

Miscellaneous Application. No. 213 of 2015 (Arising from Civil Application no.36 of 2011)

WALANYIRA GEORGE DAVID-----APPLICANT

VERSUS

1. KAVUYA BEN

2. GLOBAL CAPITAL SAVE 2004 LTD.

3. RUTUNGU PROPERTIES LTD.-----RESPONDENTS

CORAM: HON. MR. JUSTICE RICHARD BUTEERA [SINGLE JUSTICE.]

This is an application brought by Notice of Motion under rules 30, 31, and 43(1) and (2) of the Judicature (Court of Appeal Rules) Directions).

The applicant is seeking for orders that:

" a) This honourable court in its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.

b) Such other order or orders as the honorable court may deem fit."

The grounds for the application are set out in the Notice of Motion which is supported by an affidavit of Wakanyira George David, the applicant. The affidavit sets out the grounds in more detail. The grounds as per the Notice of motion are the following:

"1. There is sufficient reason requiring the adducing of new evidence in the Appeal herein.

2. There are grounds for this Honourable Court to examine reports of the handwriting expert dated 25th day of May 2014 and the 9th day of September 2014, and the report of the Auditor to Police dated the 19th day of December 2014 that the applicant only accessed in July 2015, so as to conclusively determine the whether the was fraud committed by the first respondent (sic).

3. The applicant will suffer irreparable damage if this application is not granted.

4. And any other ground to be addressed at the hearing."

At the hearing of the application the applicant was represented by learned Counsel, Mr. Dalton Oponya. The respondents did not appear to defend the application nor did their advocates. There was evidence on Court record, however, that the respondent's advocates were served for the hearing. The applicants Counsel applied to proceed exparte which Court **granted** since there was evidence of effective service and the respondents and their counsel were not in court and there was no explanation for their absence.

The background facts to this application are the following:

On the 18th of January 2007, the applicant borrowed shs. 170,000,000/= from the 2nd respondent at an interest rate of 10% per month for six months. The applicant and the 1st and 2nd respondent signed a sale agreement for two properties in respect of this transaction. The 1st and 2nd respondents later transferred the two properties to the 3rd respondent, without the consent of the applicant.

The applicant then sued the two in the High Court (Commercial Division) under Civil Suit No. 560 of 2007. The High Court decided against the appellant.

In July 2015, after the High Court suit was determined the appellant obtained reports of the handwriting expert dated 25th March 2014 and 9th September 2014. In January 2015 he accessed a report of the Auditor to police dated 19th December 2014 all of which indicated that the 1st respondent had committed fraud in the sale and transfer of the two suit properties.

Counsel Dalton Oponya, for the applicant submitted that the applicant was not in possession of the two reports of the handwriting expert and the report of the Auditor by the time the High Court heard and determined the suit between the appellant and the respondents.

He contended that the **appellant** accessed the new evidence after the case was determined but the evidence was relevant as it revealed fraud in the transaction. He contended further that since the new evidence was not available to the appellant at the time of trial there was no way he would have adduced it before **the** High Court. Counsel urged this Court to admit on court record the new evidence as additional evidence for consideration at the hearing of the instant appeal.

The Decision of Court

The admission of additional evidence by this court is governed by Rule 30 (1) (b) of the Rules of this Court which provides:

"30. Power to reappraise evidence and to take additional evidence.

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

(a) -----

(b) In its discretion, for sufficient reason, take additional or direct that additional evidence be taken by the trial court or by a commissioner. "

The principles and conditions that this court follows in the admission of additional evidence were stated by the Supreme Court in two cases that this court relied upon in Civil Application No. 133 of 2014 (Arising from Civil Appeal No. 122 of 2013) , Makubuya Enock William T/a Polly Post versus Bulaim Muwanga Klbirige T/A Kowloon Garment Industry, to which counsel for the appellant referred the court. The Supreme Court in Hon. Bangirana Kawoya vs. National Council for Higher Education Misc. Application. No. 8 of 2013. Quoted

with approval its earlier decision of *The Attorney General vs. Paul Kawanga Ssemwogerere and others*, Constitutional Application No. 2 of 2004 (SCC 2/2004) unreported. It held:

"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 evidence sought to be given;

vi. The application to admit additional evidence must be brought without undue delay.

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 have considered the conditions and standards above quoted which this court has to follow for admission of additional evidence. I have also had opportunity to consider and re-consider the provisions of Rule 30 of the Rules of this Court. I note that the admission of additional evidence is done on the exercise of discretion by the court. I also note that the admission of additional evidence is done for sufficient reason. These are important considerations.

In the instant application the main ground of the application for admission of new evidence is that the applicant obtained new evidence indicating the commission of fraud by the 1st and 2nd respondents. The respondent allegedly obtained the evidence after the trial court had delivered its Judgment. My observation is that the nature of the evidence sought to be admitted as new evidence and the impact of its admission are critical issues to the whole appeal that the Court is set to hear and determine.

The exercise of the discretion to admit or not to admit the additional evidence is of such great importance to the whole appeal, that in my view, such discretion should be exercised by the full Court set up to hear and determine the substantial appeal rather than a single Justice in circumstances that would not allow me as a single Justice in the circumstances of this case, to fully investigate the matter.

I therefore adjourn the application under Rule 53(1) of the rules of this Court for the same to be heard and determined by the full Court hearing the appeal.

The costs of this application shall abide the outcome of the main appeal.

Dated at Kampala this 7th day of April 2016.

Justice Richard Buteera

JUSTICE OF APPEAL