



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA**

**AT KITALE.**

**CIVIL CASE NO. 77 OF 2004.**

**LOIS HOLDINGS LTD.....PLAINTIFF.**

**VERSUS**

**NDIWA TAMBOI & 53 OTHERS.....DEFENDANT.**

**R U L I N G.**

1. This matter apart from being old as it was filed in 1992; it has had a chequered history of moving from court to court and having been handled by several Judges. The record also shows numerous interlocutory applications and counter applications have also been made. Finally the matter came up for hearing before me on 28<sup>th</sup> February, 2011, when counsel for the defence unsuccessfully applied for an adjournment. After the court declined to grant the adjournment, **Mr. Ngeiwa** learned counsel for the defendants left court, immediately thereafter **Mrs. Wanyama** placed herself on record as holding brief for **Mr. Ngeiywa**.

2. The hearing proceeded with the 1<sup>st</sup> plaintiff's witness giving evidence. When it was time for the defence counsel to cross examine PW1, **Mrs Wanyama** renewed the application for adjournment and the witness to be stood down so he could be cross examined on another date. Since the court had made a ruling earlier in the day on the same application, the second attempt was also unsuccessful. **Mrs Wanyama** did not cross examine the witness thus the plaintiff proceeded to close their case and the court stood over the matter for the defence hearing on 26<sup>th</sup> May, 2011.

3. On 24<sup>th</sup> may, 2011, the defendant filed a Notice of Motion dated the same day under certificate of urgency seeking for orders that PW1 be recalled for purposes of cross-examination. This application was filed by **M/s. Walter Wanyonyi & Co.** Advocates who had filed a notice of change of advocates on the same day. The application is supported by the grounds that counsel for defendant left the defendants in court as he had a sick child. The defendants were in court, although **Mrs. Wanyama** held brief for defence counsel, she had no instructions to proceed. Counsel urged the court not to visit the mistake of counsel upon innocent litigants.

4. This application was opposed; **Mr. Kiarie**, learned counsel for the plaintiff relied on grounds of opposition on points of law. He submitted that under order 18 rules 20, the basis upon which this application was brought, provides that it is the court that has the power to recall a witness if the court deems it fit. Secondly, this application is an abuse of court process because this is a backdoor method of obtaining an adjournment or to circumvent the order of 28/2/2011 when the court declined to allow an adjournment. The defendants were represented by **Mrs. Wanyama** who sat in court throughout when the plaintiff testified but she declined to cross examine PW1, and the plaintiff's case was closed. The avenue for the defendant is to appeal against the order that refused to allow an adjournment.

5. This application seeks to recall the plaintiff's witness who was not cross examined after the close of evidence. There was counsel for the defendant who held brief for **Mr. Ngeiwa** who left court after he unsuccessfully applied for an adjournment. It has been repeatedly restated that an Advocate who holds brief for another assumes full responsibility for the one being represented. The defendants were

represented on that day. The defendants exercised their right to choose counsel of their choice. The issue to determine is whether the court should recall PW1, I have taken into account this is a very protracted matter that has been in the courts for about two decades. Perhaps in the interest of justice the defendants should be allowed to recall the witness. However since failure to cross examine the witness was as a result of the fault by the defence counsel, it will be proportionate that the defendants should bear the costs of the inconvenience and the thrown away costs.

**6.** In the interest of proportionality, although I detest this practice of applying for adjournment especially by defence on the day of the hearing, I will reluctantly exercise my discretion and allow the application to recall PW1, on condition that the defendants are ordered to pay the plaintiff thrown away costs assessed at Ksh 50,000/= ( Kenya shillings fifty thousand). The said sum is to be paid within seven (7) days of this order. Failure to pay the order to recall the plaintiff shall lapse and the matter shall proceed for the defence hearing as ordered earlier on.

The plaintiff shall also have the costs of this application.

**Ruling read and signed on this 24<sup>th</sup> Day of June 2011**

**M. K. KOOME**

**JUDGE**