

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO. 328 OF 2018

(Arising out of Civil Appeal No. 239 of 2018)

(Arising out of H.C. Miscellaneous Application No. 376 of 2018)

(Arising out of High Court Civil Suit No. 192 of 2015)

BISMILLAH TRADING LIMITEDAPPLICANT

VERSUS

FALCON ESTATES LIMITED.....RESPONDENT

BEFORE: HON. JUSTICE EZEKIEL MUHANGUZI, JA
(SINGLE JUSTICE)

RULING

Introduction

This is an application for additional evidence to be admitted/taken/considered by this court in determining Civil Appeal No. 329 of 2018.

It was filed under Rules 2 (2), 30 (1) (b), 43 (1) and (2) and 44 (1) of the Judicature (Court of Appeal Rules) Directions Sl. 13 – 10.

Pleadings

By Notice of Motion sealed and issued by this court on 01/11/2018 the applicant sought:-

“(a) An order that additional evidence of notification to resume building works in relation to Plot 3542, Block 244, Muyenga dated 8th June 2018 to Lulu Pearl Limited and statement of search as at 2nd September 2014 in relation to Plot 3542, Block 244, Muyenga to Falcon Estates Limited be admitted/taken/considered by this Honourable Court determining Civil Appeal No.239 of 2018.

“(b) Costs be provided for.”

The application was based on three grounds that were stated in the motion

as follows:

- “1. The notification to resume building works in relation to Plot 3542, Block 244, Muyenga dated 8th June 2018 to Lulu Pearl Limited and statement of search as at 2nd September 2014 in relation to Plot 3542, Block 244, Muyenga to Falcon Estates Limited are pertinent in establishing when the building plan in relation to plot 3542, Block 244, Muyenga was transferred to Lulu Pearl Limited and ownership of the said plot as of September 2014.*
- 2. The said evidence sought to be considered by this Honorable Court in determining Civil Appeal No. 239 of 2018 was never available to the applicant by 05th day of June 2018 when the appealed decision in Miscellaneous Application No. 376 of 2018 was delivered.*
- 3. It is just, fair and equitable that this application is granted,”*

Evidence

The affidavit of Badru Kibowa, a director in the applicant company, affirmed at Kampala on 10/10/2018 was attached and filed together

with and in support of the application. It set out 16 paragraphs as follows:

- “1. That I am a male adult Uganda of sound mind, a director in the Applicant Company well conversant with the facts in this matter in which capacity I affirm this affidavit.*
- 2. That the applicant instituted civil suit No. 192 of 2015 against the Respondent and Kampala Capital City (KCCA) for among others cancellation of the Respondent’s approved plan No. PPC 95 which sealed off the Applicant’s only access to her property in plot 3344 Muyenga.*
- 3. The Respondent had also sued the Applicant and her directors in Civil Suit No. 188/2015 for trespass on the suit land plot 3542 where both suits that is 192/2015 and 188/2015 were consolidated but in March 2018, the Respondent withdrew her suit No.188/2015 due to not being the registered proprietor of the suit land.*
- 4. That after the Respondent withdrawing her suit No. 188/2015, she filed Miscellaneous Application No. 376 of 2018 seeking to strike out Civil suit no. 192 of 2015 and the High Court indeed struck it out with costs for non-disclosure cause of action against the Respondent.*
- 5. The Applicant had secured approval of her building plan for her plot 3344 block 244 Muyenga with a worn-out tarmac road through plot 3542 as the only access to the Applicant’s said plot 3344 block 244 Muyenga. (A copy of the said building plan is attached hereto and marked “A”).*
- 6. That later, the Respondent as well secured approval of a building plan for plot 3542 block 244 Muyenga for a perimeter wall sealing off the Applicant’s only access road to her plot 3344 block 244 Muyenga. A copy of the said building plan is attached hereto and marked ‘B’).*
- 7. That while opposing Miscellaneous Application No. 376 of 2018, the Applicant submitted that she was right to sue the Respondent because the Respondent graded, destroyed the access road and blocked the Applicant from accessing her plot 3344 while implementing her plan No. PPC 95 that she secured in relation to plot 3542 block 244 Muyenga.*
- 8. That in granting the orders sought in Miscellaneous Application 376 of 2018, the learned trial judge held that plan No. PPC 95 for the perimeter wall on plot 3542 was approved in the Respondents names and was transferred to M/S Lulu Pearl Ltd when the suit land changed hands thus the Respondent didn’t destroy the Applicant’s only*

access road. (A copy of the Ruling in M.A 376 of 2018 is attached hereto and marked 'C')

- 9. That the notification to resume building works in relation to plot 3542, block 244, Muyenga dated 8th June 2018 to Lulu Pearl Limited shows when the said plan was transferred to Lulu Pearl Limited on a date after the Ruling in Miscellaneous Application No. 376 of 2018. (A copy of the notification is attached hereto and marked 'D').*
- 10. That whereas the Respondent claims that she ceased being registered proprietor of plot 3542 block 244 Muyenga on the 25th June 2014, a statement of search as at 02nd September 2014 in relation to the said plot by herself was her proof of ownership and the basis to secure the building plan No. PCC95 in relation to plot 3542, Bloc 244, Muyenga. (A copy of the statement of search is attached here to and marked 'E')*
- 11. That the said statement of search confirms our averment that the transfer of plot 3542 to Lulu Pearl Ltd both companies having similar directors and member was dubious.*
- 12. That both the notification to resume building works and the said statement of search are credible as they are from the KCCA and the lands office respectively and are documents of the Respondent, are relevant because once allowed, they shall influence the decision of court in Civil Appeal No.239 of 2018 and were never within the knowledge and could not have been produced by the Applicant at the time of hearing Miscellaneous Application No. 2018 as the notification was not yet the statement of search was in the custody of the Respondent.*
- 13. That this Application is made without undue delay.*
- 14 That it is jus, fair and equitable that this Application is granted.*
- 15. That I affirm this Affidavit in support of an Application to admit additional evidence in determining Civil Appeal No. 239 of 2018.*
- 16. That whatever I have state herein is true and correct to the best of my knowledge and belief".*

In opposition to the application the affidavit in reply of Alwi Hassan, the respondent's Managing Director affirmed at Kampala on 05/11/2018, was filed. It set out 13 paragraphs as follows:

- “1. That I am an adult, male Ugandan of sound mind, well versed with the facts of this matter being the Respondent’s Managing Director herein and duly authorized to affirm this affidavit.**
- 2. That I am informed by my advocates M/Tumusiime Kabega & Co. Advocates which information I believe to be true that this Application is premised on Civil Appeal No. 293 of 2018, which appeal is incompetent and irregular for failure to take essential steps in filing the Appeal thus this Application cannot stand.**
- 3. That the Respondent herein has filed Civil Application No. 351 of 2018 to have the Appeal struck out with costs for failure to take essential steps in filing the appeal. (A copy of the Application is attached hereto as “A”).**
- 4. That in specific reply to paragraph 5, 6, and 8 of the affidavit in support of the Application, the Applicant has never been entitled to any access road to its land comprised in Plot 3344 Block 244 through the Respondent’s then land comprised in plot 3542 Block 244. The Respondent’s then building plan PCC 95 does not show any access road to the Applicant. The Applicant’s access road is Baka Road. (A copy of the building plan is attached hereto as “B”)**
- 5. That in specific reply to paragraph 7 of the affidavit in support of the Application, it is not true that the Respondent graded, destroyed the access road and blocked the Applicant from accessing her land. The Respondent at the time no longer had interest in the said land comprised in 3542 Block 244 (A copy of the Duplicate Certificate of the Title and A search statement is attached hereto as annexure “C” and “D” respectively)**
- 6. That in specific reply to paragraph 9 of the Affidavit in support of the Application, the notice to resume building works was made in response to Lulu Pearl Limited Application (R/17/18) which Lulu Pearl Limited made on 6 June 2018 in request to resume its works which it had earlier started well.**
- 7. That in specific reply to paragraph 10 to the Affidavit in support of the Application, it is false that the Respondent was the Registered proprietor of Plot 3542 Block 244 as at the time H.C.C.S No. 192 of 2015 was filed and the said land was duly transferred to Lulu Pearl Limited on 25th June 2014 vide Instrument No. 487424. (Refer to Annexures “C” and “D”)**
- 8. That in specific reply to paragraph 11 of the Affidavit in support of the Application, I am informed by my advocates which information I believe to be true that the Respondent and Lulu Pearl Limited are two separate legal entities whose operations**

are executed differently and therefore the transfer of Plot 3542 Block 244 by the respondent to Lulu Pearl Limited is not dubious whatsoever.

9. *That in specific reply to paragraph 12 of the affidavit in support of the Application, the statement of search was evidence given by the Applicant herein in Miscellaneous Application No. 376 of 2018 as annexure "A" to the affidavit in reply and as such it was considered by the court during trial. The said statement of search cannot be sought to be additional evidence in the circumstance. (A copy of the Affidavit in Reply is attached here as "E")*
10. *That the legal rights in the building plans submitted by the Respondent were transferred to Lulu Pearl Limited upon transfer of ownership of the property in issue and therefore annexure "D" to the affidavit of Badru Kibowa in support of this Application is in respect of Lulu Pearl Limited which is not a party to the proceedings in the lower court and this court and as such cannot be made as part of the record of the Appeal in issue.*
11. *That I now affirm this Affidavit in reply to the Applicant's Application and Affidavit in support of this application.*
12. *That it is just and equitable in the circumstances that this Application be dismissed with costs.*
13. *That whatever is stated herein above is true and correct to the best of my knowledge and belief save where expressly stated, in which case the same is true and correct to the best of my information and belief".*

In rejoinder to Alwi Hassan's affidavit in reply Badru Kibowa affirmed yet another 10 paragraphs affidavit in rejoinder at Kampala on the 06/11/2018 as follows:-

1. *That I have read and understood the contents of the Affidavit in reply sworn by Alwi Hassan to which I rejoin as follows.*
2. *That I am informed by my lawyers of Okecha Baranyanga & Co. Advocates which information I believe to be true that Civil Appeal No. 239 of 2018 is competent and regular as the essential steps in filing the appeal were followed and this Application is firm.*
3. *That am still informed by my lawyers of Okecha Baranyanga & Co. Advocates which information I believe to be true that the contents of paragraphs 4 and 5 of the*

affidavit in reply to this Application are arguments for the appeal and not this Application but in reply, the Applicant's plan has an approved then tarmac far dating (1960s) access over the Respondent's land in plot 3542 and has no other access. (See copies of photos showing the access road prior to its destruction 'A', Memorandum of KCCA Legal Department marked 'B' and site visit Report marked 'C').

4. *That the Respondent applied and secured a building plan for a perimeter was around her plot 3542 and its only her then that graded, destroyed the access road and blocked the Applicant from accessing her plot 3344 while implementing her plan. (See a copy of a Notification of approval marked 'D', photos showing grading and blocking of the tarmac road marked 'E').*
5. *That the Respondent was the registered proprietor of plot 3542 block 244 Muyenga even as of 07th April 2015 when she filed her plaint Civil Suit No. 188 of 2015 against the applicant and others. (A copy of the plaint and filed certificate of title are marked 'F')*
6. *That the statement of search which we are applying to be additional evidence for the appeal was executed by the Respondents on 02nd September 2014 and we only secured the same on the 14th June 2018 when served with the affidavit in reply to Miscellaneous Application No 838 of 2018, this is different from the search statement attached to the affidavit in reply to this Application and was never considered by the trial court in M.A No. 376 of 2018. (A copy of the affidavit in reply to Miscellaneous Application No. 838 of 2018 marked 'G').*
7. *That the building plan submitted by the Respondent could not have been transferred to Lulu Pearl Limited on the alleged transfer of plot 3542 as the building plan was not in existence then to be allegedly transferred, the transfer was 08th June 2018. (Refer to Annexure 'D')*
8. *That it is jus, fair and equitable that this Application is granted.*
9. *That I affirm this Affidavit in rejoinder in support of granting the Orders sought in Civil Application No. 328 of 2018.*
10. *That whatever I have stated herein above is true and correct to the best of my knowledge save for where the source of information is expressly stated where the said information is also true and correct to the best of my belief."*

Representation

At the hearing of the application, Mr. Saad Seninde appeared for the applicant while Mr. Ronald Oine appeared for the respondent. Mr. Badru Kibowa, a director in the applicant company and Mr. Alwi Hassan, a director in the respondent company were in court on behalf of their respective companies.

Submissions of the applicant

In his submissions Mr. Seninde began by indicating the considerations that court ought to take into account before an order for admitting additional evidence is normally granted. He argued that those considerations have been met by the averments in the two affidavits in support of the application.

Further, Counsel clarified, firstly that the search statement sought to be admitted as additional evidence is “Annexure E”, to Badru Kibowa’s affidavit in support of the application, which is dated 02nd September, 2014 and not “Annexure D” of Alwi Hassan’s affidavit in reply which is dated 19th March 2018.

Secondly, Counsel clarified that the applicant seeks to have annexure “D” to the affidavit in support of the application admitted in evidence on appeal for purposes of showing that approval of the building plan was granted on 8th June 2018 after the ruling sought to be appealed which is dated 5th June 2018 and is marked “Annexure C” to the affidavit in support of the application. Counsel prayed that the application be allowed with costs.

Mr. Ronald Oine, learned counsel for the respondent opposed the application. He submitted that, firstly Civil Appeal No. 239/2018 is

irregularly before court and that there is a pending Civil Application No.351/2015 seeking to strikeout the appeal for failure to take essential steps in prosecuting that appeal.

Secondly, counsel submitted that this application did not comply with the requirement of Rule 30 (2) of the rules of this court as the application did not indicate whether additional evidence would be taken orally or by affidavit so as to afford the respondent an opportunity to cross examine the deponent.

Further, Mr. Oine submitted regarding the 1st document sought to be admitted that was “Annexure E” of Badru Kibowa’s affidavit, is dated 8th June, 2018 while the ruling sought to be appealed is dated earlier, namely 05th June, 2018 and therefore that annexure is evidence that came into existence after the determination of the ruling. That for evidence to be admitted as additional evidence, it must have been in existence at the time of hearing and determination of a matter being appealed against. He cited the case of **Nsereko Joseph & ors V Bank of Uganda** Supreme Court Civil Application No. 13 of 2009 in support of this submission.

Regarding the second document sought to be admitted as additional evidence, Mr. Oine submitted that “Annexure D” to the affidavit of Badru in support of to the application was in the possession of the applicant during the hearing and determination of the ruling sought to be appealed and as such cannot be said to be new or additional evidence at this particular time.

Court's Consideration of the Application

I have carefully perused the notice of motion, the supporting affidavits and the affidavits in opposition. I have also carefully considered to the submissions of counsel of both parties.

This application was brought under four provisions of the rules of this court, namely:

1. Rule 2 (2) which provides for the inherent powers of this court;
2. Rule 30 (1) (b) which provides for taking or directing for the taking of additional evidence;
3. Rule 43 (1) and (2) which provides for the format of the application; and
4. Rule 44 (1) which provides for what documents to support the applications.

From the submissions and contentions of both parties it appears to me that there is no contention regarding Rules 2 (2), 43 (1) and (2) and 44 (1). The contention so far as this application is concerned appears to be in regard to Rule 30 (1) (b) and (2) of this Judicature (Court of Appeal Rules) Directions, S.I No. 13 – 10, which provides as follows:

“Power to appraise evidence and to take additional evidence.

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

(a)

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

(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”.

The main thrust of the applicant's case is what is stated in paragraphs 9 and 10 of Badru Kibowa's affidavit in support of the application, namely that the applicant wishes to adduce additional evidence in form of two documents which are marked as annexures "C" and "D" which documents the applicant claims were not in its possession at the time Miscellaneous Application No. 376/2018, which is being appealed, was determined so that these two documents may be considered by this court when this court is hearing Civil Appeal No.239 of 2018 now pending in this court.

The respondent on the other hand resists this application on the basis that the applicant did not comply with Rule 30 (1) (b) and (2) of the rules of this court and also the applicant did not satisfy the requirements for grant of applications for additional and or new evidence because the documents in issue were in existence and in possession of the applicant before this application sought to be appealed was determined.

I have considered the Supreme Court decision in **Attorney General & Anor V Agric Cooperative Society Ltd**, Misc. Application No.6/2012 and noted that the case was considering Rule 30 of the Judicature (Supreme Court Rules) which is slightly different from Rule 30 (1) (b) of the rules of this court in that while under the Supreme Court rules court has no discretion to admit additional evidence, unlike under the Court of Appeal Rules where court has discretion in taking additional evidence or directing such evidence to be taken.

Nevertheless in that case court reviewed various earlier decisions and

came up with what it termed as useful guidelines on the admission of additional evidence which were stated thus:-

- “(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.”***

Against the above guidelines I have also considered the affidavit in reply of Alwi Hassan as well as the submissions of Counsel for the respondent in opposition to this application, which in effect are to the effect that the evidence sought to be admitted is not new and was in the possession of the applicant prior to the determination of the matter being appealed and that the respondent would be denied the opportunity of cross-examining whoever seeks to adduce such evidence if this court were to grant this application now.

I am not persuaded by the respondent's contentions because firstly, the applicant has shown that the notification to resume building works dated 8/6/2018 as well as the statement of search as at 02/9/2014 in respect of property at Muyenga Plot No.3542 Block 244 were not in the

applicant's possession prior to the determination of Miscellaneous application No.376 of 2018 which is being appealed in Civil Appeal No. 239 of 2018. See paragraphs 9 and 10 of the affidavit of Alwi Hassan in support of the application.

Secondly, I am not persuaded that the respondent would be denied an opportunity to cross-examine the witness who would adduce the two specified documents sought to be admitted as additional evidence. Those documents have been specifically identified. The witness is the same person who swore the affidavit in support of the application. That witness was present in court at the hearing of this application. Counsel for the respondent was at liberty to apply to cross-examine the witness, if he so wished, but did not avail himself of the opportunity.

I have considered the evidence sought to be admitted as additional evidence for consideration during the hearing and determination of Civil Appeal No. 239 of 2018. Upon consideration of that evidence against the guidelines spelt out in **Attorney General & Anor. V. Agric Cooperative Society Ltd** (Supra) it seems to me and I am satisfied that:

- (i) The Applicant discovered new and important evidence which the applicant did not have in its possession prior to the determination of MA No. 376 of 2018;
- (ii) The two documents sought to be admitted as additional evidence are relevant to the issues in Civil Appeal No. 239 of 2018 which seeks to overturn the decision in MA No. 376 of 2018;
- (iii) The said two documents are credible in the sense that they are capable of belief;

- (iv) The said documents if admitted, they would, in my view, make a difference on the result of the said appeal, though they would not necessarily be the determining factors in the appeal;
- (v) The said two documents were attached to the affidavit of Alwi Hassan in support of this application and marked "D" and "E" respectively, as proof of the evidence sought to be given;
- (vi) This application to admit additional evidence was received on 11/10/2018 and issued on 01/11/2018, which in my view, was timely.

On the whole I find and hold that this is a fit and proper application for the grant of the orders sought in the application.

The admission of the two documents, in my view, would not in any way prejudice the respondent's case whatsoever.

Therefore let the notification to resume building works dated 8/6/2018 as well as statement of search dated 2/9/2014 in relation to Plot 3542 Block 244 at Muyenga, attached to the affidavit of Alwi Hassan in support of this application and marked as "D" and "E" respectively, be admitted to form supplementary record of appeal in Civil Appeal No. 239 Of 2018 between the parties to this application.

I award costs of this application to the applicant in any event.

Dated at Kampala this ^{17th} day of April 2019.



EZEKIEL MUHANGUZI
JUSTICE OF APPEAL.