

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISC. APPLICATION NO. 69 OF 20171.

AIRTEL UGANDA LTD

5 BABEINE & CO. LIMITED:.....APPLICANTS

VERSUS

HAJI MUSA HASSAN:..... RESPONDENT

BEFORE: HON. JUSTICE WILSON MASALU MUSENE

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RULING

The two applicants, Airtel Uganda Ltd and Bageine & Co. Advocates filed this application under Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act against the Respondent, **Haji Musa Hassan.**

15 The application was for orders that:-

- a) The exparte proceedings entertained by the Court be set aside and the matter be heard inter-parties.
- b) That an order doth issue for the joint survey of the land to ascertain the location of the mast.

20 c) Costs of this application be provided for.

The grounds in support of the Application are contained in the affidavit of Joseph Mwenyi but are generally:-

- i) The matter was called by the Court severally and the curt made the order for the matter to proceed exparte.

- ii) The non-attendance of court was caused by the absence of the applicant's counsel who has personal conduct of the case but left the law firm to pursue further studies.
- iii) The applicants/Defendants have a valid and legal defence to the Respondent's claim in the plaint;
- 5 iv) The first defendant heavily invests on the suit land and established a telecommunications booster stationed and could be greatly prejudiced by the exparte proceedings as it would not be heard on its interest and existing rights.
- v) The crux of the suit as pleaded by the applicants/Defendants in their joint statement of defence and conceded throughout by the Plaintiff requires an expert survey for
10 resolution beyond the facts presented.
- vi) That the matter has since not suffered judgment and the applicants having been alerted to the current position have without delay moved to remedy the misfortune of then counsel in conduct of the case.
- vii) That there are exceptional circumstances in this case and justice of the case demands
15 that the suit be heard on its merits.

The Applicants were represented by Lex Uganda Advocates and solicitors, while the respondent was represented by M/S Kasangaki & Co. advocates. The Respondent filed an affidavit in reply, opposing the Application. The notable paragraphs are 2,5,6,7,8,9 and 10 for avoidance of doubt, they are reproduced below:-

- 20 2) That I have read together with the assistance of my lawyers and understood the applicants' application and affidavit in support and accordingly respond as hereinafter.
- 5) That the applicants were consistently served hearing notices to appear in court which they on various occasions defied and/or did not answer (hereto attached collectively marked B).
- 25 6) That the Applicants are guilty of dilatory conduct and the instant application is inordinately delayed.
- 7) That the instant application has been instituted as a delaying tactic by the Applicants.

8) That there is no explanation at all why the applicant's officials did not attend Court at all occasions.

9) That I have been informed by my Lawyers M/S Kasangaki & Co. Advocates which information I verily believe to be true and correct that Applicant's affidavit in support contains falsehoods, is suspect and incurably defective.

10) That I have been informed by my Lawyers M/S Kasangaki & Co. Advocates which information I verily believe to be true and correct that the applicants have not shown any sufficient cause for setting aside the order to proceed *ex parte* entered by Court.

Counsel for the Applicants Mr. Richard Latigo submitted that the applicants have a valid claim and have invested in the land in question. He added that when the decision was made to proceed *ex parte*, the Advocate who was handling the case had left the law firm, otherwise there is need to establish whether the land over which the applicant has a lease is the same land sold to Rwasweswe and Applicant.

Reference was made to paragraph 12 of the supporting affidavit to the effect that despite the order to proceed *ex-parte*, the presiding Judge never concluded the case as there was no visit to the locus in quo to verify the land sold to the late David Rwesweswe and whether it is the same land in dispute in this case.

It was further submitted in reference to paragraphs 14 and 16 of the supporting affidavit that since there is no judgment as the case was never completed, and the opinion of the expert is missing, then it is in the interests of Justice that the suit be heard on the merits. Mr. Kasangaki opposed the application on grounds that the case filed and handled in 2012 is now five years old and backlog. He added that despite the fact that the order to proceed *ex parte* was made two years ago, the Applicants are just making up now to present this application, hence no seriousness. He prayed for the dismissal of the application on account of inordinate delay. Counsel for the Respondent also wondered

why the officials of Airtel (U) LTD did not appear in Court, and that whereas an error of counsel should not be visited on a client, the client should also be active and not indolent.

Lastly, Mr. Kasangaki submitted that since it is established that the suit mast is on the land in dispute, then there is no need for a joint survey.

5 In the alternative, counsel prayed for costs before hearing of the head suit.

I have carefully followed and considered the submissions on both sides in this application. The matter concerns a land dispute over which Telephone masts have been erected and provide services to the people. In my view and in line with the provisions of Section 33 of the judicature Act, it is pertinent and necessary that such a case of land of public importance is heard and concluded on its merits by hearing all parties. The other reason is that despite the order to proceed ex-parte, the case has not been concluded. In such circumstances and in further exercise of this Courts' powers under Section 98 of the Civil Procedure Act, I allow this application and order that the hearing of this case proceeds inter-parties.

15 However, in view of the longtime the application has taken to be filed, I shall exercise this court's discretion to award the costs of the application to the Respondent.

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W. Masalu Musene

20 **Judge.**

03/08/2017