IN THE TDC DISTRICT COURT HELD AT TEMA ON FRIDAY THE 7TH DAY OF JULY 2023 BEFORE HER HONOUR AKOSUA ANOKYEWAA ADJEPONG (MRS.), CIRCUIT COURT JUDGE, SITTING AS AN ADDITIONAL MAGISTRATE

SUIT NO. A9/39/2011

MAHAMA ZANGO ----------
PLAINTIFF/RESPONDENT
KLAGON, TEMA

VRS

1. **EFUA AGYEIWAA DEFENDANT**
   COMMUNITY 8, TEMA
2. **RT. REV. ABRAHAM TAGOE ----------**
   DEFENDANT/APPLICANT

PARTIES: PLAINTIFF ABSENT
DEFENDANTS PRESENT

COUNSEL: K. N. ADOMAKO-ACHEAMPONG, ESQ. FOR PLAINTIFF/RESPONDENT ABSENT
RICHARD AKPOKAVIE, ESQ. WITH SOLOMON ADDO AND
RICHARD CLARKE FOR DEFENDANTS/APPLICANT PRESENT

RULING ON MOTION ON NOTICE SEEKING LEAVE TO RE-OPEN 2ND DEFENDANT'S CASE

The Plaintiff herein originally caused a Writ of Summons to be issued on 9th December 2010 against the occupants of the property being the subject matter of the instant suit. The suit got struck out on some occasions which was relisted and also suffered series of adjournments including sine die adjournments.

In the Amended Writ of Summons filed on 21st March, 2019 pursuant to an order of this Court, the Plaintiff claims against the Defendants jointly and severally for the following reliefs:

a. Declaration of title to one (1) house numbered 83, Community 8 situated and being at a place commonly known and called co-operative, Community 8, Tema.
b. Ejectment and recovery of possession of the said property.

On 2nd April, 2019 the 1st Defendant filed her Amended Statement of Defence pursuant to an order for joinder and denied the claims of the Plaintiff and further stated that the Plaintiff is not entitled to his claim. The 2nd Defendant on same date also filed his Statement of Defence and counterclaimed against the Plaintiff as follows:

1. A Declaration that House No. 83 Cooperative Community 8 Tema is the property of the 2nd Defendant.
2. An order setting aside the auction sale of House No. 83 Cooperative Community 8 Tema.

The Plaintiff on 8th August 2019 filed a Reply and Defence to the 2nd Defendant's counterclaim.

The hearing of the instant action has ended and the Court was about to give its judgment when the instant application was filed on 8th June 2023.

In his affidavit in support the 2nd Defendant/Applicant deposed that on the 1st day of March 2023, the Honourable Court ordered him to be joined to the suit as the 2nd Defendant at a time when he had filed a witness statement to testify on behalf of the Defendant. That he filed the witness statement on the 2nd of April 2019 referring to exhibits which had been previously attached to his witness statement of the 22nd of January 2019.

The Applicant further deposed that the said exhibits though indicated in the paragraphs of his witness statement were inadvertently not attached to his witness statement of the 2nd of April 2019 to be tendered in evidence. That it was when his counsel was reviewing the proceedings of the Court whilst preparing the written address that this omission was noticed. That this was an oversight by his counsel and as a party this omission should not be visited on him.

The Applicant further states that a review of the evidence on record will show that he indicated to the Court during cross examination that he knew he had attached documents to his witness statement. That it will be in the interest of justice for the application to be granted and the refusal of this application will cause a grave miscarriage of justice as it will deny him the opportunity to present his full case before this Honourable Court.

The Applicant continued that the grant of this application will necessitate a short delay which he and his counsel are prepared to fast track the process to ensure it is completed quickly in the interest of justice. That the grant of this application will not prejudice the Plaintiff's case as the documents he intends to attach to a

supplementary witness statement have already been filed previously and have been in the possession of the Plaintiff and his counsel since 2019. That his witness statement and attached exhibits as properly tendered as his evidence in chief is material to his claim. He prayed the Court to grant him leave to reopen his case to tender a supplementary witness statement together with the attached exhibits and give the Plaintiff the opportunity if he so desires to cross examine him before delivery of judgment.

In his submission in Court, counsel for the Applicant submitted that they have been served with an affidavit in opposition and the gravamen of that affidavit is that there is no provision in C.I. 59 to allow this application. That paragraph 8 of that affidavit however concedes that the Evidence Act makes provision for recall of a witness. That the totality of their application is to re-open the case of the 2nd Defendant and re-call him to tender some exhibits. That unless his case which has been closed is re-opened he cannot be re-called. That it was an oversight on their part to have not attached the necessary exhibits therefore they are asking the Court to allow them to re-open their case and tender those exhibits. That the grant of the application will not cause undue delay as the Plaintiff is alleging.

In the affidavit in opposition filed on 16th June 2023, counsel for the Plaintiff/Respondent deposed that they are vehemently opposed to this application as same is alien to our civil procedure. That the conduct of cases at the District Court is governed by C.I. 59, which are the District Court Rules.

Counsel for the Plaintiff/Respondent further deposed that nowhere in the District Court Rules is there a provision to allow a party to remount the box to re-open his case several months after the case is closed and awaiting judgment since

address is not mandatory. He continued that the 2nd Defendant led by his lawyer closed his case about a year ago and was effectively discharged after his counsel had given indication of the closure of his case, therefore it sins against the rules of civil procedure to allow the 2nd Defendant to fish for an otherwise non-existent evidence in an unknown exercise which would be an abuse of the Court process.

Counsel for the Plaintiff/Respondent further stated that the Evidence Act does not make provision for such an exercise and that it is section 79 of the Evidence Act which talks of re-call of a witness not a party to re-open his case. That it is too late in the day over one year after the 2nd Defendant closed his case to be allowed back to give fresh evidence after evidence fishing expedition. That such a strange exercise if allowed would occasion great injustice to the Plaintiff. He prayed that this application be dismissed with cost.

Ruling

I have read the affidavit in support of the instant application as well as the affidavit in opposition to same. I have also listened to the submission made by counsel for the 2nd defendant/Applicant.

On 22nd January 2019, one Rt. Rev. Abraham Tagoe filed a witness statement as a potential witness for the then sole Defendant in the instant action. Subsequently, he applied to join the suit as a 2nd Defendant and upon that, filed a witness statement as a party to the suit. The 2nd Defendant in opening his defence relied on the witness statement he filed on 2nd April 2019. Therefore the 2nd Defendant did not file two witness statements, one on 22nd January 2019 and another on 2nd April 2019. As a party to the suit, the only witness statement he filed in this matter was on 2nd April 2019 and that is what he relied on as his evidence in chief during the hearing of the instant matter.

On 18th August 2022, counsel for Defendants announced to the Court that they have closed their case. Therefore the hearing of the instant case came to an end on 18th August 2022. Then, the instant application was filed on 8th June 2023. The judgment in the instant case would have long been delivered by the Court but for the delay in obtaining the record of proceedings to write the judgment.
The order by the immediate past Chief Justice for me to return to this Court to deliver the judgment in this case was based on the petition by counsel for Applicant herein to the Chief Justice for me to be ordered to return to this Court to deliver the said judgment, which was on 28th February 2023.

Section 79 of the Evidence Decree , 1975 (NRCD 323) provides that after a witness has been excused from giving further testimony in the action he cannot be recalled without leave by the Court in its discretion.

To guide the discretion of the Court, the Supreme Court has held per Wood CJ (as she then was) in the case of ***Poku v. Poku [2007-2008] 2 SCGLR 996*** that in an application like the instant one, the first criterion which an Applicant ought to establish is whether or not the evidence sought to be adduced was in the possession of the Applicant party or was not obtainable by the exercise of reasonable diligence or human ingenuity before the impugned decision was rendered. It is only when the first hurdle has been surmounted that the Court should proceed to determine whether or not the intended evidence would have a positive effect on the outcome. Stated differently if the first criterion is not met, no useful purpose would be served by examining the other factors.

Also in the case of ***The President of The Methodist Church of Ghana v. Kaye [1970] GLR 70***; it was held per Owusu J that, once a party closes his case he abandons every right to call further evidence except with the leave of the Court. Such an application is only considered when at the time of closing the case, no human ingenuity could foresee the existence of the particular evidence that the party is seeking to adduce.

Applying the above authorities to the instant application and having further considered the circumstances of this case and during the hearing, the 2nd Defendant/Applicant has not satisfied the Court that no human ingenuity could foresee the existence of the particular evidence he is seeking to further adduce since as Counsel for the Applicant in his submission rightly said, the said evidence/exhibits were right before them when they filed the witness statement of the 2nd Defendant and even when the 2nd Defendant relied on his witness statement and it came up during cross examination that no such exhibits were attached. Nothing was done about it during the hearing until after the Court has finished writing its judgment and a date was to be given to the parties to appear for the judgment that the party is now seeking to do something about it by way of the instant application.

Flowing from the above and applying the authorities above to the circumstances of the instant action, I do hereby dismiss the instant application.

There will be no order as to costs since neither the Plaintiff nor his lawyer appeared before the Court for the hearing of the application despite having been given notice of same.

[SGD.]

H/H AKOSUA A. ADJEPONG

(MRS)

(CIRCUIT COURT JUDGE)