



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL CASE NO. 73 OF 2006**

DISMAS WAKHISI MULUPI .....PLAINTIFF/ APPLICANT

VERSUS

JULIUS MUKHONGO LUKHUBI ..... DEFENDANT/RESPONDENT

**RULING**

[1]. The applicant brings this application under Section 3, 3A 63 (e) and 50 of the Civil Procedure Act and also under Order 44 Rule 1 of the Civil Procedure Rules (2010). He prays that this courts orders dated 3<sup>rd</sup> day of November, 2015 be reviewed and set aside. That the County Surveyor be called for cross-examination on the survey report dated 11<sup>th</sup> September 2015. He prays that in the alternative and without prejudice to prayers 2 and 3, the plaintiff/applicant be granted leave to engage an alternative licensed surveyor of his choice to survey, identify, establish the size of, and demarcate boundaries of **E.Bukusu/E. Sangalo/1140, E. Bukusu/E. Sangalo/966 and E. Bukusu/E. Sangalo/1141.**

[2]. His reasons for doing so is that the defendant/respondent was opposed to and/or did not accept the surveyors report presented to court because it was erroneous, false, biased and/or incomplete. Further, that his own counsel acted contrary to the plaintiff/applicants instructions when he informed the court that he had no problem with the adoption of the report, yet the report was hotly contested among other reasons supporting his affidavit.

[3]. The application is opposed by the respondent. The respondent argues that the court order of 3.11.15 cannot be reviewed and/or be set aside. He argued that the applicant had in court a lawyer Mr. Murunga who said,

***“That the surveyors report be and is hereby adopted as an order of the court.”***

The respondent argues that the court record is clear that the parties have been given 30 days’ notice to study the report. That it was within those 30 days that the County Surveyor should have been summoned to court and be cross examined. The respondent further argued that the parties to this suit had previously entered into a consent which gave the County Surveyor the mandate to visit the suit lands aforesaid, and point out the beacons.

[4]. This application is clearly without any merit. The appointment of the County Surveyor was by consent of the parties to this suit entered into on 22.7.2015. It was not established in court that that consent was based on any misrepresentation, fraud or mistake, when the consent was filed in court. This matter was later mentioned in court on 30.9.15. Madam Nanzushi, advocate appeared for the defendant while Mr. Murunga, advocate appeared for the plaintiff/applicant. On that day the court made the following order;

***“The surveyors report is in the court file. Parties to peruse the same. The matter to be mentioned on 3.11.15 for further orders.”***

On 3.11.15 only Mr. Murunga for the plaintiff/applicant appeared and he said,

***I have discussed the report with my client. I have no problem with it.”***

The court then adopted the report as the order of the court. The allegations of the plaintiff now through another lawyer, that his previous advocate acted contrary to his instructions cannot be true at all. The report has been made an order of the court and now forms part of the evidence in this case. I cannot change that. The time to cross examine the County Surveyor or his report and time to bring another report by another surveyor is long gone. That period was the time between 3.9.15 and 3.11.15 the dates the court told the parties that a report was filed and when the report was adopted as the order of the court. That was a period of 60 days. This application is without any merit. It is dismissed with costs to the defendant/respondent.

**DATED at BUNGOMA this 11<sup>th</sup> day of May 2016**

**S. MUKUNYA**

**JUDGE**