



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 85 OF 2005**

**MOSES KHAOYA WAFULA..... PLAINTIFF**

**VERSUS**

**NABAYI MULTIPURPOSE**

**CO-OPERATIVE SOCIETY..... DEFENDANT**

**RULING**

1. The applicant Nabayi Multipurpose Co-operative Society filed a Notice of Motion dated 21/3/2016 in which it seeks an order that the ex-parte proceedings of 7/3/2016 which resulted in closure of the defence case be set aside and it be allowed to present evidence in furtherance of its defence. The applicant also seeks leave of the court to allow it to call one more defence witness.
2. On 27/1/2016, the applicant presented one defence witness. The case was then adjourned to 7/3/2016 and summons were issued to the Executive Officer Bungoma to come and produce **Bungoma High Court Civil Case No. 128 of 2001**. On 7/3/2016 when the case was called out for defence hearing, neither the defendant's representatives nor their advocate were in court. Counsel for the plaintiff asked the court to order closure of the defence case as the date had been taken by consent and the defendant or its advocate were not present. The court ordered that the defence case be closed and parties to file written submissions.
3. The applicant contends that failure to appear in court on 7/3/2016 was due to a mechanical problem on the counsel's vehicle. That the applicant's advocate's vehicle broke down as he was on his way to court. That the chairman of the applicant who had testified as DW1 was actually in court when the matter was called out but that the defence case was closed without the court bothering to ask if the Executive Officer who had been summoned was in court.
4. The applicant further contends that it has come across some evidence which was not readily available as at the time DW1 testified and that it will be fair for defence case to be re-opened so that the applicant is heard. That its advocate arrived in court after the defence case had been closed.
5. The applicant's application is opposed by the respondent through a replying affidavit sworn on 4/5/2016. The respondent contends that the application is made in bad faith, is belated and that the deponent's supporting affidavit is contradictory and that no explanation has been given for the applicant's failure to appear in court through its representative or their counsel. That the applicant is seeking to introduce documents which had been rejected in evidence as they had been written on a without prejudice basis.
6. I have gone through the applicant's application as well as the opposition to the same by the respondent.

The issues which arise for determination is whether the applicant has demonstrated good reasons for re-opening the defence case and whether the applicant should be allowed to call one more witness.

7. The applicant has deponed that the reason why its advocate failed to come to court was because his vehicle broke down while he was on the way. Though paragraph 3 of the supporting affidavit indicates that it is the deponent's vehicle which broke down, this is not the case because it talks of client. This was clearly a mistake of the person who drafted the affidavit. The deponent himself claims in paragraph 5 that he was actually in court and stood up when the case was called. It could not therefore be said that he is the one whose vehicle broke down.

8. The applicant's chairman has even insisted in the supplementary affidavit that he was actually in court and that he stood up. This may be true because in most cases, when litigants are in court and their matter is called out, most of them stand up without uttering a word. If the judge fails to prompt them to say if they are parties most do not even utter a word or even say that their lawyer is not in court. It is therefore not strange to hear the chairman of the applicant say that he was in court on 7/3/2016. I am therefore prepared to give him benefit of doubt on this account.

9. The applicant's counsel may not have been in court at all. If he was, he should have sworn an affidavit to state why he was not in court. This is why instead of swearing an affidavit to explain his absence, he as the drafter of the affidavit and supplementary affidavit has resorted into imputing bias on the part of the court which imputation is misplaced and has no basis. If the court had insisted on the case proceeding, this is not a reason for claiming bias and ought not to have been introduced in this application.

10. Since the chairman of the applicant was in court but he failed to inform the court that he was present, I find that the applicant has given an explanation which is convincing. On whether the applicant should be allowed to present one more witness as proposed in the application, I find that this prayer is well founded. The applicant has annexed a document to the supplementary affidavit. This document is not written on a without prejudice basis. The applicant may not have had time to look for it. This is because when the defence case started on 27/1/2016, the defendant's counsel had sought for adjournment which adjournment was rejected. They were forced to proceed and even if the defence case was adjourned to 7/3/2016 there is no way they would have presented that witness without leave of the court.

11. It is only fair that each party is given an opportunity to bring all evidence which will not only assist their case but also assist the court to reach a fair judgment on the issues involved. It is for the reasons given hereinabove that I allow the applicant's application with the result that the order made on 7/3/2016 closing the defendant's case is hereby set aside and the defence case is re-opened. The applicant is also allowed to call **Geoffrey Situma Cherwenyi** as a witness. Leave is accordingly granted to that effect.

12. The applicant shall not have costs of this application because they are the cause of all this. Their previous conduct of not being

keen on proceeding also disentitles them to the costs of this application.

It is so ordered.

Dated, signed and delivered at Kitale on this **14<sup>th</sup>** day of **September, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of M/s. Mufutu for Mr. Kiarie for Plaintiff/Respondent.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**14/9/2016**