



**Mkamenyi Farmers Cooperative Society Limited v Ministry of
Lands and Physical Planning & 8 others (Environment & Land Case
15 of 2023) [2024] KEELC 3714 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3714 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT & LAND CASE 15 OF 2023
NA MATHEKA, J
APRIL 25, 2024**

BETWEEN

MKAMENYI FARMERS COOPERATIVE SOCIETY LIMITED PLAINTIFF

AND

**MINISTRY OF LANDS AND PHYSICAL PLANNING 1ST DEFENDANT
NATIONAL LAND COMMISSION 2ND DEFENDANT
REGISTRAR OF TITLES – TAITA TAVETA 3RD DEFENDANT
HONOURABLE ATTORNEY GENERAL 4TH DEFENDANT
COUNTY GOVERNMENT OF TAITA TAVETA 5TH DEFENDANT
VOI SISAL ESTATE LIMITED 6TH DEFENDANT
VOI PLANTATION LIMITED 7TH DEFENDANT
VOI POINT LIMITED 8TH DEFENDANT
DIAMOND TRUST BANK KENYA LIMITED 9TH DEFENDANT**

RULING

1. The application is dated 20th February 2024 and is brought under Sections 63 (e) IA, 1B, 3, 3A of the [Civil Procedure Act](#), Section 146 (4) of the *Evidence Act* and Order 18 Rule 10 of [Civil Procedure Rules](#) 2010 seeking the following orders;
 1. That this application be certified urgent and service be dispensed with in the first instance.



2. This Honorable Court be pleased to set aside proceedings and/or orders closing the 5th Defendant's case and substitute the same with an order reopening cross-examination of the Defendants' witnesses basing on the evidence on record.
 3. That this Honorable Court be pleased to reopen the Defence case and make orders allowing the 5th Defendant to participate in the proceedings, by calling witnesses, to give evidence and produce documents for purposes of fair trial and just determination of real issues of dispute herein.
 4. That the 5th Defendant be allowed to file its defence and/or Statement of Admission out of the prescribed time.
2. It is based on the following grounds that the evidence of the 5th Defendant will greatly help this court to reach a sound and a just determination of this matter. That the rights and interests of the people of Taita Taveta County will be greatly prejudiced if this suit is allowed to proceed without the evidence of the 5th Defendant. That it is in the interest of justice that the 5th Defendant be allowed to participate in the proceedings by cross-examining the Defendants witnesses and calling witnesses, to give evidence and produce documents for purposes of fair trial and just determination of real issues in dispute. That the Plaintiff or other Defendants will not suffer any prejudice if this application is allowed.
 3. Elizabeth Mkongo the County Executive Committee Member Lands, Physical Planning, Mining and Energy who was appointed in November 2022 stated that in February 2024 members of the public approached her to find out why the 5th Defendant was not participating in this case. She found out that the 5th Defendant had not filed any defence in this case and that their case was closed. That the mistake of the previous regime should not be revisited on the people of Taita Taveta. That the evidence of the 5th Defendant will greatly assist the court to reach a sound and just determination. That they have crucial witnesses who participated in the transfer of the said property.
 4. I have carefully considered the application, the supporting affidavit, as well as submissions and authorities cited. In my considered view the issue that arise for determination is whether the Applicant has demonstrated sufficient cause to warrant the grant of the orders sought.
 5. The discretion of the court to set aside *ex parte* proceedings is unfettered. However, it must be exercised judiciously for the interests of justice. In the case of *Shah v Mbogo & Another* (1967) EA 116, the East African Court of Appeal stated as follows;

This discretion (to set aside *ex parte* proceedings) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought out whether by evasion or otherwise, to obstruct or delay the course of justice.”

Therefore, the discretion to set aside *ex parte* proceedings ought to be exercised for purposes of furthering justice and not to obstruct or delay justice. Hence, it behooves an applicant for such orders to demonstrate the justification for such application by showing that there is sufficient cause why they failed to attend court and that their application is made in good faith and not meant to delay the course of justice.



6. In the Indian case of *Parimal v Veena Bharti* (2011), the Supreme Court of India stated that;

Sufficient cause means that the parties had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently-----”

7. Similarly, in the case of *Wachira Karani v Bildad Wachira* (2016) eKLR, the court stated that;

Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight jacked formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause.”

8. Section 146(4) of the *Evidence Act*, Chapter 80 of the Laws of Kenya and Order 18 rule 10 does afford the Court the discretion to entertain the application and grant the orders sought to recall of the witnesses for the Defendants.

146

- (1) Witnesses shall first be examined in-chief, then, if the adverse party so desires, cross-examined, then, if the party calling them so desires, re-examined.
- (2) ...
- (3) ...
- (4) The court may in all cases permit a witness to be re-called either for further examination in-chief or further cross- examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

9. Order 18 Rule 10 of the *Civil Procedure Rules* provides that;

The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit.”

It is not in dispute that this matter proceeded without the participation of the 5th Defendant and was at the stage of taking evidence of the last defence witness when this application was made. This appears to be a public interest matter which would indeed affect the people of Taita Taveta County and it would be prudent to allow the 5th Defendant who is the County Government of Taita Taveta to participate in the matter though belatedly. The 5th Defendant/Applicant wishes to file a statement of admissions in order to shed more light on the matter and to also call witnesses which they claim are crucial. I concur with the Applicant that the mistake of the previous regime should not be revisited on the people of Taita Taveta and that the evidence of the 5th Defendant will greatly assist the court to reach a sound and just determination. I find that the application is merited and I grant the same. Costs to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF APRIL 2024.

N.A. MATHEKA



JUDGE

ELC CASE NO. 15 OF 2023 Page 2 of 2

