THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: KATUREEBE; KITUMBA; TUMWESIGYE; KISAAKYE; JJ.S.C; ODOKI; TSEKOOKO; OKELLO; AG .JJSC]

MISCELLANEOUS APPLICATION NO. 8 OF 2013

BETWEEN

HON. ANIFA BANGIRANA KAWOOYA :::::::::::::::::::::: APPLICANT

AND

NATIONAL COUNCIL FOR HIGHER EDUCATION :: RESPONDENT

(Application arising out of Supreme Court Constitutional Appeal No. 4 of 2011)

RULING OF THE COURT

This is a ruling on an application that was filed by the applicant seeking leave of the court to adduce additional evidence in respect of Constitutional Appeal No. 4 of 2011 which is pending before this Court.

Background to this application

Before considering the merits of this application, we consider it necessary to give the following background which is drawn from the Judgment of the Constitutional Court in Constitutional Petition No. 42 of 2010.

On 8th December 2005, the National Council for Higher Education (hereinafter referred to as NCHE), the respondent in this application, issued a Certificate of Equivalence to the applicant. The Certificate confirmed that the Bachelor of Arts Degree in Development Studies, which the applicant obtained from Nkumba University had satisfied the NCHE that she had completed a formal education equivalent to "Advanced level or its equivalent", hence making her eligible to contest for 2006 Parliamentary Elections.

In 2006, the legality of the said certificate was unsuccessfully contested before the High Court of Uganda in ***Joy Kabatsi v. Anifa Kawoya and Electoral Commission,(Election Petition No. 1 of 2006)***. The matter was appealed against all the way to this Court in ***Joy Kabatsi v. Anifa Kawooya & Anor, Election Petition Appeal No. 25 of 2007*** . This Court nullified the applicant's election on other grounds but nevertheless upheld the decision of the High Court to the effect that the applicant was academically qualified to be elected as a Member of Parliament. A by-election was held and the applicant emerged as the successful candidate.

On 25th August 2010, the respondent recalled and cancelled the Certificate of Equivalence it had issued to the applicant. On 26th October, 2010, the applicant filed a Constitutional Petition, ***Hon. Anifa Bangirana Kawooya v. Attorney General and National Council for Higher Education, Constitutional Petition No. 42 of 2010***, in which she challenged the decision of the respondent.

In the petition, the applicant contended among others that the respondent's act of recalling the Certificate of equivalence issued to her in 2005 by a letter dated 25th August, 2010, was inconsistent with and/or was in contravention of Articles 28(1), 42 and 44 of the Constitution, namely the right to a fair hearing and a right to just and fair treatment in administrative decisions. She also contended that the matter of her academic qualifications upon which the Certificate of Equivalence was recalled was *res judicata,* the same having been fully and finally determined by the Supreme Court in ***Joy Kabatsi v. Anifa Kawooya & Anor, Supreme Court Election Petition Appeal No. 25 of 2007***. She further contended that subjecting her to a fresh investigation and hearing of this matter violated her rights under Article 28(1), 42 and 44 of the Constitution.

The thrust of the respondent's case was that it did not revoke the Petitioner's Certificate of Equivalence but merely recalled it for further investigation during which the applicant would be given opportunity to defend her academic qualification.

The Constitutional Court ruled in favour of the applicant. Being dissatisfied with the holding of the Constitutional Court, the respondent, NCHE, filed Constitutional Appeal No. 4 of 2011 on the 25th July 2011 based on 5 grounds of appeal of which the following three are relevant to the application.

1. ...

2. ...

3. *That the learned Justices of the Constitutional Court erred in law and in fact in holding that the respondent's recalling of the Certificate of equivalence was inconsistent with Articles 28(1), 38, 42 and 44 of the Constitution.*

4. *That the learned Justices of the Constitutional Court erred in law and in fact in holding that the matter before the said court was barred by res judicata; and*

5. *That the learned Justices of the Constitutional Court erred in law and in fact in holding that the appellant had no right to investigate or recall the academic qualifications of the respondent (the applicant).*

When the Appeal came up for hearing on 7th October 2013 before this Court, the applicant (who is the respondent in that appeal) applied for an adjournment of the hearing of the appeal pending the outcome of this Constitutional Application No. 8 of 2013 and the filing of a supplementary record of appeal by her Counsel. The Court granted the adjournment of the hearing of the appeal pending the disposal of this Constitutional Application.

This application is based on seven grounds set out in the Notice of Motion. The most relevant grounds for purposes of disposing of this application are as follows:

1. *That new evidence has been discovered which shows that contrary to the respondent/appellant's evidence at the trial and the preliminary hearing of the appeal to this Court that no final decision had been taken by the*

appellant to cancel the applicant's academic qualifications without giving an opportunity to be heard, ... a final decision was taken by the NCHE on 3rd September, 2010 whereby Nkumba University was ordered to withdraw the degrees awarded to the Applicant vide letter dated 3rd September, 2010.

2. *That the said evidence was not in the applicant's knowledge by the time Constitutional Petition No. 42 of 2010 was heard and could not be obtained even with exercise of reasonable diligence as it was only in possession and knowledge of the appellant/respondent until when the applicant instructed her current lawyers who drew her attention to its existence following the proceedings and decisions in Election Petition No. 0006 of 2011: B. M. Nsubuga v. Muyanja Mbabali, in which NCHE and Nkumba University officials produced the said evidence.*

3. *That the evidence sought to be adduced is crucial and very necessary for the applicant's case as the appellant is asking the Supreme Court to rule on its power to recall and investigate qualifications.*

4. *That the said evidence if not allowed will leave the Appellant's false affidavit sworn by Prof. A.B. Kasozi on 5th November, 2010 paragraph 15, 16 and 17 thereof, at page 462, 465 of the record of Appeal to stand as the truth whereas not.*

5. ...

6. ...

7. *It is fair and equitable that the Application is allowed.*

The application is supported by an Affidavit affirmed by the applicant.

The Respondent filed an affidavit in reply affirmed by Ms. Faridah Bukirwa, a senior legal officer of the Respondent in which she contested the application for leave to adduce additional evidence.

The applicant was represented by Mr. G. N. Kandeebe and Mr. Adoci Luwum from Ntambirweki Kandeebe & Co. Advocates, while the respondent was represented by Mr. Edmund Wakida and Mr. Richard Komakech.

Submissions of Counsel

Mr. Ntambirweki, counsel for the applicant submitted that this being a Constitutional Application, this Court had a duty, as the first appellate Court to re-evaluate the evidence. He also submitted that the new evidence is necessary for determination of the issues before this Court. He further contended that the letter, (Annexure C7), which is the subject matter of the application, would help the court to decide whether a final decision regarding the applicant's Certificate had been made by the respondent. According to counsel, the letter shows that the respondent had written to Nkumba University directing it to withdraw the applicant's Certificate.

Counsel for the applicant relied on Rule 30(2) (a) of the **Judicature (Supreme Court) Rules**, which gives this court power to appraise evidence from decisions of the Constitutional Court, as well as Rule 2(2) of the Judicature (Supreme Court)

Rules, which allows this Court to exercise its inherent powers to ensure that the ends of justice are achieved.

Counsel also relied on the authority of ***Attorney General v. P. Kawanga Ssemwogerere & 2 others,(Supreme Court Constitutional Application No. 2 of 2004)***, which laid down the principles which this Court can use to determine whether leave to adduce additional evidence should be granted or not.

Learned counsel for the applicant contended that the orders sought should be granted because the respondent had withheld crucial evidence from the Constitutional Court. Counsel also informed court that he intended to file a supplementary record of appeal because the record of appeal that had been filed by the respondent was incomplete.

Counsel for the respondent, on the other hand, opposed the application. Counsel drew Court's attention to the fact that the proceedings of ***Election Petition No. 0006 of 2011: B. M. Nsubuga v. Muyanja Mbabali***, wherein the letter which is the subject matter of this application was tendered into evidence were before the Constitutional Court proceedings from which the appeal arose. Counsel further contended that the letter was referring to a meeting that was held between the National Council for Higher Education and Nkumba University on 3rd September 2010 and that the letter was only requesting Nkumba University to verify the applicant's papers. He contended that the letter was not the final decision of NCHE as the applicant had alleged.

Counsel further submitted that the Rules of this Court demand that there should not be inordinate delay in bringing such an application. In this case, counsel submitted

that this application was brought after two years. He contended that in the ***Ssemwogerere*** case ***(supra)***, Court rejected the application for leave to adduce additional evidence because there was delay of six months.

Counsel for the respondent further submitted that another requirement before an application is allowed is whether the new evidence is relevant or whether it will have an influence on the outcome of the appeal. Lastly, counsel for the respondent contended that the applicant having been arguing *res judicata* in her Constitutional Petition and now in the main appeal, cannot argue that she needs this additional evidence. Counsel prayed that the application should be dismissed. In the alternative, he prayed that if Court feels inclined to grant it, then a full record should be filed.

In reply, counsel for the applicant contended that there had been no inordinate delay on the part of the applicant. Counsel contended that the applicant had only discovered the evidence months before the application was filed and that was when Counsel had taken over instructions to argue the applicant's appeal. He further contended that this application was filed soon after the discovery of the new evidence.

Court's determination

With this background in mind, we now proceed to the merits of the application.

This application was brought under Rule 23 (2) of the **Constitutional Court (Petitions and Reference) Rules 2005** and Rules 2(2) and 30(2)(a) of the **Judicature (Supreme Court) Rules.**

Rule 23 (2) of the **Constitutional Court (Petitions and Reference) Rules 2005,** provides as follows:

> *"For purposes of appeals against a decision of the Court, the Supreme Court Rules shall apply with such modifications as may be necessary."*

Rule 30(2)(a) of the **Judicature (Supreme Court) Rules** provides for admission of additional evidence as follows:

> *"When an appeal emanates from a decision of the Constitutional Court 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 applicant further relied on Rule 2(2) of **the Judicature (Supreme Court) Rules** which vests inherent powers in this Court to make such orders as are necessary to meet the ends of justice. It provides as follows:

> *"Nothing in these rules shall be taken to limit or otherwise affect the inherent power of the court, and the court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the court 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 is no doubt that Rule 30 (2) (a) of the **Judicature (Supreme Court) Rules** gives this court discretion to admit additional evidence from parties before it. The question for determination now is whether the applicant has satisfied this court to exercise its discretion and allow the applicant to adduce the additional evidence. In order to answer this question, it is necessary first to consider the principles under which additional evidence can be admitted in this Court.

In **Attorney General v. Paulo Ssemogerere & Ors., Supreme Court Constitutional Application No. 2 of 2004,** this court, cited several persuasive authorities which have dealt with this issue of when additional evidence may be admissible on appeal. These include, *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.* The Court then held as follows (at page 11 of the ruling.)

> *"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.

The court went on to give the rationale for these principles as follows:

> *"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 up its full case before the court."*

Turning to the present case, we need to examine whether the applicant has satisfied these principles to warrant our grant of leave to adduce additional evidence.

The first principle the applicant needs to meet is to prove that the evidence she discovered and which she seeks to adduce is "new and important" and that it is 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."

The applicant averred in her affidavit that she did not have knowledge of the letter (Annexure C7) by the time she filed the Constitutional Petition or even at the time it was heard. She contended that she could not have obtained the letter even with exercise of reasonable diligence, as it was only in the possession and knowledge of the respondent. She further averred that it is only after she instructed her current lawyers that they drew her attention to its existence following the lawyers' attendance of the proceedings in Election Petition No. 0006 of 2011.
We find that even if the applicant had been meticulous in her gathering of evidence to support her case, she could not have had access to the said evidence as it was in the possession of the respondent at the time of her filing of and of the hearing of the Constitutional Petition.

The second principle the applicant needs to satisfy is that the evidence to be adduced must be relevant to the issues to be determined by the court. The applicant avers in her affidavit and her counsel's submissions that the evidence is crucial and very necessary for her case as the respondent in the appeal pending before this Court.
A proper evaluation of these contentions calls for us to consider the relevancy of the evidence the applicant seeks leave to adduce in relation to the appeal. Upon perusal of the grounds of appeal which we reproduced earlier in this Ruling, the issues for determination in the main appeal include, among others, whether the respondent recalled the academic qualifications of the applicant obtained from Nkumba University; whether the respondent cancelled the applicant's Degree

Certificate without giving the applicant a hearing and lastly whether the issue of the validity of the applicant's qualification is res judicata.

The applicant averred in paragraph 7 of her affidavit in support of this application that contrary to the respondent's claim that it had not taken a final decision to cancel her academic qualifications without according her an opportunity to be heard, the letter Annexure 7 which the subject matter of this application clearly shows that a final decision had indeed been taken by the respondent. The letter was attached to the applicant's affidavit and we have had the benefit of reading it. The contents thereof are directive in nature. The respondent was directing Nkumba University to withdraw the applicant's degree.
In view of the above, we find that the letter is relevant as it will help the Court to determine whether the respondent actually withdrew the applicant's degree and secondly whether the respondent did so without according the applicant an opportunity to be heard.

The third principle the applicant needs to prove is that the evidence must be "credible in the sense that it is capable of belief". The letter Annexure 7 is on the respondent's headed paper. It is signed by the respondent's Deputy Executive Director. It bears a stamp of the respondent certifying it as a true copy. The respondent did not object to its authenticity in its affidavit in reply and in its submissions before this Court. The only contention the respondent made with respect to the letter, according to paragraph 5 of the respondent's affidavit in reply, was that it was issued before the Constitutional Court proceedings took place and that it was concerned with what transpired at a meeting which was held between the respondent and officials from the applicant's University on 3rd September 2010.

We also note that the letter 'C7' was mentioned during the examination in chief of Ambassador Acato in **Birekeraawo Nsubuga v. Muyanja Mbabali (Election Petition No. 006 of 2011)**, at pages 10 and 15 of the proceedings.

In the light of all the above findings, we find that the letter to be adduced is credible and capable of belief.

The fourth principle the applicant needs to satisfy is that "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." As already noted, one of the issues for determination in the appeal from which this application is arising is whether the applicant's degree was withdrawn by the respondent without giving the applicant a hearing. The contents of the letter which the applicant seeks to adduce in evidence, on the face of it seems to confirm the applicant's contention that the respondent directed Nkumba University to withdraw the Degree it had awarded to the applicant.
It is our finding that though it might not be wholly decisive, the letter will have an influence on the determination of the appeal.

The fifth principle the applicant needs to satisfy is that "the affidavit in support of an application to admit additional evidence should have attached to it, proof of the evidence sought to be given." Annexure "C7" which is the additional evidence the applicant is praying to Court to adduce was attached to the applicant's affidavit in support of the application. Paragraph 7 of the affidavit also refers to Annexure "C7" as the letter written by the respondent to withdraw her degree. Court finds that the applicant has also satisfied this principle.

The sixth and last principle the applicant needs to satisfy is that "the application to admit additional evidence must have been brought without undue delay."

The applicant in her affidavit stated that she came to know of the letter through her Counsel in the course of issuing instructions and discussing the pending appeal. The applicant did not indicate when she gave her new counsel instructions to enable us to properly determine whether she brought this application within a reasonable time. However, her counsel in his submissions indicated that he had received instructions two months before the application was heard.
The respondent on the other hand contended that there had been unreasonable delay but did not adduce any evidence to support its contentions.
Going by the date when the application was lodged in this Court, which was about two months before we heard it, we are satisfied that there was no delay on the part of the applicant to bring this application within a reasonable time.

The applicant also prayed to Court to be allowed to file a supplementary record of appeal to introduce crucial parts of the proceedings in the Constitutional Court which were omitted by the respondent. We decline to grant this prayer for reasons that the applicant does not need to seek permission of this Court to file a further record of appeal. This is clearly provided under **Rule 86(1)** of the Judicature **(Supreme Court) Rules** which provides as follows:

> *"If the respondent is of opinion that the record of appeal is defective or insufficient for the purposes of his or her case, he or she may lodge in the registry a supplementary record of appeal containing copies of any further documents or any additional parts of documents which are, in his or her opinion, required for the proper determination of the appeal."*

Rule 86(2) of our Rules further provides that the respondent shall, as soon as practicable after lodging a supplementary record of appeal, serve copies of it on the appellant.

The applicant in this application is the respondent in the appeal from which this application arose. If the record of appeal filed by the respondent was in her opinion insufficient, she should have moved under Rule 86(1) to file a supplementary record of appeal.

Rule 2(2) of the Rules of this Court preserves the inherent jurisdiction of this Court to make such orders as may be necessary for achieving the ends of justice. However, the applicant has a duty to demonstrate that she falls under the sphere of this Rule to justify the Court to grant leave for additional evidence to be adduced. We are satisfied that the evidence which the applicant seeks to adduce was not in her knowledge at the time of filing the Constitutional Petition and could not have become aware of it even if she had been prudent in gathering evidence to support her case. We are also satisfied that the evidence is not only relevant to the issues for determination, but is also credible and capable of having an influence on the result of the appeal. We accordingly allow this application.

The applicant is hereby directed to file the additional evidence within 7 days from the date of this ruling. Costs will abide the determination of the appeal.

Dated at Kampala this 2nd day of July 2014.

B. M. Katureebe.
Justice of the Supreme Court

C. N. B. Kitumba
Justice of the Supreme Court

J. Tumwesigye
Justice of the supreme Court

Dr. Esther Kisaakye
Justice of the Supreme Court

Dr. B. J. Odoki
Ag. Justice of the Supreme Court

J. W.N. Tsekooko
Ag. Justice of the Supreme Court

G. M. Okello
Ag. Justice of the Supreme Court

Mr. Ntambirweki for Applicant.
Mr. Wakida for Respondent.

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Ag. JSC