

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO. 630 OF 2011
ARISING FROM CIVIL APPEAL NO. 60 OF 2011

ADMINISTRATOR GENERAL.....APPLICANT

VERSUS

KIFUBANGABO FRED.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under sections 80(1)(d) and 98 of the Civil Procedure Act, Order 43 rule 22, and Order 52 rules 1 and 3 of the Civil Procedure rules for orders that:-

- i) ***The Applicant be allowed to produce additional evidence during the hearing of Civil Appeal No. 60 of 2011.***
- ii) ***Costs of the application be in the cause.***

The application is supported by the affidavit of **Wagubi Aggrey** the Assistant Administrator General of the applicant/appellant which also spelt out the grounds on which it is based. The application was opposed by the respondent who filed an affidavit in reply.

The facts in brief as averred in the supporting affidavit are that the respondent's purchase of the kibanja from Nankya Jane who purported to be the widow of Douglas Semuli Sebugwawo was challenged by the applicant on the ground that Nankya Jane did not have authority to transact

business in respect of the suit kibanja. The alleged kibanja is part of the land comprised in LRV 1305 Folio 24 land at Kazo which is registered in the names of Douglas Semuli and over whose estate the applicant holds letters of administration. During the hearing of the case, the said Nankya Jane alleged that she had inherited the suit land from the late Douglas Semuli Sebugwawo and that it was an unregistered kibanja holding. All efforts by the applicant to trace the duplicate certificate of title as well as the white page in the land office during the hearing of the case to prove that the alleged kibanja holding was actually registered land proved futile. The applicant was therefore unable to adduce this evidence in court. The applicant has obtained and is now in possession of documentary evidence to show that the “kibanja holding” which Jane Nankya allegedly sold to the respondent is actually land comprised in LRV 1305 Folio 24 land at Kazo and registered in the names of Douglas Semuli Sebugwawo. The applicant now wishes to use this additional evidence during the hearing of the appeal as it will be relevant in addressing grounds 1 and 3 of the memorandum of appeal. It is in the interests of justice that the applicant be allowed to produce additional evidence for the proper determination of the appeal.

The respondent on the other hand averred in his affidavit in reply that he purchased a kibanja from Nankya Jane. That the said purchase was challenged by the applicant and he consequently instituted a suit in the Magistrate’s court of Nabweru. Judgment was entered in his favour and he believes it was proper. He averred that the applicant never relied on the alleged certificate of title in the lower court yet he had knowledge of it as per the proceedings of the said court and the various communications to the applicant.

In his submissions, learned Counsel for the Applicant, relied on the affidavit evidence of **Wagubi Aggrey** an Assistant Administrator General in the applicant’s office. He submitted that the trial court did not get an opportunity to establish whether or not the suit land was registered or unregistered and was therefore unable to arrive at an informed decision regarding the ownership of the suit land. He submitted that the additional evidence is credible and will be relevant to the appeal, and that the ends of justice dictate that it ought to be admitted to enable this court reach a just decision. He cited the case of **Wilberforce John V Tinkasimire CACA 32/98 arising from HCCA 1/97 Fort Portal** to support his position.

Counsel for the respondent submitted in reply that in order to have additional evidence admitted on appeal, the party submitting such evidence is required primarily to establish that the evidence

itself was not available at the time of the trial in any form. He contended that the applicant did not depone that the evidence of the title it intends to produce was not available at the time of the trial. He submitted that the evidence of the certificate of title was available at the time of trial and was within the knowledge of the applicant. He also submitted that the applicant did not exercise due diligence to produce the evidence showing that the land was registered. He contended that the applicant got knowledge of such certificate in 1999. Counsel for the respondent also submitted that the production of the evidence of the existence of a certificate of title is not relevant to the issue of ownership of a kibanja in the appeal. He argued that Order 43 rule 22 does not apply to the instant application as it only applies where the trial court whose decree appealed against refused to admit evidence which ought to have been admitted. He argued that the applicant had all the opportunity to produce the evidence but chose not to and in that regard cannot be seen to rely on this sub rule. He argued that the rule applies where the High Court on its own calls for production of additional evidence or witness if it needs clarification, but not when a party seeks to produce additional evidence.

I have perused the court record as well as the application and its supporting affidavit, including all its annexures and submissions of Counsel.

Section 80(1)(d) of the Civil Procedure Act provides that subject to such conditions and limitations as may be prescribed, an appellate court shall have power to take additional evidence or to require such evidence to be taken. Order 43 rule 22(1) of the Civil Procedure Rules stipulates that parties to an appeal shall not be entitled to produce additional evidence. However, if the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or if 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 sufficient cause, the High Court may allow the evidence or document to be produced or the witness to be examined.

The applicant's affidavit evidence in this application shows that Jane Nankya's sale of a kibanja to the respondent was challenged by the applicant who is administering the estate of Jane Nankya's late husband Douglas Sebugwawo. This was in civil suit no. 372 of 2008 filed by the respondent against the applicant and a one Cotilda Najjumba. Nankya gave evidence that she had inherited the kibanja from her husband and that it was unregistered, and the trial Magistrate ruled in her favour. The applicant and Cotilda Najjumba, being dissatisfied against the judgment, filed

civil appeal no. 60 of 2010 pending before this court. Grounds 1 and 3 of the memorandum of appeal, annexed as **B** to the applicant's supporting affidavit state as follows:-

“1. The learned trial magistrate erred in law and fact when she found that the respondent was a bona fide purchaser and therefore acquired good title to the property.

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3. The learned trial magistrate failed to properly evaluate all the evidence on record and therefore came to the wrong conclusion.”

The applicant has averred that all efforts to trace the duplicate certificate of title and the white page at the land office during the trial were futile, but that he has now obtained the title, as per the search report annexed as **C** to his supporting affidavit. This is disputed by the respondent's Counsel who argues that the evidence sought to be adduced by the applicant was within his knowledge at the time of the trial. With respect, I disagree with this argument. The key contention in this application is whether such evidence was available to the applicant at the time of the trial, not whether it was within the knowledge of the said applicant. In **Wilberforce John V Tinkasimire, supra**, the Court of Appeal, citing with approval the decision in **Elgood V R [1968] EA 274** held that additional evidence should be allowed in very exceptional circumstances, such as where the evidence to be called was not available at the trial which evidence must be credible and relevant to the issues. That it is in the discretion of the appellate court to permit additional evidence, which discretion must be exercised judiciously. Also see **Board of Governors Gulu S. S. S V Phinson Odong [1991] HCB 85**.

I find the arguments by Counsel for the respondent that the applicant should have indicated the non availability of the evidence and reserved the right to produce it as and when it came to his possession untenable. I have found no authority, neither did the respondent's Counsel cite any, where court practice and procedures require one to reserve the right to produce evidence after a trial has been concluded. One can only adduce evidence in the duration of a trial. Counsel for the respondent also submitted that the applicant had not exercised due diligence to adduce the certificate of title. The applicant did aver in paragraph 10 of his supporting affidavit that his efforts to trace the duplicate certificate of title and the white page were futile and he could therefore not adduce such evidence. This affidavit evidence was not rebutted by the respondent's

affidavit in reply. The submissions of the respondent's Counsel's on the matter were akin to adducing evidence from the bar which this court will not accept.

The other important aspect to address is the relevance of the evidence sought to be adduced to the pending appeal. I have perused the judgment of the trial magistrate in civil suit no. 372 of 2008. In paragraph 2 of page 5 of the judgment, it is clear the trial magistrate treated the land as unregistered kibanja when she found that the respondent was a *bona fide* purchaser with good title to the property. She ruled out section 59 of the Registration of Titles Act which she stated applies to registered land and instead relied on utility bills to establish the kibanja ownership. In my opinion, the certificate of title showing that the kibanja holding in question is actually registered land will be relevant in addressing ground no. 1 of the appeal where the applicant is challenging the trial magistrate's finding that the respondent was a bona fide purchaser of the land. This is in the sense of such Magistrate having based her findings from a premise that the land was unregistered. In the interests of justice, this additional evidence is credible and would be relevant for proper adjudication of the appeal. The exceptional circumstance requiring such evidence to be adduced is that the trial magistrate's decision was premised on a non existence of a certificate of title to the suit land. The applicant seeks to adduce additional evidence in form of a certificate of title to the said land, which evidence was not available at the trial. I however do not agree with the applicant's Counsel's submissions that the same evidence would be relevant when addressing ground 3 of the appeal since the said ground only concerns the evidence that was on record as at the time the judgment was written and not evidence found after the judgment was made.

In the premises and on the foregoing authorities, it is my opinion that this application meets the criteria set by Section 80(1)(d) of the Civil Procedure Act, Order 43 rule 22(1) of the Civil Procedure Rules, as well as the case law cited above that would justify the adducing of additional evidence in civil appeal no. 60 of 2010.

I am satisfied that the applicant has proved the grounds of his application against the respondent.

I allow this application for the following orders as prayed:-

- i) The applicant is allowed to produce additional evidence during the hearing of Civil Appeal No. 60 of 2011.

ii) Costs of the application will be in the cause.

Dated this 18th day of October 2012.

Percy Night Tuhaise

JUDGE.