

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)**

CIVIL SUIT NO. 428 OF 2015

- 1. SAM JAKANA**
- 2. TILDA JAKANA:.....PLAINTIFFS**

VERSUS

EMMANUEL MSABIMANA:.....DEFENDANT

Before: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The background is that the Plaintiff who had closed their case would like to re-open the Plaintiff's case with leave of Court for purposes of calling the Plaintiffs themselves to give evidence in support of their case.

Counsel relies on *Smith versus New South Wales (1992) HCA NO. 36 (1992) 176 CLR 256 – High Court of Australia* to argue that,

'the case be re-opened after Court inquiring why the evidence was not called at the hearing'.

The reason according to Counsel for the Plaintiff is that the Plaintiffs live in California USA, and were not in Uganda at the time when their case came up.

Counsel relied on Article 126 (2) (e) and Section 98 of the Civil Procedure Act and argued that no miscarriage of justice is likely to occur. The evidence will only enhance the Plaintiff's claim against the defendants. It was also pointed out that the Defendant is on the land, and hence would not be prejudiced.

The defence Counsel opposed the application on grounds that re-opening the case would amount to miscarriage of justice. This is because PW1 – Dan Jakana had Powers of Attorney by the Plaintiffs which is (DEX1). The evidence of Jakana according to Counsel, binds the Plaintiffs and re-opening the case amounts to the Plaintiffs testifying twice.

However, in rejoinder, it was argued by counsel for the Plaintiffs that the Power of Attorney referred to is a defence document and cannot bind the Plaintiffs. Court was referred to ***Kijabwami Michael versus Byomuhangi Francis, Civil Appeal No. 48 of 2009***, holding that;-

‘closing the Defendant’s case without according him a hearing caused a miscarriage of justice’.

I have carefully listened to the arguments. The record of this case is that the Plaintiffs have been in control of their case to the stage where on 15th December 2015, three witnesses testified and the Plaintiff’s case was closed.

The case was fixed for defence on 14th January 2015, however, it did not take off and by agreement, was adjourned to 3rd May 2015 and then to 18th May 2016.

The matter stalled and came before me on 28th September 2017, whereby the Plaintiff’s Counsel applied to re-open the case.

With due respect to all arguments, the purpose of trial is to accord parties an opportunity to be heard on their grievances. It has been a common law practice that if counsel makes an error or mistake, it should not be vested on the litigant.

In Re-***Christine Namatovu Tebajjukira (1992 – 93) HCB 85***, it was held that;

‘the administration of justice requires that the substance of disputes be investigated and decided on their merits and errors and lapses should not necessarily debar a litigant from the pursuit of his rights’

It is on record that Counsel Mpanga who conducted the case had closed it without calling the Plaintiffs who are the principal complainants in the case. Should they then, be locked out just because he had closed? I do not think so especially as the defence has not even commenced. The Power of Attorney is a defence exhibit and no evidence on record shows that the Plaintiffs gave PWI power to testify on their behalf as alleged by counsel for the defence.

No prejudice is therefore likely to be occasioned since the Defendants are even in possession. Actually by the Plaintiff’s testifying, Court will have a better grasp of the entire case and accordingly be capable of giving justice to all parties concerned.

In this case, I have not come across any law or rule which prohibits a re-opening of the case, neither have Counsel quoted one.

I agree that even if such a rule exists; Article 126(2) (e) of the Constitution of Uganda would come in aid of the Plaintiffs so that substantive justice is given priority over technicalities.

For those reasons, I do grant leave to the Plaintiff to re-open the Plaintiff's case to enable the Plaintiffs to give evidence following a strict time line as to be given by this Court in the interest of fast trucking the trial.

I so order.

.....

Henry I. Kawesa

J U D G E

30/10/2017