

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 28 OF 2009**

SSEMPIJJA PETER..... PLAINTIFF

VERSUS

M/S ENERGOPROJEKT..... DEFENDANT

RULING

BEFORE HONOURABLE LADY JUSTICE EVA K. LUSWATA

The plaintiff's claim against the defendant is for a declaration that the suit land situated at Busukuma Gayaza - Zirobwe Road is his property, an order against the defendant its agents or servants to remove their construction materials from the suit land, a permanent injunction restraining the defendant from interfering with the suit land, general damages for trespass and inconvenience, costs of the suit and any other relief as the court may deem fit and just.

The brief facts are that the suit land formerly belonged to the plaintiff's grandmother a one Nabitaka who used to stay with the plaintiff. The said Nabitaka never produced any child, passed away sometime in 1980s and was buried on the suit land. The deceased left a will by which she left the suit land to the plaintiff. The plaintiff by then still young was left to reside in the only house on the suit land and at the time of filing the suit, he had been in occupation for twenty years. That sometime in 2008, the defendants, her agents, servants and or attorneys encroached on the suit land,grading it without the plaintiff's consent and permission resulting into costs and inconvenience to the plaintiff for which he claims general damages and costs of the suit.

The defendant denied the claims and stated that since about April 2008 up to October 2012, they were in occupation of the suit land and with permission of the owners, namely, Busukuma Sub County Local Government and the Buganda Government its owners. That before commencement of the said occupation the land had been bushy and unoccupied. They further challenged the plaintiff's claim of ownership and a right to general damages on the ground that there was a parell claim by John Segujja and Sam Lubega who claimed that the plaintiff had alienated the suit land to them. In his reply to the written statement of defence, the plaintiff

admitted the parell claim but contended that he had only alienated part and not the whole of the suit land.

Evidence in this suit was upon agreement of counsel, adduced by witness statements. Before I could write my final judgment in the matter, I noted that in his submissions, counsel for the defendant raised an objection that it is not clear whether the documents adduced by the plaintiff were witness statements or sworn affidavit evidence. He further argued that the statements are false and appeared not to have been made by the witnesses themselves or any indication that an oath was taken before a commissioner for oaths. This in his opinion is a matter of law and of form and technicality. He prayed for all three statements to be struck out. No response was made for the plaintiffs on all those objections. At this juncture I opine that it is in the interests of justice, I consider that objection as a preliminary point and given my decision before descending into the merits of the suit itself.

I have previously held in my judgment of **Kiridde Mathew Vs Busulwa Vincent & Ors HCCS.449/13**, that witness statements are dispositions made on oath. They may on some but not all accounts be equated to affidavits. Both are made by persons as evidence and can be subject to cross-examination. Statements need not always be commissioned, but on all occasions can only be admitted in evidence after the witness presenting a statement has taken oath, so as to confirm its truth.

I have looked at the three statements, presented by the plaintiff and his two witnesses and admitted in evidence as plaintiff's Exhibit 1, 2 and 6 respectively. Although each witness did at the foot of the document state that the statement was "sworn" by a "deponent" the rest of the contents and style of each document satisfies the requirements of a witness deposition or statement, but not an affidavit. Indeed, a statement is made by a witness but reduced into writing or print by another, usually his/her lawyer.

In relation to the evidence on record, the witness statements of PW1, PW2 and PW3 were sworn at Kampala on 30th May 2014 before Sseguya Samuel a commissioner for oaths, who in addition certified that a translation into Luganda was made to the witness before they signed. However in cross-examination, PW1 testified that;

“I signed the document in Busukuma. The chairperson was present, and the one in charge of the land at the sub county. There was no other lawyer i.e. Mr. Sebanja i.e. the one here in court. There was no other lawyer present i.e. no lawyer called Sseguya was present. On that day, I never went to the chambers of the one called lawyer Sseguya.”

PW2 also testified in cross-examination that;

“I signed the witness statement in Busukuma. I signed it in the presence of Sewava and other people I don’t know if a lawyer was present or not. I don’t know Counsel Sseguya Samwiri I don’t know where his office is. I never saw Sseguya Samwiri on the day I signed the witness statement.”

PW3 testified in cross-examination that he signed the statement at Kampala near Radio One in the office of counsel for the plaintiff and in the presence of two other gentlemen. He also stated that the plaintiff’s counsel read back the statement to him and also signed on the same. This evidence was not challenged by the defendant’s counsel.

This evidence is contrary to what was stated by the commissioner for oaths in the witness statements by the plaintiff and his witnesses that the oath was taken at Kampala. PW1 and PW2 state that their statements were made and taken in Busukuma while PW3 says that his statement was made in the plaintiff’s counsel’s office and in the absence of Sseguya Samuel who commissioned the statements. It is also evident from those testimonies that neither witness took the oath before the commissioner nor was a translation done by the latter from the English to the Luganda language yet each of the 3 witnesses professed not to be fluent in the English language. PW1 admitted to have only gone up to Primary two.

It is highly probable therefore that each of these three witnesses were never the authors of the statements and could not have understood the contents therein. I would thus agree with the arguments for counsel for the defendant that the statements belonged to whoever carefully constructed them, most probably the legal counsel. In my view, counsel for the plaintiff is partly to blame as it was solely his duty to present the witnesses before the commissioner for them to take the oath, and for a proper translation to be made. Evidently he did not do so. The above notwithstanding, I still hold the view that such evidence is unreliable and in my view, would entirely invalidate their testimony and as a court I choose to disregard it entirely and expunge the statements of PW1, PW2 and PW3 from the record.

The end result of my decision above would be that neither the plaintiff nor his witnesses has presented any examination in chief which would offend the provisions of Sections 146 Evidence Act that gives the chronology by which evidence shall be presented to Court. More seriously, it would offend the tents of due process and result into a legal absurdity for logically, without any examination in chief, there would be no basis upon which counsel for the defendant lead his cross examination and eventually re-examination of those three particular witnesses.

I have already observed that the plaintiff and his witnesses cannot be entirely to blame for this mishap. They instructed and trusted their legal counsel to prepare and present their evidence in a manner legally acceptable by this court. Without any evidence in chief, it would mean that the plaintiff is condemned unheard which is against his constitutional rights for no fault of his own. Therefore, to cure this anomaly and to serve the interests of justice, I choose to exercise my powers under Section 98 Civil Procedure Act land Section 146 (4) of the Evidence Act to recall the plaintiff's witnesses to give their evidence in chief orally and for cross-examination and re-examination to follow. Should defendant's counsel deem it necessary, he is also allowed the option to recall his witnesses for any additional examination in chief as allowed under the same law. The plaintiff's counsel and the plaintiff shall meet in equal shares any costs that may be incurred in re-calling the plaintiff's witnesses.

I so order.

EVA K. LUSWATA
JUDGE
17TH March 2015