THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

HCT-05-CV-MA-0182-2004

(From HCT-05-CV-CS-21-2004)

UGANDA ELECTRICITY BOARD …….APPLICANT

VS

EMMANUEL TURYAMUHIKA KIKONI……... RESPONDENT

BEFORE: THE HON. MR. JUSTICE P. K. MUGAMBA

RULING

This is an application under S.98 of the Civil Procedure Act for orders that judgment in Civil Suit No. 0021/2004 be withheld, that the applicant/defendant be permitted to reopen the defence case to call a witness and for costs for the application to be in the cause.

The genesis to this application is not complicated. On 6th March 2004 Civil Suit No. 0021/2004 came up for hearing after facts, issues and even documents were agreed. For the record, amongst the documents agreed were the land title, the valuation report dated 17th May 2001 and a letter of protest from the plaintiff to the defendant dated 11th December 2001. All these documents were produced on behalf of the plaintiff, as were the two witnesses who testified and underwent cross-examination. At the close of the case for the plaintiff counsel for the defendant stated that he was not calling any witnesses. Thereupon counsel for both parties agreed to file their written submissions by the 26th October 2004. On 12th October 2004 counsel for the plaintiff did file his written submissions. To date counsel for the defendant has not. Instead on November 2004 the applicant/defendant filed this application seeking the remedies I have set out above and giving the following six grounds:

1. On or about the 6th October 2004, when the hearing of CS No. 0021/2004 came up for hearing, counsel for the applicant/defendant informed court that the defendant was not calling any witness. As a result thereof, the defence case was closed.

2. That it has transpired that indeed the applicant/defendant intended and or had substantial witnesses it intended to call in support of its case.

3. That the prayer to close the defense case was made by the applicant's counsel under the mistaken brief (sic) that the intended witnesses particularly the Chartered Surveyor had not carried out a valuation.

4. That the re-opening of the defence case does not in any way prejudice the respondent/plaintiff.

5. That the re-opening of the defence case to call witnesses shall enable this Honourable Court determine all the necessary issues in controversy between the parties.

6. It is only fair and equitable that judgment be withheld and the applicant case reopened to call the witness.

The application, by notice of motion, was accompanied by two affidavits, one by Noel Muhangi Board Secretary to the applicant and another by Pope Ahimbisibwe who represented the applicant on the occasion in issue. In sum both affidavits tell of the prospective evidence contained in a valuation report they would have wanted to introduce in evidence through its maker whom they had intended to call. The two affidavits show that although the report was available at the time the suit came up for hearing it was never brought to the attention of counsel for the applicant/defendant as it transpired later that the report was on yet another case file. The case for the application was that had that report been brought to the attention of counsel for the defendant at the time of hearing no doubt he would have called its maker to testify and introduce the report. From the above I take it that but for lack of knowledge that a valuation report existed the defendant's counsel would have gone ahead and called his vital witness to introduce the vital report. Indeed that is what is suggested in the pleadings of the applicant. Assuming that to be the position, I must look at the pleadings of the defendant in the main suit to see what accompanies the written statement of defence. Order 6 rule (1) (b) Civil Procedure Rules provides:

> 'Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on: except that an additional list of authorities may be provided later with the leave of court.'

The list of witnesses contained in the written statement of defence filed on 23rd March 2004 includes the District Manager of the defendant in Rukungiri, the defendant's way leave officer/assistant way leave officer and Chartered Surveyor. On the other hand the list of documents includes map on the line, pleadings in Civil Suit Nos. 0026 of 2001 and 0027 of 2001 filed in High Court Mbarara. For reasons that will remain speculative 'others with leave of court' is included on the list of documents. From the foregoing a Chartered Surveyor was envisaged as were the two other witnesses indicated above. They could have been called. And if there was a valuation report intended to be called in evidence that report could have found pride of place in the list of documents.

As it was the report was found not to be necessary and was not included. Needless to say its inclusion on the list is mandatory if it is to be used as Order 6 rule (I) (b) CPR ordains. In the circumstances I do not see how the report can be introduced at this point in time or at any time when it is not included in the pleadings. Similarly for the prayer by the applicant to re-open the defence case and call a witness I find such a prayer unconscionable. For one counsel for the applicant/defendant must have been well instructed. Pleadings indicated he had not one but three witnesses due to testify for the defendant. He elected to call none of them. That was a deliberate decision not to be confused with a mistake, in my view. It is with that in mind that I find this matter distinguishable from *Kalemera vs Salaama Estates Ltd* [1971] EA 284 where court found there had been a genuine mistake when an Advocate failed to appear in court on the date set because he had noted down the wrong date in his diary. In the event court granted a rehearing. There is no reason I should grant reopening of the defence on the basis of the application before me. Obviously the respondent would thereby be inconvenienced as would court.

This application is made under S.98 of the Civil Procedure Act which invokes the discretion of court. It craves for equity. One of the attributes of equity is that it is available to the vigilant and not the indolent. I have to repeat that the matter was before court on 6th October 2004. That is the day hearing of the case came to an end. Needless to say that is when the defence closed its case. Final submissions were to be filed by 26th October 2004. No submissions have been forthcoming from the defendant. The defendant filed this application on 1st November 2004 well outside the time set for filing submissions. I agree with counsel for the respondent that in that

regard the applicant did not come to this court with due dispatch. It did not come with clean hands either. In the result equity will not assist the applicant.

As for the concern that it *is* the applicant being penalized for the omission of his counsel I regret to note the turn of events but hasten to add that his counsel was fully instructed to take deliberate decisions. For any apparent negligence the matter belongs elsewhere.

This application is dismissed with costs.

P. K. Mugamba

Judge

16th November 2004

Mr. Bashaija Andrew for the respondent

Ms Tushemereirwe court clerk

Court:

Ruling read in open court.

P. K. Mugamba

Judge