

UGANDA / JUDGMENT

China Railway No. 3 Engineering Company Limited v Prof . Gakwandi (Miscellaneous Application 25 of 2023) [2023] UGHCCD 217 (8 June 2023)

[2023] UGHCCD 217

COURT

HC: Civil Division (Uganda)

BEFORE

Wagona, J

CASE / FILE NUMBER

Miscellaneous Application 25 of 2023

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL
MISC. APPLICATION NO. 0025 OF 2023 (ARISING FROM CIVIL SUIT NO. 0027 OF
2019) 5 CHINA RAILWAY NO. 3 ENGINERING CO. LTD ::::::::::: APPLICANT VERSUS
PROF. ARTHUR GAKWANDI ::::::::::: RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA 10 RULING

The applicant brought this application under section 98 of the Civil Procedure Act Cap. 71, Order 18 rule 13, 52 rules 1 & 2 of the Civil Procedure Rules seeking:

- 1. An order recalling the Respondent as a witness in Civil Suit No. 0027 of 2019 for cross examination be issued.
- 15 2. That the costs of taking out this application be provided to the Applicant.

The application was supported by affidavit of Mr. Openy Stephen, the applicant's Health, Safety and Environment officer where he averred as follows:

1. That the applicant is a defendant in Civil Suit No. 0027 of 2019 and in 2023 20 instructed M/s Masereka C & Co. Advocates to represent them. That upon studying the file and its contents, it was established that there was need to conduct a search on the true ownership of the suit property.

- 2. That upon conducting the search, it was discovered that the Respondent in the main suit is not the owner of the suit property. That the Respondent disposed of the suit property by way of sale in April 2019 at a consideration of UGX 160,000,000/= before the institution of the suit. That after the conclusion of the sale, the suit property was to be subdivided to create separate titles. That the transfer was concluded and the Respondent is not the owner of the suit land.
- 3. That the above information is essential in determining the dispute between 10 the parties in the main suit, Civil Suit No. 0027 of 2019.
- 4. That when the case came up for hearing, the registrar of titles testified about these facts regarding the certificate of title and subdivision.
- 15 5. That the Respondent has no right to lodge any claim against the Applicant and it is in the interests of natural justice to recall the Respondent for cross examination as a witness for both the parties to be heard.
- 6. That the application has merit since the matter is still on-going and judgment 20 has not been concluded. That if this application is not granted, the applicant will suffer harm and financial loss in satisfying any claims by a wrong party to a suit. That it is fair, equitable and in the interest of justice that this application is granted.

The application was opposed by the Respondent who contended as follows;

25 1. That the application is devoid of merit, frivolous, vexatious and a delaying tactic and a total abuse of court process. That the application is overtaken by

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events since the Respondent closed his case and the defendant has also closed. That allowing this application would be detrimental and prejudicial to the Respondent's case.

- 5 2. That the Applicant is trying to fill gaps when all evidence is long heard and closed. That the applicant cannot be allowed to present a totally different case at trial.
- 3. That at scheduling, among the agreed facts it was agreed that the plaintiff is 10 the registered proprietor of the suit land. That the Respondent did not sale the suit land subject of the dispute before filing of the suit.
- 4. That the allegations by the applicant that the Respondent sold the land where the house is situate is false and unfounded. That the Respondent is the owner 15 of the suit land.
- 5. That the Applicant's application is defective since there is no reason by the applicant to file the said application. That no one refused the Applicant from carrying out the search before the hearing and the information from the 20 applicant is false.

- 6. That on 21st February 2023, the Respondent testified and presented a certificate of title and the same was duly admitted as PEXA. That also in the report admitted as PEXE, it was acknowledged that the title was in the 25 names of the Respondent and Tumwesigye Edith and the same fact was confirmed by the Chief Government Valuer.

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- 7. That allowing this application would be to allow the Applicant to present a case that is totally different from the one pleaded. That the Applicant shall not suffer any prejudice if this application is not granted. The Respondent thus asked court to have the application dismissed with costs.
- 5 In rejoinder, the applicant contended as follows:
 - 1. That the applicant's affidavit in reply contains material falsehood and is intended to mislead court. That the failure to mark the annexure was an oversight of the Applicant's counsel and the said defect should not be visited on the Applicant and the same were attached and marked to the affidavit in 10 rejoinder.
 - 2. That the information provided is proof that the Respondent has no right to lodge any claim against the Applicant. That the current application has merit and it is in the interest of justice and the rules of justice to have the 15 Respondent recalled as a witness for both parties. That the Respondent should be recalled as a witness even after close of both parties' cases.
 - 3. That if the application is not granted, the applicant will suffer harm and financial loss in satisfying any claims by the wrong party to the suit. That it 20 is fair, equitable and in the interest of justice that the preliminary objection is overruled and the application is granted.

Representation and Hearing:

Mr. Masereka Geoffrey Chan of M/s Masereka C & Co. Advocates appeared for the Applicant while **Mr. Agaba Jadison of M/s Ahimbisibwe & Agaba Co. Advocates** appeared for the Respondent. A schedule to file submissions was issued by court and both parties complied and I have considered the same extensively in 5 this ruling.

Issues:

- 1. Whether the applicant's affidavit in support of the application is defective.
- 10 2. Whether the company did not authorize the filing of the application.
- 3. Whether the Respondent should be recalled as a witness for further cross examination.

Submissions of the Respondent:

15 1. Whether the applicant's affidavit in support of the application is defective.

The annexure to the application are not marked and sealed by the stamp of the commissioner for oaths. Rule 8 of the Advocates (Commissioner for Oaths) Act: "all exhibits shall be securely sealed to the affidavits under the seal of the 20 commissioner and shall be marked with serial letters for identification.

In **Yowabu Kamukuha Vs. Bukuru Moses & others, Misc. Application No. 114 of 2009** Giddu J held that: "*there is no doubt that the applicant's annexures to his*

affidavit in support offend this rule. It would follow that the consent order which is purported to be an annexure is not available to the applicant's affidavit in support.

Gidudu, J further observed that: "a *defect in an affidavit is therefore not a* 5 *procedural matter but a matter of law which must be complied with. That the situation cannot be served by Article 126(2)(e) of the constitution because this is not a mere technicality but a substantial requirement of law."*

A plain look at the annexure attached shows that none is marked by any serial 10 letter of identification. The annexure must bear a stamp of the commissioner for oaths.

Submissions of the Respondent:

The failure to mark the annexure and have them sealed by a seal of the 15 commissioner for oaths was an oversight by the lawyer which should not be visited on the Applicant. Such defect is curable under Article 126 (2) (e) of the 1995 Constitution (**Baryaija Julius Vs. KikwesireZaverio & Anor, Civil Application No. 324 of 2016**).

20 Consideration by Court:

Rule 8 of the Commissioner for Oaths Act provides thus:

All exhibits to affidavits shall be securely sealed to the affidavits under the seal of the commissioner and shall be marked with serial letters of 25 *identification.*

On the affidavit in support of the Application, the applicant attached an agreement dated 9th April 2019, a certificate of title for land comprised in LRV 3165/23, Volume KBO3, Folio 10, Plot 34, Busongora, Kasese. These annexure are stamped by the Commissioner for Oaths Mr. Mugabe Robert and signed; however they are 5 not marked and numbered.

In the affidavit in support of the application, the annexure attached were duly mentioned and assigned a number. Under paragraph 6, the applicant referred to a sale agreement attached as annexure "A" and under paragraph 8, the certificate of 10 title was cited as annexure "B".

However, the annexure were not actually marked. This was the only omission. I find that everything was done to comply with the law and except for this omission, the documents, being only 2 of them, and having been described in the affidavit, 15 and referred to by their intended markings were easily identifiable. Rule 8 of the Advocates (Commissioner for Oaths) Ac does not provide for the consequences of failure to fully comply with the said rule. In the circumstances of this case, I find the omission minor and curable under Article 126 (2) (e) of the Constitution.

20 I agree with the decision of *Hellen Obura J (as she then was) in Civil Application No. 324 of 2016, Baryaija Julius Vs. Kikwesire Zaverio & Anor* where she observed thus:

"It is the view of this court that the purpose of rule 8 of the Commissioner for Oaths Rules is to ensure authentication of the documents referred to in 25 *the affidavit and attached thereto. The mischief to be avoided to my mind,*

is attachment and reliance on a document other than the one referred to in the affidavit. That is why the rule requires the secure sealing of the exhibits and marking with serial letters identification."

- 5 In the affidavit in support of the Application, the applicant clearly mentions the annexure attached and the same are sealed by the stamp of the commissioner for oaths. The failure to mark the annexure in my view was technicality which is curable under Article 126 (2) (e) of the Constitution.
- 10 I therefore find no merit in this point of law and the same is overruled.

2. Whether the company did not authorize the filing of the application.

Submissions of the respondent:

The company did not authorize the filing of the application which is by way of a 15 resolution and that this renders the application incompetent. In **Rubaga Building Ltd Vs. Gopal DevsiVekaria& Anor Civil Suit No. 0534 of 2014** court held that: *"that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed at a company or board of directors meeting and recorded in minutes."*

In **Masaka Tea Estate Ltd Vs. Samaha Tea Estate & others M. A No. 505 of 2004***,* court observed that a suit instituted in the names of a company without authority of directors is not maintainable in law.

Mr. Openy Stephen who deponed the affidavit in support is not a director of the applicant and does not show anywhere in the affidavit that he was authorized by the applicant's directors.

5 Counsel for the Applicant did not response to this issue in the submissions in rejoinder.

Consideration by court:

10 A suit by or in the names of the company must be commenced with authorization by the company or the directors of the company. The authorization can be in form of a resolution registered or through the minutes of the company. Hon. Justice Kawesa in **Rubaga Building Company Ltd Vs. Gopal Devsi Vekaria & Anor HCMA 534 of 2014** noted that **"It is trite law that a suit instituted in the names* 15 *of a company without the authority of the directors is incompetent*."**

In **Bugerere Coffee Growers Ltd versus Sebadduka & Anor [1970] 1EA 147***, it was held, in dismissing the suit, that when companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed 20 either at a company or Board of Directors meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in the case. The Court held further that where an advocate has brought legal proceedings without authority of the purported plaintiff the advocate becomes personally liable to the defendants for the costs of the action.

A similar position was taken in **Makerere Properties Ltd versus Mansukhlal Ranji Karia; HCCS No.32 of 1994**, where it was noted that authority to file a suit by a company extended to situations where an Advocate purports to commence proceedings in the name and on behalf of a company without authority.

Hewett, J. in **Assia Pharmaceuticals v Nairobi Veterinary Centre Ltd HCCC No. 391 of 2000** as observed in relation to this issue as follows:

"It is settled law that where a suit is to be instituted for and on behalf of a company there should be a company resolution to that effect..... As* 10 *regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the* 15 *company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified."*

20 In this case the suit was already instituted and is being prosecuted. The subsequent proceedings relate to to the prosecution of the suit. It is my view that where a suit has already been instituted and the subsequent proceedings by the company are auxiliary to the main proceedings, then such authorization is not required. Proceedings auxiliary to the main proceedings may be required to be taken out in 25 the shortest time possible which may not necessitate taking out fresh resolutions

each time such further or auxiliary proceedings in the suit are to be undertaken. I therefore find no merit in this point of law.

Regarding the competence of Mr. Stephen Openy to take out the affidavit, Order 5 29 rule 1 of the Civil Procedure Rules provides thus: *In a suit by or against a corporation any pleading may be signed on behalf of the corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case*.

- 10 Mr. Stephen indicated that he is the Health, Safety and Environment officer of the Applicant and he deposed the affidavit in that capacity. In the absence of any evidence to the contrary, I am persuaded to believe that he is a principal officer of the applicant in charge of health, safety and environment. The applicant's case concerned the applicant failing to take the required safety measures in their quarry 15 activities that led to the damage of the Respondent's house. I believe such allegation falls with the position that Mr. Stephen occupied in the Applicant's company. I thus find him competent to swear the affidavit on behalf of the applicant.
- 20 I therefore find no merit in the points of law raised by the Respondent and they are overruled.

3. Whether the Respondent should be recalled as a witness for further cross examination.

25 Submissions of the Applicant:

Under Section 164 of the Evidence Act and Order 18 rule 13 of the Civil Procedure Rules, court my recall any witness for cross examination

In **Onek Manacy & Anor Vs. Omona Micheal**, High Court Civil Appeal No. 5 0032 of 2016 court held that:

"The court is given wide discretionary powers under both Order 18 rule 13 of the Civil Procedure Rules and section 164 of the Evidence Act to recall witnesses. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice either party. Once court decides that 10 *certain evidence is essential for just determination of the case, then it may recall a witness or witnesses to give that evidence whatever its effect is likely it to be, provided that the

parties are allowed to exercise their right to cross examine any such person, and the court should adjourn the case for such a time if any as it thinks necessary to enable such cross examination* 15 *to be adequately prepared if, in its opinion either party may be prejudiced by the calling of such person as a witness"*

In the present case, it was discovered that the suit land was sold by the Respondent before institution of the suit. There is a sale agreement dated 9th April 2019 and a 20 certificate of title in the names of another person. This evidence is vital in determining the dispute between the parties since the registrar of title testified about the same in favour of the applicant. The information proves that the Applicant has no locus to file this case. The calling of the Respondent is in the interest of justice since the evidence sought to be examined about is vital for the 25 determination of the case between the parties.

Submissions of the Respondent:

The application is devoid of merit, frivolous, vexatious a delaying tactic and a total abuse of court process. No reasonable cause has been shown for this application. There is no new evidence which was discovered by the Applicant.

The applicant admitted that the land belongs to the plaintiff during scheduling and the certificate of title was admitted by consent and marked as PEXA. There is a report where the applicant also admitted that the suit land is for the Respondent.

- 10 Recalling the plaintiff as a witness will prejudice his case. The plaintiff long closed his case and the defense. It is not possible to re-open the plaintiff's case when the defense has been closed. Doing so would amount to allowing the defendant to fill gaps in their case which will be prejudicial to the applicant's case.
- 15 In **Onok Manacy & Anor Vs. Omana Micheal** cited by the applicant's counsel, Justice Mubiru held that a witness should not be called to fill gaps in their defense evidence for them. The evidence that the applicant seeks to introduce is strange to the case and would amount to allowing the applicant to amend the pleadings since it was not pleaded.
- 20

CONSIDERATION BY COURT:

Order 18 rule 13 of the Civil Procedure Rules provides thus:

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 or her as the court thinks fit.

5 The above rule gives court the discretion subject to the law of evidence to recall any witness and put questions which court deems necessary. It is my view that recalling a witness is not a matter of right or course. Court can only do so in deserving circumstances where recalling such a witness is meant to clarify on the evidence on record or other evidence which court in its wisdom is necessary to arrive at a just decision.

The rule was given judicial consideration by **Mubiru J in Onok Manacy & Anor Vs. Omana Micheal, Civil Appeal No. 0032 of 2016** thus:

".. Such powers must be exercised judicially and reasonably and not in a way likely to prejudice either party. Once the court decides that certain evidence is essential for the just determination of the case, then it may recall a witness or witnesses to give that evidence whatever its effect is likely to be, provided that the parties are allowed to exercise their right to cross-examine any such person, and the court should adjourn the case for such a time, if any, as it thinks necessary to enable such cross-examination to be adequately prepared if, in its opinion, either party may be prejudiced by the calling of any such person as a witness. This provision is not a license to a court to summon witnesses at its own motion who have not been summoned by either party. A judicial officer should not **proprio motu** summon witnesses not called by either party."

It follows therefore that the power to recall a witness is entirely discretionary and should be exercised in exceptional circumstances and it should not be done to the prejudice of any party to a suit. I wish to emphasize that where the evidence that a party is to be further examined about is relevant and admissible and will aid court to reach a fair, balanced and just decision, then court should recall such a witness

In this case, I have considered the plaint filed by the Respondent on 31st July 2019. Under paragraph 4, the Respondent contended that he is the registered proprietor of

although it should not serve to re-open the case afresh.

- 10 the suit land comprised in Plot 17, Block 84 which was developed with his house. The Respondent contends that the issue of him being an owner was admitted by the defendant during scheduling. Contrary to the submissions of the respondent, the scheduling memorandum and the fact of the plaintiff being the owner of the suit land was not stated as an agreed fact.
- 15

The applicant now wishes to recall the respondent to be cross examined on an agreement dated 9th April 2019 where it is alleged that before filing this suit, he had already sold the suit land to one Twebaze Esau of Hima at shs 160,000,000/=. The other is a certificate of title for land comprised in LRV 3165/23, Volume 20 KB03, Folio 10, Plot 54, Block 84, Busongora, Kasese measuring 7.8060 hectares which is alleged to be the suit land which was transferred to the purchaser Esau.

On the other hand the respondent vehemently denies the contentions of the applicant and states that the allegations by the applicant that the Respondent sold

the land where the house is situate is false and unfounded; that the Respondent is the owner of the suit land.

The question is, who is telling the truth on this aspect of whether the Suitland had 5 been sold or not, prior to filing the suit? How do we know who is telling the truth? The best way in the circumstances of this case is to recall the respondent.

I thus find that clarifying this matter by recalling the respondent is essential for the just determination of the case. I therefore find that this is a proper case to allow the

- 10 application to have the respondent recalled to clarify to court as to whether he had sold the suit land prior to the institution of the suit and the circumstances under which the title was transferred into the names of Mr. Esau from the Respondent if at all.
- 15 This application therefore succeeds with the following orders;
- **1. The Respondent is hereby recalled for further cross examination only on the sales agreement dated 9th April 2019 where it is alleged that he had sold the suit land to one Twebaze Esau of Hima at shs 160,000,000/= and on the certificate of title for land comprised in 20 LRV 3165/23, Volume KB03, Folio 10, Plot 54, Block 84, Busongora, Kasese measuring 7.8060 hectares.**
- **2. The Applicant shall obtain certified copies of such documents from the Commissioner of Land Registration and serve them on Counsel**

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for the Respondent at least two weeks prior to cross the crossexamination of the Respondent.

3. The costs of this application shall abide the outcome of Civil Suit No. 5 002 of 2019.

It is so ordered.

Dated at High Court Fort-portal this 8th day of June 2023

Vincent Wagona **High Court Judge**

FORT-PORTAL

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