

KENYA / JUDGMENT

Wachira v Ndanjeru [1987] KECA 92 (KLR)

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Civil Appeal 44 of 1984

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Wachira *v* Ndanjeru

Court of Appeal, at Nairobi November 5, 1987

Platt, Gachuhi & Apaloo JJA

Civil Appeal No 44 of 1984

(Appeal from the High Court at Nairobi, O’Kubasu J)

Arbitration *- entering judgment in accordance with arbitrators’ award - judgment entered before the expiry of 30 days after notifying the parties - whether such judgment proper - whether an application for setting aside such judgment may lie - Civil Procedure Rules order XLV rules 16, 17.* ***Appeal*** *- new question of law - arising for the first time on appeal - trial court making an illegal order - nullity of order not raised on first appeal - procedural mistakes committed by lower courts and by counsel - whether proper for second appellate court to ignore mistakes and set aside proceedings.*

The appellant was the defendant in a case before a Senior Resident Magistrate’s Court which had been referred to arbitration. After the arbitrators had made their award and filed it in court, the appellant stated to the court that he did not agree with it. The court observed that the case had been referred to arbitration by consent and made an order in the terms of the award.

The appellant’s motion seeking a review of the judgment and also the setting aside of the arbitration award was denied. In his appeal to the High Court, the appellant challenged the magistrate’s finding that the award should not be set aside.

The judge, in dismissing the appeal, observed that application for review had been wrong and the application for setting aside had been properly heard.

The appellant filed a second appeal.

Held:

Apaloo JA dissenting:

1. The trial magistrate had misunderstood the process of passing judgment upon an arbitrators' award as provided by the Civil Procedure Rules order XLV rule 16. He ought to have allowed 30 days from the date of

notifying the parties of the award. The trial court had no jurisdiction to pass judgment under rule 17 because 30 days had not passed.

2. The trial magistrate had merged the award of the arbitrators with his judgment. There was therefore no longer an award which was capable of being set aside as the appellant had sought to do.
3. The trial magistrate had erred in considering the appellant's motion as being entirely for setting aside and ignoring the prayer for review. He could only deal with review and not the setting aside. His decision was a nullity.
4. The grounds of appeal to the High Court were misconceived and the judge erred in law in entertaining the setting aside of the award in preference to the review.
5. The appellant had been deprived of his rights by the trial court and his advocates had misconceived the procedure and failed to take up the vital issues on his behalf. This was a proper case in which to set aside all the mistakes committed and to start afresh.

Appeal allowed.

Cases

1. *Connecticut Fire Insurance Co v Kavanagh* [1892] AC 473
2. *Overseas Finance Corporation Ltd v Administrator General* (1942) 9 EACA 1
3. *Chief Asante v Chief Tawia* [1949] WN 40
4. *Bains v Chogley* (1949) 16 EACA 27
5. *Tanganyika Farmers Association Ltd v Unyamwezi Development Corporation Ltd* [1960] EA 320
6. *Macfoy v United Africa Co Ltd* [1962] AC 152
7. *Pontin v Wood* [1962] 1 QB 594
8. *Warehousing and Forwarding Company of East Africa Ltd v Jafferli*
* & Sons Ltd* [1963] EA 385
9. *Damodar Jinhabbhai & Co Ltd v Eustace Sisal Estates Ltd* [1967] EA 153
10. *Githinji v Kinyanjui* Nairobi Civil Appeal No 105 of 1984 (unreported)
11. *Ravenshear and Coles in Re* [1907] 1 KB 1
12. *Pritchard Deed* [1963] 2 WLR

13. *Amarshi Madhavji v Sarilal Ltd* [1977] KLR 8

Statutes

1. Civil Procedure Rules (cap 21 Sub Leg) order XLV rules 13, 15, 16, 17, 17(1), order XLIV rule 1
2. Civil Procedure Act (cap 21) sections 79A, 3A
3. Judicature Act (cap 8) section 3(2)

Advocates

Mr J Murithi for the Appellant

Mr Satish Gautama for the Respondent

November 5, 1987, **Platt JA** delivered the following Judgment.

The appellant Ndegwa Wachira, has brought this appeal against the judgment of the High Court dated May 11, 1982. That is a very long time ago. The appellant complains that the learned judge on first appeal was wrong to dismiss the appeal to him, from the decision of the Senior Resident Magistrate, refusing to review his own judgment, given in terms of an award by arbitrators. The learned Senior Resident Magistrate had conducted proceedings on November 27, 1980 at which counsel for the present respondent (plaintiff) and counsel for the appellant (defendant) were present. The court said that it would explain the award to each party.

The appellant (defendant) said straight away:

‘I do not agree with award.’

The court then remarked that the matter had been referred to arbitrators by consent. The court then made the following orders:

‘I will make an order in terms of the award. The defendant to give two acres of the land to the plaintiff if he does not sign the transfer papers the same to be signed by the executive officer 1. Costs to the plaintiff. Defendant informed of his right.’

That entirely misinformed and wrong judgment is the cause of all this ensuing litigation. The appellant/defendant was effectively deprived of his rights. Now it is said that nothing can or should be done for him. That is a matter which must be observed closely.

It is not disputed that the learned Senior Resident Magistrate misunderstood the process of passing judgment upon the award, as provided by rule 16 of the Order 45 of the Civil Procedure Rules. He ought, under rule 16, to have allowed 30 days from the date of notifying the parties of the award under rule 10 of that order. That might have been November 8, 1980, but it was reasonable to notify them by reading the award to them as the new practice is. I presume the award was read though the record is silent on that point, and that it was after reading the award that the appellant made his remark. He was telling the learned magistrate that he would try to avoid the award. It was the appellant himself informing the court not just his advocate. It was

especially a case where the learned magistrate should have allowed the appellant time to act in accordance with rule 16. He did not. He gave judgment at once. If he had acted correctly, then under rule 17 there would have been no appeal. Rule 17(1) especially provides that time under rule 16 must have elapsed, before judgment can be entered. It is an unusual situation in which the learned magistrate notified the parties of their right to appeal, because he was actually right, through his own mistake. It has been held that where rule 16 has been complied with rule 17 will not allow judgment to be lawfully entered. It is a nullity and appealable. But I doubt whether the learned magistrate's indication that the parties could appeal was intended as an indication that he had entered a judgment null and void. Allow me to refer to the terms of rule 17.

'17(1) The court shall on 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 rule 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 any such refusal has been granted within 14 days of that refusal.
- (2) Upon the judgment so entered a decree shall follow and no appeal shall lie from such decree except in so far as the decree is in excess of, or not in accordance with, the award.
- (3) Order 48, rule 2 shall apply to the entry of judgment under sub-rule (1).'

So there it is; judgment could not be entered, and it should have been set aside. Rule 17 is in mandatory form.

But the appellant was woefully advised; so badly, indeed, that his advocate did not know whether to bring a review of the invalid judgment, or proceedings to set aside the award under the rules in Order 45. He started off on the right foot. He headed his notice of motion as falling under Order 44, rule 1 of the Civil Procedure Rules. His first prayer was for a review of the judgment of November 27, 1980 based on the arbitration award. But then he added the misleading second prayer that the arbitration award filed in court should be set aside, and the dispute heard by the court on its merits. The affidavit in support was full of the errors that allegedly had taken place during the arbitration, and making the award. The chief, who was neither an arbitrator nor the umpire, had interfered in the arbitration. He had exceeded his position as convener of the arbitration.

There was not one complaint about the lack of time to set aside the award.

The position was clearly this. Judgment had been entered without jurisdiction since 30 days had not been accorded to the appellant. But by entering judgment, the award had been merged in the judgment. There was no longer an award to set aside, whilst judgment remained on the record. It is because the parties have consented to go to arbitration, that when judgment has been entered, it is like a consent judgment. There is no appeal because the parties have had their dispute decided in the way they have chosen and have agreed to be bound by arbitration. Judgment is

entered therefore upon an agreed basis, and the award which is that basis, is not open to question, any more than the judgment. There are exceptions in rules 13 and 15. There is an appeal if judgment is not in accordance with the terms of the award. The parties have not agreed to be bound by these things which the arbitrator or court have done wrong. But outside these exceptions, when the exceptions have been catered for, then the award is merged in the judgment and binds the parties.

In these circumstances, a review will lie against a judgment, like the one in this case for error upon the face of the record. The court had no jurisdiction to pass judgment under rule 17 of Order 45 because 30 days had not passed. But while judgment remained on the record, obviously, no application could lie to set aside the award. The learned magistrate in entertaining the appellant's motion considered the matter as one for setting aside the award. He merely noted the two prayers in the application, ignored the review, and concentrated fully on the setting aside of the award. That was again very wrong, and a complete nullity. He could only deal with review and not the setting aside of the award. But counsel did not put the right case before the court, and misled it.

The long suffering appellant appealed to the High Court. The advocate got it all wrong once again. The appeal challenged the findings that the award should not be set aside. But the respondent's advocate Mr Ghadially began to sense the illegal drift of these proceedings. When the motion was heard by the learned Senior Resident Magistrate, he questioned what the proceedings were supposed to be about. Was it review or setting aside the award, he queried? The answer given him was that it should be setting aside the award, using section 3A of the Civil Procedure Act to give the court power to convert a motion for review into one for setting aside the award. Mr Ghadially repeated his objection to the learned judge. He said that the appeal was misconceived, and so was the application to set aside the arbitration award. He was quite right. Of course it is impossible to use section 3 A of the Civil Procedure Act to convert a proper review into an illegal setting aside of an award. The grounds of appeal were as misconceived as the request to set aside the award. But the learned judge would have none of that. He actually reversed the situation. He held that the application for review was wrong and the application for setting aside the award was properly considered, since section 3A of the Civil Procedure Act had allowed the learned magistrate to do so. In fact all that the latter had done was properly done, and the appeal was dismissed.

Now the matter is before this court. During the application for leave to appeal out of time this court observed:

'A moment's reflection would have revealed that only the first prayer for review could stand at that stage because, obviously, you cannot set aside an award after judgment has been given upon it. In such circumstances, to set aside an award, one must first set aside the judgment and then give time to the aggrieved party to set aside the award under rule 16. After hearing that application the trial court could then decide on merits whether or not the award should be set aside.'

The Court of Appeal held that judgment had been prematurely entered and that Mr Macharia would have had good grounds upon which to ask for review.

But Mr Gautama for the respondent forcefully contended that this court could do nothing about all these mistakes. He reduced all of them to mere irregularities and said that they had been cured because the lower courts had decided that there was nothing wrong with the arbitration proceedings or award.

The first point to be noticed is that the grounds of appeal do not adequately cover all these errors. Mr Gautama contended that the court could not raise a matter of law at this stage, for the first time. It was not a matter which went to jurisdiction.

Mr Muriithi has not taken up the points raised by Mr Ghadially nor this court in its ruling extending time to appeal. In ground 1 Mr Muriithi has set out the reasons why the judgment entered on November 27, 1980 was wrong. That is conceded. But Mr Muriithi has not taken the next point that the order refusing to set aside the award was null, since only review could lie. Thirdly, the error of law on the part of the learned judge that setting aside the award could be entertained in preference to review was not raised either. Ground 2 of the memorandum dealt with the merits of setting aside, of which this court cannot take cognisance.

But this court took the points which were omitted. The court itself raised them and thereby allowed additional arguments to be canvassed. Speaking for myself, I was not at all affected by Mr Gautama's derogatory description of this court engaging in a useless "safari" of its own. I must say with all the emphasis that I can muster, that the premature judgment was null, the proceedings to set aside the award null, and the High Court totally wrong not to have recognized the force of Mr Ghadially's address to it. If the respondent knew these proceedings were wrong, the court should have taken heed, even if the appellant did not know. It amounted to a concession by the respondent. How strange that the appellant was to lose in proceedings which his opponent conceded were wrong. And Mr Ghadially had warned the judge, and this court had warned the parties of the true position in the interlocutory ruling, it is not true to say that the omissions in the memorandum of appeal, have only been raised by this court at the hearing of the appeal. What is a fair comment is that the appellant, through bad advice, did not raise the original nullity, before it was set out in ground 1 of the memorandum, and Mr Ghadially perhaps did not raise that particular point. But this court had done so in its ruling. It had said that the judgment had been entered prematurely. That meant that it was null. This court has taken this view from the beginning. There has been no surprise. These proceedings are not just irregular. They are fundamentally wrong at every stage, and the quicker this sort of procedure is seen as such the better.

Mr Gautama referred to the cases when a new point of law cannot be raised on second appeal for the first time.

The principles can be summarised as follows: the discretion to allow a point of law to be taken for the first time on appeal will not be exercised unless full justice can be done between the parties. It will not usually be allowed when to do so could involve disputed facts which were not

investigated or tested at the trial. Nor will a party be allowed to raise on appeal, a case totally inconsistent with that which he raised in the trial court, even though the evidence taken in that court supports the new case. (See **Tanganyika Farmers Association Ltd v Kinyamwegi Development Corporation** [1960] EA 620, **Overseas Finance Corporation Ltd v Administrator General** (1942) 9 EACA 1). But the court will allow a new question concerning the construction of a document or the legal effect of admitted facts, since no question of evidence arises, and it will usually be regarded as expedient in the interests of justice to do so. The most relevant principles to this case however are those which apply when the court itself raises a question of its own motion. This is almost invariably done where there is any question as to jurisdiction **Damodar Jinhbhai & Co Ltd v Eustace Sisal Estate Ltd** [1967] EA 153 at 158 or when the court is asked to give a judgment which would be contrary to statute (**Jagat Singh Bains v Chogley** (1949) 16 EACA 27). As Law Ag P said in **Amarshi Madhavji v Sarilal Ltd** [1977] KLR 8 at 14:

‘It would be intolerable for a court of last resort to be bound by a lower court’s decision on a question of law which is manifestly wrong.’

This case proceeded upon the principles set out by Lord Guest in **Warehousing and Forwarding Co of East Africa Ltd v Jafferli & Sons Ltd** [1963] EA 385 (following **Connecticut Fire Insurance Co v Kavanagh** (1892) AC 473 at 482):

‘When a question of law is raised for the first time in a court of last resort, upon a construction of an instrument, or upon [facts] admitted or proved beyond controversy, it is not only competent but expedient, in the interest of justice to entertain the plea.’

In this case, there are no disputes on the facts. The facts lie upon the record. Mr Gautama does not dispute that the judgment on November 27, 1980 was wrongly entered. Mr Ghadially did not dispute that setting aside the award was wrong, and that the appeal was wrongly brought. Can this court then ignore all this illegality? In my opinion, it is expedient in this court of last resort to ventilate the questions of law conceded by the respondent.

Next Mr Gautama contended that these are merely irregularities of procedure as has been seen above. Rule 17 of Order 45 is mandatory. There is no discretion about it. There is no question of irregularity once judgment has been entered. If the award is to be attacked, the judgment must be set aside first. There is no question that section 3A of the Civil Procedure Act can cure any of these errors.

But if Mr Gautama were right, would it be realistic to argue that what should have been a review of judgment is cured by setting aside proceedings? The principles which apply to review do not apply to setting aside an award, and vice versa. Even if there is material for setting aside an award, if judgment is entered properly under rule 17, judgment cannot be set aside, simply because the award is wrong. It is not possible to decide whether judgment should or should not be vacated, by reference to the merits of setting aside the award. Conversely however proper the award may appear to be, if the judgment is not entered properly and no time has been allowed, it must be set aside in order to provide time, if that objection is taken. Courts cannot know what the parties may know behind the scenes, which may unsettle an apparently proper award. All these

steps must be taken in proper order, because the law says so. Moreover, after all the muddles at every step I cannot persuade myself that the advocates properly concentrated on what they were supposed to be doing, so that I would feel justified in informing the appellant, that although he was deprived of his rights by the trial court; and that although his advocates misconceived all the procedures, and did not take up for him the vital issues; nevertheless all is really right in the case, even if the lower courts misdirected themselves, and so he should give up his chance to follow the procedure correctly. I do not see how anybody could believe that. I think that it would generally be held to be right to set aside all these mistakes and start again late as it is. A similar view was taken in **Githinji v Kinyanjui** Nairobi Civ Appeal of 1984 (unreported). There, the question was, what effect would the lack of consent to go to arbitration have on the award. The award was also out of time. These improprieties caused the award, and subsequently orders for execution to be null and void. All these orders were set aside and the parties were ordered to start again.

Consequently I would allow the appeal on the first ground and the points allowed to be argued by this court. I would set aside the High Court's decision as wrong in law. I would substitute therefor an order that the Senior Resident Magistrate's order, refusing review, should be set aside, and that there should be substituted therefor an order allowing the application for review, in terms that the judgment of November 27, 1980 be set aside. I would allow the appellant 30 days from the date of this order to bring proceedings for setting aside the award under rule 16 of Order 45. I would allow the appellant the costs of this appeal, in the High Court, and both proceedings in the Senior Resident Magistrate's court.

As Gachuhi JA agrees, it is so ordered.

Gachuhi JA. I have read the judgment of Platt JA which I am in full agreement with. However, I would add that the procedure as laid down is meant to be strictly followed. Failure to do so, would result in a miscarriage of justice.

The arbitration, the subject matter of these proceedings is under Order 45. Rules 15, 16 and 17 are very important. The Senior Resident Magistrate overlooked the requirement of rule 16 that the parties must be allowed 30 days within which to file application for setting aside the award. Judgment could only be entered after 30 days if it has to be a valid judgment. Any judgment entered prematurely is a nullity.

The argument by Mr Gautama that the court should not consider any point of law not previously raised, cannot be entertained by this court. There are circumstances that allow it. This is the court of last resort. If it cannot correct any point of law that had not been considered, which caused bad decision to be reached, then if that decision remains on record it will be referred to as an authority in the future. Then what would be the purpose of the court of the last resort. It would be the duty of this court to interpret the law and to give its effect in the best possible way. The instant appeal is a clear precedent. The judgment entered by the Senior Resident Magistrate is a nullity and cannot be allowed to remain on record. It has to be set aside to allow the operation of rule 16 of Order 45 of the Civil Procedure Rules (cap 21). I am in agreement with the

orders Platt JA proposes the court should make.

Apaloo JA (Dissenting). I have the misfortune of reaching a conclusion diametrically opposite to the one reached by my learned brothers. In my opinion, the learned judge on the material and complaint presented to him, arrived at a just result and no good ground exists for disturbing his conclusion.

The memorandum of appeal to this court lists three grounds on which the judgment of the court below was to be contested. The third ground was abandoned. So there were left only two grounds. Of these the second ground was hardly argued. Counsel said it was an alternative ground which deserves the serious consideration of this court only if the court should be against him on the first. As formulated, it reads:

‘That the learned judge erred in law and in principle (sic) in that he failed to consider that although the parties agreed to be bound by the arbitration award, the arbitrator’s proceedings were necessary in determining whether there was:

(a)Corruption or misconduct of the arbitrators or umpire.

(b)Either party had fraudulently concealed any matter he ought to have disclosed, or had willfully misled or deceived the arbitrators or umpire.’

It does not surprise me that counsel for the appellant did not press this ground. The only grievance ventilated in the court below was some imaginary inadequacies of the chief and arbitrators. A number of affidavits were sworn to in support of these failings. The assertions made in those affidavits were disputed by counter affidavits. But the question of substance was whether the arbitration was in truth held by the designated arbitrators and whether they published an award. That an award made and signed by the arbitrators was established beyond the possibility of controversy. The signed award was made part of the record. The main and only relief the appellant sought before the court below was the setting aside of the award. The learned judge found no ground for doing so. This, indeed was the main and only relief the appellant sought both in the magistrate’s court and in the High Court.

The appellant had good reason for seeking to be relieved of the arbitral award. It obliged him to give two acres of the land in dispute to the respondent. He was averse to doing that. So it is fair to say that the only issue of substance which the appellant sought both in the magistrate’s court and in the High Court were decided against him. He was permitted to ventilate his grievance against the conduct of the arbitrators and the umpire in full. It is worthy of note that he made no procedural complaint in the High Court.

Although he filed no fewer than six grounds of appeal in that court his counsel told the judge that:

‘There are six grounds of appeal but I shall argue them under two heads - the role of the chief in the arbitration and denial of the right to be heard during the arbitration.’

After addressing argument to the court under these two heads, he ended with supplication to the court in these terms:

‘The appellant humbly prays that this case be allowed to be heard afresh either by this court or by way of arbitration.’

In this court, the head and front of his complaint was that there had been breaches of various rules of Order 45. These breaches were not induced or occasioned by the respondent. It was not the appellant’s case that these transgressions resulted in any failure of justice, or prejudiced him in any way. That being so, I would, for my part, decline to allow a mere procedural complaint which was not raised in the court below to be debated in this court. At all events, it seems to me to accord with principle, that a second appellate court would not allow a ground of appeal which was open to the appellant and which he omitted to urge in the first appellate court, to be raised in the second appellate court. This common law principle has support in statutory law of this country.

Section 79A of the Civil Procedure Act, enacts that:

‘No decree shall be reversed or substantially varied .. on account of any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.’

It must be conceded at once that some procedural irregularities occurred in respect of the arbitration before the magistrate. It was in part the court’s fault in part the appellant’s. And the irregularity arose in this way. When the arbitration award was filed in court, the parties were summoned thither. This was on 27 November 1980. The court then explained the nature of the award to the parties. The appellant then immediately came out against it. He said:

‘I do not agree with the award.’

He was entitled under Order 45, rule 15 to have the award set aside on two grounds set out by rule 15. But he has 30 days from 27 November 1980 to do this. But as soon as he made his dissatisfaction known to the court, the learned Senior Magistrate noted:

‘I will make an order in terms of the award.’

The defendant to give two acres of the land to the plaintiff. If he does not sign the transfer papers, the same to be signed by the EOI. Costs to the plaintiff.’

It is unclear whether the court conceived itself as giving judgment on the award. The learned magistrate did not, in terms say, he was giving ‘judgment’. The appellant however, thought so and sought to have the ‘judgment’ vacated. Although the court had power to give judgment in terms of the award, it could not do so unless the period of 30 days had elapsed. The clear object of this is to enable the party dissatisfied by the award and who could bring himself within rule 15 of Order 45 to have it set aside. So on my reckoning, the court could not give judgment until 26 December 1980, and could only properly do so at the request of the respondent. In delivering the judgment on 27 November, the court acted prematurely and the judgment was on that score, irregularly

entered. It is plain to me that this is merely a procedural irregularity which the appellant could waive either expressly or by implication. He was not obliged to move for setting aside the 'judgment'.

Within a fortnight of the entry of 'judgment', the appellant moved the court to review its judgment under Order 44 rule 1. He has good and sufficient reason for this. In giving judgment on November 27, the court disabled the appellant from exercising his right of having the award set aside under rule 15 of Order 45 and had he confined his prayer to this and drew the court's attention to his right under rule 16 of Order 45, it is difficult to see how the court could have done otherwise than to accede to the prayer.

But the appellant tacked to the application for review, the prayer clearly close to his heart, namely, the setting aside of the 'arbitration award'. He was not able to pinpoint any procedural rule, apart possibly from rule 15 of Order 45, which empowers the court to do this. So he fell on the inherent jurisdiction of the court conferred by section 3A of the Civil Procedure Act. He then prayed for setting aside the award on the two grounds specified by rule 15 of Order 45.

It is not clear whether the learned magistrate appreciated that without setting the judgment aside, he could not properly entertain a plea of setting aside the award. But in the context of this case, it seems both the court and the parties conceived that setting aside the award and setting aside the judgment were one and the same thing. In a very real sense it was. The judgment under rule 17 Order 45 must conform with the award. So the award and the judgment must speak the same language. If the award is set aside, then there can be no foundation for the judgment. Although there is no procedural warrant for this, the appellant or his adviser must have thought that as the judgment merely formalized the award, it was the one thing to get rid of. So in inviting the court to set aside the award, the appellant produced affidavit evidence which had it been accepted, would have justified the setting aside the award under rule 15 of Order 45. The respondent replied with a counter-affidavit.

In these circumstances, it seems reasonable to hold that the parties were anxious that the court should determine on the merits on the basis of the affidavit evidence they produced, whether good grounds existed for setting aside the award, which in their contemplation, was coterminous with setting aside the judgment. If this is a correct way of looking at the matter, then it seems reasonable to hold that the appellant waived the irregularity, namely the court's premature entry of judgment. The magistrate then proceeded to examine in some depth, the grounds urged by the appellant for setting aside the award. In the end the court held that there was no merit in the application and dismissed it. The appellant does not now complain that on the merits the award should have been set aside. His complaint is now directed against the premature entry of judgment. As it is a mere procedural irregularity which does not affect the merits of the case, section 79 (a) provides a statutory injunction against this court interfering with the judgment.

As I said, the appellant appealed against the judgment of the magistrate to the High Court as he was entitled to do. It is to be noted that he acted throughout with professional assistance. The only complaints he made and on the basis of which the respondent was called upon to defend the

judgment, were about the role of the chief in the arbitration and the alleged denial by the arbitrators of his right to be heard. Both complaints were adjudged to be unmeritorious. He now abandons the complaint of substance and takes his stand on procedural irregularities which he must be deemed to have waived. He should be held estopped from so doing.

At all events, it seems to me the appellant is merely standing on bare technicalities. Nobody has a vested right in procedure and a court must, at least, at the present day, strive to do substantial justice to the parties, undeterred by technical procedure rules. As is often said, rules of procedure are good servants but bad masters. These rules have their origin in England and the philosophy there is to move from form to substance. Lord Denning, the celebrated English judge has said **ad nauseam**, that technicalities are a blot in the administration of justice. English courts have on numerous occasions refused to set aside process for technical irregularities. See **Macoy v United Africa Co Ltd** [1962] AC 152, **Pontin v Wood** [1962] QB 594 to mention only two.

In **Pritchard Deed** [1963] 2 WLR, Lord Denning, regretting a technical decision by the majority of the court said:

‘My brethren take a different view. They think the defect is fatal and the widow must be driven from the judgment seat without a hearing. I greatly regret that this should be so.’

Quite recently in **Pointin v Wood**, Holroyd Pearce LJ recalled the proud boast of Bowen LJ that:

‘It may be without fear of contradiction that it is not possible in the year 1887 for an honest litigant in Her Majesty’s Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation.’

It would be strange if the principle today were otherwise in this or any of the newer Commonwealth countries where professional and judicial standards are less high than in England.

In the same case, Upjohn LJ who wrote the leading judgment, examined the cases in which defects or irregularities were held to be fatal and those in which they were not and proceeded:

‘I do not think that the earlier cases or the latter dicta upon them prevent me from saying that the law when properly understood, is that Order 70 applies to all defects in procedure unless it can be said that is fundamental to the proceedings. A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity and should be anxious to bring the matter within the umbrella of Order 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the person entitled to complain of the defect **ex debito justitiae**.’

I think that exemplifies the present liberal approach to breaches of procedure rules. It is plain to me that the original breach of rule 16 of Order 45 was committed by the court and was compounded by the faulty steps taken by the appellant himself. To use the cumulative breach of the rules by the court and the appellant to oblige the blameless respondent to another spate of litigation, would, to my way of thinking, be wrong and unjust.

Although I am wholly satisfied that the breach of the rules complained of in ground 1 of the memorandum of appeal was not fundamental, I have asked myself whether it in any way affected the jurisdiction of the court.

I think it is settled law that the point of jurisdiction can be taken at any stage and even on appeal since the result of an order made without jurisdiction is that it is a nullity. See the Privy Council case of **Chief Asante v Chief Tawia** [1949] WN 40.

But the term 'jurisdiction' has no fixed legal meaning. It is used in different senses in different contexts. But its basic meaning is, legal authority or the extent of legal power. **Jowitt's Dictionary of English Law** defines it as:

'The power of a court or judge to entertain as an action, petition or other proceedings.'

In 9 **Halsbury's Laws of England** (3rd edn) at page 350 appears the following:

'Jurisdiction is meant the authority which a court has

to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.'

The appellant did not contend and cannot, with the slightest plausibility, contend that the magistrate's court had no power either to set the arbitration award aside or to enter judgment thereon. Properly analysed, the appellant's complaint is that by giving judgment before the 30 days' grace period so to say, granted him by rule 16 of Order 45, elapsed, the court took a faulty procedural step. He was entitled to have that judgment set aside **ex debito justitiae**. Instead of seeking only that, he also at the same time, sought the setting aside of the arbitration award. He thus obliged the respondent to defend the validity of the award on the merits. I cannot see how it can be said that the court lacked jurisdiction either to enter judgment or to set aside the award. It clearly has.

As I understand the judgment of the majority of this court, once a faulty procedural step was taken at some stage for which the respondent was in no way blameable, the whole process is nought. The parties must commence afresh. With respect, that approach runs counter to modern notions. I think a final court should not appear to be astute in making a fetish of procedure rules. I should have thought the days when procedure was given preeminence over substance were gone. The court, I think should be loath to resurrect any of the older niceties and refinements of procedure for which there is no present justification.

To oblige the parties in 1987 to commence all over again a litigation which was commenced in 1979 when the substance of the dispute was determined and fairly determined because at some point in the litigation, a faulty procedural step was taken, ill-accords with one's notions of justice and clearly runs counter to the statutory directive given to the courts by sub-section 2 of section 3 of the Judicature Act that:

'The High Court, Court of Appeal and all subordinate courts shall decide all such cases according to substantial justice without due regard to technicalities of procedure and without undue delay.' [Emphasis is mine.]

It must be for some reason and not for no reason that the legislature has seen fit to direct in mandatory terms that the courts shall decide cases according to 'substantial justice' and abjure 'technicalities of procedure' and 'undue delay'.

As I have said already, whether the respondent was entitled to a portion of the suit land was decided at an arbitration to which the parties voluntarily submitted. The decision was in favour of the respondent. The appellant took steps, procedurally faulty in part, to have the award set aside. But in the process, his main grounds for seeking to have the award set aside were examined on the merits by the different courts. Both found against him. He does not now contend that those concurrent holdings were wrong, but says, at some point in the litigation, both he and one of the courts below took a faulty procedural step. For this reason, he says the judgment should be vacated so he could have another go at setting the award aside. In my opinion, accession to such plea will not only give the appellant a fresh and undeserved opportunity to reagitate a twice failed case, but would be oppressive to the twice successful respondent. For myself, I cannot think of anything more opposed to the concept of 'substantial justice' or more productive of 'undue delay'.

I also think, assenting to the appellant's present contention, would be tantamount to running a pencil through a sensible legislative provision which seeks to prevent pointless formalism and promote expeditious administration of justice.

In this connection, I believe I can do no better than quote the sentiment expressed by Collins MR 80 years ago in **Re Coles and Ravenshear** [1907] 1 KB 1. The learned Master of the Rolls said:

'Although I agree that a court cannot conduct its business without a Code of Procedure, I think that the relation of rules of practice to the work of justice, is intended to be that of handmaid rather than mistress and the court ought not to be so far bound and tied by rules, which are after all intended as general rules of procedure as to be compelled to do what will cause injustice in the particular case.'

That seems to me, if I may respectfully say so, good sense. That observation so effectively expressed my views, that I do not scruple in adopting it as my own. In my opinion, in view of the facts of this case and the events which have happened, the appellant's complaint of breach of Order 45, rule 16 ought not to be listened to. It would be inequitable to do so. If it is rejected, as I think it should, there can be nothing left of this appeal, which in my judgment, ought to be dismissed with costs.

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