



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

Civil Suit 123 of 2006

SIENYA OLUOCH.....PLAINTIFF

VERSUS

JULIUS OCHOLA OJUNGA.....DEFENDANT

RULING

On 12th June 2008 the parties entered into the following consent:-

- (a) **Original Land Parcel number Kisumu / Nyalunya / 222 be resurveyed by the Kisumu District Land Surveyor and the Kisumu District Land Registrar with a view to apportioning the same into two (2) equal parts.**
- (b) **The plaintiff to take the upper portion and the defendant taking the lower portion.**
- (c) **Both the plaintiff and the defendant to share costs of resurvey.**
- (d) **The District (Kisumu) Surveyor to file his report within sixty (60) days from the date of service of this order.**
- (e) **Matter stood over generally.**

The above exercise was undertaken and title number **Kisumu/Nyalunya / 3477 and 3478** were issued.

The plaintiff has filed the notice of motion dated 21st April 2011 seeking the review of the said consent with a view of setting the same aside as well as the resultant consequences.

The substances of his affidavit sworn on 21st April 2011 is that he did not give clear instruction to his counsel **Mr. D. O. E Anyul**. Accordingly to him the suit property consisted of other parties who have been aggrieved by the results of the said consent.

The plaintiff has opposed the application by way of a replying affidavit sworn on 30th August 2011. According to the plaintiff the application is frivolous and vexatious as the applicant had sought similar orders which were dismissed by this court on 3rd December 2010.

I have perused the said application as well as the supporting and opposing rival affidavits. What is not in dispute is that the consent was duly entered by the parties through their counsels.

The letter dated 10th June 2008 (annexture SA 1) of the plaintiff affidavit shows the communication between the firm of D. E. O. Anyul & Co Advocates and M/s Mwamu & Co Advocates in regard to the apportionment of the suit land.

From my observation therefore I do not see any iota of misrepresentation by the firm of Anyul & Co Advocates.

The parameters of the negotiations seemed to have been defined way before entering the consent.

The celebrated case of **Flora N. Wasike =vs= Destine Waboko (1982-88) 1KLR 25** clearly states the circumstances when to set aside the consent order.

Further in **Purcel =vs= F. C. Trigell Ltd (1970) 2 ALL ER 671 Winn J** said:-

.....If a consent order is to be set aside it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons and I see no suggestion here that any matter that occurred would justify the setting aside of rectification of this order looked at as a contract”.

I am unable too to see any basis of setting the said consent aside. I am unable to know from the pleadings what Mr. Anyul was not supposed to do or do for his client.

In any event the parties executed the consent without any objection. The surveyor moved to the land and sub-divided without any objection from the defendant or other interested parties. Titles were issued and I suppose he collected his.

All these activities took place from 18th June 2008. The application in my mind is belated and an afterthought. There is always need to take into consideration the steps and the period taken by the aggrieved party in circumstances where a consent has been entered and one want to challenge. The period of over three years is manifestly excessive.

I have noted also that the applicant attempted to set aside the said order vide his application dated 30th June 2009 but the same was dismissed. This application is in my mind an attempt to seek a second chance by the applicant. I shall not allow it. The same is dismissed with costs.

Dated, signed and delivered at Kisumu this 15th day of October 2012

**H. K. CHEMITEI
JUDGE**

In the presence of:

Otieno for Mwamu Advocate for the Plaintiff

Omondi for Anyul Advocate for the defendant