

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
[LAND DIVISION]

HCCS. NO. 0798 OF 2017

HADIJA MUTYABA

[As Administratrix of the Estate of the late Sewalu Ahamada]

PLAINTIFF

V

1. SEMOGERERE BASHIR

2. KASIDA LTD

3. MARIAM NDIWO.....

.....

DEFENDANTS

BEFORE: - HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

[ON LATE FILING OF A WITNESS STATEMENT]

Representation:

Mr. Ahabwe Joshua for the Plaintiff.

Mr. Ndahiriwe George for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

Introduction:

[1] This Ruling is in respect of an oral application by Mr. Ndahiriwe; Counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, by which he sought the leave of court to allow the latter file a witness statement late. Learned Counsel filed the said witness statement,

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for the 4<sup>th</sup> witness; Mr. Hatanga, on May 30, 2022 over a month after April 28, 2022 when court had directed him to file the same.

Background:

- [2] Ms. Mutyaba (the Plaintiff) sued the Defendants alleging *inter alia* fraud against them in respect of the land and developments thereon, comprised in **LRV 987 Folio 10, Block 273 Plot 363 at Najjanankumbi, ('the suit property')**.
- [3] In her suit, Ms. Mutyaba contends that her brother; Mr. Semogerere (the 1<sup>st</sup> Defendant) impersonated their late father; Sewalu Ahamada for whose estate she holds letters of Administration, and that he fraudulently obtained a mortgage using the suit property as security.
- [4] She further contends that with the knowledge that Mr. Semogerere was not the registered proprietor, M/s Kasida Ltd (the 2<sup>nd</sup> Defendant) transacted with him and discharged the mortgage on the suit property, by way of sale, in April 2009, to Ms. Ndiwo (the 3<sup>rd</sup> Defendant). That both the 2<sup>nd</sup> and the 3<sup>rd</sup> Defendants are not *bona fide*.
- [5] In their joint written statement of defence, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants contend that they are *bona fide*, and that Ms. Mutyaba was aware of all the transactions by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to acquire interests in the suit property, but did not challenge them.

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[6] The suit is proceeding *ex parte* against Mr. Semogerere (the 1<sup>st</sup> Defendant).

Submissions of Counsel:

[7] Mr. Ndahiriwe orally submitted that the 4<sup>th</sup> Defence witness; Mr. Hatanga, was sick and hence the delay to file his witness statement.

He further submitted that the information in Mr. Hatanga's witness statement is critical and that as such allowing the application shall not disenfranchise (*sic*) the Plaintiff's case, but rather, shall shed more light on what transpired at the time of the transaction.

[8] In answer, Mr. Ahabwe (the Plaintiff's Counsel) raised a spirited objection to the application, citing **Order 18 Rule 5 (A) of the CPR (amendment) Rules, 2019** and submitted that filing witness statements now and again results into endless litigation. He relied on **Elizabeth Nakayiwa, Eric Westen & John Hansen v the Attorney General**<sup>1</sup>, and prayed that court disallows the prayer to admit the said witness statement.

Issue for determination:

[9] The question to be determined is **'Whether the late filing of the 4<sup>th</sup> Defence witness's statement should be allowed?**

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<sup>1</sup> HCCS No. 549 of 2013

Analysis by Court:

[10] Order 18 Rule 5A (1) and (6) of the CPR (amendment) Rules, 2019 and the Guidelines under schedule 2 made under Order 11 (A) Rule 7 (2) of the Rules,

provide that witness statements shall be filed after the scheduling conference, on the direction of, and on the same day fixed by the trial Judge, and exchanged with opposite Counsel on the date of filing.

[11] In the present case, after the scheduling conference taken on March 15, 2022 court directed all Counsel to file all their witness statements before the date scheduled for the hearing of the case. Each party was assigned two (2) days for the hearing of their respective cases. The Plaintiff was assigned March 28 and April 28, 2022 while the Defendants were assigned May 23 & 27 2022. All the parties filed their witness statements<sup>2</sup> and included them in the bound joint trial bundle filed in court on March 25, 2022.

[12] The Plaintiff presented her witnesses and closed her case on April 28, 2022 whereupon, at the subsequent hearing on May 23, 2022 the defence opened its case with its principal witness completing his evidence. On May 30, 2022 Mr Ndahirwe then filed the 4<sup>th</sup> witness statement and orally applied, on that day, for the leave of court to allow the late filing of the same.

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<sup>2</sup> The Plaintiff filed five (5) witness statements, while the defendants filed three (3) witness statements.



[13] I have carefully considered the above events in this case, the arguments of both counsel, the authorities they rely on, and the two factors listed below.

On the basis of all these, I hold the view that I should allow, and hereby do allow, the late filing of the witness statement of Mr. Hatanga.

First, the Rules on witness statements that I cited earlier under paragraph [10] of this Ruling, give discretion to the Judge as to when witness statements may be filed. The emphasis in those Rules seems to be that witness statements should be filed after the scheduling has been taken and that they should be filed and exchanged on the same day fixed by court.

In the present case, although the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants' Counsel did not comply with the timelines and directions issued by court, which is unfortunate, nonetheless, I see no prejudice, and none has been shown, that would be occasioned to the Plaintiff if the late filing of the witness statement is allowed.

Second, Mr. Hatanga, the witness referred to; was named as a witness as early as the time the written statement of defence was filed. He is therefore not a new witness, and in any case, his testimony can be tested by way of cross-examination.

[14] In any event, to allay any fears that may be harboured by the Plaintiff and her Counsel, I will allow her (the Plaintiff) the liberty to recall any of her own witnesses

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for the purpose, if necessary, of responding to any matter that may arise out of Mr. Hatanga's testimony in court.

[15] I am fortified in my decision, by the decision of the Supreme Court in Bakaluba Peter Mukasa v Nambooze Betty Bakireke<sup>3</sup> to the effect that Rules of procedure are merely hand maidens of Justice and not Justice themselves. They only form the procedural frame work within which a fair hearing is conducted.

[16] In that Bakaluba case, the Supreme Court found that non-compliance with Rule 4(8) of the Parliamentary Elections (Election Petition) Rules<sup>4</sup> by Ms. Nambooze, did not affect Mr. Bakaluba's right to a fair hearing, and that neither did it prejudice him at all.

[17] In addition, I have also looked at the Elizabeth Nakayiwa case (supra) that was relied on by Mr. Ahabwe, and found that, unlike the scenario in the present case, in that Nakayiwa case, after the defence therein failed to produce its witnesses and its case was closed, the court directed the Plaintiffs therein to proceed to make their submissions. At that point the defence applied to set aside the *ex parte* order and have its witnesses heard. Although the learned trial Judge allowed the application, it declined to allow the defence to call additional witnesses, and to file additional witness statements, on the basis that the same were intended to produce a video whose source was not properly explained to

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<sup>3</sup> SC Election Petition Appeal No. 04/ 2009.

<sup>4</sup> S.I 141 -2

court. The Court found that, that would amount to abuse of court process and would cause endless litigation.

[18] As stated earlier, in this present case, Mr. Hatanga is not an additional witness, he was named at the start, in the Defence pleadings.

Decision of Court:

[19] In the result, the Defence Counsel is granted leave for the late filing of the 4<sup>th</sup> Defence witness's statement.

[20] The costs associated with this application and the objection thereto, shall be in the cause.

I so order,



**P. BASAZA - WASSWA**

**JUDGE**

June 22, 2022

Ruling delivered in court on June 22, 2022 at 11: 00 am during the hearing of the case, in the presence of:

1. Mr. Ahabwe Joshua for the Plaintiff

2. Mr. Ndahiriwe George for the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants

3. Ms. Mutyaba Hadijah (the Plaintiff)

4. Court Clerk: Ms. Nakimera Aisha

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