

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0012 OF 2016
(Arising from Civil Suit No. 0023 of 2013)

1. ALUMA MICHAEL BAYO }
2. ISMAIL DRATIGA } APPLICANTS
3. SWALEH AYO }

VERSUS

SAID NASUR OKUTI RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of Order 43 rule 22 (1) (b) and Order 52 rules 1 and 3 of *The Civil Procedure Rules*, for leave to adduce additional evidence, both oral and documentary, at the hearing of the appeal. It is supported by the affidavit of the first applicant in which he deposes that during the hearing of the suit by the trial court, he handed over to his advocate all documents capable of proving that the land in dispute belongs to a firm other than the respondent. During the hearing of the suit, their advocate did not guide them to produce the said documents in evidence. As a result, the trial court came to the wrong decision that the land in dispute belongs to the respondent, which it decision would have been different had this evidence been adduced. Further, that this was a mistake of their advocate which should not be visited on them.

In his affidavit in reply, the respondent opposes the application and instead contends that the documents intended to be adduced are not relevant to the decision on appeal. They were not tendered during the trial because the applicants' advocate knew they were irrelevant to the decision the court had to make. He prayed that the application be dismissed.

Submitting in support of the application, counsel for the applicants Ms. Daisy Patience Bandaru expounded further the grounds contained in the motion and affidavit in support while counsel for the respondent, Mr. Henry Odama reiterated the contents of the affidavit in reply.

It is trite that litigation must come to an end. In *Brown v Dean* [1910] AC 373, [1909] 2 KB 573 it was emphasised that in the interest of society as a whole, litigation must come to an end, and “When a litigant has obtained judgment in a Court of justice.....he is by law entitled not to be deprived of that judgment without very solid grounds.” For that reason, Lord Loreburn LC considered an application for a new trial on the ground of *res noviter*, and said in relation to the exercise of a power to admit further evidence if it was thought “just”, then the evidence;

Must at least be such as is presumably to be believed, and if believed would be conclusive.....My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine “*Interest reipublicae ut sit finis litium*”, remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.

The maxim *interest reipublicae ut finis litium* is strictly followed. Courts should not be mired by endless litigation which would occur if litigants were allowed to adduce fresh evidence at any time during and after trial without any restrictions. Courts hence tend to be stringent in allowing a party to adduce additional evidence on appeal, thereby re-opening a case, which has already been completed. On the other hand, courts must administer justice and in exceptional circumstances, new evidence should be allowed. The appellate court should weigh these two interests when determining whether a party may adduce additional evidence not presented at the appeal stage.

In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the court. An obligation rests on the parties to adduce any material evidence before the court, and if they fail to do so they cannot require a second hearing to put the matter right. Exceptionally, however, justice conflicts with the principle of finality. Evidence sometimes emerges which suggests that the court may have reached the wrong decision in circumstances where it might be unjust not to reopen the judgment. Hence the courts have developed principles for determining when justice requires a case to be re-opened and a new trial

ordered. The jurisprudence is longstanding but the principles were pithily encapsulated over by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489, 1491.

In that case, at the trial, the wife of the appellant's opponent said she had forgotten certain events. After the trial she began divorce proceedings, and informed the appellant that she now remembered. He sought either to appeal admitting fresh evidence or for a retrial. The Court considered guidelines for the admission of new evidence on an appeal against the background of its availability at the first hearing. Such evidence might be admissible where a witness had made a material mistake and wished to correct it. If a witness had been bribed or coerced into telling a lie and wished to correct it, then a retrial might be appropriate. Per Lord Denning:

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. The evidence must be such that as is presumably to be believed or in other words it must be apparently credible though it need not be incontrovertible.

The decision in *Ladd v. Mashall* was approved in *Skone v. Skone* [1971 1 WLR 817] where the husband appealed, seeking a new trial of a divorce petition following the discovery of fresh evidence consisting of a bundle of love letters from the co-respondent to the wife clearly showing that, contrary to his sworn evidence, he had committed adultery with her. The court admitted the fresh evidence on grounds that a strong prima facie case of wilful deception had been disclosed, and a new trial was ordered. In that case, Lord Denning said:

It is very rare that an application is made for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence for 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: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, although it need not be incontrovertible.'

In agreement, Lord Hodson said:

Assuming, as I think your Lordships must for the purposes of this application, that the letters sought to be tendered as evidence are genuine, the basis of the judge's finding of fact at the trial has been falsified to such an extent that to leave matters as they are would, in my opinion, be unjust.....A strong prima facie case of wilful deception of the court is disclosed....” and “The situation of the wife is or was, however, at the material times a peculiar one in that she was in the opposite camp in the sense that she was anxious not to do anything without the approval of the co-respondent, feeling that her interests were bound up with his. The petitioner was advised by counsel, as I have said, and I find it impossible to hold that in these circumstances it is right to hold that the petitioner failed to exercise due diligence in this matter.

Those principles were followed in *Mzee Wanje and others v. Saikwa and others [1976-1985] I E.A 364 (CAK)* and *Attorney General v. P. K Ssemogerere and others Constitutional Application No. 2 of 2004(SCU)*. In the case of *Mzee Wanje* the court of Appeal of Kenya had this to say:

It must be shown that the new evidence could not have been obtained with reasonable diligence for use at the trial, and that it was of such weight that it was likely in the end to affect the court's decision. I consider that the same test should be applied to our rules for otherwise it would open the door to litigants leave until an appeal all sorts of material which should properly have been considered by the court of trial” Emphasis added.

The principles and conditions to be followed for the admission of additional evidence on appeal were re-stated by the Supreme Court in *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, Civil Application No. 133 of 2014* and in *Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013* where it held:

A summary of these authorities is that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- i. Discovery of new and important matters of evidence which, after the exercise of due diligence, were not within the knowledge of, or could not have been produced at the time of the suit or petition by, the party seeking to adduce the additional evidence;
- ii. It must be evidence relevant to the issues;
- iii. It must be evidence which is credible in the sense that it is capable of belief;
- iv. The evidence must be such that, if given, it would probably have influence on the result of the case, although it need not be decisive;

- v. The affidavit in support of an application to admit additional evidence should have attached to it, proof of evidence sought to be given;
- vi. The application to admit additional evidence must be brought without undue delay.

It was further held in *Karmali Tarmohamed and Another v. T.H. Lakhani and Co. [1958] EA 567*, and *Namisango v. Galiwango and another [1986] HCB.37* 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 would not have made it so available. It is an invariable rule in all the courts 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

For such a reason, in *Hon. Anthony Kanyike v. Electoral Commission and two others C.A Civil Application No. 13 of 2006, arising from C.A. Election Appeal No. 4 of 2006*, it was decided that fraud was an exceptional circumstance enough in itself to justify leave to adduce additional evidence on appeal to prove that at the trial of the petition, the 3rd respondent, fraudulently told a lie to court about his names and that the court believed his lie hence its judgment in his favour. This would be proved by way of evidence of records of entry of the 3rd respondent into Senior One at St. Mary's College Kisubi as opposed to the one he used in his Nomination papers for the 23rd February 2006 Parliamentary elections for the Constituency. It was also admissible as evidence that elucidated on the evidence that had emerged from or was already on record, to ensure that the ends of justice are attained.

Hence in exceptional cases, the appellate court will take in evidence at the appellate stage that elucidates on the evidence already on record, as opposed to the introduction of an altogether new matter, that was never raised or does not emerge at all from the evidence already on record (see for example *R. v. Yakobo Busigo s/o Mayogo (194.5) 12 EACA 60* where the Court of Appeal for Eastern Africa made a distinction between new evidence in a trial and evidence adduced to elucidate evidence already on record).

Appellate courts will not admit additional evidence which introduces a matter that is new altogether, which was never raised or does not emerge at all from the evidence already on record. For example in *Regina v. Secretary of State for the Home Department ex parte Momin Ali*, [1984] 1 WLR 663, [1984] 1 All ER 1009, the fresh evidence that was sought to be introduced was clearly available and should have been placed before the trial Judge. On application to the appellate court for its admission as additional evidence, it was held that it was not the function of the court, as an appellate court, to retry the matter on different and better evidence. We are concerned to decide whether the trial judge's decision was right on the materials available to him, unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies its admission and consideration by this court. That was not in this case.

The affidavit in support of the application has attached to it, copies of the documentary evidence sought to be adduced as additional evidence on appeal. I have therefore examined the nature of this additional documentary evidence intended to be introduced on appeal. From the affidavit and the documents attached, I can safely deduce the import of both the oral and documentary evidence the applicant seeks to adduce. It in essence seeks to prove that the land in dispute does not belong to the respondent as decided by the trial court, neither does it belong to the applicants but rather to a named third party. In cases involving questions of ownership of land, the question is never; "who is the true owner of the land?" but rather the relative strengths of the basis of the conflicting claims to ownership proved by the rival claimants. As Lord Diplock pointed out in *Ocean Estates Ltd v. Pinder* [1969] 2 AC 19:

Where questions of title to land arise in litigation the court is concerned only with the relative strengths of the titles proved by the rival claimants. If party A can prove a better title than party B he is entitled to succeed notwithstanding that C may have a better title than A, if C is neither a party to the action nor a person by whose authority B is in possession or occupation of the land.

By introducing that evidence, the applicants seek to prove that the true owner of the land in dispute was not a party to the trial or the pending appeal. That being the case, although it is evidence which on the face of it is capable of belief, the applicants have failed to prove that it is relevant to the grounds to be decided on appeal since proof of such a fact is irrelevant to the determination of the dispute between the two parties to the appeal yet one of the principles which

must be satisfied is that the applicant must show that the evidence is relevant to the issues to be decided. Although not decisive, it therefore is not evidence of such a nature which if given, would probably have any influence on the result of the case. It instead is evidence which introduces a matter that is new altogether, which was never raised or does not emerge at all from the evidence already on record. If admitted, evidence to rebut it will also have to be admitted which will greatly alter the whole shape of the case to make the case decided on appeal entirely or, at the very least, substantially different from that decided at the trial. This court will in effect have ordered a new trial yet that is not the purpose of proceedings of this nature.

It is further a cardinal requirement in applications of this nature that the evidence sought to be adduced should be shown to have been discovered as a new and important matter 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 by, the party seeking to adduce it as additional evidence. The only exception is where the evidence elucidates on the evidence already on record, which I have already found that it does not in this case. To avoid this requirement, the applicants argue that although the evidence was all along available to their advocate during the trial, for some unknown reason their advocate did not lead them to adduce it in court and therefore this was a mistake of their counsel which should not be visited on them.

Indeed it is now trite that the mistakes, faults, lapses or dilatory conduct of Counsel should not be visited on the litigant (see the Supreme Court decisions in *Andrew Bamanya v. Shamsherali Zaver*, S.C. Civil Appln. No. 70 of 2001; *Ggoloba Godfrey v. Harriet Kizito* S.C. Civil Appeal No.7 of 2006; and *Zam Nalumansi v. Sulaiman Bale*, S.C. Civil Application No. 2 of 1999). However, there is a distinction between mistakes, faults, lapses or dilatory conduct of Counsel and errors of judgment of counsel.

Acts of un-skillfulness, carelessness or lack of knowledge have long been distinguished from errors of judgment. Whereas the former are a result of factors such as inadvertence, negligence and sheer incompetence, i.e. a failure to act with the competence reasonably to be expected of ordinary members of the profession, the latter is the product of the deliberate application one's mind to the complex tasks of assessing probabilities and predicting values in directing one's

choices during the imponderables and uncertainties of litigation, where unfortunately it turns out that the wrong or more disadvantageous choice was made. Whereas the former may not be visited on a litigant, a litigant is bound by the latter since in choosing legal representation, a litigant relies not only on the assumed skilfulness of the advocate but also largely on that advocate's capacity at judgment and making rational decisions. The acid test is whether the decision permits of a reasonable explanation. If so, the course adopted will be regarded as optimistic and as reflecting on the advocate's judgment but it is not a mistake. Litigants are only absolved of acts or omissions of their advocates that occur in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have done or omitted to do.

Implicit in mistakes, faults, lapses or dilatory conduct of Counsel is the common thread of breach by Counsel, of the duty owed to his or her client by failure to conform to the applicable standards of professionalism. It is only just that such lapses should not be visited on a litigant. However on the other hand, a trial is a complex process. The advocate is from time to time called upon to make judgmental calls under conditions sometimes of extreme uncertainty. Advocates may be called upon to take immediate decisions which, if in the result they turn out to have been wrong and may have disastrous consequences, but still will not be considered mistakes. This is because no advocate, no matter how skilful, wise and well informed, can ever fully overcome the inherent uncertainty embedded in the decision-making environment that a trial presents. The environment is well illustrated in *Ridehalgh v. Horsefield*; *Allen v. Unigate Dairies Ltd*, [1994] Ch 205, [1994] 3 All ER 848, [1994] 3 WLR 462 thus;

An advocate has to make decisions quickly and under pressure, in the fog of war and ignorant of developments on the other side of the hill. Mistakes will inevitably be made, things done which the outcome shows to have been unwise. Advocacy is more an art than a science. It cannot be conducted according to formulae. Individuals differ in their style and approach. It is only when, with all allowances made, an advocate's conduct of court proceedings is quite plainly unjustifiable that it can be appropriate to make a wasted costs order. Threats of applications for wasted costs orders should not be used to intimidate opposing solicitors. He should ask three questions: Did he act improperly, unreasonably or negligently? Did that conduct cause unnecessary costs? Is it, in all the circumstances, just to make an order? In order to establish negligence it is necessary to show that the representative concerned acted in a way which no reasonably competent representative would act.

Ideally every decision the advocate makes follows reflection, however instantaneous, on its relative impact on the overall strategy of obtaining a decision from court, most favourable to his or her client. It is thus a decision based on prediction yet every prediction contains an element of irreducible uncertainty. The assessment of uncertainty becomes a judgment. Judgment based on predictions leads to two kinds of errors; one is when an event that is predicted does not occur, i.e., a false alarm. The second is when an event occurs but is not predicted, i.e., a surprise. Because the decisions required will depend on the known facts at the time and other relevant circumstances, it will from time to time emerge with the benefit of hindsight that better choices could have been made, hence that there was an error of judgment in the decision made earlier. There is an inevitable trade-off between the two kinds of errors; steps taken to reduce one will increase the other. Sometimes opportunity presents itself before conclusion of the trial to mitigate the impact of or correct such errors of judgment but when their impact emerges at the conclusion of the case, it may be too late. Litigants are then expected to live with the consequence of their choices.

Since prediction involves human judgment, defined in this context as the synthesis of multiple items of information to produce a single prediction, for an error of judgment to be raised to the level of a mistake, it must be demonstrated that it was of such a nature that no reasonably well-informed and competent member of the profession could have made. It is not a mistake if it is shown only that other more cautious advocates would have acted differently. Advocates are often faced with finely balanced problems. In representing their clients, advocates must exercise judgment when they are confronted with several items of information and have to produce a single prediction yet they do not necessarily follow the standard rules of probability theory. Judgment involves a combination of intuition and analysis and therefore is not purely objective. Since their decision-making is largely subjective, different advocates will have different subjective projections of probabilities for the same set of facts, hence diametrically opposed views may be and not infrequently are taken by advocates, each of whom has exercised reasonable and sometimes far more than reasonable, care and competence. The fact that one of them turns out to be wrong certainly does not mean that he or she made a mistake. Thus in the nature of things, a wrong decision made by an advocate acting honestly and carefully, will not be categorised as a mistake but rather as an error of judgment.

Although it would be repugnant to good conscience and fairness to hold litigants liable for mistakes, faults, lapses or dilatory conduct of Counsel which implicitly involve breach by Counsel, of the duties owed to their clients by failure to conform to the applicable standards, I do not find a similar effect in holding litigants to be bound by errors of judgment of counsel made in their best efforts of advancing the interests of the litigant in conformity with the applicable standards of professionalism. Such errors cannot be described as mistakes simply because they led to an unsuccessful result or because other more cautious advocates would have acted differently. Re-opening litigation on account of errors of judgment would be at the cost of opening such a wide door which would indeed seriously undermine the principle of finality in decision-making. It is in the interests of the proper administration of justice that parties should know that they have the duty and the opportunity to adduce any material evidence they have in their possession or that can be procured, before the trial court and if they fail to do so they cannot require a second hearing to put the matter right, only because they have become wiser with the benefit of hindsight.

Nowhere in the affidavit in support of the application is the reason explained why counsel chose not to introduce the evidence during the trial yet he had it in his possession. Therefore, there is no basis upon which this court can determine that it is a decision no reasonably well-informed and competent member of the profession could have made rather than the fact that he deliberately decided to withhold the evidence for reasons based on his honest and careful professional assessment of its relative impact on the overall strategy of obtaining from the trial court, a decision most favourable to his client. I am therefore inclined to believe averment in paragraphs 6 – 9 of the affidavit in reply to the effect that this evidence was withheld from the trial court only because it was considered to be irrelevant at the time, to the issues that were before that court for its determination. It has therefore not been proved that the decision constituted a mistake of counsel to warrant invoking the principle that it should not be visited to the litigant. I find instead that it was possibly an error of judgment binding on the applicant.

It is an invariable rule 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 on appeal. In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the trial court.

Furthermore, applications for the admission of additional evidence must be brought without undue delay. The appeal in the instant case was filed during the year 2013. This application was filed on 13th December 2015, two years later, without furnishing any explanation for the inordinate delay. For all the foregoing reasons, I do not find any merit in the application and it is hereby dismissed with costs to the respondent.

Delivered this 29th day of March 2017.

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Stephen Mubiru
Judge
21st March 2017.