THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO 276 OF 2012

(ARISING FROM CIVIL APPEAL NO. 19 OF 2010)

ANDREW KISAWUZI}..... APPLICANT

VERSUS

TOM WALUSIMBI}..... RESPONDENT

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

RULING

The applicant filed this application under order 43 rules 22 and order 52 rules 1 and 3 of the Civil Procedure Rules for orders that the applicant is granted leave to adduce additional evidence on appeal and for the High Court to give directions on how the additional evidence should be taken. The applicant further seeks for costs of the application. The grounds of the application are that the additional evidence that the applicant intends to adduce was not available and could not have been obtained with reasonable diligence for court use at the trial. The additional evidence that the applicant seeks to adduce would have an important influence on the result of the case. That the evidence would elucidate further on the evidence already on record and that the evidence is credible and it is in the interest of justice that the application is granted.

The application is supported by the affidavit of the applicant and gives the facts in support of the grounds. The Applicant avers that at all material times he was the registered owner of motor vehicle number UAL 688 F Land Rover Free Lander. One Mwase Geoffrey expressed interest in the vehicle and the applicant allowed him to drive it to town from his residence for purposes of concluding a sale

agreement. Mwase Geoffrey disappeared with the vehicle which was subsequently found with the respondent. The applicant reported a case of theft of motor vehicle whereupon Mwase Geoffrey was arrested in Jinja on 9 May 2009 and brought to Kampala. The applicant further filed civil suit number 666 of 2009 for recovery of the vehicle from the respondent who claimed to have purchased it from the rightful owner. On the other hand Mwase Geoffrey escaped from police custody and could not be traced and therefore could not be procured as a witness during the hearing of the civil suit in the Magistrates Court. Mwase Geoffrey was eventually arrested for the offence of theft of laptops whereupon he was charged and released on bail. He was eventually charged with theft of a motor vehicle and remanded, tried and convicted. Mwase Geoffrey did not appeal against the conviction and sentence and is serving his sentence. As a result of the conviction and sentence the applicant was unable to procure him Mwase Geoffrey as a witness during the hearing of the civil suit filed in the Magistrate's Court.

Judgement was delivered on 26 August 2010 and the applicant appealed against the judgment of the Magistrate's Court in civil appeal number 19 of 2010 to this court. The deponent avers that the issue in contention before court is the ownership of this vehicle which the respondent alleged to have bought from Mwase Geoffrey while Mwase Geoffrey denies that and claims to have mortgaged the vehicle to the respondent. He contends that the evidence of Mwase Geoffrey is credible.

The respondent avers in his affidavit in reply that inasmuch as the applicant lodged a criminal case against Mwase Geoffrey for theft of his vehicle, he did not join him as a defendant in civil suit number 666 of 2009 nor did he call him as a witness. In the judgement in the lower court, the Chief Magistrate found that the applicants conduct showed that he colluded with Mwase Geoffrey to sell this vehicle to the respondent and is precluded from denying the authority of Mwase Geoffrey.

Following the delivery of the judgment the applicant purportedly acted to revive the criminal case to obtain a conviction from a Grade 1 Magistrate which findings contradicted that or set aside that of the Chief Magistrates judgement earlier

delivered in the civil suit. This was meant to abuse the process of court because the applicant did not disclose to the trial Magistrate Grade 1 that there was a judgment delivered against him by the Chief Magistrates Court at Mengo.

The respondent avers that the applicant is dishonest because his plaint discloses that the suit vehicle was valued at Uganda shillings 24 million but fraudulently obtained an order for recovery of Uganda shillings 28 million from Mwase Geoffrey in the criminal action at the same time. At the same time he is seeking for recovery of the vehicle sold by the respondent or a sum of Uganda shillings 25 million. On 15 February 2010 the applicant obtained a copy of the police statement of Mwase Geoffrey where the accused claims to have mortgaged the vehicle. This evidence was available at the trial and was marked as exhibit P3 and the trial Chief Magistrate evaluated the evidence hence it is not necessary to call Mwase Geoffrey as a witness on appeal.

The respondent further provides that the applicant did not list Mwase Geoffrey as a witness in his pleadings and neither did he apply during the trial of the suit to call him as a witness.

From advice from his lawyers the respondent avers that the evidence intended to be adduced by Mwase Geoffrey is meant to contradict a written sale agreement contrary to the express provisions of the law. Furthermore the intended evidence is not important to influence the result of this case since it is barred by statute and there is already evidence of the statement of the witness on record. Additionally the evidence of Mwase Geoffrey would not be credible since he is a convict on similar facts as in the appeal and was ordered to refund a sum of Uganda shillings 28 million to the applicant. Furthermore the learned Chief Magistrate found that the applicant colluded with the Mwase Geoffrey in an attempt to defraud the respondent. That the application has been brought in bad faith delay the appeal and defeat the respondent from obtaining his costs. Finally that it is just and equitable that the application is dismissed and the appeal fixed for hearing.

At the hearing of the application the applicant was represented by learned counsel Dan Wegulo while the respondent was represented by learned counsel David Kaggwa. Both counsels opted to file written submissions.

Written submissions of the applicant

Learned counsel submitted that order 43 rules 22 of the Civil Procedure Rules deals with production of additional evidence in the High Court on appeal. The applicant submits that he has a substantial cause for the court to admit the oral evidence of Mwase Geoffrey and a certified copy of the proceedings and judgement in Makindye criminal case number 347/11. Learned counsel relied on the principle that except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence could not have made it so available (See **Karmali Tarmohamed and Another v T.H. Lakhani and Co. [1958] EA)**. In **Namisango vs. Galiwango and Another [1986] HCB 37** Odoki J as he then was agreed with the above principles and added that fresh evidence may also be admitted where some basic assumption common to both parties has clearly been falsified by subsequent events, or where to refuse such evidence would be an affront to common sense and a source of injustice. Finally he relied on the judgement of Lord Denning in **Ladd v Marshall (1) (1954) 1 WLR 1489** where he held that to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled. Firstly it must be shown that the evidence could not have been gained with reasonable diligence for court use at the trial. Secondly the evidence must be such that if given, it would probably have an important influence on the result of the case. 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.

Learned counsel proceeded to address the court on the three conditions to be fulfilled before reception of fresh evidence. Firstly he submitted that the evidence could not have been gained with reasonable diligence for use at the trial.

This is because the applicant upon realising that Mwase Geoffrey had stolen his vehicle immediately reported the matter to police causing his arrest and detention. He subsequently filed Chief Magistrate's Court Civil Suit number 666 of 2009 against the respondent. The hearing of this suit commenced on 8 June 2009 and was closed on 15 June 2010. Judgment was delivered on 28 June 2010. Mwase Geoffrey escaped from the police post where he had been arrested on the 10th of May 2009 before the hearing of the suit commenced. He was arrested on 15 February 2010 and released on court bail. He was furthermore rearrested on 26 February 2011 after judgement in Magistrates Court Civil Suit number 666 of 2009. Mwase Geoffrey was convicted of theft on 15 December 2011 and sentenced to one year of imprisonment with effect from 16 December 2011 long after the civil suit in the Magistrate's Court had been completed. Consequently learned counsel submitted that the evidence that the applicant seeks to adduce on appeal would not have been gained with reasonable diligence for court use at the trial.

Secondly learned counsel submitted on the ground that the evidence must be such that it will probably have important influence on the result of the case though it need not be decisive. He submitted that the plaintiff brought the civil suit to recover his vehicle from the respondent/defendant at the Magistrate's Court. The issue in the trial were: "Whether Mwase Geoffrey was the rightful owner of the suit vehicle". Secondly whether he sold of the vehicle to the defendant and lastly whether the plaintiff was by his conduct precluded from denying the seller's authority to sell the car. The additional evidence that the applicant intends to adduce is conclusive. The trial court convicted Mwase Geoffrey of theft of the motor vehicle. Secondly on the issue of whether he sold or mortgaged the vehicle to the respondent/defendant, the evidence of Mwase Geoffrey at the trial was that he did not sell the vehicle to the defendant but only mortgaged it. Secondly that if this is established by this court on appeal then the respondent cannot avail himself of the defence under section 22 (1) of the Sales of Goods Act which is only available to purchasers and not mortgagees.

In **GM Combined Uganda limited vs. A.K Detergents Ltd and four others Supreme Court civil appeal number seven of 1998,** the Supreme Court held that it was not a question of directing new evidence to be taken but merely of directing the elucidation of evidence already on record. An appellate court had jurisdiction to take evidence at an appellate stage that elucidates on the evidence already on record as opposed to the introduction of an altogether new matter that was never raised nor does not emerge at all from the evidence already on record. He concluded that the evidence that the applicant intends to use only elucidates on the evidence already on record.

On the third condition that 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. Learned counsel submitted that the evidence that the applicant intends to use is presumably to be believed and apparently credible. A certified copy of the judgement and proceedings in a criminal case number 247 of 2011 which has not been appealed is admissible. Secondly the intended evidence of Mwase Geoffrey can be subjected to cross examination.

The respondent's written reply

Learned counsel submitted that the application lacks merit and ought to be dismissed with costs. Firstly the facts asserted in the affidavit of the respondent were not rebutted and or contradicted by the applicant in the affidavit in rejoinder and should be admitted as the truth. Learned counsel submitted that the application itself is incurably defective to the extent that it seeks to adduce the oral evidence of Mwase Geoffrey. On the other hand learned counsel for the applicant belatedly tries to adduce a certified copy of proceedings and judgement in criminal case number 347/11 as fresh evidence. The application does not seek such order from this honourable court. The only application before court is for an order to adduce oral evidence and not for the admission of documentary evidence.

Learned counsel submitted that it was extremely important to note of that the judgement of the Grade 1 Magistrate was delivered after the judgement of the

Chief Magistrates. It was hypothetically impossible for the learned Chief Magistrate to have predicted the outcome of the criminal proceeding in the conviction of the accused Mwase Geoffrey. The applicant therefore cannot purport to argue that he exercised all diligence to procure court proceedings and judgment that did not exist. Counsel further submitted that the applicant is dishonest in that in the plaint the suit vehicle was valued at Uganda shillings 24,000,000/=. Thereafter he obtained an order against Mwase Geoffrey in a criminal proceedings for Uganda shillings 28,000,000/=. Learned counsel submitted that the applicant did not come to court with clean hands. It is a fundamental equitable doctrine that he who comes to equity must come with clean hands.

He further submitted that the application does not satisfy the exceptional circumstances under which additional evidence may be adduced on appeal. Learned counsel relied on the case of **Hon. Anthony Kanyike vs. the Electoral Commission and others civil application number 13 of 2006** where the court quoted with approval the decision of Lord Denning in **Ladd vs. Marshall (1) of [1954] 1 WLR 1489** that if the evidence was in the possession of the parties at the time of the trial, or by proper diligence might have been obtained, it was either not produced or has not been procured, and the case is decided adversely to the other side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial. The applicants did not add Mwase Geoffrey as a defendant neither did he include him on the list of witnesses. Therefore cannot be said that the applicant exercised any diligence to adduce such evidence and the court should not at this stage grant him that opportunity.

The police statement of Mwase Geoffrey was recorded by a police officer who gave testimony as PW 4. The police statement was marked as exhibit P3 and was taken into account in determination of whether the transaction was a sale or a mortgage by the Chief Magistrates Court. The applicant did not list Mwase Geoffrey as a witness neither did he apply during the trial to have the witness

called to testify. Learned counsel contended that this application has been brought as an afterthought to waste courts time.

Learned counsel further contended that it is unnecessary to call additional evidence because the trial Chief Magistrate considered statements by Mwase Geoffrey and made a finding that such statement could not substitute oral evidence. Counsel submitted that what the applicant ought to have done was to amend his grounds of appeal so that he can argue whether the Chief Magistrate erred in law or fact. Thirdly, counsel contended that the intended evidence as to whether there was a sale or a mortgage is contrary to the provisions of section 92 of the Evidence Act and therefore the oral evidence would be barred by statute. Moreover there is already evidence of the statement of Mwase Geoffrey on the court record.

As far as the Supreme Court case of **GM Combined (Uganda) LTD verses AK Detergents and 4 others supreme court civil appeal number 7 of 1998,** is concerned, it was held that additional evidence may be called to elucidate on the evidence already on record as opposed to introduction of an altogether new matter that was never raised or does not emerge at all from the evidence already on record. Learned counsel defined the word "elucidate" to mean as explaining something that is difficult to understand by providing more information. He contended that there was nothing difficult to understand that required more information on appeal in determining whether there was a sale or a mortgage. He contended that the appellant was trying to introduce an altogether new matter that had never been raised. This is an attempt to smuggle the record of proceedings and the judgment of the Chief Magistrate's court which was a totally new matter that is not connected to the evidence on record. It further would create an absurdity in that the High Court while sitting on appeal would make findings in respect of two judgments, one from the Chief Magistrate and another from a Grade 1 Magistrate sitting as a criminal court.

The evidence of the proposed witness cannot prima facie be credible since Mwase Geoffrey is a convict on similar facts as this appeal. He was ordered to

refund Uganda shillings 28,000,000/= to the applicant which he has not done. He was arrested for stealing laptops and escaped from police custody.

Learned counsel further contended that the applicant's application is an abuse of the court process. This is because the Magistrate Grade 1 court ordered Mwase Geoffrey to pay the applicant a sum of Uganda shillings 28,000,000/=. Given the criminal nature of Mwase Geoffrey, he cannot compensate the applicant and he has conspired with the applicant to let go of the monetary claiming in exchange for oral evidence on appeal before this honourable court.

Applicants written submissions in rejoinder

In reply learned counsel for the applicant disagreed that the applicant's omission to include Mwase Geoffrey on the list of witnesses in the pleadings could lead to an inference that he did not intend to call him as a witness because a party to the proceedings can apply at any stage for the leave of court to call a witness. He invited court to consider paragraphs 13 of the affidavit in support of the application and paragraph 3 of the affidavit in rejoinder to reach a conclusion as to whether the applicant intended to call Mwase Geoffrey as a witness. As far as the police statement exhibit P3 is concerned, the documentary evidence was not considered by the trial court on the basis of section 58 of the Evidence Act. Furthermore learned counsel submitted that the intended evidence is not precluded by section 92 of the Evidence Act. He submitted that the intended evidence is not to vary the contents of exhibit ED 2 but to show the court that it was a forgery and could not be relied upon. Furthermore the evidence will show that there was no sale of the vehicle but a mortgage. The intended evidence of Mwase Geoffrey at page 30 of the criminal proceedings was that he never signed the sale agreement and never confirmed that he signed it bringing that evidence within the exceptions to parole evidence under section 92 (a) of the Evidence Act.

Ruling

I have duly considered the written submissions of counsels for the parties and the pleadings and evidence on record.

The application is made under order 43 rules 22 of the Civil Procedure Rules which for reads as follows:

> "22. Production of additional evidence in High Court.
>
> (1) The Parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court; but if –
>
> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted;
>
> (b) the High Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.
>
> The High Court may allow the evidence or document to be produced or witness to be examined.
>
> (2.) Wherever additional evidence is allowed to be produced by the High Court, the court shall record the reason for its admission."

The general rule is that parties to an appeal are not entitled to produce additional evidence on appeal. There are only two exceptions to the general rule under the rules. The first exception is that fresh evidence may be adduced where the court from which an appeal was preferred refused to admit evidence which ought to have been admitted. Secondly, where High Court requires any document to be produced or any witness to be examined to enable it pronounce judgment. In both instances the High Court has discretionary power whether to admit additional evidence or not. As far as the first scenario is concerned, the applicant's case seems not to dwell on any refusal of the trial court to admit evidence. This is only implied by reference to the rules of admissibility of evidence by the trial court in holding that oral evidence was not admissible to contradict a sale agreement that had been exhibited. The case of the applicant that comes out is that the additional evidence that it seeks to adduce was not available and could not have been obtained with reasonable diligence for court use at the trial. The

second rule gives the High Court discretionary power to admit evidence that it deems necessary to enable it to pronounce judgement. The applicant's arguments mainly proceeded under the second exception on the admissibility of fresh evidence on appeal at the discretion of the High Court.

The principles for admissibility of fresh evidence on appeal are summarised by the Court of Appeal of East Africa sitting at Kampala in the case of **Karmali Tarmohamed and another v IH Lakhani & Company [1958] 1 EA 567**. The Court of Appeal held that an appellate court will not admit fresh evidence unless it was not available to the party seeking to use it at the trial or that reasonable diligence would not have made it available for use at the trial. They agreed with the statement of Lord Denning in **Ladd v. Marshall [1954] 1 WLR 1489 at 1491** on the conditions for reception of fresh evidence on appeal. Lord Denning said:

> "to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence 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."

Again the Court of Appeal agreed with the holding on reception of fresh evidence on appeal in the case of **Corbett v. Corbett [1953] 2 All E.R. 69** that:

> "if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial."

The first consideration is whether the evidence that the applicant seeks to adduce was available at the trial. The applicant seeks to adduce oral evidence of Mwase Geoffrey. Particularly, on the issue of whether the respondent purchased the

vehicle the subject matter of the suit/appeal or whether the vehicle was mortgaged to the respondent. The judgment of the Chief Magistrate shows that the plaintiff produced evidence that one Mwase Geoffrey stole his vehicle and mortgaged it to the defendant. The defendant on the other hand adduced evidence that he bought the vehicle from someone who introduced himself as the plaintiff/applicant. Evidence on record relied on by the Chief Magistrate is that Mwase Geoffrey claimed to have mortgaged the vehicle to the respondent for a sum of Uganda shillings 9,000,000/=. Mwase Joseph alias Mwase Geoffrey is stated to have denied a sale agreement but maintained that he had mortgaged the vehicle.

The trial magistrate held that no agreement for mortgaging of the suit vehicle was produced in court and even if Mwase Geoffrey was called as a witness and substantiated allegations if at all he made them, exhibit ED 2 was not a mortgage deed but a sale agreement. The learned trial magistrate relied on section 92 of the Evidence Act to exclude any anticipated oral evidence. He held as follows:

> "The plaintiff cannot therefore adduce oral evidence or otherwise to contradict the contents of this document which was not even challenged to have been executed by the defendant and Mwase then calling himself Kisawuzi Andrew."

He held that oral evidence would not be accepted by the terms of the written contract entered into willingly by the contracting parties. The trial court further held that all facts except the contents of documents may be proved by oral evidence under section 58 of the Evidence Act. The trial Court had relied on exhibit EP 3. This exhibit is the police statement of Mwase Geoffrey. The trial court further relied on the testimony of PW 2, and PW 4. Both of them reported Mwase Geoffrey as having told them that he had mortgaged the vehicle. Consequently the court found that Geoffrey Mwase had denied the sale agreement and had told the witnesses that he had mortgaged the vehicle. The court also noted that no mortgage agreement had been produced in court. The court went on to hold that even if oral testimony of Mwase Geoffrey had been called to substantiate his police statement, it would have been inadmissible.

In this application the applicant seeks to call Mwase Geoffrey to testify on whether he executed a mortgage or a sale agreement with the respondent/defendant. The basic ground was that Mwase Geoffrey could not be procured. Learned counsel for the respondent submitted that Mwase Geoffrey was not even listed as a witness at the trial of the suit by the plaintiff/applicant to this application. He further contended that in any case the oral testimony was not admissible to contradict the sale agreement that had been admitted in court. He further submitted that the applicant ought to have amended his memorandum of appeal to include the ground that the learned trial magistrate erred in law to hold that the oral testimony was inadmissible in the circumstances of the case on the question of whether there was a mortgage instead of a sale agreement.

Irrespective of the weight that is to be given to the proposed oral testimony, the first issue is whether that evidence could have been procured and was available at the time of the trial. It is an admitted fact that Mwase Geoffrey is a convict. Prior to this he had been a fugitive of the law and at one occasion had jumped bail. Furthermore the record shows that the police statement of Mwase Geoffrey had been admitted in evidence. Geoffrey Mwase was however not called to testify. Paragraphs 7 of the affidavit in support of the notice of motion avers that on the 10th of May, 2009 Geoffrey Mwase escaped from the police post and remained at large despite numerous efforts to have him rearrested for which reasons the applicant could not produce him as a witness nor have him prosecuted. This evidence has not been contradicted by the respondent. What the respondent avers in reply is that Geoffrey Mwase was not listed as a witness. Secondly that there was no application to have Mwase Geoffrey called as a witness on court record. Thirdly the police statement was available and the Chief Magistrate evaluated the same and there would be no need to call Mwase Geoffrey as a witness on appeal.

As far as the procurement of Mwase Geoffrey is concerned, ground one of the application succeeds in that Geoffrey Mwase could not have been procured with reasonable diligence for appearance in court as he had escaped from police custody and had not been rearrested.

The second consideration is whether the evidence would have a strong influence on the outcome of the suit/appeal. This would be considered with the issue of whether the evidence would most probably be credible. Learned counsel for the respondent submitted that in any case the oral evidence was inadmissible under section 92 of the Evidence Act. Secondly the police statement of Geoffrey Mwase had been exhibited. His contention was that it was sufficient for the applicant to amend his memorandum of appeal to show that the trial magistrate erred in law in excluding the evidence of the police statement. He maintained that the applicant is a dishonest person in that in his plaint he valued the vehicle at 24,000,000/= Uganda shillings. At the trial of Mwase Geoffrey in criminal proceedings, an order was made for Geoffrey Mwase to pay Uganda shillings 28,000,000/=. At the same time the applicant is seeking from the court recovery of the vehicle or a payment of Uganda shillings 25,000,000/=.

The submission that the applicant is dishonest is on the merits of the appeal. The memorandum of appeal reads as follows: "…

1. The learned Chief Magistrate erred in law and fact when he held that there was a valid sale agreement of motor vehicle number UAL 688F.
2. Chief magistrate erred in law and fact in holding that the respondent is the rightful owner of the suit vehicle.
3. The learned Chief magistrate erred in law and fact in holding that the appellant was precluded by his conduct from denying the seller's authority to sell the suit vehicle.
4. The learned Chief magistrate erred in law and fact in dismissing the appellant's suit.
5. The learned Chief magistrate erred in law and fact in giving judgement to the respondent on his counterclaim.
6. The learned Chief magistrate erred in law in failing to evaluate the evidence on record.…."

In considering whether the evidence that is proposed to be adduced would have a strong bearing on the outcome of the appeal I am mindful of the fact that the trial magistrate excluded any possible oral testimony/police statement as would

contradict the sale agreement that had been admitted in evidence. I am also mindful of the fact that the evidence on record shows that Geoffrey Mwase impersonated the applicant and is said to have sold the vehicle to the respondent. The trial court being seized with these findings in relation to fact relied on the provisions of the Sales of Goods Act that the respondent/defendant bought the vehicle in good faith without notice of any defect in title. The court found that the plaintiff did not only part with the vehicle but also parted with the original log book and car keys which he handed over to Mwase Geoffrey.

A critical examination of grounds 1 – 3 of the memorandum of appeal show that it is a challenge to the finding of the trial court that the sale agreement was valid. In as much as the findings of the court in relation to buying from market overt would constitute part of the arguments on this ground, the question of fact as to whether the vehicle was mortgaged or sold by Geoffrey Mwase was only sidestepped on the basis of exclusion of oral testimony to contradict a written agreement.

The input of the proposed testimony of Mwase Geoffrey would broaden arguments about the nature of the transaction. After all it was held by the trial court that Geoffrey Mwase executed the deed. Before establishing whether there was a sale or mortgage one cannot hold or make a finding on whether the buyer obtained good title from market overt. The import of the evidence is on the nature of the transaction. A lot depends on what representations were made to the respondent by Mwase Geoffrey. As far as the credibility of the proposed witness is concerned, this may be subjected to the usual process of impeachment of credibility through cross-examination. For the moment, the proposed evidence would be consistent with the police statement that had been admitted as an exhibit but only excluded on the ground that it contradicts a written agreement. Even if the memorandum of appeal was amended to address a specific issue of whether the trial Court erred in law in excluding any oral testimony as will contradict the sale agreement, the police statement would not be the best evidence possible on the crucial issue of whether there was a mortgage or a sale of the vehicle in question. The importance of this evidence lies at the heart of any

controversy such as the one alleged where money was allegedly lent against documents which do not reveal the nature of the transaction. Counsel for the applicant submits that it may reveal a forgery. However it remains to be seen whether this was the case of the applicant in the trial court. The point being made is that evidence being sought is that the sale agreement relied on does not disclose the nature of the actual transaction and the issue is whether such evidence may be admitted. This is against the background that the applicant himself filed his action on the basis that he never sold the vehicle. At least the evidence shows that he was not the one who allegedly sold the vehicle to the respondent. Someone impersonated him. The transaction therefore needed to be established through independent evidence other than the document itself.

Since this is a common occurrence in the money lending world, and the court takes judicial notice of this notorious fact, the evidence that is proposed to be adduced, may probably have a bearing on the outcome of the suit/appeal. Additionally the applicant was impersonated. This is because the provision relied on in the Sale of Goods Act deals with sale of goods and not borrowing money on the security of a vehicle. The trial court had already ruled out any mortgage on the basis that no mortgage agreement had been adduced in evidence. Secondly the trial magistrate excluded oral testimony on the basis of section 92 of the Evidence Act. The trial magistrate further held that the contents of the document can only be proved by the document itself. There may be arguable points raised by exclusion of that evidence that may be considered on the merits of the appeal. However, outright exclusion of evidence is a ground for admission of fresh evidence on appeal. Before deciding finally that this evidence ought to be excluded, the court has to assess the nature of the evidence to evaluate whether it fits within the exceptions to the general rule for exclusion of oral evidence to contradict the contents of an agreement.

Inasmuch as the applicant dwelt a lot on the discretionary powers of the court to admit evidence on appeal, in this case the issue of whether there was a mortgage or a sale agreement could not be proved because the evidence was excluded. This falls within the exceptions for admissibility of fresh evidence on appeal under

order 43 rule 22 (1) (a) of the Civil Procedure Rules. By excluding the evidence, the court could not determine whether in actual fact the sale agreement was merely being used as security or was meant to pass title. Secondly the question is what harm would be done if Geoffrey Mwase is examined on all aspects of the transaction? Would this delay the hearing of the appeal? The respondent would not lose his right to cross examine or even advance points of law that could exclude the testimony, a point on the merits of the appeal. In the premises, the interest of justice is to establish the truth from the horse's mouth in a manner of speaking. The very person who is said to have transacted with the defendant/respondent will be examined to reach a final conclusion on any controversy surrounding the matter.

In the premises, the applicant's application to adduce fresh evidence on appeal succeeds. Witness summons shall issue for Geoffrey Mwase and he will be produced in court on a date to be fixed by the parties as soon as possible. Costs of this application shall abide the outcome of the appeal.

Ruling delivered in open court this 17th day of August 2012

Hon. Mr. Justice Christopher Madrama

Ruling delivered in the presence of:

Dan Wegulo for the Applicant

Applicant in Court

Charles Okuni Court Clerk

Hon. Mr. Justice Christopher Madrama

17th August 2012