THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 549 OF 2013

ELIZABETH NAKAYIWA

ERIC WESTEN

JORN HANSEN::PLAINTIFFS

VERSUS

THE ATTORNEY GENERAL ::DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The hearing of this case started on the 1st of September 2016. On 15th May 2018 almost two years later, the Defendant called her witnesses. After they had testified Counsel for the Defendant applied to bring in another exhibit and call another witness.

This was objected to by Counsel for the Defendant. Court reserved the ruling and now does so.

This suit was filed on 30th September 2013. The Written Statement of Defence was filed on 20th November 2013. After the Mediation report was filed on 24th March 2014 but before it went to scheduling the Plaintiff filed an amended plaint on 10th April 2015. It was not until 31st August 2015 four months later that the Plaintiffs' Scheduling Memorandum was filed.

This Memorandum seems to have jolted the Defendant into action because the Defendant filed a Written statement of Defence and on the same day filed the Defendant's Scheduling Memorandum.

Both the Plaintiffs and the Defendant's Memorandum described their respective cases, the issues at stake, the witnesses to call, the evidence by way of exhibits. Both the memoranda were filed after the court realizing that the parties were silent and on the 1st September 2015 directed the

Registrar to summon them for 16th September 2015. It is in fact on 16th September 2015 that court directed that Scheduling Memoranda and Trial bundles together with witness statements had to be filed by 17th October 2015.

On that directive the Defendant filed her Scheduling Memorandum on 14th September 2015. The matter was fixed for scheduling for 30th November 2015 when the court convened to schedule the case, the Defendant applied for adjournment because she had not yet filed minutes of the committee. These should have been filed earlier since they formed part of the Defendant's documents.

The court adjourned to give them time to file the minutes of the committee to be filed by 15th December 2015 and in the same vein extended time within which to file witness statements by end of January 2016.

None of the parties maintained the deadline for filing witness statements. The Plaintiffs filed theirs a month later on 17th February 2016 while the Defendant filed her witness statements over a year later on 20th April 2017. The Defendant said she would call ten occupants as witnesses but ended up calling one occupant as witness. Because of the unreadiness of parties, the suit which was to be heard in Special Civil Session on 22nd February 2016 was delisted.

It is important to note that on 22nd February 2016 the Defendant who had not filed her witness statements was given up to 7th March 2016 to do so. This was not to be. In any case, the suit which was fixed for hearing on 11th May 2016 could not take off because the Defendant was not represented and anyway there were no witness statements. It was adjourned to 1st September 2016 still she had not filed. Court than decided to proceed. It wrote;

> "*For close to a year court has given the Defendant a chance to file its documents and ready itself for hearing. The Defendant has not only on most occasions stayed away but has failed to file any of the documents, which include minutes that it intended to rely upon. Lack of interest by the Defendant is clearly exhibited. Court should proceed with the hearing of witnesses."*

So on that day court adopted the witness statements of the Plaintiff and would have proceeded to take the evidence at that stage but Ms Nabasa who appeared for the Defendant could not cross examine because she said it was***"Mr. Bafirawala who was in personal conduct of the case."***

Mr. Bafirawala appeared on 23rd May 2017 and cross examined the Plaintiffs' witnesses. On 31st August 2017 when the matter came up for further hearing Ms Nabasa appeared instead of Mr Bafirawala and applied for adjournment in these words;

> "*Our only witness is not here. She is out of the country we pray for a last adjournment."*

Court did grant the adjournment till 30thNovember 2017. For some reason the hearing did not proceed on that day but the parties were served a hearing notice for 3rd February 2018. Again no one appeared for the Defence on 3rd February 2018 and when the matter was called, counsel for the Plaintiffs applied that the case closes and submission proceeds. Court ruled thus;

> *"The last time court sat the State Attorney sought a last adjournment because the witness was away. Today the State Attorney has not even appeared though record shows that they were served. No reason has been forwarded for absence. The Defence closes and the Plaintiff may proceed to submit."*

On 27th February 2018 the Defendant filed an Application seeking court to set aside the exparte order and hear her witnesses. One of the grounds in support of the Application read;

> *"That the Applicant has already filed sworn witness statements on court record in defence of the claims in Civil Suit No. 549 of 2013."*

The Respondent/Plaintiff did not object to the Application. Court also considering that at last there were signs that the Defence was interested in proceeding with the matter, granted the Application. The case was fixed for 15th May 2018.

On the 15th of May 2018, although the Defendant's counsel had earlier said their only witness was out of the country, two witnesses were called for the defence. In the mind of all parties the suit was to be closed. That was not to be.

The Defendant's Attorney then suddenly submitted that they had a video to produce. He said it was taken to him by one Lubega of Vision Group. He stated it showed what had happened at the scene on the day the eviction took place. He submitted that the Application had not delayed. He further submitted that if the Plaintiffs' advocate wanted to cross examine the others who had already testified, they would be recalled.

Counsel for the Plaintiffs objected stating that such an act would lead to endless litigation. This is a 2013 case over four years old.

Counsel for the Defendant submitted that they had just got the video and so had not delayed.

I do not believe that they had just got the video. This position is buttressed by the evidence of DW1, who clearly told court that on all her missions a video recording was made. That even the meeting in issue was video recorded. DW1 has been known to the Defendant as a witness on this matter right from the time the suit was filed. Her witness statement which was filed a year after the court directed that it be filed, does not mention anywhere that such evidence existed. She was always there and knew she was a witness in the matter.

If this video existed, it must be as old as this case. For electronic evidence to be admitted in evidence there must be a degree of certainty that the evidence being presented is authentic and was handled in such a way that it has not compromised the integrity of its content.

In the instant case DW1 told court that there was a recording of the proceeding at the eviction meeting. Court was also told that minutes were taken. The court directed for the filing of these minutes on the 30th of August 2015. This has never been done.

In my view, where the Defendant failed to produce minutes of such an important meeting, the other piece of evidence should have been the video recording. That also was not produced nor availed to the opposite party. What the Defendant intends to provide today is a recording that counsel for the Defendant said he had just got. This submission does not in any way inform court of who did the recording, when was it done, at what stage of the meeting was it recorded. He does not in any way submit that what is being presented is authentic and was handled in such a way that its integrity is not compromised.

The test which identifies the true origin of this communication is indispensible. His submission stopping only at the point that ***"It was brought to me by one Lubega of Vision Group"*** falls short of demonstrating the history of how it was obtained and managed.

It is only then that the court will expect the production of data devoid of the assertion that it has been modified, replaced and or corrupted.

Counsel's submissions fell short of the above.

It has taken the Defendant two years to get witnesses to court. The suit has been adjourned for reasons that could have been avoided. To now having videos whose source is not even properly before court would entail the recalling of Plaintiffs' witnesses to say something about it. More so it would require the recall of the Defence witness whose availability in court was through a chain of adjournments and promises of last adjournments by the Defence Counsel which promises were unblinkingly breached.

When the Application to set aside the order for exparte hearing was filed, the Defendant stated that all the witness statements were on file. Now she seeks to file others.

In cases such as this one, is detected abuse of court process. Such a situation must not be allowed to arise.

In conclusion being alive to the fact that litigation must be concluded, I find that reopening a 2013 case here on the Application of a party which was given every opportunity to call evidence, would occasion injustice and ridicule the judicial system.

This Application for further evidence is therefore denied.

It is ordered that the Plaintiff files written submissions within two weeks from the delivery of this Ruling.

A Reply by the Defendant be filed within two weeks from the date of service upon them of the Plaintiffs Submissions. The Plaintiff to file a Reply/ Rejoinder within the week thereafter.

Dated at Kampala this 23rd day of May 2018

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HON. JUSTICE DAVID WANGUTUSI

JUDGE