



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(Coram: Madan, Kneller, JJ A and Nyarangi, Ag J A)**

**BETWEEN**

**SHELMITH GATHIGIA HENRY ..... APPELLANT**

**AND**

**WACHIRA RUCATHI ..... RESPONDENT**

**(Appeal from a Judgment and order of the High Court of Kenya at Nyeri (O’Kubasu, J) dated  
September 23rd, 1982**

**In**

**Civil Suit 294 of 1979)**

**JUDGMENT OF THE COURT**

**KNELLER, J A**

Shelmith Gathigia Henry (Gathigia), the appellant, wants a decision of the High Court in Nyeri (O’Kubasu J) of September 23, 1982 set aside and an order for a retrial of the suit which she brought in the High Court. Although served through his advocate Wachira Ruchathi (Ruchathi), the Respondent, did not appear.

She was the applicant in Nyeri High Court suit 294 of 1979 and in he originating summons she asked for a declaration that she had acquired title to some land, namely, Konyu/Gachuku/1069 by way of adverse possession, that she be registered as proprietor of it, that Rucathi should be directed to execute a transfer of it to her or, in the alternative to this, a declaration that

he holds that land on trust for her, and, in any event, she prayed for the costs of this litigation. She said in her affidavit of December 11, 1979 that she occupied this land in 1958 and then she developed it and built a permanent house on it but all along Rucathi refused to transfer it to her and was now trying to sell it to a third person. Her advocates had told her, and she believed them, that because she had been there for more than 12 years against the will of Rucathi his title to this land had been extinguished under Section 17 of the Limitation of Actions Act and now held the land in trust for her under Section 37 of the same Act together with Sections 28 and 30 of the Registered Land Act. She seems to have added

another affidavit on December 22, that year in which she claims the land belonged to Waruguru Muchunu who had no sons so it was inherited by her and that is why she lived on it and planted coffee and bananas and other crops there. At some stage Rucathi was registered as its owner and had recently entered on the land and started to cut down her crops.

The appeal record does not have any affidavit in reply from Rucathi to any of this. She obtained an interim injunction on March 11, 1980 from Wilkinson- Guillemard J restraining Ruchathi from having anything to do with this land until the suit was determined.

On November 30, 1981 Gathigia and Rucathi were represented by Mr Waweru and Mr Kaburu before Mr Justice O'Kubasu at Nyeri and they consented to "the matter" being referred to arbitration under the chairmanship of the Chief of Konyu Location. Each party was to appoint two elders. The award was filed before July 22, 1982 and the parties were given until August 5, that year to read it. When the parties appeared before the learned judge, Mr Waweru was for Ruchathi and he asked for judgment to be entered in terms of the award and for costs of the action and that is what was done. Gathigia was not represented and the record does not show what she said, if anything.

The award is dated April 1, 1982 and signed by the Chief and addressed to the Deputy Registrar of the High Court at Nyeri. He lists the names of the arbitrators and two of them signed and two of them pressed their left thumbprints on the paper besides their names. He then sets out a summary of the statements made by the parties and their witnesses and turns to the conclusion reached by the elders. We will follow the same procedure. Waruguru Muchunu Kibirio inherited some land from her husband and purchased some more with her savings. She gave this parcel to Rucathi but later demanded Kshs 1,340 from him in the presence of the Chief and Assistant Chief of the area but Rucathi did not pay her this sum or any sum at all because he had no money then.

When Waruguru fell ill he did not help her, or Gathigia who was looking after her, and he did not pay his share of the cost of her burial and the ceremonies that followed.

When Ruchathi had scraped together Kshs 1,340 he offered it to Gathigia but she refused to take it.

Gathigia was the daughter of Waruguru and Ruchathi was her nephew and when he was given this parcel he was the only grown up male in the family. On all this, the two elders selected by Gathigia found that the land belonged to Gathigia and those chosen by Ruchathi said it belonged to Ruchathi. On the one hand there were the two who said he had not helped Waruguru when she was sick and did not pay for her funeral, and Gathigia did both so she should have the land. On the other, there were two who said Ruchathi inherited this land from Waruguru while she was alive, and Waruguru only asked him to pay towards the expenses of her illness. They went on to say this parcel had not been awarded to Gathigia by the clan elders. She was married and her husband owned some land and that was enough for her. The voting was equal among the elders and the Chief cast his vote with those who said the land belonged to Ruchathi and therefore the final decision, a majority one, was that Gathigia's claim should be dismissed. The chief then recorded two further points. First, Gathigia had cultivated this property from the time her mother committed suicide until the date of the award. Secondly, there were two witnesses who told the arbitration panel that Gathigia's mother said that her land should be divided between her three daughters as if they were her three sons and she had no sons. The Chief added that the witnesses said Waruguru did not die a natural death but committed suicide.

So the judgment entered in terms of the award was that Gathigia's application by originating summons was dismissed with costs. This was on August 5, 1982 and on September 17, the same year the learned judge heard Gathigia's application by Chamber Summons dated August 20, 1982 asking

him to set aside that award under Section 3A of the Civil Procedure Act and Order XLV rule 15 of the Civil Procedure Rules. It should have been brought by motion on notice under Order XLV rule 15 only. See Order XLV rule 19 and *Hassam Karim & Co Ltd v Africa Import and Export Central Corpn Ltd* [1960] EA 396 (T).

It was supported by a document headed 'errors complained on oath' by Gathigia and two affidavits sworn by the two elders who voted in favour of her claim saying that the errors that she complained of on oath were in fact the truth of what happened.

These alleged errors amounted to the following. The Chief made the elders sign or thumb print the paper before the proceedings began and he then had typed out his version of what happened which was incorrect. Furthermore, one of the elders chosen by Ruchathi was a stepbrother of the Chief. The evidence of the three witnesses for Gathigia were not taken into account, none of the elders had reached the decision which the Chief recorded and some of them went and reported this to the District Officer, Mathira. Gathigia also claims that it was overlooked that she had used this land for 23 years and Ruchathi was not her mother's heir and she was. She had looked after her mother during her very long illness. No account was taken of the written will of her mother witnessed by Ruchathi and other men in the area. Ruchathi's refusal to pay Kshs 1,340 to her mother had not been taken into consideration.

There seems to have been no affidavit or evidence in any other form in reply to all this. When this summons came before the judge Mr Ngubuini appeared for Gathigia and Mr Ole Kaparo for Ruchathi. Mr Ngubuini referred to matters, which he submitted vitiated the arbitration proceedings. The Chief was related to this family and gave no reasons for his casting vote. He made no allegations against the arbitrators. Mr Ole Kaparo underlined the fact that the matters disclosed in the affidavit and the document setting out the errors did not amount to corruption or misconduct. He learned judge agreed with Mr Ole Kaparo and dismissed the application with costs.

Order XLV rule 15 of the Civil Procedure Rules provides that the court may set aside an award on the following grounds only:

- (a) corruption or misconduct of the arbitrator or umpire
- (b) that either party has fraudulently concealed any matter, which he ought to have disclosed or has willfully misled or deceived the arbitrator or umpire.

The relationship of the Chief and the parties or one of the elders was not objected by either of them at the arbitration and appears to be a very remote one. The signatures and thumbprints are recorded opposite the names of the arbitrators to acknowledge the fact that they were there for the proceedings and took part in them. The summary of the matters put before the elders and their conclusions are too detailed and cogent for them to have been invented by the Chief. All the points Gathigia wanted taken into account are covered. The matter appears to have been decided according to the customary law of the parties and that is why the elders were chosen.

No corruption or misconduct on the part of the elders or the Chief was revealed. Neither party was shown to have concealed fraudulently any matter that ought to have been disclosed or willfully misled or deceived the Chief or the elders. The grounds on which the learned judge might, in his discretion, have set aside the award do not emerge. In our judgment he was right to dismiss the application and this appeal should also be dismissed. We make no order for the costs of the appeal.

**Delivered at Nairobi this 17th day of November, 1983.**

**C B MADAN .....**

**JUDGE OF APPEAL**

**A A KNELLER .....**

**JUDGE OF APPEAL**

**J O NYARANGI .....**

**AG JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**



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