



THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MBARARA
HCT-05-LD-MA-0212-2023
(ARISING FROM HCT-05-LD-CS-0073-2019)

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1. EDONDI BAGATAHI
2. ERUKADI NUWAGIRA
3. TEREZA KEMPETA MBIKA ----- APPLICANTS

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VERSUS

1. KITURA MIXED FARM LTD
2. BIGIRWA TOBIAS
3. TUMWEBAZE ROBERT
4. NTUNGIREHI PONTIAN ----- RESPONDENTS

15 **BEFORE:** Hon. Justice Nshimye Allan Paul M.

RULING

REPRESENTATION

20 The Applicants are represented by M/s Rock Advocates while the Respondents are represented by M/s Bwatota Bashonga & Co. Advocates.

BACKGROUND

25 The applicants herein filed Civil Suit 73 of 2019 against the respondents herein. On 11th November 2022 scheduling was concluded by admission on court record of the amended joint scheduling memorandum signed by both parties. The plaintiffs opened their case on 11th November 2022 and closed their case on 29th November 2022 after presenting three witnesses they listed in the amended joint scheduling memorandum. The defendants opened their case on 06th February 2023 and presented all their witnesses then finally closed their case on 30 14 March 2023.

When the case was then adjourned for mention to determine a date for the locus visit. The plaintiffs filed this application in court seeking among others leave to re-open their case as plaintiffs in Civil Suit 73 Of 2019.

- 5 This application was brought by way of Notice of Motion under Article 126(2)(e) of the Constitution, Section 33 of the Judicature Act, Section 98 of the Judicature Act, and Sections 98 and 100 of the Civil Procedure Act seeking orders that;
1. The Applicants be granted leave to re-open their case.
 2. That leave be granted to add documents and witnesses to the list of
10 documents and witnesses respectively.
 3. Costs of the application be in the cause.

The application is supported by the affidavit deponed by the 1st Applicant, and opposed in an affidavit in reply deponed by the 2nd Respondent who did so on
15 his behalf and also on behalf of the 1st, 3rd and 4th Respondents.

GROUND

The grounds as set out in the Notice of Motion are;

1. That the finality of Civil Suit No.73 of 2019 has not been reached.
- 20 2. That the documents in question are vital for the Applicants' case.
3. That this evidence will not prejudice the Respondents.
4. That some of the Court documents the Applicants intend to rely on to prove the triable issues in Civil Suit No.73 of 2019 are certified true copies of Court proceedings.
- 25 5. That some of the documents were not in the Applicants' possession at the time of filing and hearing of Civil Suit No.73 of 2019 till when the Plaintiffs closed their case.
6. That the documents to be introduced by the Applicants are within the knowledge and scope of the Respondents.
- 30 7. That it is reasonable and in the interest of justice that this application is granted and or allowed and exclusion of the additional evidence may lead to a miscarriage of justice.

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SUBMISSIONS

Applicants' submissions

The Applicants filed their submissions, stating that this Court is obliged to dispense justice without undue regard to technicalities under Article 126(2)(e) of the Constitution. Counsel argued that since the Court has not yet visited locus, nor Judged this matter, the Defendants will not be prejudiced as they will have ample time to cross examine the witness.

Respondents' submissions

The Respondents' filed submissions wherein they contended that the application does not warrant Court to exercise its discretion because it was brought too late and lacks merit. Counsel submitted that a scheduling conference was held a year ago, the Plaintiffs' case was closed, and the Defendants' case was closed, and the matter scheduled for locus visitation on 12th June, 2023. Counsel argued that reopening the case would confuse the entire record of proceedings and relied on **UGANDA ELECTRICITY BOARD VS EMMANUEL TURHAMUHIKA KIKONO HCT-05-CV-MA-0182 OF 2004** for the position that Section 98 of the Civil Procedure Act involves discretion of Court, which craves for equity which is available to the vigilant and not the indolent.

Applicants' submissions in rejoinder

In rejoinder, the Applicants reiterated their earlier submissions.

I have considered the pleadings and submissions in determining this matter.

DETERMINATION

In principle a court of law can consider an application seeking to re-open a party's case. In **KYABAHWA V CHINA HENAN INT'L GROUP CO. LTD HIGH COURT CIVIL SUIT NO. 721 OF 2020** , Hon Justice Duncan Gasagwa held that;

"The overriding principle is that the court considers whether, taken as a whole, the justice of the case favours the grant of leave to re-open and any prejudice in re-opening the case should be minimal".



The evidence on court record shows that this application HCMA 212 of 2023 was filed on court record on 19th May 2023, by the time it was filed, the plaintiffs and defendants had led all their witnesses and closed their cases. I am of the view that the case had progressed to far, only pending a locus visit, which means that the stage at which the case had reached doesn't favour re-opening the plaintiffs case since it would amount to restarting the case.

I am also mindful of the fact that the current civil procedure dispensation in our Courts of law requires that scheduling is done whereby parties to a suit inform court about the witnesses they intend to rely on, thereafter the witnesses file witnesses' statements that are served on the opposite party.

Order 18 Rule 5A (1) of the Civil Procedure Rules as amended provides that;

"Witness statement.

(1)The evidence of a witness shall consist of a witness statement which shall be filed after the scheduling conference on the direction of the trial judge and served upon the opposite party."

The exchange of witnesses' statements is done before the commencement of the hearing, it means that an application to open the plaintiff's case with a witness that was not listed in the scheduling memorandum among the plaintiff's witnesses, after the defendants have closed their case can only be accepted if it has minimal effect on the procedure leading to conclusion of the suit. In this case the stage of the suit pending locus visit, is not favorable, as stated earlier it will amount to restating the case.

In conclusion, I find that a case has not been made out to justify making an order to reopen the plaintiff's case in High court Civil Suit 73 Of 2019. I therefore dismiss this application with costs to the Respondents.



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NSHIMYE ALLAN PAUL M.

JUDGE

05-04-2024