

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CORAM: HON.MR.JUSTICE.SBK KAVUMA, JA

CIVIL APPLICATION NO. 13 OF 2006

HON. ANTHONY KANYIKE.....APPLICANT/APPELLANT

VERSUS

1.ELECTORAL COMMISSION)

2.THE RETURNING OFFICER, MUKONO).....RESPONDENTS

3. HON. MUWULIZE NORMAN IBRAHIM)

(ARISING OUT OF ELECTION PETITION APPEAL NO. 4 OF 2006)

RULING OF MR. JUSTICE S.B.K.KAVUMA, JA.

This is an application brought under Rules 2 (2), 30 (1) (b), (2) (3) and (4) and 43, 44 of the Court of Appeal Rules. It is seeking orders from this Court that: -

(a) The applicant be granted leave to adduce additional evidence on appeal

(b) The additional evidence be by affidavit

(c)The costs of this application be provided for:

The application is supported by an affidavit sworn by Hon. Anthony Kanyike (hereinafter called the applicant/appellant) dated the 17th day of November 2006. The application is based on seven grounds which are stated in the Notice of Motion.

Hon. Muwulize Norman Ibrahim (hereinafter called the 3rd respondent) opposed the application and affirmed to an affidavit in reply dated the 8th January 2007.

Briefly, the back ground to the application is that judgment was entered against the Petitioner, (now applicant/ appellant), in Election Petition No. 1 of 2006 where it was held inter alia that the 3rd respondent had spelling mistakes in his 'O' level certificate he had

presented for nomination and election in the February 23rd 2006 Parliamentary elections for Buyikwe West Constituency (hereinafter called the constituency). The applicant/appellant challenged the nomination, election and declaration of the 3rd respondent as the validly elected member of Parliament for the constituency on the grounds, inter alia, that the 3rd respondent was, at the time of his election not possessed of the requisite academic qualifications and that he had told a lie to court that his 'O' level certificate contained spelling mistakes concerning his names, which lie was believed by court.

At the hearing of the application, Mr. Richard Mwebembezi appeared together with Mr. Steven Mungoma (hereinafter together called counsel for the applicant/appellant) representing the applicant/appellant. The 3rd respondent was represented by Mr. Paul Kiapi (hereinafter called counsel for the 3rd respondent).

Counsel for the applicant/appellant submitted that Rule 30 (1) (b) gives Court discretion to admit additional evidence on appeal from the decision of the High Court in the exercise of its original jurisdiction if sufficient reason is shown.

Counsel submitted, further, that in the instant application the applicant/appellant seeks to adduce additional evidence of records of entry of the 3rd respondent into senior 1 at St. Mary's College Kisubi and his Nomination papers for the 23rd February 2006 Parliamentary elections for the Constituency. The applicant/appellant, by adducing the additional evidence he seeks Court's leave to adduce, intends to prove that at the trial of the petition, the 3rd respondent, fraudulently told a lie to court about his names and that the court believed his lie hence its judgment in his favour. According to the applicant/appellant, this judgment was fraudulently obtained and is, therefore, a nullity. Fraud, counsel contended, is one of the exceptional circumstances for which additional evidence on appeal is admissible. It was counsel's submission that instead of his extensive search for the information he seeks to adduce as additional evidence on appeal, he was only able to get it after judgment had been delivered. He relied on **Karmali Tarmohamed and Another v Lakhani [1958] EA. 567**. He also referred Court to *Rev. Fr. Narsensio Begumisa and three Others Vs Erick John Tibebaga Court of Appeal Civil Application No. 64 of 2000* (unreported). Counsel contended that it was not until the 3rd respondent had introduced the element of mistaken mis-spelling of his name in his 'O' level certificate in an affidavit in

support of

his answer to the petition that the records of his entry in St. Mary's College Kisubi became relevant to the matter. Regarding the nomination papers for the 3rd respondent, counsel submitted that throughout the proceedings at the court below, counsel for both parties and the learned trial judge kept referring to them but they were never exhibited in court. The same was true to the 3rd respondent's admission records mentioned above. Counsel prayed Court to invoke its inherent powers under rule 2 (2) of the Rules of this Court to ensure the ends of justice are met. These records according to counsel, are necessary to enable Court to reach a conclusive and just decision concerning all the matters raised in the appeal. He prayed Court to grant the appellant/applicant leave to adduce the additional evidence he seeks to adduce on appeal. He also prayed for costs of the application.

Opposing the application, counsel for the 3rd respondent submitted that leave to adduce additional evidence is granted only on exceptional circumstances. He relied on *G.M. Combined (U) Ltd Vs. A.K. Detergent Ltd and another SC Civil Appeal No.7 of 1998*. He submitted that Hon. Kanyike did not prosecute his petition diligently. It was counsel's further submission that the evidence sought to be adduced would have no influence on the outcome of the appeal. According to the Parliamentary Elections Act, (PEA), counsel contended, an election petition is supposed, to be filed within 30 days from the date of gazetting or publishing the election results. That time had long been expired yet, according to him, the petitioner is supposed to file his petition with the evidence to support it. He prayed Court to dismiss the application with costs to all the respondents.

In reply, counsel for the applicant/ appellant submitted that when admitted, the additional evidence the applicant/appellant seeks to adduce will have a tremendous impact on the outcome of the main appeal as it will show that the 3rd respondent claimed to be what he was not. Counsel submitted that the sum total of the additional evidence sought to be adduced by the applicant/appellant is that the 3rd respondent could not have been qualified for nomination, election and declaration as the elected Member of Parliament for the constituency.

It was counsel's final submission that whereas there is a time limit for filing a petition, there is no law limiting the time for filing evidence. They opposed counsel for the 3rd

respondent's prayer for costs to all the respondent's since the other two neither filed any evidence nor appeared at the hearing of the application.

I attentively listened to submissions by counsel for both parties;

I also carefully perused the pleadings and evidence on record and gave careful consideration to the law applicable to the matter now before me. I also studied all the authorities relied upon by both parties.

Rule 2 (2) of the Rules of this Court provides:

"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent abuse of the process of any court caused by delay."

Rule 30 (1) and (2) provides -

30 (1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may -

(a) reappraise the evidence and draw inferences of fact, and

(b) in its discretion, for sufficient reason, take

additional evidence or direct that additional evidence be taken by the trial court or by commission.

(2) When additional evidence is taken by the court, it may be oral or by affidavit and the court may allow the cross-examination of any deponent

From the above rules, it is clear this Court has jurisdiction to hear and determine the application before it.

See also Fredrick J.K. Zaabwe v Orient Bank Ltd and Others CAMCA No. 10 of 2003.

The issue for determination in this application is whether the applicant has shown sufficient reason for the Court to exercise its discretion to grant him leave to adduce additional evidence on appeal.

The principles upon which an appellate court should admit fresh evidence where the application is not made on the grounds of fraud or surprise are well settled.

These are as was held in Karmali Tarmohamed and Another Vs T.H. Lakhani & Co. 1958 EA,

(i) except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party

seeking to use it at the trial, or that reasonable diligence would not have made it so available."

In Namisango Vs Galiwango and another 1986 HCB.37 Odoki J, as he then was had this to say "Except for fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it available. Fresh evidence may also be admitted where some basic assumption common to both parties has clearly been falsified by subsequent events, or where to refuse such evidence would be affront to common sense a source of injustice" (sic)

In Ladd v Marshall (1) [1954] 1 WLR 1489, Lord Denning in his judgment held -

" Therefore 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 gained with reasonable diligence for Court 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 incontrovertible."

It is an invariable rule in all the courts... that if evidence which either was in the 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 the granting of a new trial.'

'The new evidence is admissible if it would have formed a determining factor in or an important influence on the result... A fortiori where it would be conclusiveSed quaere if it is admissible if there is only a reasonable probability that, if it

were given, a different decision would be reached...¹

See also Rev. Fr. Narsensio Begumisa and three Others Vs. Eric John Tibebaga Court of

Appeal Civil Application No. 64/2000

Black's law dictionary defines fraud thus: -

"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact whether by words or by conduct; by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by single act or combination or by suppression of truth or suggestion of what is false whether it be by direct falsehood or innuendo, by speech or silence, word of mouth or look or gesture. A generic term embracing all multifarious means which human ingenuity can devise which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth and includes all surprise, trick, cunning, dissembling and any unfair way by which another is cheated." (Black's Law Dictionary Sixth Edition at page 660).

This definition, in my view, is so wide as to cover the circumstances surrounding the '0' level certificate of the 3rd respondent, the subject matter of this application considering all the pleadings and evidence on record. My understanding of the purpose for which the additional evidence sought to be adduced by the applicant/appellant is to show, inter alia, that the explanation the 3rd respondent gave to court about the discrepancies in his academic records, which the court believed, was a total lie fraudulently floated by him. A judgment influenced by and based on such a fraud, is itself a nullity and an illegality which court cannot sanction or condone.

See- Makula International Ltd Vs. His Eminence Cardinal Nsubuga and another [1982] HCB 11.

On this ground alone I would grant the applicant/ appellant's application. Fraud is, in itself, an exceptional circumstance enough to justify leave to adduce additional evidence on appeal. *Tarmohamed and another Vs. Lakhara & Co. (supra)*.

That apart, however, I find additional justification for this Court to exercise its jurisdiction and take in further evidence at the appellate stage. I base myself on the case of *R. vs Yakobo Busigo s/o Mayogo [194.5] 12 EACA 60*. In that case, the Court of Appeal for

Eastern Africa made a distinction between new evidence in a trial and evidence adduced to elucidate evidence already on record. Though a criminal case, *R. vs Busingo* (supra) is now applicable to civil proceedings in Uganda. (See Oder JSC (as he then was) in *G.M. Combined U Ltd and A.K. Detergent Ltd and 4 Others Supreme Court Civil Appeal No. 7 of 1998* (unreported).

The Supreme Court Justice had this to say on calling evidence to elucidate on evidence already on record -

"Realizing that such jurisdiction must always be exercised with great care (The Kink v. Robinson (1917) 2 KBD 1098), we are of the considered opinion that this is a proper case for its exercise.

Quite apart from the fact that the evidence shall throw light upon the case (The Kink v Robinson) (supra) this is not a question of directing new evidence to be taken but merely of directing the elucidation of evidence already on the record the East African Court of Appeal had occasion to discuss calling new evidence at a trial and elucidating on evidence already on record in the case of Rv. Yakobo Busi2o s/o Mavoko (1945) 12 EACA 60. There the Court of Appeal is held that the appellate court had jurisdiction to take in evidence at the appellate stage that elucidates on the evidence already on record, as opposed to the introduction of an altogether new matter, that was never raised or does not emerge at all from the evidence already on record"

In the instant case, the records of entry of the 3rd respondent in St. Mary's College Kisubi and his nomination papers for the February 23rd 2006 Parliamentary elections for the constituency do "emerge" from the evidence on record. They keep featuring in the judgment in Election Petition 0001 of 2006, now annexure 'A' to the applicant/appellant's affidavit in support of this application.

Going by the authority of *R vs Yakobo Busigo* (supra), the applicant/ appellant's request in the instant case also qualifies, in my view, as one for Court to take in the records of entry into S I at St. Mary's College Kisubi by the 3rd respondent and his nomination papers for the February 23rd 2006 Parliamentary elections for the constituency, as evidence that elucidates on the evidence that emerges from and is already on record. I, therefore, also on this ground, find that this is a proper case for Court to exercise its

discretion and invoke its powers under r. 2 (2) of the Rules of this Court to allow the applicant/appellant to call evidence in the form of the entry records of the 3rd respondent into S I, St Mary's College Kisubi and his nomination papers for the February 23rd 2006 Parliamentary elections for the Constituency to elucidate on evidence that emerges from or is already on record, to ensure that the ends of justice are attained.

I am not persuaded that the applicant/appellant is time barred in furnishing additional evidence in the matter before Court in the main appeal as contended by counsel for the 3rd respondent. As long as the applicant/appellant does so with the leave of Court, all election petition appeals, there could never be a need or justification for a party, in a deserving case, to furnish court with additional evidence or evidence elucidating on evidence already on record or evidence that emerges from the record to enable Court reach a fair and just decision in matters before it on appeal.

In the circumstances, I find that this application is one that is proper for the grant of leave to the applicant/appellant to adduce additional evidence on appeal or to call evidence that elucidates on evidence already on record or evidence that emerges from the record and leave to do so is hereby granted.

That evidence shall be adduced by way of affidavit with the records of entry of the 3rd respondent to S. 1 at St. Mary's College Kisubi and his Nomination papers for the February 23rd 2006 elections for the constituency annexed thereto.

Costs of this application are granted to the applicant/appellant. It is so ordered.

Dated at Kampala this 8th day of February 2007.

STEVEN B.K. KAVUMA
JUSTICE OF APPEAL.