THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO.201 0F 1993

NANGUNGA LIVESTOCK CO-OPERATIVE SOCIETY LTD ::::::::::::PLAINTIFF

VERSUS

M/S ENERGO PROJECT CORPORATION ::::::::::::::::::::::::::::DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA

RULING

In this case the plaintiff called evidence and closed its case. The defence did also adduce evidence in support of its version and immediately the defence closed its case Mr. Lutakome the learned counsel appearing for the plaintiff made a verbal application for leave to adduce further evidence on half of the plaintiff because of certain facts which did not come out clearly in the plaintiff's evidence. That procedure was objected to by Mr. Nshimye counsel representing the defendant hence this ruling to resolve the matter.

Mr. Lutakome submitted that there was something he was not satisfied with. The purpose of DW2 was to satisfy the court as to whether Mr. Dragon was in Uganda by the time the order for supplying commodities to the defendant corporation was made but the officer who testified on this was not there at the time. He had admitted there was a minute where Dragon's application was considered and those officers are still there. The vital document was the visa. The said visa is a photostat copy and not even certified. That officer does not even know the person who endorsed that visa. So if that was the case this court has the discretion to call that witness to show when Mr. Dragon arrived in Uganda. He submitted that leave be granted to allow the learned counsel to call the relevant person who handled the work permit and visa for Mr. Dragon.

On the other hand Mr. Nshimye submitted that the court has the discretion to call a witness say those who sat on the hoard considering the permit to come and testify and even those who granted the visa. Normally such witnesses are called by the court at the instance of the court. He wondered how his learned friend reads the mind of the court and says that such witness would be called. He contended that even if such officer was called the originals (the visa and working permit) could not be produced. He was of the view that those were delaying tactics because he did not oppose the production of the file in evidence otherwise the entry card and permit would have been produced to satisfy his learned brother. Unless the court accepted what his learned friend had submitted he would oppose the application.

I had the occasion to peruse the evidence on record and at the same time listened attentively to the submission of the learned counsels. **S. 133 of the Evidence Act Cap 43** regulates the order of production of witnesses under the law. Also **sections 135 and 136** of the **Evidence Act** lays down the procedure to be followed when witnesses are called upon to testify in court. That is they are examined in chief, cross examined and then re-examined See also **Odgers on Principles of pleading and practice the 21st Edition pages 272 to 282.**

In the instant case the plaintiff had the opportunity to call all the evidence in support of its case. Mr. Lutakome has personal knowledge of the type of evidence he wanted to call in order to prove his case. It is procedurally wrong to wait when the defence had closed its case to request for leave to adduce evidence because of what transpired in the evidence of DW2 a witness called by the adverse party. I would have expected the learned counsel to fortify his argument by citing some authorities. He did not unfortunately do that. Be that as it may this is not the situation where order 16 r 12 of the civil procedure rules would come into play. Under the above law the court has power at any stage of the suit to call any witness who has testified and put questions to him as the court thinks.

The witness the learned counsel wanted to call as a witness was never called as a witness in the first instance. To allow the plaintiff to call in a new witness after the closure of evidence by both the plaintiff and the defence will in my humble opinion amount to opening new issues. Mr. Lutakome should have foreseen the type of evidence he wanted to call more so after PW1 and PW2 had given their evidence.

The judge has however power to call and examine a witness who has not been called by either party if neither party objects See **Enoh and Zaketaky Bock and cos Arbitration 1910 1 KB P.327.**But See **R V. Dora Harris 1927 and R .V. Machnon 1933 24 CR.APPR 95** as to rule in criminal cases.

I am aware that the cases referred to above are English decisions and not binding on this court but are of a highly persuasive authority and I would in the premises follow then.

Moreover the witness Mr. Lutakome referred to in his submission the person wanted to call as a witness was not identified. According to his submission the witness he required to prove certain matters were likely to be more than one. He spoke of the production of the work permit and visa which in my humble opinion may require more than one witness. Counsel should come to court when well prepared.

In the end the preliminary objection by the counsel appearing for the defendant is upheld with costs.

I. MUKANZA

JUDGE

21.7. 1994.