



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Civil Case 235 of 2008

PETER NG'ANG'A MUIRURI ::::::::::::::::::::::::::::::::::: PLAINTIFF/RESPONDENT

- VERSUS -

CO-OPERATIVE BANK OF KENYA LTD. ::::::::::: 1ST DEFENDANT/APPLICANT

GATHOGO T/A VALLEY AUCTIONEERS ::::::::::: 2ND DEFENDANT/APPLICANT

ELIZABETH W. MUIGAI T/A

WAGLEY AUCTIONEERS ::::::::::::::::::::::::::::::: 3RD DEFENDANT/APPLICANT

RULING

The Applicant through a Notice of Motion dated 1st July 2011 seeks *inter-a-alia* an order that the Defendant's/Applicant's case be re-opened for the limited purpose of recalling the Defendant's Witness to adduce evidence of the Land Control Board Consents issued for the charging of the security Nyandarua/Nyandarasi/332. An alternative prayer is that the Defendant be allowed to adduce by way of affidavit the evidence of the Land Control Board Consents issued for the charging of the aforesaid security and that the Plaintiff be at liberty to cross-examine the witness so called or be allowed to produce the said evidence by affidavit. The application is based on the grounds stated therein among them that:-

1) *The Plaintiff's advocate, when cross-examining the 1st Defendant's Witness, raised an issue as to lack of consent from the Land Control Board Consent allowing the charging of the aforesaid security property by the Co-operative Merchant Limited.*

2) *The issue of consent to charge the said property was originally not among the issues arising either in the Plaintiff's Defence nor in the applications or previous proceedings prior to the hearing of the dispute herein.*

3) *The issue of consent to charge the said security was not so anticipated and the consent to charge was not therefore part of the agreed bundle of documents.*

4) *The said issue having been raised goes into the root of the matter and should be considered.*

5) *That it is in the interest of just and judicious determination of the suit between the parties herein to ascertain the loyalty and the validity of the charge.*

6) *That no prejudice shall be suffered by the Plaintiff which cannot be addressed by further cross-examination.*

The application is supported by affidavit of Mr. SAMWEL KIBUGI dated 1st July 2011 with annexures attached thereto. The affidavit merely restates the grounds on which the application is based.

The application is opposed through grounds of opposition filed in court on 2nd August 2011. Among the grounds of opposition are that:-

- *The facts in evidence upon the 1st Defendant's application are at variance with, contradict, defeat and do not support or justify the application.*
- *The facts in evidence upon which the Defendant's application is made augment and vindicate the Plaintiff's contention that Plaintiff's property title no. Nyandaru/Nandarasi/322 was agricultural land and that any dealing with any interest therein required the relevant Land Control Board's consent.*
- *That the application is incompetent and misconceived.*
- *That there is no reasonable explanation as to why the evidence was not adduced at the hearing of the case.*
- *That the evidence sought to be adduced have no value and will not add weight to the 1st Defendant's defence or deduct from the Plaintiff's evidence.*

I have considered the application, the opposing affidavits and the submission of the parties. I have also considered the law upon which the application is based. The law allows a case, for good reasons, to be opened for the purposes of a party giving further evidence. This court also has the discretionary power to do that for good reasons.

It is however, necessary to note that this case was closed and the parties directed to file written submissions. The Plaintiff filed their submissions on 10th June 2011. The Defendant has not filed their submissions. The Plaintiff is apprehensive that this application is merely meant to delay the suit.

In my view, the reasons provided by the Plaintiff in opposing the application are not good enough. It is the Defendant who knows the weight of its defence or how weighty it intends to make it. To submit, as the Plaintiff has done, that the evidence sought to be adduced have no value and will not add weight to the 1st Defendant's defence or deduct from the Plaintiff's evidence is to be presumptuous. The Applicant has stated clearly the reasons as to why it seeks to re-open the case. I am satisfied that the application should be granted and that any evidence the 1st Defendant may wish to tender should not be locked out.

In the case of **HASSAN HASHI SHIRWA – VS – SWALAHUDIN MOHAMUD AHMED [2011] e KLR**, the court allowed the reopening of a case after both parties had closed their case. A court has a duty to find out the truth, by unearthing any mystery which may assist the court to arrive at a just decision.

However, since the case is already closed, I will not grant prayer (a) but its alternative prayer (b) of the application.

I hereby grant the Defendant leave to adduce by way of affidavit the evidence of the land Control Board Consents issued for the charging of the security Nyandarua/Nandarasi/332. The Plaintiff/Respondent shall be at liberty to reply to the said evidence by affidavit.

The prayer (b) should be complied with within 14 days of the date of this Ruling and the Plaintiff/Respondent to reply, if need be within 7 days of service.

I further direct that the 1st Defendant files its submissions in the suit within 21 days of compliance with prayer (b) above.

The costs of the application shall be for the Plaintiff/Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI

THIS 14TH DAY OF JUNE 2012.

E. K. O. OGOLA

JUDGE

PRESENT:

N/A for the Plaintiff

M/s Mung'athia for the Defendant

Teresia – Court clerk