THE REPUBLIC OF UGANDA

THE COURT OF APPEAL OF UGANDA
AT KAMPALA

CORAM: KIRYABWIRE, JA; MUGENYI, JA AND KASULE, AG. JA

CIVIL APPLICATION NO. 314 OF 2020

BETWEEN

1. **ATTORNEY GENERAL**
2. **NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY ..... APPLICANTS**

AND

DMW (U) LIMITED ..... RESPONDENT

RULING OF THE COURT

A. Introduction

1. DMW (U) Limited ('the Respondent') instituted **High Court Civil Suit No. 24 of 2019** against the office of the Attorney General ('the First Applicant') and the National Environmental Management Authority (NEMA) ('the Second Applicant'), contesting the cancellation of its sand mining licenses in respect of land comprised in Block 149 Plot 7 Kakwanzi village, Kitti parish, Bukamba – Kalungu district. It sought compensation for loss of business and earnings; special and general damages, and interest thereon. In its judgment of 20th May 2020, the trial court found for the Respondent, awarding it compensation of Ushs. 178,000,000,000/= (one hundred and seventy-eight billion), which was *inter alia* premised on three sand valuation reports prepared by Mr. Fred Kigereigu, a Senior Geologist.

2. Aggrieved by the trial court's decision, the Applicants lodged **Civil Appeal No. 138 of 2020** challenging it in its entirety. They did subsequently lodge the present Application in this Court seeking leave to adduce additional evidence on appeal. The Application is brought under Rules 2(2), 30(1)(b), (2), (3) and (4), 43 and 44 of the Judicature (Court of Appeal Rules) Directions ('Court of Appeal Rules'), and is premised on the following grounds:

    I. The additional evidence intended to be adduced was not available at the hearing of *High Court Civil Suit No. 24 of 2019*.

    II. The evidence, if adduced at the hearing of *High Court Civil Suit No. 24 of 2019* would have had an important impact on the result of the case.

    III. The evidence sought to be adduced is material, credible and of probative value in the determination of the issues in the Appeal and case.

    IV. The evidence sought to be adduced will assist the court to determine the dispute between the parties conclusively.

    V. The Respondent shall not be prejudiced if the application is allowed.

VI. It is in the interests of justice that this application is allowed.

3. It is supported by the affidavit of Ms. Sarah Naigaga, a Senior Legal Officer of NEMA, which attests to the new evidence sought to be adduced having been unavailable at the hearing of **Civil Suit No. 24 of 2019**. That evidence essentially seeks to demonstrate that in awarding compensation of Ushs. 178,000,000,000/= (one hundred and seventy-eight billion) to the Respondent the trial court relied on valuation reports authored by a person with no professional authority to do so. It is averred that although valuations, mining and hydrological surveys are regulated by the Surveyors Registration Board under the Surveyors Registration Act Cap. 275, the author of the valuation reports in issue presently is not a registered surveyor and could not, therefore, issue authentic reports for evidential purposes. It is further averred that the additional evidence sought to be adduced had not been produced before the High Court owing to (mis)representations by the Respondent, his advocate, as well as Mr. Kigereigu himself that he was qualified to render the reports he presented. It is opined that the Respondent would not suffer any prejudice if the Application was granted given that it would have the opportunity to interrogate the cogency of the additional evidence in the course of the Appeal.

4. The Application is strongly opposed by the Respondent, which filed affidavits in reply to that effect deposed by its Managing Director, Pastor Daniel Walugembe and Mr. Kigereigu. Pastor Walugembe essentially attests to the Application being misconceived, urging that the additional evidence sought to be adduced is irrelevant but, in any event, would have been readily available to the Applicants had they sought to access it during the trial court's proceedings. The irrelevance of the additional evidence to the dispute is reiterated by Mr. Kigereigu, who further avers that he undertook the valuation of soil samples as a qualified geologist not as a surveyor; as such he is not subject to the regulation of the Surveyors Registration Board, and over his professional career he has routinely conducted numerous geological evaluation reports.

5. The First Applicant was represented at the hearing by Ms. Susan Apita Akello and the Second Applicant by Mr. James Mukasa Sebugenyi and Mr. Joseph Luswata, while Mr. Ronald Muhwezi and Ms. Grace Atuhaire appeared for the Respondent.

B. **Preliminary Objection**

6. At the hearing of the Application, learned Counsel for the Respondent raised two preliminary objections. First, that M/s Sebalu and Lule Advocates – the law firm representing the Second Applicant – was improperly before the Court on account of Regulation 24(3) of the Advocates (Professional Conduct) Regulations. That legal provision supposedly prohibits advocates from carrying on any practice under a firm name consisting solely or partly of the name of a partner that has since ceased to practice as an advocate. Citing Regulation 24(4) of the same Regulations that provides a five-year grace period to affected advocates, it was argued that the firm of M/s Sebalu and Lule Advocates had ceased to exist in 2013 upon the death of its founding partner, Mr. Paul Sebalu, and the grace period under Regulation 24(4) had expired in 2018. It was further argued that the other founding partner, Mr. Godfrey Lule, had since retired from the firm. Relatedly, the second preliminary point of law raised was that, as a government entity the procurement function of which is regulated by the Public Procurement and Disposal of Assets Authority (PPDA), the Second Applicant violated the provisions of section 70 of the PPDA Act in procuring the services of a law firm that (in the Respondent's view) has no legal capacity to execute a contract.

7. In reply, learned Counsel for the Second Applicant faulted opposite Counsel for not alerting him of his intention to raise the preliminary objections above, as professional courtesy would have dictated. He nonetheless contended that the Law Council had authorized a change of name from *Sebalu and Lule Advocates* to *S and L Advocates*, and a certificate of change of name to that effect at the Uganda Registration Services Bureau would have allayed the Respondent's

misgivings, had it bothered to make the appropriate inquiry. He undertook to furnish a copy of the certificate to the Court if given the opportunity. On that premise, it was Mr. Sebugenyi's contention that the law firm had legal capacity and was properly procured; no evidence to the contrary had been adduced by the Respondent but, in any case, the Application having been co-presented by the Attorney General's office, it could still be heard on that basis were the Court inclined to deny his firm appearance. He did also raise the issue of a similar matter on the firm's legal capacity awaiting the decision of the High Court, arguing that it was a misdirection on the Respondent's part to raise it again before this Court. Ms. Apita, for the First Applicant, supported the Second Applicant's contention that no evidence had been adduced in proof of the alleged non-compliance with procurement rules. It was her assertion that the Second Applicant did comply with all requisite procurement processes in procuring the services of S and L Advocates.

8. By way of rejoinder, it was argued that whereas the firm had taken remedial action to redress the anomaly raised, learned Counsel for the First Applicant had claimed that the procurement was in respect of S and L Advocates yet that firm name appeared nowhere in the pleadings or court record. He urged the Court to disregard the Applicants' submissions for being self-contradictory.

9. The Court delivered an *ex tempore* decision over-ruling the preliminary points of law raised in the following terms:

> *We are not inclined to accept the objections for the following reasons, details of which we shall give:*
>
> *i. If you had so wished to raise this matter we think you should have done it formally before coming to this court, provided the necessary evidence which you have submitted from the Bar and then allowed the parties also an opportunity to respond, which you have not done.*
>
> *ii. We are aware, again unfortunately from the Bar, that this matter is also the subject of judicial review. We do not have those proceedings before us. It is not the nature of good judicial practice for various courts to pronounce*

themselves differently on matters which are already before the courts of law. That's not in our best interest. We do not know what is happening in the judicial review, we have only heard it from the Bar. Any ruling we make from the superior court may have big ramifications.

iii. And finally, in any event the Attorney General is her so we do not see any prejudice in this matter. The greater detail will be provided.

10. The detailed reasons for that decision having been reserved to this Ruiing, we do revert to them forthwith. The celebrated case of **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA 696** is the *locus classicus* on what a preliminary objection entails and the circumstances that would warrant recourse to it in judicial proceedings. In that case a preliminary objection was defined as '**a point of law which has been pleaded, or which arises in the course of the pleadings and which, if argued as a preliminary point, may dispose of the suit.**'[1] Clarifying this position, the court in **Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd** (supra) further observed (per Newbold, P):

> **A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if a fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuses the issues. The Court considers that this improper practice should stop.** *(Our emphasis)*

11. In the instant case, the supposed preliminary objections were neither specifically pleaded nor can they be deduced from the pleadings. They would not dispose of the present Application either given that the First Applicant is in a position to

[1] See also Attorney General of the Republic of Uganda v Media Legal Defence Initiative & 19 Others, EACJ Appeal No. 3 of 2016 and Attorney General of the Republic of Kenya v Independent Medical Legal Unit, EACJ Appeal No. 1 of 2011 (Also reported at **(2005 – 2011) EACJ LR 377).**

present the Applicants' joint Application. Furthermore, it seems to us that the objection raised as to the *locus standi* of M/s Sebalu and Lule Advocates to appear in this case hinges on proof of the death and retirement of the firm's founding partners, Mssrs Paul Sebalu and Godfrey Lule respectively. It would also necessitate demonstration by the Respondent that the provisions of Regulation 24 of the Advocates (Professional Conduct) Regulations have in fact been violated. These are clear questions of fact that require proof and cannot, therefore, be raised as preliminary objections. They most certainly do not represent pure points of law arguable on the face of the pleadings in so far as they entail the clash of law and fact.[2] To compound matters, in the absence of notification of the Respondent's intention to raise the preliminary objections raised, opposite party (caught unawares) was unable to support their contestations from the Bar that either the firm had indeed been duly authorized to operate as M/s S and L Advocates or due process had been followed in procuring its legal services.

12. It is on the foregoing basis, therefore, that the Court over-ruled the preliminary objections raised by the Respondent for being improperly before it. For parity, nonetheless, we would exercise the inherent powers of the Court under Rule 2(2) of the Court of Appeal Rules to have learned Counsel for the Second Applicant lodge proof of their law firm's legal capacity to operate in Uganda with this Court's Registry.

C. **Determination of the Application**

13. Turning to the Application before the Court, in joint written submissions, the Applicants invoke Rule 30(1)(b) of the Court of Appeal Rules as the basis for their quest to adduce additional evidence. That Rule provides:

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

[2] See **Attorney General of the United Republic of Tanzania vs. Africa Network for Animal Welfare (ANAW), EACJ Appeal No. 3 of 2011**, where points of law were defined to exclude matters that entailed **'the clash of facts, production of evidence and assessment of testimony.'**

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.**

14. They sought to buffer their case with the decision in **Attorney General v Paul K. Ssemogerere & Others, Constitutional Application No. 2 of 2004** (Supreme Court), where the exceptional circumstances under which an appellate court may admit additional evidence were expounded as follows (per Odoki, CJ):

> (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 the 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 the 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.**

15. The Applicants argue that courts often relax the criteria that the evidence would have been available at the time of trial with the exercise of due diligence where a witness is demonstrated to have acted with fraud, deception or other impropriety. They cite the following decision in **Takhar v Gracefield Developments Ltd & Others (2019) UKSC 13** to support of their proposition:

> **Supposing that a party to a case in which judgment had been given against him could show that his opponent had obtained the judgment entirely on the strength of, say, concocted documentation and perjured evidence, it would strike me as wrong if he could not challenge the judgment even of the fraud could have reasonably been discovered. Were it impossible to impugn the judgment, the winner could presumably have been sent to prison for his fraudulent conduct and yet able to enforce the judgment he had procured by means of it: the judgment could still, in effect, be used to further the fraud.**

16. They opine that they are entitled to adduce additional evidence in this matter given that the valuation reports relied upon in the High Court's now contested judgment were adduced in evidence by misrepresentation as to their author's qualification to undertake such a valuation. In addition, it is argued that the additional evidence sought to be adduced was not available during the trial in the lower court because the responsible regulatory body (the Surveyors Registration Board) only got wind of the alleged misrepresentation and communicated its misgivings to the Applicants following the delivery of the impugned judgment. The evidence sought to be admitted is opined to be relevant to *Issues 2* and *4* as framed before the trial court, which respectively raised the questions of the loss suffered by the present Respondent and the appropriate remedies in that regard. Furthermore, it not only impugns the credibility of the evidence relied upon by the trial court, but is plausible in its own right. Reference in that regard is made to *Black's Law Dictionary's*[3] definition of the term 'credibility' as '*the quality that makes something (as a witness or some evidence) worthy of belief.*'

17. In terms of the probability of the additional evidence influencing the result of the case, the decision in **Wood v Gamlings (1993) PIQR[4] 76** (Court of Appeal) was cited in support of the argument that it is probable that in order to avoid

[3] 9th Edition, p. 423
[4] Personal Injury and Quantum Reports, England.

perpetuating an illegality, the trial court would have dismissed the impugned valuation reports on account of their author's lack of qualification. Finally, it is asserted that the additional evidence is indeed duly attached to the affidavit in support of the Application, which Application was brought without delay, having been lodged within a year from the time it was authored and three months from the date of filing the Appeal from the trial court decision. The Court was referred to the decision in **Lattimer v Cumbria CC (1994) PIQR 395** (Court of Appeal) to admit additional evidence that had been filed fifteen months after an application for leave to appeal had been made.

18. Conversely, the Respondent Company purports to raise yet another 'point of law' that the affidavit in support of the Application had raised falsehoods, an allegation that is intricately tied with factual proof. It does indeed respond to the allegedly false averments in two affidavits of reply, rendering any reference to them as points of law superfluous and meaningless. The supposed point of law would therefore suffer the same fate as the so-called preliminary objections that were raised orally and is hereby over-ruled. It is to the merits of the Application, including the veracity of either Party's averments, that the Court now turns.

19. It is the Respondent's contention that the evidence sought to be adduced is neither new and important, nor was due diligence exercised to produce it at trial, so as to warrant its admission on appeal as clarified in **Attorney General v Paul K. Ssemogerere & Others** (supra). It is argued that the Surveyors Registration Board is not a new entity and the list of surveyors was readily available at the time of the trial, therefore evidence premised thereon cannot be considered new. The Respondent further argues that given that the impugned valuation reports had been attached to its trial bundle that was served upon the Applicants in July 2019, the latter's failure to interrogate their witness's qualifications prior to the hearing in February 2020 is indicative of a lack of due diligence on the their part. In the Respondent's view, given that the suit before the trial court had been premised on cancellation of its sand mining licenses, the additional evidence sought to be adduced is neither new, important or relevant to the pending Appeal.

20. Contesting the inference that the additional evidence was not within the Applicants' knowledge, it is argued that the Applicants were aware that a geologist need not be registered as a surveyor but, rather, is the competent professional to undertake sand valuation hence their decision not to raise the issue at trial. The circumstances of this Application were distinguished from those that pertained in **Anifa Kawooya Bangirana v National Council for Higher Education (NCHE), Miscellaneous Application No. 8 of 2013** and **Michael Mabikke v Law Development Centre, Miscellaneous Application No. 16 of 2015**; the contention being that the additional evidence in the present case was neither in the hands of opposite party at trial (as in the **Hanifa Kawooya** case) nor dependent on future events (as in the **Michael Mabikke** case). In like vein, the Respondent questions the relevance of **Takhar v Gracefield Developments Ltd & Others** (supra), arguing that whereas fraud was the bone of contention in that case there was no deception or fraudulent misrepresentation before the trial court as alleged. The fact of Mr. Kigereigu having testified as a geologist is argued to have been well within the Applicants' knowledge at trial as an accurate representation of the capacity in which he presented the impugned valuation reports. In the estimation of learned Respondent Counsel, the Applicants seek to raise a new cause of action in deception and fraudulent misrepresentation that was not canvassed before the trial court.

21. Drawing a distinction between geology and surveying as defined in *Chambers Twentieth Century Dictionary*[5], the Respondent maintains that the additional evidence is irrelevant to the pending appeal in so far as it erroneously purports to subject geologists to the regulation of the Surveyors Registration Board. Learned Respondent Counsel invited the Court to note the rationale behind the reports as spelt out in the Executive Summaries thereof, to wit, '*the proper evaluation of the design appropriate mining strategy, to consider the economic evaluations. The study led to the samples of sand being taken to a reputable Engineering laboratory to test its quality for civil works. The report stated the amount of silica sand deposits and the estimated tones and the current process.*' It is the

[5] At pp. 345, 1360.

contention that such studies could not have been undertaken by a 'mere' surveyor but a qualified expert as sourced by the Respondent. The circumstances in **Kakembo v Roko Construction Ltd, Civil Appeal No. 5 of 2005** were distinguished from the foregoing scenario on the premise that, whereas the evidence of a land surveyor who had no knowledge of the soil was rightly rejected in that case, the expert evidence of a geologist formed the basis of the trial court's findings in the instant case.

22. It is therefore the Respondent's case that to the extent that the additional evidence sought to be adduced is grounded in the misconception that Mr. Kigereigu had illegally usurped the function of a surveyor, that evidence is not credible. It is further argued that Mr. Kigereigu's contested credentials with regard to valuations would have negatively influenced the trial court's decision had his limitations in that respect been brought to its attention. This was not done, and no law has been cited by the Applicants to support their claim that geologists are not mandated to undertake sand evaluations and other related activities. Finally, the Respondent urges the Court to dismiss the Application for having been brought six months after the delivery of judgment in the trial court, as purportedly transpired in **Attorney General v Paul K. Ssemogerere & Others** (supra).

23. In a brief rejoinder, the Applicants argue that the issue before the Court is whether the 'valuation reports' adduced in evidence before the trial court as Exhibits B1, B2 and B3 did in fact represent reliable expert evidence on the basis of which a court would arrive at a reasonable decision in a valuation-based compensation. In their estimation, supposedly re-echoing the decision in **Kakembo v Roko Construction Ltd** (supra), the additional evidence sought to be adduced clarifies that geologists are not valuers or surveyors, and cannot therefore render a valuation report. It is argued that the purported expert evidence in this case offends the principles laid out in the cases of **The I Karian (1993) 2 Lloyds Reports 68** and **Cala Homes v Alfred McAlpine (1995) CILL**[6]

[6] Construction Industry Law Letter.

1083.

24. We carefully considered the Parties' rival submissions in this matter. Undoubtedly, the Surveyors Registration Board is not a new entity and the list of surveyors registered thereunder would thus have been readily available to the Applicants during the trial court's proceedings. To that extent, one might ponder the possibility that with due diligence that evidence could have been accessed by the Applicants. However, it would appear that Mr. Kigereigu's competence to adduce the documentary evidence he presented was not in issue at trial. It only came into purview upon completion of those proceedings following the intervention of the Chairperson of the Surveyors Registration Board vide her letter to the Honourable Attorney General. It is that letter that forms the basis of the present Application for the production of additional evidence on appeal. We deem it necessary to reproduce the part thereof that addresses the question as to whether Mr. Kigereigu was legally authorized to undertake the valuation he did.

> *Re:* ***Professional Opinion on Values Returned in a Geological (Sand Mining) Survey Report, and Award of Damages in DMW (U) Ltd vs AG and NEMA HCC No. 24 of 2019***
>
> ***1.0 Background***
>
> *According to section 3 of the Surveyors Registration Act Cap. 275 in 1974, the role of the Surveyor's Registration Board is to "regulate and control the profession of surveyors and the activities of registered surveyors within Uganda, and to advise the Government in relation to those functions."*
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> *Under section 1 of the Surveyors Registration Act Cap. 275, the term 'a Surveyor' is used in reference to: "land surveyors, quantity surveyors, building surveyors,* ***mining and hydrological surveyors*** *and* ***valuation surveyors,*** *as well as land agents and other professionals responsible for the management of land or buildings." It has come to the attention of the Board that in the case of DMW (U) Ltd vs AG and NEMA HCC No 24 of 2019, a report prepared by Mr. Fred Kigereigu who signed off as a senior government geologist, attempted to give a professional opinion of value of*

unmined sand, which was to be prospected from Plot 27 Block 149 and Plot 7 Block 149, Kakwanzi Village. ....

2.0 ***Two key issues of concern arising from the above case, and of concern to the Surveyors Registration Board are as follows:***

1. *Whether Fred Kigereigu is legally authorized under the laws of Uganda to carry out a valuation or evaluation to determine a monetary or any other value of any asset.*
2. *Under what legal framework and how are the services of a Geologist (Mining Surveyor) in private practice regulated*

3.0 ***Resolution of Key Issue 1*** *– whether Fred Kigereigu is legally authorized to carry out a valuation or an evaluation to determine a monetary or any other value or to even assign a value to any asset under the laws of Uganda.*

According to the International Valuation Standards (IVS), the term ***"valuation'*** *refers to the act or process of determining an estimate of value of an asset or liability in adherence to the guidelines in the IVS. The term '**value**' refers to the judgment of the valuer of the estimated amount consistent with one of the bases of value set out in IVS 104 Bases of Value. A '**valuer**' is an individual, group of individuals or a firm who possesses the necessary qualifications, ability and experience to execute a valuation in an objective, unbiased and competent manner. In some jurisdictions, licensing is required before one can act as a **valuer**.*

The Surveyors Registration Act Cap 275, defines a person authorized to carry out a valuation in Uganda as a ***Valuation Surveyor*** *registered under the Act and referred to as a Registered Surveyor of Uganda (RSU).*

In the case of ***DMW (U) Ltd vs AG and NEMA HCC No. 24 of 2019****, the Board has taken note of a report by Fred Kigereigu signed off as a Senior Geologist, from the Department of Geological Surveys and Mines Entebbe, and prepared for DMW (U) Ltd. On pages 12 and 10 – 11 of the two reports respectively, he gave 2 opinions of value with respect to alleged sand deposits at the aforementioned plots of land.*

A diligent search through our register of Surveyors of Uganda revealed that the said Fred Kigereigu is not registered as a surveyor under the Surveyors Registration Act Cap 275, and as such, cannot give a

professional opinion relating to the value of any asset, and certainly not one which can be relied upon by a court in Uganda.

It should be noted however that whereas under item 50.2 of the IVS Framework, the ***valuer*** *(the valuation surveyor) can rely upon the professional input of any other experts and it provides that "If a valuer does not possess all of the necessary technical skills, experience and knowledge to perform all aspects of a valuation, it is acceptable for the valuer to seek assistance from specialists in certain aspects of the overall assessment, providing that this is disclosed in the scope of work",* ***this does not grant the other specialist however, (in this case the geologist) any power to carry out an independent valuation or make any formal statement with respect to value, as was the case above.***

In line with our mandate to advise government on matters relating to the Surveying Profession under which valuation falls, we are of the considered opinion that the purported monetary values deriving from the subject report prepared by Fred Kigereigu, ought not to have been relied upon by court to make an award of damages in the subject case. Particularly since the award relied on the purported value of prospective sand deposits given by a non-registered or qualified Valuation Surveyor.

4.0 ***Resolution of Key Issue 2 – Under what legal framework are the services of a Geologist (Mining Surveyor) in private practice regulated?***

.....

Yours Sincerely,

Judy Rugasira Kyanda

Chairperson,

Surveyors Registration Board

25. Therefore, the availability of information on qualified surveyors notwithstanding, it would appear that it was only upon receipt of the above letter that the Applicants were able to appreciate Mr. Kigereigu's purported incapacity to attest to the documentary evidence that had been adduced at trial. The question of the witness' competence was not canvassed before the trial court but does have a critical bearing on the integrity of its judgment.

26. A similar scenario arose in **Takhar v Gracefield Developments Ltd & Others** (supra), to which we were referred by learned Counsel for the Applicants. In that case, Mrs. Takhar unsuccessfully sued Dr. and Mrs. Krishan for using undue influence or other unconscionable conduct in transferring her properties to Gracefield Developments Ltd. She was unable to recall having signed a written profit share agreement that formed the basis of that transaction. After the trial, she sought the services of a handwriting expert who conclusively reported that the signature on that agreement had been transposed from previous correspondence between Mrs. Takhar and the Krishans' solicitors. In fresh proceedings, she sought to set aside the judgment and orders in the case of undue influence on the premise that it had been obtained by fraud. As a preliminary issue, the trial court held that a party that sought to set aside a judgment on grounds that it was obtained by fraud did not have to demonstrate that s/he could not have discovered that fraud by the exercise of reasonable diligence.[7] That decision was later reversed by the Court of Appeal,[8] but subsequently reinstated by the Supreme Court.

27. Citing the case of **Henderson v Henderson (1843) 3 Hare 100**, the Supreme Court of England acknowledged that parties should normally advance the totality of their case on the first bout of litigation, it not being open to them (save in exceptional circumstances) to raise a point which should have been raised then and which, with reasonable diligence, could have been discovered and canvassed in the first trial. It nonetheless observed that the **Henderson** case did not speak to two issues. First, the applicability of that general rule where the new point was not in issue between the parties in the first trial and whether a different outcome might have ensued had it been in issue and evidence on it had been led; and secondly, whether the rule would require modification or disapplication where the new issue raises an allegation of fraud by which the original judgment was obtained.

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[7] Judgment at (2015) EWHC 1276 (Ch).
[8] Judgment at (2017) 3 WLR 853.

28. The observation in **Canada v Granitile (2008) 302, 303 DLR (4th) 40** was cited with approval:

> **A failure to exercise due diligence, where fraud might otherwise have been discovered, is not enough to sustain a judgment which resulted from that fraud. ... All of this is consistent with and in furtherance of the fundamental proposition that 'Fraud unravels everything' .... Where fraud is present, finality will give way to the responsibility of the court to protect its processes 'so as to ensure that litigants do not profit from their improper conduct' ...**

29. The court then held (per Lord Kerr):

> **The idea that a fraudulent individual should profit from passivity or lack of reasonable diligence on the part of his or her opponent seems antithetical to any notion of justice. Quite apart from this, the defrauder, in obtaining judgment, has perpetrated a deception not only on their opponent and the court but on the rule of law.**

30. We find the foregoing reasoning most persuasive. In the matter before us, it is the Applicants' contention that in deciding as it did the trial court *inter alia* relied upon documentary evidence that was laced with fraudulent misrepresentation as to its author's qualification to undertake such a valuation, such misrepresentation only coming to the attention of the Surveyors Registration Board following the delivery of the now impugned judgment. It was argued that the incidence of fraud would waive the requirement upon the Applicants to prove that, despite the most onerous due diligence on their part, the additional evidence sought to be admitted was neither within their knowledge nor could it have been produced at trial.

31. It is trite law that fraud entails an intentional perversion of truth for the benefit of one party over another; a false misrepresentation of a matter of fact to the legal detriment of another; anything calculated to deceive. See *Black's Law Dictionary, 6th Edition, p. 660* as cited with approval in **Fredrick J. K. Zaabwe v Orient Bank**

Ltd & 5 Others (2007) 1 ULR 98. However, in that case fraud was distinguished from negligence, mistake or error; fraud being depicted as '**always positive, intentional**' while negligence or mistake is not. This definition of fraud thus bespeaks an intentionality that we neither detect in Mr. Kigereigu's actions, nor was it duly established before us. We find no proof that either he or the Respondent Company intentionally adduced in evidence the reports of a witness whose competence to author the same they knew to be questionable. Rather, it seems to us that the witness' competence to adduce the valuation reports was mistakenly presumed by both parties, as well as the trial court. We would therefore not go so far as to impute fraud in this matter as urged by learned Counsel for the Applicants.

32. Nonetheless, the letter from the Surveyors Registration Board does raise pertinent policy considerations on the basis of the professional standards and rules that govern that profession. Of particular interest in that regard are the International Valuation Standards (IVS). If, as argued by the Applicants, the trial court's decision on *Issues 2* and *4* before it was primarily premised on the now contested valuation reports would the integrity of that judgment remain unassailable? Would additional evidence that clarifies regulatory policy not warrant consideration for admission with no recourse to the requirement for due diligence?

33. The term '*valuation*' is defined in the International Valuation Standards (IVS), 2020 as '**the act or process of determining an estimate of value of an asset or liability by applying the IVS**', the term '*value*' itself being referred to as '**the judgment of the valuer of the estimated amount consistent with one of the bases of value set out in IVS 104 *Bases of Value*.**' On the other hand, whereas geology is defined in *Chambers Twentieth Century Dictionary* as '**the science relating to the history and development of the earth's crust, with its successive floras and faunas**,' the same dictionary defines surveying to include obtaining by measurements data for mapping.[9] However, valuation surveyors are

[9] See Chambers Twentieth Century Dictionary, pp. 545, 1360.

included in the definition of surveyors under section 1(h) of the Surveyors Registration Act.

34. Consequently, without delving into the merits of the additional evidence sought to be adduced (which are a matter for the Appeal), there would appear to be reasonable merit in the proposition that qualification in geology in itself would not qualify one to undertake the valuation of assets. That would be the prerogative of a qualified valuer or valuation surveyor. Such a professional valuer might procure the services of a geologist when conducting an earth valuation but that would not render the geologist akin to a valuer. It is inevitable, therefore, that this Court ponders the implications to the rule of law of insulating from further contestation a judgment that is seemingly grounded in a legally untenable premise. Stated differently, would a court faced with an application to adduce additional evidence that, while not necessarily highlighting fraud nonetheless impugns the core foundational premise of a judgment, decline to admit it on the premise of a purported absence of due diligence by the applicant?

35. In our judgment, to do so would be to invite the Court to turn a blind eye to a possible regulatory absurdity cum illegality; become an unlikely accessory to a grave miscarriage of justice, and perpetuate a most undue deception against the rule of law. That is an eventuality that we are disinclined to contemplate. In any event, it is not readily apparent to us how the Applicants could have exercised diligence to unearth a regulatory position, the alleged inconsistency with which only came to light following the delivery of the trial court's judgment. Furthermore, in so far as expert opinions relied upon by courts are grounded in a witness' credentials and competence to testify as such; the impeachment of a so-called expert's professional competence would render nugatory his/ her claim to expertise. At the very least, therefore, and in furtherance of the notion of justice and the rule of law, such witness' claim to professional competence should be subjected to judicial scrutiny to provide clarity to the sector's regulation; obviate connotations of professional abuse and underscore the integrity of courts' decisions.

D. **Conclusion**

36. The additional evidence sought to be adduced having been received by the Applicants after trial demonstrates that it is indeed new and was apparently unknown to the Applicants at trial. The fact that the compensatory orders made by the trial court were primarily premised on the now impugned valuation reports should dispel any questions as to the vitality of the additional evidence to the pending Appeal. It is absolutely relevant to the determination of the Appeal. Further, having been provided by the head of a professional regulatory body that regulates the valuation sector, it is adjudged to be plausible and to that extent credible for purposes of this Application. Furthermore, whereas it might be premature to deduce its decisiveness to the Appeal with any form of certainty, the additional evidence would undoubtedly have a significant bearing on it. We find no *undue* delay in the lodging of the Application within three months of the date of filing the Appeal.

37. Finally, in terms of costs, having found no fraud or intentional misrepresentation attributable to the Respondent with respect to the evidence it relied on in the trial court, we are disinclined to condemn it to the costs of this Application.

38. In the result, this Application is allowed with the following orders:

    I. This Court shall admit additional evidence in **Civil Appeal No. 138 of 2020** in the terms set out in the letter from the Chairperson of the Surveyors Registration Board dated 1st June 2020 and attached to the affidavit in support of this Application.

    II. The additional evidence shall be presented by way of affidavits as follows:

i. The Applicants shall file their affidavit evidence and serve the same on the Respondent within seven (7) days from the date of this Ruling.

ii. The Respondent shall file its affidavit(s) in reply and serve the same on the Applicants within 7 days from the receipt of the Applicants' affidavit(s).

iii. Any affidavit in rejoinder shall be filed within 3 days from the receipt of the affidavit(s) in reply.

III. All deponent(s) shall be subject to cross examination and re-examination, should the parties so wish.

IV. The costs of this Application shall be in the cause.

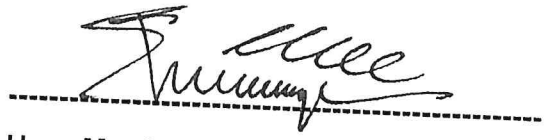
It is so ordered.

Dated and delivered at Kampala this 24th day of June, 2021.

Hon. Mr. Justice Geoffrey Kiryabwire
JUSTICE OF APPEAL

Hon. Lady Justice Monica K. Mugenyi

JUSTICE OF APPEAL



Hon. Mr. Justice Remmy Kasule

AG. JUSTICE OF APPEAL