



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 72 OF 2016**

**CLARA BUYAYI NDINYO.....PLAINTIFF**

**VERSUS**

**JOHN TABALYA MUKITE..... DEFENDANT**

**R U L I N G**

1. The plaintiff/applicant filed a notice of motion dated 11/8/2016 in which she seeks the following reliefs:-

**(a) That the order dated 15/6/2016 be varied to the extent that the representatives of National Environment Management Authority be present at the time of the survey.**

**(b) That the defendant be barred from engaging Protus Wanyonyi Muhindi a surveyor from participating in the survey exercise.**

**(c) That the order dated 15/6/2016 be varied to the extent that the County Surveyor Trans-Nzoia to carry out the survey to establish the size of the plaintiff's portion of LR. No. 7127/4 less the portion subject to riparian rights.**

**(d) That both parties be at liberty to be present with their private surveyors to witness the survey exercise**

**(e) That costs of the application be in the cause.**

2. The applicant contends that a surveyor called **Protus Wanyonyi Muhindi** should be excluded from the survey exercise as he has an interest in the land in issue. That there is a river which originates from the suitland and hence the need to involve officials from NEMA. That the said Protus Wanyonyi Muhindi has been preparing to carry out survey since the orders of 15/6/2016, were given.

3. The applicant's application is opposed based on a replying affidavit sworn on 2/9/2016 and filed in court on the same day. The respondent contends that the application is bad in law in that it is based on **Section 3A of the Civil Procedure Act** when there are specific provisions of the law which ought to have been cited. The respondent further contends that Protus Wanyonyi Muhindi is the one who surveyed Parcel No. 7127 for titling purposes and that the defendant was at liberty to pay him in kind and that this fact alone does not make him an interested party in this matter.

4. The respondent further contends that a party to a consent cannot be aggrieved with the same consent in which he/she participated and that the application does not meet the threshold for review of consent orders.

5. I have carefully considered the application herein as well as the opposition to the same by the respondent. I have also taken into account the submissions of counsel for the respective parties. I must say at the outset that there was no order made by this court on 15/6/2016. What triggered this application is a consent which was recorded on 31/5/2016. The counsel for the parties herein agreed that each party was to appoint a surveyor for purposes of ascertaining the actual size of the plaintiff's land. The surveyors were to file a joint report within 30 days. Each party was to pay their own surveyor.

6. It would appear that the plaintiff came across an agreement between the defendant and Protus Wanyonyi Muhindi in which the defendant had agreed with Protus who is a surveyor to survey **LR. No. 7127/4** which comprises **541 acres**. The said parcel is occupied by over **300 people**. The surveyor was to get **two acres** in lieu of cash payment for his services. The plaintiff contends that she has learnt that the same surveyor is the one who will undertake the exercise in pursuance of the consent order recorded on 31/5/2016. It is on this basis that she wants Protus barred from being part of the survey team.

7. The applicant is seeking to review the consent order which was recorded on 31/5/2016. The only issue for determination in this application is whether the applicant has established grounds for review of the consent. It is trite law that a consent order can only be varied on grounds which can be used to set aside a contract. In the case of **Brooke Bond Liebig (T) Ltd -vs- Malya [1975]** the judges of the then East African Court of Appeal had this to say regarding consent judgment or order:-

**“It is well settled that a consent judgement can be set aside only in certain circumstances, e.g. on the ground of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract”.**

8. In the instant case the advocates for the parties entered into a consent which was clear in its terms. The consent can only be set aside or varied if there are grounds for it to be set aside or varied. If the defendant has settled on Protus as his surveyor of choice, the surveyor cannot be barred from proceeding to carry out the survey exercise. Protus had been assigned the exercise of surveying the larger portion of 541 acres. The defendant agreed to pay him in kind by giving him two acres. There is absolutely nothing wrong with that arrangement.

9. The plaintiff had purchased **28 acres** out of the **541 acres**. She is one among the over **300 persons** occupying the land. If any portion of the 28 acres is part of riparian land, this can be ascertained by the surveyors. The applicant's application lacks merit. There are no grounds which have been raised to warrant variation of the consent order which was recorded on 31/5/2016. The applicant's application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this **10<sup>th</sup>** day of **October, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of Mr. Nyamu for applicant and Mr. Kiarie for respondent.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**10/10/2016**