REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 138 OF 2000

STEPHEN NYAPARA.....1ST PLAINITFF

ABSOLOM SIMOTWO.....2ND PLAINTIFF

PAUL KIBOI.....3RD PLAINTIFF

VERSUS

THE PRNCIPAL DIRECTOR OF SETTLEMENT.....1ST DEFEDNANT

RICHARD NGEIYWA.....2ND DEFENDANT

HENRY NDIEMA.....3RD DEFENDANT

MR TOWETT.....4TH DEFENDANT

R U L I N G

BACKGROUND

1. The three plaintiff/Respondents namely **Stephen Nyapara, Absolom Simotwo** and **Paul Kiboi** filed a suit against the Provincial Director of Settlement and three other individuals seeking among other prayers a declaration that they are lawful allottees of 168 acres out of **LR No. 2070/R** at Kitalale Settlement scheme. The Attorney General was later joined as the fifth defendant

2. The three respondents brought this suit on their own behalf and on behalf of 35 others. This suit was filed in 2000 but for one reason or another, it was not concluded until February 2016 when a consent order was recorded compromising the suit by its withdrawal on condition that the respondents were resettled in Trans Nzoia County within one year from the date of adoption of the consent. It was also part of the consent that each party was at liberty to apply.

3. The consent order was adopted on 17/2/2016. On 5/5/2016 the Attorney General filed an application seeking variation and or amendment of the consent.

APPLICANTS CONTENTION

4. The applicants contend that soon after the adoption of the consent they embarked on the process of implementing the order. It turned out that the land which the applicants had in mind was a Gazetted forest whose degazettment process will take time beyond the one year within which the respondents ought to have been resettled. It also turned out that the department of settlement had no funds to purchase alternative land for resettlement of the respondents.

5. The applicants therefore contend that it is imperative for the consent order to be set aside so that they can be allowed to file a consent with an implementable timeline.

RESPONDENTS CONTENTION

6. The respondents have opposed the applicants application based on grounds of opposition filed on 7/6/2016 together with a replying affidavit filed in court on 10/6/2016. The respondents contend that a consent order can only be set aside by another consent order and that there are no grounds to warrant review of the consent. The respondents further contend that the land on which they were to be resettled is not forest land as alleged. That LR No. 2070 is Government land which is allotted to beneficiaries by the settlement department. That the applicants have not annexed any document to show that the said land which had been earmarked for their resettlement is forest land.

ANALYSIS

7. The respondents were initially fighting to remain on 168 acres out of LR No. 2070/R. The position however changed when they agreed to withdraw their suit on condition that they were resettled in Trans - Nzoia within one year. I have looked at a letter dated 7/3/2012 marked "F 001". This is a letter in response to one dated 22/2/2016 from the office of the Attorney General Eldoret. It is clear that the Attorney General's office had started the process of implementing the consent order.

8. From the response of the Land Adjudication and Settlement, it is clear that the consent was arrived at in ignorance of material facts. For instance it was not in the knowledge of the state counsel who entered the consent that the alternative land in question was Government forest. The issue which then arises for determination is whether the applicants have shown grounds which can warrant review, setting aside or amendment of a consent order.

9. Mr Kuria State Counsel cited the case of ***Kenya Commercial Bank Limited – Vs- Benjoh Amalgamated Limited & Another [1998] eKLR*** in which reference was made to the case of ***Hirani – Vs – Kassam [1952] 19 EACA 131*** where it was held as follows:-

> ***" Prima facie any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them ….....and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ….....or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for any reason which would enable the court to set aside an agreement".***

10. The Hirani case (*supra*) summarised the circumstances under which a consent order can be varied or set aside. In the instant case, it is clear that the applicant's major worry is on the time given for compliance. The applicants have shown that the alternative land which they had indented to resettle the respondents is forest land. Forest land cannot be degazetted without following elaborate procedures including Public participation. This is not a process under the control of the department of settlement. It is a process which will take time and definitely one year is not possible. We are now towards the end of October. The consent was adopted in February 2016. If we were to stick to the one year given in the consent, time will lapse sometime, before February 2017 which is about three months away.

11. The parties to the consent made it one of the conditions that each party was at liberty to apply to court. The applicants have applied to court and indicated that the time is not enough. From the letter of the director of Settlement dated 7/3/2016 it is clear that the consent was entered in ignorance of material facts. As I have said hereinabove it was not known that the land which had been earmarked for resettlement was forest land. It was also not clear that implementation of that order was possible within one year.

12. There was no need for the applicants to demonstrate that the land in question was government forest. What the applicants were required to show is that the consent was made in ignorance of material

facts. It is clear that the consent was recorded without consultations with the client. This is clear from the letter from the Director of Settlement who has given reasons why such consent cannot be implemented. I therefore find that this is a clear case where the consent should be set aside and parties allowed to file a fresh one should they desire so. The upshot of this is that the consent adopted on 17/2/2016 is hereby set aside. The parties are at liberty to file a fresh one or let the case be heard on its merits.

It is so ordered.

Dated, signed and delivered at Kitale on this 25th day of October 2016.

E. OBAGA

JUDGE

In the presence of Mr Komen for M/s Arunga for respondents.

Court Assistant – Isabellah

E. OBAGA

JUDGE

25/10/16