

**THE REPUBLIC OF UGANDA**  
**IN THE SUPREME COURT OF UGANDA**  
**AT MENGO**

*(CORAM: ODOKI, CJ; ODER, TSEKOOKO, KAROKORA, MULENGA,  
KANYEIHAMBA, JJ.S.C. AND BYAMUGISHA, AG. J.S.C).*

**CONSTITUTIONAL APPLICATION NO.2 OF 2004**

*(Arising from Constitutional Appeal No.1 of 2002)*

BETWEEN

ATTORNEY GENERAL.....APPLICANT

**AND**

1. PAUL K. SSEMOGERERE }
2. ZACHARY OLUM }
3. JULIET RAINER KAFIRE}.....RESPONDENTS

**RULING OF THE COURT.**

The Attorney General brought this Application under Article 132(4) of the Constitution, and Rules 1 (3), 41 (1) and (2) of the rules of this court, for orders that:

(1) This Honourable court be pleased to recall and alter, vary and/or review/reverse its judgment in Constitutional appeal No.1 of 2002.

- (2) This Honourable court be pleased to vary and/or review/reverse its declaration and order for costs in the said Constitutional Appeal No.1 of 2002, so that amendments to articles 88, 89, 90 and 257 of the Constitution are held to have been validly made.
- (3) Costs of this application be provided for.

The notice of motion states that the grounds of the application are set out in the affidavits of the clerk to Parliament, Mr. Aonis Tandekwire and of Mr. Mike Chibita, Principal State Attorney, both of which are attached to the Notice of motion. The grounds also provide a background to the application. They are set out as follows:

- (a) The Constitutional Appeal No.1 of 2002 challenged the Constitution (Amendment) Act 2000, on grounds that in amending Articles 88,89,90,97 and 259 of the Constitution, the right procedure was not followed by Parliament.
- (b) The amendments to Articles 88,89,90, and 257 were declared null and void for the reason that the method of voting used by Parliament in passing the Bill was not the Head-count method, and that the Bill for assent to the President for those amendments was not accompanied by a Certificate of the Speaker of Parliament showing that the provisions of Chapter 18 of the Constitution had been complied with.
- (c) In actual fact, during the debate on the Constitution Amendment Bill 2000, Parliament did not use the voice voting method of "Ayes" and "Noes", but the Head count method.
- (d) In actual fact on the said Bill for amendment of Articles 88,89,90, and 257 was accompanied by a Certificate of the Deputy Speaker of the 6<sup>th</sup> Parliament showing that the requirements of Chapter 18 of the Constitution had been complied with.
- (e) Mr. Dennis Bireije, Commissioner for Civil Litigation, who represented the Applicant in Constitutional Appeal No.1 of 2002 and in Constitutional Petition No. 7 of 2000 did not seek prior instructions from Parliament on the two matters and did not therefore adduce evidence in this or the Constitutional Court to show that head-count methods of voting was used in passing the Constitution (Amendment) Act 2000, and to show that a Certificate showing compliance with Chapter 18 of the Constitution accompanied the said Bill to the President before it was assented to.
- (f) Had Mr. Bireije presented the Hansard relating to the passing of the Bill for Amendments, and the said certificate, the amendments to Articles 88,89,90 and 257 would have been upheld.

- (g) Constitutional Appeal No. 1 of 2002 was a matter of great national and public importance in that the amendments to Articles 88,89 and 90 of the Constitution were intended to remove the paralysis in Parliament caused by the decision of the Constitutional Court delivered on 10<sup>th</sup> August, 2000, in Constitutional Petition No.3 of 1999, with regard to quorum and voting in Parliament, and the functioning of the Committees of Parliament when handling Bills.
- (h) Therefore the mistake of Mr. Bireije should not prejudice the amendments of the said Articles 88,89,90 and 257 when the Constitution (Amendment) Bill was passed using the Head-count method of voting, and was sent to the President for assent accompanied by the Certificate of the Speaker showing compliance with Chapter 18 of the Constitution.
- (i) The declarations made by this Court in the said Constitutional Appeal No.1 of 2002 have not been enforced, in that no order or decree has been served on the Applicant by the Respondents in the said Constitutional appeal No.1 of 2002, for the purpose of effecting a formal repeal by Parliament, of the impugned Constitution (Amendment) Act, 2000.
- (j) The declarations made by this court have not been enforced and this court has power under Article 132(4) of the Constitution and/or Rule 1(3) of the Rules of this Court to grant the orders sought.
- (k) It is in the interest of Justice that this court recalls and alters, varies and/or reviews its decisions nullifying the amendments to the said Articles 88,89,90 and 257 and awarding costs to the Respondents in the said Constitutional Appeal No.1 of 2002.

The applicant was represented by the learned Solicitor General, Mr. Tibaruha, who was assisted by Mr. Joseph Matsiko, learned Ag. Commissioner for Civil Litigation. The respondents were represented by Mr. G.S. Lule S.C. who was assisted by Mr. Balikuddembe.

Following guidance from the court, the learned Solicitor General dropped Article 132(4) of the Constitution from the Notice of Motion. He also conceded that the application would be incompetent without leave of court to adduce additional evidence, and he proceeded to make an informal application under rule 1(3) of the Rules of this court, to be allowed to present additional evidence which was the basis of the application by motion.

The learned Solicitor General commenced his submissions by stating that the application concerns a matter of great public and national importance, namely the Constitution (Amendment) Act 2000, which was annulled by this Court in its judgment of 29<sup>th</sup> January 2004 in Constitutional Appeal No.1 of 2002. He contended that had this court received the additional evidence, which he wishes to be admitted now, the Court's decision and declarations in Constitutional Appeal No.1 of 2002 would have been different. He submitted that the pieces of additional evidence he sought to adduce were:

- (a) Copy of Hansard containing the proceedings of Parliament in passing the Constitution (Amendment) Bill No.13 of 2000, showing that voting was by head-count;
- (b) The Speaker's (certificate which accompanied the Bill for Presidential assent, signifying compliance with Chapter 18 of the Constitution in passing the Bill.

Both the documents were attached as annexures to Mr. Tandekwire's affidavit supporting the Notice of Motion.

The learned Solicitor General contended that the reason why the evidence was not produced was because of the incompetence of counsel who represented the applicant in both the Constitutional Court and this Court. The counsel concerned was named by the Solicitor General as one Dennis Bireije, Commissioner for Civil Litigation in the applicant's chambers. Mr. Tibaruha contended that Mr. Bireije who represented the applicant in Constitutional Appeal No.1 of 2002 and in Constitutional Petition No.7 of 2000 did not seek instructions from Parliament on the two instruments and did not tender them as evidence in either of the two Courts. The solicitor General contended that had Mr. Birige done so and presented the Hansard relating to the passing of the Bill, certain amendments in it which were properly passed would have been severed from the rest of the Act and upheld by this Court as having been validly passed by Parliament. He submitted that this court should invoke the principle that the failings of counsel should not be visited on to the client; and exercise its inherent powers to remove a miscarriage of justice, which has occurred as a result of the annulment of the Constitution (Amendment) Act 2000.

Mr. Tibaruha contended that as a result of that annulment there exists a paralysis in Parliament, which would cease if the main application is granted. He maintained that it was therefore in the public interest that the judgment be revisited to remove the paralysis in Parliament. He cited

***NPART Vs General Parts (Uganda Ltd), Misc. Application No. 8 of 2000 (SCU (unreported); the Government Proceedings Act. Cap. 79, and Article 126(2)(c)*** of the Constitution 1995; and *Kawoya Joseph Vs. Uganda Cr. Appeal No.50 1999 (SCU)*; as authorities for his submissions and to show that this Court has powers to recall its judgment as that judgment has not yet been the subject of execution.

Mr. Lule S.C, lead counsel for the respondents, opposed the application for leave to adduce additional evidence. In effect he argued that the Solicitor General had not shown good cause to justify reception of additional evidence by this Court during the hearing of this application, six months after the conclusion of the appeal. In his view, the case of ***General Parts*** (supra) is inapplicable and distinguishable, while that of ***Kawoya Joseph*** (supra) supports his clients' case. Mr. Lule contended that the first issue of the procedure adopted in Parliament during the debate and the eventual passing of the Bill resulting into the Constitution (Amendment) Act, 2000 and the second issue of the absence of the Speaker's Certificate for the Presidential Assent to the Act were raised by the respondents at the earliest available opportunity when the petition was lodged in court. The two issues were raised during the trial of the Petition and later during the hearing in this Court of the Appeal therefrom. At no stage did the applicant attempt to adduce either of the two pieces of evidence. Mr. Lule contended that the applicant has failed to justify the need to admit additional evidence.

Having heard both counsel and examined the background to this application and the evidence on which we based our findings and decisions in our judgment in Constitutional Appeal No.10 of 2002, we are in a position to consider and resolve the pertinent issues raised in the oral application for tendering additional evidence. We shall consider and rule on the oral application as a preliminary matter. Rule 29(2)(a) of the Rules of this court does not apply to application for leave to adduce additional evidence after the disposal of an appeal, which the applicant seeks to do by his oral application.

The rule provides:

"2 (2) (a) When an appeal emanates from a decision of the Constitutional Court -

(a) In the case of an appeal on a petition to the Constitutional Court, the Court, may appraise the evidence and decide matters of fact, or law or mixed law and fact, and may in its discretion take additional evidence."

The rule permits additional evidence in an appeal from the Constitutional Court to this court in a Constitutional Appeal. It does not apply to a situation, as now in the instant case, where the appeal has been disposed of and the party who lost the appeal is applying for a review and reversal of the judgment in the appeal. Consequently, the applicant has relied on rule 1(3) of the Rules of this court, which provides: "1(3) Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the Court, and Court of Appeal to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay."

There are no authorities on what principles or conditions this Court may allow an application such as the present, but our opinion is that authorities or decided cases which are relevant to this Court's discretion to admit additional evidence on appeals to it do provide useful guidance for that purpose, and are of persuasive value. We have in mind: ***Ladd Vs Mashall (1954) 3 All ER 745 at 148 Skone Vs Skone (1971), 2 All ER 582 at 586; Langdale Vs Danby (1982) 3 ALL ER. 129 at 137; Sadrudin Shariff Vs Tarlochan Singh (1961) EA.72, Elgood Vs Regina (1968) EA 274; American Express International Vs Atulkimar S. Patel, Application No.8B, of 1986 (SCU) (unreported); Karmali Vs Lakhani (1958), EA.567 and Corbett (1953), 2 ALL ER, 69.*** 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, was 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 the evidence sought to be given;
- (vi) The application to admit additional evidence must be brought without undue delay.

These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court. We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal.

The applicant's explanation why the additional evidence now sought to be admitted was not adduced at the trial of the petition or at the appeal to this Court is alleged negligence and incompetence of Mr. Dennis Bireije, Commissioner for Civil Litigation in the applicant's chambers, who was one of the counsel who represented the applicant in both courts. To us, this means that the evidence was available and that with due diligence it could have been adduced at the trial of the petition or on the appeal to this court, but it was not.

The record shows, that the applicant's answer to the petition was drawn by "Mr. Cheborion Barishaki" Director for Civil Litigation in the applicant's chambers, not Dennis Bireije. More importantly when the hearing of the petition commenced, the applicant was represented by another senior counsel, "Mr. D. Byamugisha, A. A. Director of Civil Litigation, assisted by Samu Serwanga, SSA, and Ms. C. Kahwa, SSA." Mr. Byamugisha raised and argued two preliminary points of objection to the petition. The first was that the petition was incompetent, because the affidavits which supported it were defective. The second was that in this case, the Constitutional Court had no jurisdiction to interpret Act 13/2000 because the Act had become part and parcel of the Constitution as all the Constitutional procedural requirements for enacting it had been complied with. Counsel for the respondents, Mr.G.S. Lule, opposed the objections. The Constitutional Court overruled the objections and proceeded to hear the petition. In the circumstances with due respect, we are unable to agree with the learned Solicitor General's contention that it was the fault of Mr. Dennis Bireije alone that evidence now sought to be admitted as additional evidence was not produced at the trial of the petition or at the appeal hearing. It is inconceivable that a petition and an appeal of this importance could have been left to the whims of, or to put it in the words of the learned Solicitor General, to the incompetence

of one Commissioner who, notwithstanding the judgment of him by the Solicitor General, had risen steadily in the promotional ranks of the Attorney General's Chambers, presumably on merit. Further, the applicant's case both in the Constitutional Court and on appeal to this Court having been handled, according to the record, by Dennis Bireije and other quite senior officers in the applicant's chambers we would have expected Dennis Bireije or any one or more of the other officers who handled the petition and the appeal to have explained by affidavit why copies of the Speaker's Certificate and of the Hansard were not produced as evidence at the hearing of the petition or as additional evidence on appeal to this court. When the court questioned the learned Solicitor General on this point his answer was that Dennis Bireije was on suspension. He did not say what efforts had been made to get Bireiji to give such explanation by affidavit even though he was on suspension or why the others had not done so.

Lastly another factor we must take into account is that this application to admit additional evidence was brought several months after the appeal was completed. The judgments in the appeal were delivered on 29/1/2004, and this application was filed in Court on 22/7/2004. That was not bringing this application without undue delay.

For these reasons, we are unable to say that the oral application to adduce additional evidence in this case fulfills the special conditions we have referred to above. It must therefore fail and it is accordingly dismissed with costs to the respondents.

As the additional evidence sought to be adduced forms the only basis of the application by notice of motion for recalling the judgment of the Court in Constitutional Appeal No. 1/2000, that application has no basis. It must also fail, and it is dismissed with costs to the respondents.

***Dated at Mengo this 2nd day of September 2004***

**B.J. ODOKI.**  
**CHIEF JUSTICE**



**A. H. O. ODER.**  
**JUSTICE OF THE SUPREME COURT.**

**J.W.N. TSEKOOKO.**  
**JUSTICE OF THE SUPREME COURT.**

**A. N. KAROKORA.**  
**JUSTICE OF THE SUPREME COURT.**

**J. N. MULENGA.**  
**JUSTICE OF THE SUPREME COURT.**

**G. W. KANYEIHAMBA.**  
**JUSTICE OF THE SUPREME COURT.**

**C. BYAMUGISHA**  
**AG. JUSTICE OF THE SUPREME COURT.**