

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 14 OF 2009

(ARISING OUT OF CIVIL APPEAL NO. 078 OF 2008)

ELECTORAL COMMISSION..... APPLICANT

VERSUS

HON. SEKIKUBO THEODORERESPONDENT

CORAM: HON. JUSTICE S.B.K.KAVUMA DCJ RULING OF THE COURT

Introduction

This is an application brought by way of Notice of Motion under Rules 30 (1) (b), (2), (3) & (4), 43 and 44 of the Judicature (Court of Appeal Rules) Directions S.I 13-10. It seeks the following orders:

- a) That the applicant be granted leave to adduce additional evidence on appeal.
- b) The additional evidence be by affidavit.

The costs of this application be provided for.

Background

The background to the application is that judgment was entered against the applicant / appellant in H.C.C.S No. 035 of 2006. The applicant/ appellant failed to prove the amount of money it spent on the election of the male youth councilors for Sembabule District Council in 2006. They were ordered to pay costs of the suit. After judgment, the applicants discovered evidence that the actual expenditure records in respect of the election of the said male youth councilors, though in existence, were not availed to counsel for the applicant/ appellant who therefore did not avail the same to the High Court.

Grounds of the application

The application is based on eight grounds which are stated in the Notice of Motion and the affidavit in support dated 2nd March 2009 sworn by Sam A. Rwakoojo, Secretary to the Electoral Commission. Briefly the grounds are:

- . That judgment was entered against the applicant/ appellant in H.C.C.S No. 035 of 2006 finding, inter alia, that the applicant/ appellant had failed to prove the amount it spent on the election of male youth councilors.
- That the actual Expenditure Records in respect of the election of the male youth councilors though in existence were not availed to counsel for the applicant/ appellant ipso facto they were not availed to the High Court to elucidate the said expenditure during the hearing of H.C.C.S. No. 035 of 2006.
- The said actual Expenditure Records could not with due diligence be availed to counsel for the applicant/ appellant.
- The said Expenditure Records in respect of the elections are absolutely necessary to enable this Court to reach a

conclusive and just decision concerning all matters raised in the appeals.

- The additional evidence to be adduced will have a tremendous impact on the outcome of the substantial appeal.
- The respondent will not in any way be prejudiced if the application is granted.

Representation

At the hearing of the application, the applicant was represented by Mr. John Mary Mugisha, counsel for the applicant, while the respondent was represented by Mr. Wandera Ogalo, counsel for the respondent.

The case for the applicant

Counsel for the applicant submitted that Rule 30 of the Rules of this Court gives Court the 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 and if such evidence could not with due diligence, have been available at the trial.

He relied on the case of **Karmali Tarmohammed & anor vs Lakhari** (1958) E.A. 574, where the conditions upon which additional evidence may be adduced were summarized.

He started that the applicant failed to prove the amount it spent in the youth council elections yet the elections were actually conducted to voting stage and the appellant had incurred expenses. He noted that at the trial, though the actual records were in existence, they were not asked for by the appellant's counsel then and as such, they could not be availed to the High Court. He contended that the records were relevant to the pending appeal.

He submitted further that it would be grossly unfair if the counsel's error of judgment was to be visited upon the applicant/ appellant to stop them from adducing further evidence yet such evidence would definitely have a tremendous impact on the outcome of the main appeal.

Counsel contended that the applicant had acted with due diligence by entrusting the handling of their case to the former lawyers. To counsel, it was the original lawyer who messed up the applicant's case and as such, that misconduct should not be visited upon the applicant to their prejudice.

The case for the respondent

Counsel relied on the affidavit in opposition. He agreed with the principles in **Karmali Tarmohammed v Lakhani** (supra). He submitted that the applicant had not fulfilled all the conditions stated therein. He pointed out that the applicant did not use all the due diligence expected of them. He cited the case of **Elgood v R 1968 E.A, 279** where it was held, among other things, that the admission of additional evidence should not be geared at filling in missing gaps.

According to counsel, it appeared that the applicants were asking the Court to allow them to improve their case because there was no evidence from the former lawyers by way of affidavit to show that it was their mistake not to adduce the evidence of a budget list of the real expenditure. He asked this Court to dismiss the application with costs.

Court's consideration of the application

I listened to the submissions of counsel and carefully studied the evidence adduced. I have also considered the law applicable and the authorities cited herein. The principles to be followed by this Court in exercising its discretion

concerning an application to adduce additional evidence on appeal are well settled In **Karmali Tarmohammed & anor v Lakhani & Co. 1958 E.A. 567** where the case of **Ladd v Marshall 1954 3 ALLER, 745,1965 1 WLR 1489** was cited with approval, it was held :

“Except on grounds of fraud or surprise, the general rule is that an appellant court will not admit fresh evidence unless it was not available to the party seeking use of it , the trial or that reasonable diligence would not have made it available.”

Similarly, in the case of **Ladd v Marshall** (supra) it was stated:

“To justify the reception of fresh evidence or a new trial three conditions must be fulfilled. Firstly, it must be shown that evidence could not have been obtained with reasonable due diligence for use at the trial. Secondly, the evidence must be such that if given, it would probably have an impact 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.”

In the instant application, the affidavit in support of the application admits that the evidence sought to be adduced was in existence and was not only availed to counsel for the applicant/ appellant and as such could not be availed to the High Court. I find it difficult to believe considering that the applicant is a body that has a fully- fledged legal office and it should possibly figured that the evidence of the actual Expenditure very critical to proving its case.

The Supreme Court authority of Attorney General Ssemogerere and Others constitutional Application No.2 of 2004 cited a number of authorities which are relevant to the court’s discretion to admit additional. evidence and thereafter stated:

“A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- (i) Discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;**
- (ii) It must be evidence relevant to the issues;**
- (iii) It must be evidence which is credible in the sense that it is capable of belief;**
- (iv) The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;**
- (v) The affidavit in support of an application to admit additional evidence should have attached to it proof of the evidence sought to be given.**
- (vi) The application to admit additional evidence must be brought without undue delay.**

The Supreme Court, in justifying its reasoning for these stringent conditions further stated

“These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal.”

I am not persuaded that the applicant here acted with due diligence to ensure that the evidence was availed to Court. It is not enough to blame counsel for that failure when it is the duty of a client to ensure that counsel has all the evidence necessary to prove their case. If they had exercised due diligence, they would have produced that evidence even without counsel asking for it.

I find this one case where this Court may exercise its discretion in rejecting the application for lack of merit as I hereby do. The costs of the application to abide the outcome of the appeal.

I so order.

Dated at Kampala this 12th day of February 2015.

S.B.K. Kavuma

DEPUTY CHIEF JUSTICE