IN THE COURT OF APPEAL
AT MENGO

CORAM: Lubogo, Ag. J.A.

CIVIL APPLICATION NO. 8 OF 1986

BETWEEN

AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION……..APPLICANT

AND

ATULKUMAR SUMANT BHAI PATEL……RESPONDENT

(Appeal from an order of the High Court
of Uganda at Kampala (Mr. Justice Kantinti)
dated 21st February, 1985).

In

HIGH COURT CIVIL CASE NO. 454 OF 1983

RULING OF LUBOGO AG. J.A.

This is an application under rules 29 and 42 of the court of Appeal rules for an order that the applicant be allowed to raise and file additional evidence by way of affidavit by Dennis M. Singham the applicant's counsel in Singapore against the respondent, Atulkumar S.B. Patel in the Supreme Court of Singapore there would be a problem of serving the court process outside

the Singapore jurisdiction if judgment were to be obtained in Singapore it would not be possible to execute such judgment in Singapore because there is no knowledge of the respondent's assets in Singapore against which execution could be levied, and further as there is no reciprocal agreement between Singapore and Uganda a judgment obtained in Singapore cannot be enforced in Uganda where the respondent is known to have assets.

The application was filed on a notice of motion on 10th October, 1986 accompanied by an affidavit sworn by Mr.Nkambo-Mugerwa Counsel for the applicant.

Learned Counsel for the applicant submitted that the purpose for the application for additional evidence is to make available to court evidence that could not be available at the time when the suit was heard in the lower court. He submitted further that the institution of the suit in Singapore could be unsuitable because if judgment were to be obtained against the respondent it would be impossible to enforce it in Uganda. He referred me to paragraph 2 of his affidavit in which he swore that the main issue to be decided by this honorable court is which of the two courts Uganda High Court and the Supreme Court of Singapore is more convenient forum where the appellant should have filed the suit.

With respect, the issue before me is not concerned with forum but whether additional evidence should be allowed at this stage. The matter appertaining to forum will be argued at a later stage.

In his submission Mr. Guatama, who appeared with Mr. ALiko stated that he had several objections to the application to make. The first one was that there was inordinate delay in making the application. There was complete lack of deliverance on the part of the applicant. He then referred to the sequence of events since 31st March 1978 when the guarantee was signed, The suit was filed on 3rd May, 1983. The defence was filed on 17th August, 1983. A reply to the defence in September, 1985. Then there were a number of affidavits sworn in support of Notices of Motion including the affidavit of M.CL. James who was once the Vice President of the applicant Bank, and also the affidavit of Dennis Singham counsel for the applicant in Singapore. Judgment or ruling was delivered on the 21/2/85.

The point which learned counsel wished to emphasize in regard to the application for additional evidence was the fact that Mr. Dennis Singham had the opportunity to include in his affidavit of 8th February, 1984 the matter which is being sought now to be subject matter of another affidavit by the same person.

Mr. Guatama went to submit that during the hearing the name of Mr. Dennis Singham appeared everywhere in the proceedings and that nothing new would help the court to arrive at a teasobable decision. Reference was made to many authorities in regard to the principles to be followed in considering whether additional evidence should be allowed by the Court of Appeal. Two of them were **Karmati Tarmohamed and Another V I.H Lakhani & Co. (1958) EA 562 at p 574/576** an East African authority, and **Nash V Rochford Rural Council (1917) I.K.B 393** an English authority.

Learned counsel for the applicant did agree with learned counsel for the respondent that **larmohamed and Another** (Supra) in paragraph F lays down conditions to be fulfilled before additional evidence could be allowed. However, he submitted that the matter concerns a very important issue as it was stated in **The Abidin Daver (1984) 1 All ER 470.** Learned counsel also referred to **Dicey & Morris on the conflict of laws (10th Ed 1980 vol 1 Chapter 12)** where the learned authors dealt with burden of proof.

The essence of his submissions was that the affidavit sworn by Dennis Singham would clarify and conclusively show two things in order to enable the Court arrive at an equitable decision namely (1) that the respondent's contention that we sue in Singapore is misconceived because we cannot sue in Singapore unless the respondent agrees to be sued there. (2) that even if he has to give such consent to be sued in Singapore any resulting judgment would not be enforced in Singapore because he is a non-resident and has no assets in the country and furthermore the judgment could not be enforced in Uganda as there is no reciprocal understanding between Uganda and Singapore.

First let me deal with the authorities referred to by learned counsel for the applicant i.e. **The Abidin Daver and Dicey & Morris on the Conflict of Laws** (Supra). In regard to the former an action in rem was brought by foreign plaintiffs against defendants' vessel whilst the vessel

was in an English port, but proceedings had been commenced by defendants in a foreign court. The question was whether the existence of foreign proceedings was a sufficient factor to be taken into account in weighing balance of convenience.

Lord Diplock had this to say at page 475.

> **"In the same case this House also made it clear**
> **That the balancing of advantage and disadvantage**
> **to the plaintiff and defendant of permitting litigation**
> **to proceed in England rather than, or as well as,**
> **in a foreign form is to be based on objective**
> **standards supported by evidence. Unlike the rule**
> **as it was stated by Lord Reid to have been applied**
> **before the Atlantic Star, a mere belief, however**
> **genuinely held, by a would-be plaintiff or his legal**
> **advisers that it would be to his advantage to pursue**
> **an action in the English Court rather than participate**
> **in proceedings in what would appear to be**
> **the more natural and appropriate forum is insufficient**
> **to justify refusal of a stay, unless the belief is supported**
> **by objective evidence".**

The expression contained in the words "objective evidence" is what, precisely, the applicant wishes to adduce as additional evidence about in order to have the action against the respondent heard in Uganda Courts. It is, therefore, necessary to look at other authorities to

> **"To justify the reception of fresh evidence or a new**
> **trial three conditions must be fulfilled: first, it must**
> **be shown that the evidence could not have been obtained**
> **with reasonable diligence for use at the trial; secondly**
> **the evidence must be such that, if given, it would**
> **probably have an important influence on the result**
> **of the case, though it need not be decisive; thirdly,**
> **the evidence must be such as is presumably to be**

believed, or in other words, it must be apparently
credible, though it need not be un-contravertible"

The learned president went on to quote Birket L.J. in Corbett V Corbett (1953) 2 All ER 69 at p 72:

"It is an invariable rule in all the courts……..
That if evidence which either was in possession of the
parties at the time of trial, or by proper diligence
might have been obtained is either not produced, or
has not been procured, and the case is decided adversely
to the side to which the evidence was available, no
opportunity for producing that evidence ought to be
given by granting a new trial".

The learned president went on and cited quite a number of authorities on the issue of additional evidence and came to the conclusion that it was not shown that the evidence was not available at the time of the trial or could not with reasonable diligence have been procured.

Bennett J in **Civil Appeal No. 67 of 1953 Nyanzi v Kayima reported in** Uganda Law Reports vol VII p 132 the learned Judge referred to Nash v Rochford (Supra) and quoted scrutton LJ as saying:-

"**The principle which I have to apply is, I think the principle**
stated by Lord Chelmford in the case of Sheden vPatrick in these words:
"It is an invariable rule in all the Courts, and one founded
upon the clearest principles of reason and justice, that
if evidence which either was in possession of parties at
the time of a trial, or by proper diligence might
have been obtained, is either not produced, or has not
been procured and the case is decided adversely to
the side to which the evidence was available, no opportunity
for producing that evidence ought to be given by granting
a new trial'……I am quite clear that the evidence

as stated would be material; but I think the application to give it should be refused, on the ground that the plaintiff has not shown that with diligence he could not have discovered it before and has not used due diligence in bringing it to the notice of the court".

The principles upon which additional evidence could be granted cited in all these authorities are crystal clear and could not be bent to meet a situation in any given case unless it is shown that such evidence was not available at the time; secondly show due diligence in obtaining it and thirdly it would have important influence on the outcome of the case if produced.

In the instant case the applicant filed the suit on 3rd May, 1983 and between then and the time this application was filed there has been many affidavits sworn including that of Dennis Singham regarding jurisdiction and other related matters. The ruling by Kantinti J. was delivered on 21/2/85. What is being sought now is another affidavit by Dennis Singham to show (1) that if the suit is filed in Singapore there would be a problem of service outside jurisdiction (2) execution would be impossible because there are no known assets of the defendant in Singapore. (3) That there is no reciprocal agreement between Singapore and Uganda. By any stretch of imagination I would not believe that Dennis Singham as a lawyer was not aware of the above problems that were likely to crop up, during the course of the proceedings in Uganda. These matters could have been included in his affidavit of 8th February 1984 because as a procedural matter they were within his knowledge at the time of filing. In fact, it is not new evidence that was available at the time, it is evidence available at the time, it is evidence that was not produced at the time. The absence of reciprocity between Uganda and Singapore cannot be a fact that was not known at the time of filing the suit in Uganda. All these facts were within the knowledge of counsel whether in Singapore, Britain or here, it is not a discovery of new facts or evidence that was not available at the hearing.

With regard to diligence the first telex message to Dennis Singham was sent on 25th July, 1986 according to Annexure 'A' attached to the Notice of Motion. The telex message was seeking clarification on procedural matters three years after filing the suit. Another telex message Annexure 'B' was sent on 2nd August, 1986 also seeking information regarding jurisdiction if the

respondent submitted to Singapore jurisdiction, where the respondent had no known assets. The answers to those questions are the ones upon which this court is called upon to allow additional evidence. I am of the opinion that the applicant has not shown due diligence in obtaining facts or evidence which were available at the time in regard to his case.

Accordingly, the application is refused. Costs would go to the respondent in any event.

THIS 7TH DAY OF NOVEMBER, 1986.

DAVID L.K. LUBOGO
AG. JUSTICE OF APPEAL