

UGANDA / JUDGMENT

Kare Distribution Limited v African Rivers Fund (Miscellaneous Application 2714 of 2023) [2024] UGCommC 270 (25 March 2024)

[2024] UGCommC 270

COURT

Commercial Court of Uganda

BEFORE

Anna B. Mugenyi, J

CASE / FILE NUMBER

Miscellaneous Application 2714 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA (coMMERCIAL DIVISION)

MISCILTANEOUS APPLICATION. 2714 OI 2023

5 KARE DISTRIBUTION LIMITED APPLICANT

VERSUS

AFRICAN RIVERS FUND RESPONDENT

BEFORE: HON. LADY JUSTICE ANNA. B. MUGENYI

Rulino

I have read the pleadings and submissions of the parties in this matter.

The applicants seek orders that:

- 1. An order recalling the plaintiff's witnesses in Civil Suit No.700 of 2019 for cross-examination.
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- 2. The counter defendants be allowed to file pretrial documents to wit, scheduling memorandum, trial bundles and witness statements.

With regard to the first prayer/ground, Order 18 rule 13 of the CPR 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 or her as the Court thinks fit.

In the case of Chino Railway No. 3, Engineering Co. Limited v Prof. Arthur Gokwondi M. A 0025/2023; Hon Justice Vinceni Wogono held that:

"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 clothe on the evidence on record or other evidence which Court in its wisdom is necessary to arrive at a just decision. "

In the present application, the applicants seek an order to recall a witness in the main suit for cross-examination by the 2nd applicant himself, a state of affairs that is not provided for by any law. The 2nd applicant was in Court on the day the witness testified in Court but he chose to contemptuously storm out of Court thereby forfeiting his rights to cross-examine the witness. The said plaintiff's witness was heard and the court did indeed put questions to the witness for clarification and the plaintiff's case was closed and they were directed to file written submission pending final determination of the case.

Suffice it to note that the power to recall a witness can only be exercised by the Court and this must be done judiciously, reasonably and not to the prejudice of any party to the suit. (Order 18 rule 13 CPR; Simbomonyo Esloles Ltd v Equity Bank and others M. A No. 6601 of 2022). 15

In this matter this Court already entertained the plaintiff's witness and heard what he had to say; and there is no basis for recalling the said witness by the Court.

The choice by the 2nd applicant to storm out of Court, as earlier stated, was voluntary and signified his dis-interest in cross-examining the plaintiff's witness when given an opportunity to do so. He cannot therefore seek the order sought because there is no basis in law for grant of such an order, and he forfeited his

right to cross-examine by his contemptuous actions that this Court will not condone. 25

With regard to the second prayer/ ground; from the court record it is evident that the applicants filed on 24/1/2020 a plaintiff's trial bundle that included a copy of the proposed Joint Scheduling memorandum; a witness statement of Koregyeyo Geoffrey and several other documents.

5 In paragraph 4 of the affidavit in support of this application; the 2nd applicant deposes that pre-trial documents were filed by the respondents 'stealthily' on 27th October 2023 and served on the 2nd applicant via email on 28th October 2023 for a matter that was coming up on 30th October 2023.

This itself is confirmation that pre-trial documents were prepared and received by the applicants in preparation for the scheduling conference to take place on 30th October 2023. It is of the scheduling conference that the pre-trial documents were presented and discussed by the parties with a view to coming to one common position in respect of facts; issues, witness; documents etc. before the matter is heard on its merits. 10

- On 30th October 2023, as earlier stated, the 2nd applicant rudely and contemptuously stormed out of Court before the scheduling conference could be held; and the same was eventually held and hearing of the case commenced with the presentation of the plaintiff's witness on that day and closure of the plaintiff's case. 15
- The 2nd applicant closed itself from the proceedings and opted not to participate in the same; and cannot now be seen to turn around and pretend to show interest in the said proceedings which they abandoned voluntarily yet they had been given an opportunity to be heard. Again, there is no basis for grant of the order sought by the applicants and the same is dismissed/ disallowed. 20
- Before I take leave of this matter, the applicants through the 2nd applicant alluded to being denied their constitutional right to a fair hearing which included a right 25

to legal representation and a right to be heard by allowing them to file their pre-trial documents and to cross-examine the respondent's witness.

It is notable that on 18th September 2023 the 2nd applicant wrote to the respondent's lawyers and informed them, inter alia, that he has withdrawn instruction from his former lawyers and that he was representing himself. On 30th October 2023 when the matter was called for hearing; the applicants sought an adjournment to February 2024 when they would have instructed a lawyer; almost 5 months from the set date of hearing.

Further, the applicants themselves filed several applications in this Court and the Court of Appeal; all seeking to stop/ stay the hearing of the main suit in one way or the other. In fact, in CA No. 804 of 2022; the Court of Appeal held that the applicant's *prima facie* case seems to be an abuse of the court system and cannot be allowed to continue after which the application was dismissed' 10

To date the applicants have never instructed a new lawyer and in fact during the hearing of 20/10/2024; the 2nd applicant confirmed that he was representing himself. This confirms that the applicants indeed never intended to instruct any lawyers to represent them and this is yet another delaying tactic to prolong the hearing and determination of C. S 700 of 2019. 15

To ihis Court; the opplicants were ollowed to exercise ltheir constitutionol right to o foir heoring in os for os ihey were given on opportunity to otlend o scheduling conference; heoring of the plointiff 's witness ond cross-exominition of the some ond preseniotion of their witness; but instead they opied to contemptuously storm out of ihe Court os eorlier stoted, thereby voluntOrily closing lhemselves out of their own cose for which they hod been given on opportuniy to be heord ond def end themselves. 20 25

For emphosis; the opplicants did noi intend io hove o legol representotio ot ony one point os cloimed, ond even when lhey were ollowed to represenl themselves and were afforded an opportunity to be heard and present their defence, they sat on their rights and opted not to participate in the court proceedings out of their own volition. They, therefore, cannot now turn around and seek to benefit from their rude; contemptuous and time wasting conduct.

In conclusion and from all the fore-going; this application is a clear abuse of Court $\$ \backslash \mathrm{mathsf{S}} \$$ process and is dismissed accordingly.

$\$5 \$$

Costs of the application shall be borne by the applicants.

Ombitatie Anna . B. Mugenyi

Judge 10 25th.03.2024

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