

**THE REPUBLIC OF UGANDA**  
**IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA**  
**[Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA]**  
**CIVIL APPLICATION NO. 318 OF 2021**  
**(ARISING OUT OF CIVIL APPEAL NO. 36 OF 2014)**

**BETWEEN**  
**LIBERTY CONSTRUCTION COMPANY..... APPLICANT**  
**AND**  
**LAMBA ENTERPRISES LTD ..... RESPONDENT**

**RULING BY CHRISTOPHER GASHIRABAKE, JA**

This is an application by Notice of Motion brought under Rules 2(2), 30 (1) (b), 43(1) and (2) and 44(1) of the Judicature (Court of Appeal Rules) Directions S1 13-10, where the applicant has moved this court to make orders that: -

1. Additional evidence in respect of proof of transfer of payment to the respondent by way of a bank statement be admitted/taken /considered by this honorable Court in determining Civil Appeal No. 36 of 2014.
2. That Cost of this Application be in the Cause.

The grounds in support of the application are clearly stated in the affidavit in support of the application by **Mabiro Edmund** the managing director of the applicant / appellant herein: -

1. That the applicant / appellant filed this appeal seeking orders of this court to allow the appeal and set aside the award of Ug. Shs. 253, 308,223/= to the respondent.

2. That at the time when the trial judge, delivered the judgment in Civil Suit No 215 of 2008, there was a mathematical error in the calculation of the payments which the applicant/appellant deposited on the bank account of the respondent through the Real-Time Gross Settlement (RTGS) electronic bank transfer system
3. That the appellant can only prove disbursement of the additional payment by adducing the bank statement which at the time of filing the instant appeal had not been secured.
4. That the said evidence of the bank statement confirms that the respondent was paid Ug. Shs 125,000,000,000/= by RTGS from the bank account of the appellant in Orient Bank which the judgment in the High Court did not capture or include in its judgment, during assessment of quantum meruit. Inclusion of the same does not in any way cause injustice to the respondent, but aims to accurately reconcile the accounts to include all amounts received by the respondent.
5. That upon the appellant discovering and securing the said additional document this application has been made without undue delay.

**Brief facts.**

The applicant/appellant filed Civil Suit No. 219 of 2008 at High Court Commercial Division seeking orders mainly for recovery of construction sites forcefully held on by the respondent after termination of its subcontracts with the applicant/appellant. The respondent counterclaimed for enforcement of memorandum of understanding entered into with the applicant /appellant, to

recover the unsubstantiated amount of Ugx 500,000,000/= therein. The applicant as counter defendant asked court to dismiss the counter claim on the grounds that the memorandum of understanding was entered into by duress visited on it by the counter claimant. The head suit was dismissed leaving only the counterclaim for resolution by court.

The trial court dismissed the counter claim on account of duress. The court went further to grant the counter claimants remedies based on quantum meruit, hence the need to reconcile claims and accounts.

The applicant /appellant filed Civil Appeal No. 34 of 2014 in the Court of Appeal seeking orders to set aside the judgment of the High Court on the ground that the reliefs granted to the respondent were neither pleaded nor prayed for.

The applicant /appellant has what he calls newly discovered evidence, in form of a bank statement, which can credibly prove that the respondent received Ugx 125,000,000/=from applicant, but the trial judge during the time of delivering his judgment only considered Ugx 25,000,000/= as the money which the appellant deposited on the respondent's account hence this application.

### **Representation**

Mr. Guma Davis represented the Applicant, whereas Mr. Godfrey Himbaza represented the respondent.

### **Applicant's submissions**

Mr. Guma adopted the written submissions.

Mr. Guma submitted that this court should exercise its discretion under Rule 30 (2) to grant leave to the applicant/appellant to adduce additional evidence in Civil Appeal No. 36 of 2014 on the grounds stated by Mr. Mabiwo Edmund in his affidavit in support of the Motion.

Mr. Guma argued that the applicant has conformed to Rule 44(1) by providing a copy of the Bank Statement sought to be adduced, and equally presented sworn evidence to prove that evidence in the Bank Statement is relevant in helping the court to resolve the issue of reconciling the claims with the payments received and had in respect of the contracts in issue.

Mr. Guma further submitted that, it is apparent that the amount whose payment is sought to be proved remains in controversy, since it is perceived to have been omitted by the trial judge during his application of quantum meruit. The need to reconcile the figures of payment didn't constitute the main thrust of the case at the trial Court because the pleadings were squarely based on the memorandum of understanding, whose performance the respondent sought, and the applicant, in turn, challenged it on account of duress. The post-trial application of quantum meruit, is a departure from the pleadings of the parties which has partly necessitated the leave to provide additional evidence.

The applicant has provided the court with sworn testimony to prove that the evidence of the bank statement was newly discovered, and was not in its possession at the time the appeal was filed.

There is further evidence to prove that this application was brought without undue delay upon discovery of the new information. Counsel emphasized that the evidence of the bank statement is credible in the sense that it is capable of belief.

Counsel relied on **Bismillah Trading Limited vs. Falcon Estates Ltd, Civil application No. 328 of 3018**, to support his prayer for this court to exercise its discretion to grant leave to the appellant to adduce additional evidence necessary to resolve the issue of quantum.

### **Respondent's submissions**

Mr. Himbaza on the other hand submitted that, the application was served upon the respondent on Friday 05<sup>th</sup>/11/2021 and the attachment of the statement indicating payment of Ugx. 125,000,000 Shs. Only (one hundred and twenty-five million shillings only) which the applicant contends was omitted from the judgment of the trial judge. He noted that they could not ascertain the authenticity of this statement within the short time given yet they were to appear in court on Monday 08/11/2021. Counsel stated that if it is ascertained that indeed this amount was paid and received by the respondent they would have no objection.

He submitted that the judgment indicated that they paid Ug. Shs. 25 million but the attached statement indicates they had paid Ug. Shs. 125,000,000 /= (one hundred and twenty-five million shillings) and not Ug. Shs. 25,000,000 /= (Twenty-five million). He told Court that he would verify whether that money was paid in 2008.

### **Analysis of Court**

In accordance with Rule 2(2), of the Judicature (Court of Appeal Rules) Directions SI 13-10, this court has inherent power that cannot be fetted or limited, with regard to admitting additional evidence.

Rule 30(1) (b) of the Judicature (Court of Appeal Rules) Direction, provides that,

**“On any appeal from the decision of the High Court acting in the exercise of its original jurisdiction the Court may, in its discretion, for sufficient reason, take additional evidence or direct that additional evidence to be taken by the trial court or by a commissioner.”**

Rule 43(1) (2) and Rule 44 of the Judicature (Court of Appeal Rules) Directions, provides for the procedure by which the applicant can approach court if they desire to secure audience for additional evidence to be adduced.

This court has on previous occasions addressed this issue and has laid down the standards to be followed when assessing whether it should accept or dismiss an application to adduce additional evidence. It has been settled that the discovery of new and

important matters of evidence which after exercise of due diligence was not within the knowledge of the party seeking to adduce additional evidence is sufficient reason for court to exercise its discretion. Further that this evidence sought to be added must be relevant, credible and capable of belief by a reasonable court. It must be capable of influencing the final result though not necessarily decisive. The applicant must attach to the affidavit such evidence sought to be added. Lastly the applicant must bring the application without delay (The **Attorney General versus Paul K. Ssemwogerere and Others Constitutional Application No. 2 of 2004 (SCC2/04 and Bismillah Trading Limited Vs. Falcon Estates Limited CACA 328 OF 2018)**)

With the above conditions met, court may in exceptional circumstances exercise its discretion for sufficient reason to admit additional evidence. The essence of this stringent rule is to prevent abuse of the court process by not entertaining endless litigation.

The applicant in this case seeks to bring a bank statement as additional evidence attached to Mr. Mabiro Edmund's affidavit in support of the motion. For court to exercise its discretionary power, the applicant must first prove that the evidence is new and important and could not be discovered even after exercising due diligence.

According to the current trends of technology that the banks operate in, it's unbelievable that the applicant could not access the evidence of the bank statement before or during the trial. RTGS

payment system is automated and would easily be accessed. Secondly, the applicant is a construction company which by its nature is expected to keep record of its transactions. It should have knowledge of its own banking and payments to the adverse party. Had it exercised due diligence, this evidence would have been discovered either before or during the trial. The evidence sought to be adduced has always been available to the party that wishes to adduce it. Since the respondent has no objection to the application, the parties are at liberty to resolve this issue by agreement and adjust the decree of the trial court on account of what is alleged was an error in account keeping.

With the above, the applicant does not satisfy the requirements for calling additional evidence on appeal. When the matter came up for hearing the respondent stated that in principle they did not object to the application but needed time to verify the authenticity of the bank statement whose copy was attached to the affidavit in support. Further, the respondent did not file court submissions in opposition to the application. No costs will therefore be awarded.

Dated at Kampala this.....<sup>28<sup>th</sup></sup> day of <sup>January</sup>, 2022

.....<sup>24<sup>th</sup> Feb 2022</sup>

**C. GASHIRABAKE**  
**JUSTICE OF APPEAL**





THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA HOLDEN AT KAMPALA

CIVIL APPLICATION NO.318 OF 2021

(ARISING OUT OF CIVIL APPEAL NO.36 OF 2014)

5 LIBERTY CONSTRUCTION COMPANY LTD :::::::::::::::::::::::::::::: APPLICANT/APPELLANT

**VERSUS**

LAMBA ENTERPRISES LTD :: RESPONDENT

**CORAM:**

HON. MR. JUSTICE F.M.S EGONDA - NTENDE, JA

10 HON.MR. JUSTICE MUZAMIRU MUTANGULA KIBEEDI, JA

HON. MR. JUSTICE CHRISTOPHER GASHIRABAKE, JA

**RULING OF MUZAMIRU MUTANGULA KIBEEDI, JA**

I have had the benefit of reading in draft the Ruling of my brother, Hon. Mr. Justice Christopher Gashirabake, JA. I agree that the application ought to be dismissed. I however wish to add a few remarks for emphasis.

The background facts and submissions of Counsel have been comprehensively set out by Hon. Justice Gashirabake, JA and I need not to repeat them.

The additional evidence that the applicant seeks to have taken at the appellate stage of the case consists of the Bank Statement of Orient Bank, a copy of which was attached to the Affidavit of Mabiro Edmund dated 04<sup>th</sup> November, 2021 in support of the application. The said bank statement has an entry under which the applicant claims to have electronically paid the respondent the sum of UGX 125 Million by RTGS on 23<sup>rd</sup> May 2008. This entry was not, and

could not have been, considered by the trial Judge when preparing his judgment in High Court Civil Suit No.215 of 2008 since the evidence was not submitted to the trial Court by the  
25 applicant.

One of the key preconditions to be satisfied by a party seeking leave of this Court to adduce additional evidence on appeal is the discovery of new and important matters of evidence which, after the exercise of due diligence, was not within the knowledge of the party seeking to adduce additional evidence.

30 In the instant can it be true that the bank statement was not in existence at the time of trial? The answer is in the negative. The statement which the applicant relies upon must have been in existence in electronic form with the applicant's bank. The banking sector is a highly regulated sector that it would be an insult to the bank to state that the bank did not have a Statement of Account of the applicant, the bank customer.

35 So one would have expected that a construction company of the applicant's stature would periodically obtain hard copies of the bank statements from its bank in order to acquaint itself with how it was performing with its bank. One would also have expected a construction company of the applicant's stature to have a functional Accounting Personnel/Package/System/Department to carry out routine Bank Reconciliation statements  
40 on a monthly or quarterly or half-yearly basis. This is in light of the applicant's bank statement which indicates that their total credits/receipts/deposits onto their account with Orient Bank for the six months period from 01/02/2008 – 04/08/2008 was UGX 3,115,901,672/= and the total debits/withdrawals for the same period was UGX 2,558,319,067/=.

As such, in my view, if the applicant had exercised reasonable diligence expected of a  
45 company of its stature in 2008, including keeping proper books of accounts and periodical bank reconciliations, the payment of UGX 125 Million allegedly made to the respondent by RTGS would have been discovered before or during the trial proceedings before the High Court.

On that basis alone I would dismiss the application in the terms proposed by My Lord, Hon.  
50 Mr. Justice Christopher Gashirabake, JA. The Court of Appeal ought not be turned into a  
forum for parties to patch up the gaps in their evidence which they ought to have adduced  
before the trial Court.

Dated at Kampala this.....<sup>24<sup>th</sup></sup>.....day of.....<sup>Feb</sup>.....20.....



Muzamiru Mutangula Kibeedi

**JUSTICE OF APPEAL**



**THE REPUBLIC OF UGANDA**  
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[*Coram: Egonda-Ntende, Kibeedi & Gashirabake, JJA*]

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(Arising from Civil Appeal No. 36 of 2014)

**BETWEEN**

Liberty Construction Company Ltd=====Applicant

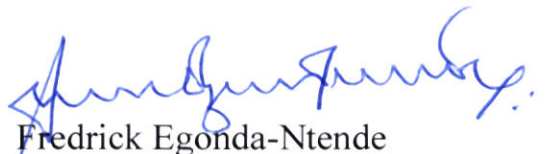
**AND**

Lamba Enterprises Ltd=====Respondent

**RULING BY FREDRICK EGONDA-NTENDE, JA**

- [1] I have had the opportunity to read in draft the ruling of my brother, Christopher Gashirabake, JA and I agree with it.
- [2] I may add, perhaps, as the respondent did not oppose this application that the question touching on the payment in question (of the sum of Shs. 125,000,000.00) can be resolved by agreement of parties resulting in the adjustment of the decree of the High Court for which the applicant had failed to adduce necessary evidence in the court below.
- [3] As Kibeedi, JA, agrees that this application should be dismissed, it is hereby dismissed with no order as to costs.

Signed, dated and delivered at Kampala this 24<sup>th</sup> day of Feb 2022

  
Fredrick Egonda-Ntende  
**Justice of Appeal**