



THE REPUBLIC OF UGANDA  
IN THE INDUSTRIAL COURT OF UGANDA AT KAMPALA  
LABOUR DISPUTE REFERENCE NO. 52 OF 2022  
(Arising from MGLSD/LC/025/2021)

COLLIN LUKIIKO .....CLAIMANT

VERSUS

CHINA RAILWAY NO.3 ENGINEERING  
GROUP CO. LTD UGANDA LTD ..... RESPONDENT

BEFORE:

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA

PANELISTS:

1. HON. ADRINE NAMARA,
2. HON. SUSAN NABIRYE &
3. HON. MICHAEL MATOVU.

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**RULING**

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Introduction

- [1] On the 29<sup>th</sup> of March 2023, Mr. Emmanuel Kirya, holding brief for Mr. Johnson Kwesigabo, appearing for the Respondent, sought leave to call Mr. Sunday Deo Otim as the Respondent's second witness. Counsel informed the Court that he had filed, in advance, Mr. Otim's witness statement. He had also served a copy on Counsel for the Claimant. He submitted that the evidence had been discovered on the 28<sup>th</sup> of March 2023 and was essential to a just conclusion of the case.

- [2] Ms. Lydia Ntono, appearing for the Claimant, opposed the application. She argued that the Respondent's Memorandum in Reply filed on 19<sup>th</sup> April 2022 did not refer to this witness or his evidence. He was not listed in the Joint Scheduling Memorandum. It was Learned Counsel's view that a witness statement has to give evidence of what has been pleaded. Citing Section 2 of the Civil Procedure Act Cap. 71 (*from now CPA*), it was submitted that a witness statement is a pleading. Counsel relied on the case of DFCU Bank Ltd v Donna Kamuli C.A.C.A 121/2016 in support of the proposition that a witness statement is evidence in proof of matters pleaded.
- [3] In rejoinder, Mr. Kirya associated himself with the decision in the DFCU v Donna Kamuli case (*supra*) on the dictum that a witness statement is not a pleading. He admitted that the witness had not been listed in the trial documents. He contended that his evidence had not been anticipated, but the information was essential to the case. It was his position that the Respondent had pleaded acts of dishonesty on the part of the Claimant in the Memorandum in Reply. The evidence sought to be adduced was a due diligence report of the Claimant before his dismissal. He added that no prejudice would be visited on the Claimant.

#### Resolution and ruling of the Court

- [4] The short point for our determination is whether the witness statement of Sunday Otim should be admitted in evidence. Under Order 18 Rule 5A(1) and (6) of the Civil Procedure (Amendment) Rules, 2019 (*from now CPR Amendment*), it is provided that the witness statement shall be filed after the scheduling conference on the direction of the trial judge, on the date fixed by the judge.
- [5] The procedural history of the matter before us is that the parties filed a Joint Scheduling Memorandum on the 28<sup>th</sup> of September, 2022. On that date, the parties were directed to file their witness statements and trial bundles by the 28<sup>th</sup> of October, 2022. The Claimant filed his witness statement on the 25<sup>th</sup> of October, 2022, with a trial bundle. The Respondent filed one witness statement and its trial bundle on the 12<sup>th</sup> of January, 2023. On the 18<sup>th</sup> of January 2023, a scheduling conference was held at which the JSM was adopted, and documents were admitted in evidence. The claimant also filed an additional trial bundle on the 31<sup>st</sup> of January, 2023. The hearing commenced, and the claimant was examined. On 29<sup>th</sup> March 2023, the Claimant closed his case. Mr. Kirya then informed Court that he had filed the witness statement of Sunday Deo Otim and sought leave to have it formally on the Court record. We reserved our ruling on the point.
- [6] The rules relating to witness statements give the judge discretion regarding when witness statements may be filed. Ms. Ntono made a very spirited argument that



witness statements were pleadings. The intrinsic meaning of the decision in the DFCU Bank Ltd v Donna Kamuli case (*supra*), cited by both Counsel, may have escaped attention. In that case, the Court had this to say:

*'As to whether a witness statement amounted to a pleading, Section 2(p) of the Civil Procedure Act defines the pleading to include any petition or summons, and also includes the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant to them, and the reply of the plaintiff to any defense or counterclaim of the defendant. In light of the above definition, I am of the considered view that a witness statement is not a pleading but rather evidence in proof of matters pleaded.'*<sup>1</sup>

The decision settles the law that a witness statement is not a pleading.


- [7] Ms. Ntono's objection, as we understand it is that Mr. Kirya seeks the admission of Mr. Otim's witness statement, which is outside the pleadings. The witness was not named in the JSM as a witness, and his evidence was not referred to in the memorandum in reply. We have perused the witness statement and the report attached. They are both dated 23<sup>rd</sup> February 2023. The report bears a stamp of Sodoc Tracking Systems Investigators (U) Ltd (*from now Sodoc*) dated the 28<sup>th</sup> of February 2023. Additionally, the Memorandum in Reply filed by the Respondent does not plead to any investigation by Sodoc. The report's executive summary indicates that Sodoc received instructions from the Respondent on the 7<sup>th</sup> of February, 2023. In our view, while late filing of a further witness statement should not ordinarily be refused<sup>2</sup>, the Respondent was not very forthright with the Court. Counsel submitted that due diligence had been pleaded in the memorandum in reply, whereas not. There is not a single paragraph in the memorandum in reply that alludes to due diligence. The summary of the Respondent's facts in the Joint Scheduling Memorandum does not make mention of any due diligence. Mr. Sunday Otim is not named in the list of witnesses in the JSM. We think, therefore, that the admission of Mr. Otim's witness statement is a departure from the pleadings and occasions prejudice to the Claimant.
- [8] It is settled law that a party to a suit shall not be permitted to succeed upon a case they have not set up in their pleadings.<sup>3</sup> The Respondent should have set up the due diligence by Sunday Deo Otim as part of its Memorandum in Reply. There has yet to be a formal application for amendment. This compounds the prejudice occasioned

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<sup>1</sup> Per Barishaki J.J.A

<sup>2</sup> Per Lady Justice P. Basaza –Wasswa in **Hadija Mutyaba v Semogerere Bashir** H.C.C.S No 0798 of 2017. See also **Madrama J.(as he then was) in Hussain Hasanali Jivani v Merali Jivra Tajdin & Anor** H.C.C.S No 471 of 2015

<sup>3</sup> Per Wambuzi C.J in **Interfreight Forwarders Ltd vs East African Development Bank** S.C.C. No 33 of 1992



to the Claimant, as the system of pleadings is meant to articulate each party's case clearly. We find that the Respondent cannot be permitted to adduce evidence that is a departure from its pleadings.

Decisions and Orders of the Court

- [9] For the reasons above, leave to adduce the witness statement of Mr. Sunday Deo Otim is denied. The statement filed upon the record is hereby expunged.

It is so ordered.

Delivered and dated at Kampala this 26<sup>th</sup> day of April 2023

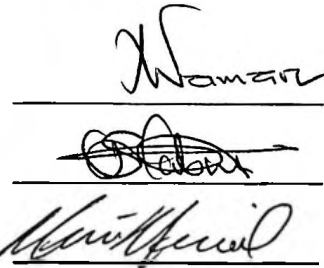
**SIGNED BY:**

THE HON. MR. JUSTICE ANTHONY WABWIRE MUSANA  
JUDGE, INDUSTRIAL COURT



**THE PANELISTS AGREE:**

1. HON ADRINE NAMARA,
2. HON. SUSAN NABIRYE &
3. HON. MICHAEL MATOVU.



Ruling delivered in open Court in the presence of:

1. For the Claimant: Ms. Lydia Ntono.
2. For the Respondent: Mr. Kirya Emmanuel.

Parties are absent.

Court Clerk: Mr. Samuel Mukiza.