

CHEPTOO KOBOT CHETURUTA.....RESPONDENT

(From the Original Civil Suit No 30 of 1988 of Resident Magistrate's Court at Kapsabet – P M Mutani SRM)

JUDGMENT

The appellants disputed with the respondents over land known as Nandi/Kaptildil/227 whereby the respondents alleged that the appellants had had that land unlawfully registered in the names by use of fraud and tricks without considering her interests. She filed the case in Court on 27th June ,1988 and prayed for an order that they, the appellants, hold 2/3 of the land in trust for her and another order that the third defendant to whom the 2/3 share was transferred held that share in trust for her as well.

On 14th September, 1989 counsels for the parties agreed that the matter could be arbitrated upon by one of the District Officers in Kapsabet and that the award be filed in Court within 90 days of the Court's order. This was made in compliance with order 45 rule 1 of the Civil Procedure Rules.

It appears sometime in 1990 the arbitrator's report was filed in Court and was to be read over to the parties on 22nd March, 1990. On that day neither the appellants nor their advocates appeared but Chumo for the respondents appeared and applied that the award be read since he had served counsel for the appellants with summons to appear. The award was read to the parties and the usual 30 days period for the objection was granted.

No objections were filed and on 22nd August, 1990 Mr Chumo for the respondents applied that the elders award be confirmed as the judgment of the Court, also intimating that he had again served the advocate for the appellants to appear on that day.

The Learned Resident Magistrate, (as he then was) confirmed the elders' award as the judgment of the Court and it appears that no action was taken by the appellants until 27th of August, 1990 when this appeal was filed.

On this appeal Chebii for the appellants' argued that the appellants were not properly served to appear

in Court for the reading of the award. He said that the appellants were only served on 1st of August 1990 through their advocates and that it was not possible for them to contact their clients for the reading of that award, notice having been too short.

He said that in this regard, therefore, the advocates could not consult the appellants in time and therefore they were not aware of the reading of the award to lodge an objection within the prescribed period of 30 days.

According to him rules relating to service of documents require that a party be given adequate time to appear and that in this particular case no sufficient time was given to the appellants to appear, hence failure to file objections in time.

Mr Onyinkwa opposed the application on behalf of the respondent and said that the appeal was incompetent and not properly before the Court because what was required of the appellant was to apply to have the elders' award set aside or apply for extension of time within which to make that application otherwise an appeal after confirmation flouted order 9B rule 8 of the Civil Procedure Rules.

In my judgment if counsel for the appellants were actually acting for the appellants and were served with notice to appear in Court for the reading of the award, they were under an obligation to appear for such reading before reverting to their clients for further instructions as to what to do next. Chebii does not deny that his firm was then acting for the appellants and there was no reason at all any of the lawyers failing to appear in Court on 22nd March, 1990 for the reading of the award.

Moreover even at the confirmation stage the same firm of advocates was served to appear but did not appear for the confirmation of the award. Why come to Court so late after all the processes of procedure have been gone through with the knowledge of the advocate for the appellants"

In law an advocate with instructions to act for his client has due authority to act as an agent in the matter and if the agent fails to carry out his principal's instructions then the principal has to turn to the agent for a remedy. In this case counsel for the appellants were wholly to blame by failing to appear for the reading of the award and confirmation thereof after they were duly served and have to bear the blame for the mishap that has befallen the appellants.

I dismiss this appeal with costs.

Dated and delivered at Eldoret this 15th day of May 1992

D.K.S AGANYANYA

JUDGE



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