

THEREPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT MBARARA

**HCT-05-CV-MA-0203-2004**

(From LC I Proceedings of Kyobukyera Kyeibare)

GODFREY KATUNDA .....APPLICANT

VS

1. BETTY ATUHAIRE BWESHARIRE]

2. NABOTH ATAMBA] ..... RESPONDENT

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

**RULING**

Counsel for the respondents, Mr. Ngaruye, raised preliminary objections to the application which Mr. Bwengye, counsel for the applicants was sent to prosecute. A summary of these objections should serve for perspective.

1. That the affidavits of Kamujanduzi, one sworn on 24th November 2004 and the other sworn on 31st January 2005 contradicted each other in factual content and should be struck out because they are false. Similarly the affidavit of Ahimbisibwe sworn on 31st January 2005 factually varied from that of the applicant and because there was a manifest falsehood the affidavits should be struck out.

2. That the affidavit of Ahimbisibwe David dated 31st January 2005 should be struck out also because Ahimbisibwe lacked capacity to swear the affidavit, being neither a holder of powers of attorney, a person duly authorized or an Advocate for the applicant.

3. That the two affidavits of the applicant sworn on 31st January 2005 and that of Ahimbisibwe sworn the same day were supplementary affidavits filed after the respondents had filed their replies and as such the affidavits and what annexures they carried should be struck out because they were filed without leave of court.

4. That prayer 6 of the application sought return of cattle and restoration of property worth Shs. 30,000,000/= but because appropriate fees was not paid the application was thereby rendered incompetent.

5. That the applicant has no cause of action in the application given that the second prayer being sought regards a warrant which is annexure G to the applicant's affidavit and the parties mentioned in the warrant are Beatrice Bwesharire and Amos Kamujanduzi.

It is premature to speak of obvious falsehoods whatever the contradictions in the first point of objection might be. In the cases of Jetha Brothers vs Mbarara 7W'unicipal Council and 4 others, HCT-05-CV-MA-0031-2004 (unreported) and Sirasi Bitaitana & 4 others vs Emmanuel Kananura [1977] HCB 34 a single affidavit was scrutinized. In each of the cases the affidavit exuded falsehoods which went to the root of the averment. Where more than one affidavit is involved each of the affidavits has to be considered separately before a decision is reached, on the aggregate, whether there are any falsehoods involved. As this would involve hearing I should at this stage reject the first objection.

As for the second objection there is nothing to stop a litigant, where necessary, assembling as much evidence as is possible in support of his case. The only difference lies in certain representative actions where a particular procedure has to be adopted. The case of Joy Kaingana per John Kaingana vs Dabo Boubon [1986] HCB 59 is but one in point. As for Ahimbisibwe's affidavit no special procedure would be necessary and as such it is distinguishable. This objection also should be rejected.

While I own the two affidavits of the applicant of 31st January 2005 and that of Ahimbisibwe of the same date were filed without leave of court I am not persuaded there is anything amiss. This objection too fails.

The next ground of objection relates to court fees which counsel for the respondent alleges remained unpaid. The law requires that all fees ought to be paid. Where the requisite fee is partially paid the action is not struck out as Mr. Ngaruye would have us believe. Rather court orders that the balance be paid up by the relevant litigant. Refer to Paul Kalule vs Losira Nanozi, High Court Civil Appeal No. 18 of 1974 (unreported).

Since the applicant paid some fee to court when this application was filed he should expeditiously make good any balance with the Registry. That would dispose of the objection. Finally counsel for the respondent submitted that the applicant has no cause of action given that an annexure to the affidavit in support of the application does not contain his name. That annexure is annexure G. Given that the application involves a multiplicity of documents my view is that this matter be determined after hearing of the actual application. In any case the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors and lapses should not necessarily deter a litigant from pursuit of his rights. See Essaji vs Solanki [1968] EA 223. I reject this objection also.

Hearing of the application should proceed with costs of this objection in the cause.

P. K. Mugamba

Judge

27th April 2005