

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

[CORAM: KATUREEBE,CJ; KISAAKYE; ARACH-AMOKO; MWANGUSYA; OPIO-
AWERI; JJ.S.C]

**CIVIL APPLICATION NO.12 OF 2016
(Arising from Civil Appeal No.02 of 2016)**

BETWEEN

1.COMMISSIONER LAND REGISTRATION

2.KYAGGWE COFFEE CURING ESTATE :::::::::::APPLICANTS

AND

EMMANUEL LUKWAJJU::::::::::::::::::::::::::::::::::::: RESPONDENT

(Application arising out of Supreme Court Civil Appeal No.02 of 2016)

RULING OF THE COURT

This is a Ruling on an application that was filed by the Applicants seeking leave of this Court to adduce additional evidence to elucidate on the evidence already on record in Civil Appeal No.2 of 2016 which is pending before the Court.

The evidence sought to be adduced is:

- i. *The Indenture dated 6th September 1916 between the Governor of the Uganda Protectorate and Reverend Robert Henry Walker in respect of Crown Grant No. 11467 and registered in Crown Lands Register Volume 39, Folio 4 No. 11467.*

ii. *The Conveyance made on 2nd February 1926 in respect of FRV 3 Folio 13 between the Venerable Archdeacon Robert Henry Walker and the Uganda Rubber and Coffee Estates Limited.*

5 iii. *An Extract of the Succession Register No. 1045/34 for the Report of death and estate of Erasito Mazinga to His Highness the Kabaka of Buganda.*

The application was brought by Notice of Motion under Section 7 of the Judicature Act and Rules 2(2), 42 and 43 of the Rules of this Court and it is based on the grounds that:

10 a) *The Applicants have discovered new and important matters of evidence which after the exercise of due diligence, could not have been produced at the time of hearing in the lower courts.*

b) *The evidence relates to the issues in the appeal.*

c) *The evidence is credible and thus capable of being believed.*

d) *The admission of the new evidence does not in any way prejudice the Respondent.*

15 e) *The evidence, if admitted, would have an influence on the result of the appeal.*

f) *It is in the interest of justice that the Applicants be permitted to adduce additional evidence.*

g) *The application has been brought without delay after the discovery of that evidence.*

20 The Applicants also prayed that costs of the application abide the outcome of the appeal.

Affidavits

The application is supported by two affidavits sworn on 2nd August, 2016 by the Commissioner for Land Registration, Mrs. Sarah Kulata Basangwa and Mr. Mohamed Alibhai, the Director of the 2nd Applicant.

25 The affidavit of the 1st Applicant substantially discloses the new evidence sought to be adduced in court. The 2nd Applicant basically supports the averments of the 1st Applicant.

In his response, the Respondent filed an affidavit sworn on 3rd November, 2016 opposing the application. The main thrust of his contention is that this court does not admit new evidence

except under special circumstances upon leave being granted. In his view, the evidence sought to be admitted as additional evidence does not meet the standard required for admitting such evidence.

Background:

5 Before considering the merits of this application, it is necessary to give a brief background to this application as far as can be gathered from the record, which is as follows:

The Respondent in his capacity as the administrator of the estate of his great- grandfather, one Erasito Mazinga, who is said to have died in 1920, filed **Jinja High Court Civil Suit No.172 of 2012** against the Applicants for a declaration that the 2nd Applicant is a trespasser on land
10 comprised in Mailo register volume 11, folio 7 measuring 258 acres at Lwanyonyi, Kyaggwe. He claimed that the said land was illegally registered under FRV 3 folio 13 on 20th March, 1926 in the name of the 2nd Applicant's predecessor. He sought for an order of vacant possession of the suit land and cancellation by the 1st Applicant of the 2nd Applicant's certificate of title as well as an order directing the 1st Applicant to issue a Mailo title to him.

15 It is the Respondent's case that the suit land was given to Erasito Mazinga by Buganda Kingdom on 4th March, 1909 and was registered under MRV 11, folio 7 on 7th June 1910. That Erasito Mazinga subsequently leased it to the 2nd Applicant's predecessor in title, Kivuvu (U) Rubber & Coffee estate ltd, for 99 years which lease was registered as an encumbrance on MRV certificate of title on 19th March 1912.

20 Subsequently, the 2nd Applicant's predecessor in title, the Uganda Rubber & Coffee Estates Ltd in concert with the 1st Applicant and without an instrument of assignment duly executed, converted the Mailo land into Freehold tenure under Crown Grant No.11467 in favour of the Uganda Rubber & Coffee Estates Ltd. On 20th March, 1926 a freehold certificate was issued in respect of the suit land under FRV 3 folio 13. The land was then transferred into the name of the
25 2nd Applicant's 2nd predecessor in title on 14th May, 1946 and later into the 2nd Applicant's name as successor in title, on 21st July, 1972. The land was affected by the expulsion of Asians in 1972 but was repossessed by the 2nd Applicant in 1991.

The 1st Applicant denied the Respondent's claim stating that the suit land was granted in freehold by the Crown on 20th March, 1926 to the 2nd Applicant's predecessor in title, the Uganda Rubber & Coffee Estates Ltd and is currently registered in the name of the 2nd Applicant as the lawful owner. The suit land has never been owned by Kivuvu (U) Rubber & Coffee Estate Ltd and that
5 it did not emanate from closed register MRV 11, Folio 7 as alleged by the Respondent.

The 2nd Applicant also denied the Respondent's claim and contended that the suit land was never in Mailo and lease tenure. Its predecessor in title was registered as owner of 258 acres of Freehold land in FRV 3 Folio 13 known as Lwanyoni Estate, Kiagwe, Mengo, Buganda and was issued a certificate of title on 20th March, 1926. On 21st July 1972, the 2nd Applicant was
10 registered as owner of the suit property.

The High Court delivered judgment in favour of the Respondent and ordered for the cancellation of the 2nd Applicant's Freehold title and issuance to the Respondent a Mailo land certificate by the 1st Applicant. The trial judge also ordered for vacant possession of the suit land.

Dissatisfied with the decision of the High Court, the Applicants appealed to the Court of Appeal
15 which over turned the decision of the trial judge and ordered that the free hold certificate of title to the suit land be restored to the 2nd Applicant and the Mailo certificate be canceled, if already issued by the 1st Applicant to the Respondent.

The Respondent then appealed to this honourable court against the decision of the Court of Appeal vide **Civil Appeal No.2 of 2016**.

20 When the appeal came up for hearing on the 27th July, 2016 before this Court, the 1st Applicant applied for adjournment of the appeal to file an application for leave to adduce additional evidence. Court granted the adjournment, hence the instant application.

At the hearing of the application, Mr. Sekitto Moses and Mr. Bamwite Moses represented the 1st Applicant while Dr.Byamugisha represented the 2nd Applicant. Mr. Muhwezi Eric, Mr.
25 Tusasiirwe Benson, Mr. Nelson Nerima and Mr. Bernard Mutyaba appeared for the Respondent. The parties adopted their written submissions.

Submissions

Applicants' submissions

In their submissions Counsel relied on Section 7 of the Judicature Act which gives this court original jurisdiction on appeals. Counsel further relied on Rule 2(2) of the Rules of this Court giving inherent powers to this court for the ends of justice to be met. They submitted that this court should invoke its powers under the said law to allow this application to adduce additional evidence.

The Applicants further relied on the case of **Attorney General & Inspector General of Government V Afric Cooperative Society Ltd Misc. Application No.06 of 2012 (SC)**, which sets out guidelines in determining applications for adducing additional evidence. The Applicants' main contention is that the documents listed herein above, elucidate the evidence already on record since they show the history of registration of the suit land and prove that the land belongs to the 2nd Applicant. It is therefore important for this evidence to be admitted in order to meet the ends of justice.

The 1st Applicant submitted that at the time of preparing the defence, she established from the lands registry file in respect of the suit land that it emanated from Crown Grant No.11467. However, at the time of preparing the witness statement, the archived file containing the documents of the grant in respect of the suit land was misplaced. She instructed the registry staff at the head office, the Mukono Registries and all other registries to search for it .But the relentless efforts did not yield any results. Therefore, even at the time of hearing up to the time the judgment was delivered, the file had not been traced. She could not therefore adduce this vital evidence during the trial. She stated that it was only during the exercise of computerizing all land records at the Ministry of Lands that the grant and Conveyance were found on 26th July, 2016, which was after judgment had been passed by the High Court.

Counsel for the 2nd Applicant also asserted in his submissions that this application should be granted since at the time of filing the defence, it was not aware of the said documents. Counsel argued further that this evidence showed that the Respondent's claim against the Applicants was fraudulent right from inception.

It is the Applicants' further submission that owing to the doubt on MRV 11 Folio 7, the Succession Register is important to show that the land was granted and conveyed by the

Governor and registered during the life time of Erasito Mazinga and the same land was converted to freehold during his lifetime. This evidence further touches the issue of locus standi which is a ground in the memorandum of appeal.

In conclusion, both counsel submitted that the documents sought to be adduced are public documents which are credible and capable of belief. The application therefore satisfies the guidelines for applications of this nature as set out in **Attorney General & Inspector General of Government V Afric Cooperative Society Ltd** (*Supra*). Counsel prayed that the application be allowed and the costs should abide the outcome of the appeal.

Respondent's submissions

10 Counsel for the Respondent, on the other hand opposed the application. His contention is that only the 1st Applicant sought for leave to adduce additional evidence. He further contended that the 1st Applicant only sought for leave to adduce two documents discovered in its custody namely; the Indenture and Conveyance. No leave was sought and granted in respect of the Succession Register. Therefore this document should be rejected.

15 Adopting the principles set out in **Attorney General & Inspector General of Government V Afric Cooperative Society Ltd** (*Supra*), counsel for the Respondent submitted that the documents alluded to do not satisfy the principles that justify the grant of leave to adduce additional evidence. He contended that the Indenture and the Conveyance were at all material times in the 1st Applicant's possession and would have been produced if due diligence was exercised. He argued further that the staff who discovered the new evidence did not file an affidavit to explain how and from where the documents were obtained. This evidence is therefore not capable of belief since it is hearsay.

25 Counsel also argued that the Indenture and Conveyance are not credible without an instrument of transfer from Mailo to the Crown. He further contended that the Applicant did not mention the issues which this evidence was intended to address. He also submitted that the evidence to be adduced did not have an influence on the result of the appeal the reason being that the documents confirmed that the Mailo was illegally transformed to freehold without the Respondent's predecessor's transfer instrument duly executed and entered in the register and without the consent of the Buganda Lukiiko.

In respect of the Succession Register, counsel submitted that the 1st Applicant had an opportunity to adduce this evidence in the lower court since it was available and within the knowledge of the 1st Applicant but did not do so. He relied on the case of **Attorney General vs Paul. K. Semwogerere & Others, Constitutional Application No. 02 of 2004 (SC)** in support of his submission. In that case, the applicant sought for leave to admit additional evidence several months after the appeal had been completed. Court found that the evidence in question was available and with due diligence could have been adduced during the course of proceedings. For that reason, Court dismissed the application on the ground that no special condition had been established to warrant the grant of additional evidence.

Secondly, counsel for the Respondent submitted that the Succession Register was neither pleaded nor was it in issue in both the lower courts. Likewise the succession of the Respondent's predecessor is not an issue in the appeal in this court. Thirdly he submitted that the succession register is untruthful since it refers to a different person and not the Respondent's predecessor in so far as it relates to Erasito Mazinga who hailed from the Mamba clan yet the Respondent's predecessor hailed from Kasimba clan and died in 1920. Lastly, he argued that the issue of locus standi is irrelevant to this application since it was determined and pronounced upon by the lower courts.

In conclusion, Counsel for the Respondent submitted that the application did not meet the principles set out in the authorities cited and should be dismissed with costs. In the alternative, counsel prayed that in the event that this application is allowed, the evidence attached to the Respondent's affidavit in reply should also be allowed as additional evidence to counter the Applicants' additional evidence to meet the ends of justice.

CONSIDERATION OF COURT

We have carefully considered the submissions of counsel, the evidence on record, the authorities cited and the law. The essence of this application is the admission of additional evidence by the Applicants to this court. It is trite that in civil appeals such as this one, under Rule 30(1) of the Rules of this court, this court does not have discretion to take additional evidence as clearly provided. The principle is that there must be an end to litigation.

However, it is now settled that according to the decisions of this court in a number of cases including the ones cited in this application, that Rule 2(2) of the Rules of this Court gives this Court the power to admit additional evidence in so far as it elucidates the evidence already on record in order to meet the ends of justice. The relevant part of the Rule provides as follows:

5 “Nothing in these Rules shall be taken to limit or otherwise affect the inherent powers of the court... 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...”

In order for this Rule to apply, however, the Applicant must demonstrate that there are exceptional circumstances where this court, notwithstanding any provision contained in the
10 Rules, will invoke its inherent power under rule 2(2) in exercise of its duty as the final appellate court to justify the grant of leave to adduce additional evidence. This court is guided by the principles set out in the case of **Attorney General V Paul Kawanga Semwogerere & Another**, (*Supra*), followed in the case of **Attorney General & Inspector General of Government V Afric Cooperative Society Ltd**, (*Supra*), setting out useful guidelines in determining
15 applications for adducing additional evidence. This court in both cases stated thus:

“...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
20 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
25 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 of these principles as follows:

5 **“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 application, we need to examine whether the Applicants have satisfied these principles to justify the grant of the order sought.

10 Upon careful consideration of the submissions by counsel, the affidavits on record, the documents to be adduced and the law, we find and conclude as follows;

Regarding the first principle, the Applicants need to prove that the evidence they discovered and which they seek to adduce is *“new and important”* and that it is the 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.”*

15 The 1st Applicant averred that at the time of preparing the defence and witness statement, the file containing the Crown Grant and Conveyance was misplaced. However, in exercising due diligence during the ongoing computerization process of all land records in the lands registry, the registry staff tasked to look for the Crown Grant No. 11467, discovered it on 26th July, 2016 after the judgment of the lower courts was passed.

20 She further averred that the Administrator General only forwarded to her office a certified true copy of the extract of the Succession Register of the Report of death and estate of Erasito Mazinga to His Highness the Kabaka by a letter dated 29th July, 2016. This was in response to her request owing to doubt which had been caused by the document attached to the Memorandum of Appeal by the Respondent as MRV 11 folio 7 which did not have the prefix
25 **MKO2877** as opposed to the one she had relied on in her testimony in the lower courts.

According to the 1st Applicant, this evidence is important to show the succession history of the Respondent’s family and of the suit land.

We note that Counsel for the Respondent objected to the Succession Register. It is however, our considered opinion that this Register is subjective to the Indenture and the Conveyance, since one cannot bequeath what one has never possessed. In any case, Court did not give the Applicants a list of documents to be adduced, when granting the adjournment to file the instant
5 application.

Given the unique circumstances of this case, and upon perusal of the Indenture, Conveyance and the Succession Register intended to be admitted, our considered view is that in admitting the evidence sought to be adduced, it will clarify on the evidence already on record, relating to the
10 land in dispute and will throw more light on the registration, the proprietorship of the suit land and guide this court to finally determine the issues raised on appeal.

For these reasons, we find that the Applicants have satisfied the first principle.

The second principle that the Applicants need to satisfy is that the evidence to be adduced is “*relevant to the issues to be determined by the court*”. The 1st Applicant averred that the evidence
15 sought to be adduced is intended to show that the suit land was granted and conveyed by the Colonial government and registered in the 2nd Applicant’s predecessor’s name before Erasito Mazinga died. This raises the issue whether the Respondent could have succeeded a property which did not even belong to his predecessor in the first place.

Further, we find that the evidence intended to be adduced shows the transactional history of the
20 suit property in the lands register. In our view, this evidence is relevant to the determination of the issues before court, that is, the legal ownership of the suit property.

The third principle that the Applicants need to prove is that the evidence is “*credible in the sense that it is capable of belief.*”

The land registry is a public office charged with administration of land in Uganda. It is an
25 authority as to the ownership and history of registered land. Its evidence would generally be the most credible and capable of belief on issues of land ownership. The Respondent has not challenged this authority.

In light of the above, we find that the evidence to be adduced is credible and capable of belief, in the absence of any evidence to the contrary.

The fourth principle the Applicants need to satisfy is that “*The evidence must be such that, if given, it would probably have influenced on the result of the case, although it need not be*”
5 *decisive.*”

The evidence sought to be adduced is definitely capable of influencing the results of the case, if indeed it is proved that at the time of late Mazinga’s death the land did not belong to him, then his successor the Respondent could not have lawfully inherited it.

The fifth principle the Applicant needs to satisfy is that “*proof of the evidence sought to be*”
10 *adduced should have been attached to the affidavit in support of the application.*”

The evidence sought to be adduced has been attached to the 1st Applicant’s affidavit, as annexure D, E, H and I. In the premises, Court finds that the Applicants have also satisfied that principle.

The sixth last principle the Applicants need to satisfy is that “*the application to admit the*”
15 *additional evidence was brought without undue delay.*”

On this principle, the 1st Applicant’s affidavit averred that the file containing the grant was discovered on 26th July, 2016 at 6.30pm and this application was filed on 3rd August. This was in our opinion expeditious.

In conclusion, and for the reasons given above, we are satisfied that the evidence which the 1st
20 Applicant seeks to adduce was in her possession as Commissioner Land Registration but could not have been produced at the time of filing the defence. 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. Most importantly, we find that the evidence sought to be adduced will not in any way prejudice the Respondent since he will be given an opportunity to
25 challenge it and give his version of the case. In the interest of justice, we accordingly allow this application and order the Applicants to file the following additional evidence within 7 days from the date of this Ruling:

a) **The Indenture in respect to Crown grant No. 11467, registered in Crown Lands Register Volume 39, Folio 4 No. 11467.**

b) **The Conveyance in respect of FRV 3 Folio 13.**

c) **The Extract of the Succession Register No. 1045/34 on the report of death and estate of Erasito Mazinga.**

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The Costs shall abide the outcome of the appeal.

Dated at Kampala this 14th day of February 2017

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B.M.KATUREEBE

JUSTICE OF THE SUPREME COURT

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E. KISAAKYE

JUSTICE OF THE SUPREME COURT

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M. S ARACH-AMOKO

JUSTICE OF THE SUPREME COURT

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5 E.MWANGUSYA

JUSTICE OF THE SUPREME COURT

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10 OPIO-AWERI

JUSTICE OF THE SUPREME COURT