THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL HOLDEN AT KAMPALA

CIVIL APPLICATION NO. 266 OF 2013.

(Arising from Civil Appeal No. 60 of 2010)

GENERAL PARTS (U) LTD:::::::::::::::::::::::: APPLICANT/APPELLANT

=VERSUS=

KUNNAL PRADIP KARIA:: RESPONDENT

RULING

BEFORE HON. JUSTICE R.A OPIO.

This application was brought by notice of motion under **Rule 30 (1) (b) and (2), rule 43 (1) and (2) and rule 44 of the Judicature Act (Court of Appeal Rules).** It is seeking for orders that additional evidence be taken in **Civil Appeal No. 060 of 2010** arising from HCCS 223 of 2006.

The application is supported by grounds contained in affidavit of Hajji Haruna Semakula, the Managing Director of the applicant company, deponed on the 15th August 2013 but briefly are:-

(1) The additional evidence intended to be adduced was not available at the time of hearing HCCS 223 OF 2006.
(2) The evidence intended to be adduced will assist court to determine the dispute between the parties once and for all.
(3) The intended additional evidence will ensure that justice is not only done but seen to be done.
(4) The Respondent shall not be prejudiced if the application is allowed.
(5) It is the interest of justice that this application be allowed.

The additional evidence intended to be adduced are:-

(i) An alleged original certificate of title in respect of plot 14, South Street LRV 184, Folio 4 which the applicant claims has been in the possession of the government of Uganda (DAPCB).
(ii) A Special certificate of title in the names of Kunnal Pradip Karia, the respondent.

The respondent opposed the application interestingly without filing affidavit in reply.

Background:-

The background facts giving rise to this application is somehow interesting. The property in dispute was expropriated during the dictatorial regime of Iddi Amin Dada. In 1995 its former owners, Rajabali Valimahomed Viaya, Akbarali Valimahomed Viaya, Tajdin Alidina Valimahomed and Nurdin Alidina Valimahomed, repossessed the property on which the suit property is located and later on obtained a certificate of repossession. At that time the Applicant was a tenant in one of shops and a flat which comprise the suit premises. The Applicant remained in the premises while paying rent but subsequently defaulted. That status quo forced the former owners to obtain a warrant of distress against the Applicant to recover arrears of unpaid rent. In 2002 the former owners instituted HCCS No. 570 of 2002 against the applicant for eviction order and vacant possession of the property and rent arrears. The Applicant filed a defence and counterclaim in which the Applicant claimed for value of the improvements carried out on the suit property and the value of the goods the plaintiff (former owners) had illegally distressed.

In that suit, the applicant counterclaimed for compensation of ug. Shs. 55,000,000/= being the costs of improvements it carried out on the suit property and also sought to recover ug. Shs. 142,100,000/= being the value of the spare parts distressed from the premises in execution of the warrant of distress. Instead of pursuing the above suit to its logical conclusion in the Commercial Court, the former owners decided to sell the suit property to the respondent in 2006.

It was the contention of the Applicant that the above transaction was illegal, fraudulent, unlawful and was intended to defeat the applicant's claim for the improvements carried out in the suit property. Consequently, the Applicant sued the Respondent vide HCCS No. 223 of 2006 making the same claims for costs of improvements and repairs carried out on the suit property and the value of the goods illegally distressed upon. An attempt was made to consolidate the above suits but was successfully opposed by the defence counsel. Subsequently, when

HCCS No. 223 of 2006 was fixed for hearing before the retired Lady Justice Ann Magezi, learned Counsel for the defence promptly raised a preliminary point of the law to the effect that no cause of action was disclosed by the plaintiff against the defendant (Respondent) because the defendant was not the repossessor (former owners) of the suit property. The presiding Judge agreed with the objection and ruled in favor of the Respondent as follows:-

> **"In conclusion the defendants' preliminary objection is therefore allowed because not having been a former owner of the suit property, he cannot be held liable under the expropriated property Act……"**

An appeal against the ruling of the learned Judge was preferred by the Applicant vide Civil Appeal No. 060 of 2010 and one of the major grounds of the appeal is that the respondent is responsible to compensate the applicant by virtue of the fact that he inherited all liabilities in respect of the suit property as an alleged buyer and therefore his liability is not only to be based on the fact of repossession.

An application for stay of execution of orders in HCCS No. 223 of 2006 particularly for recovery of costs and against eviction of the applicant was lodged vide Misc. Application No. 069 of 2010 which the Registrar allowed on condition that the applicant deposited shs. 156,000,000/= in court or a bank guarantee. The applicant was dissatisfied with the deposit part of the Registrar's ruling and accordingly made a reference to a single Justice of Appeal vide Ref. no. 084 of 2010 where it was held that there were no reasons for imposing such unjustifiable and harsh condition. It was the contention of the applicant that a series of investigations later on unearthed new evidence leading to this application.

Legal arguments

Both parties filed written submissions.

Moses Kugumisiriza, counsel for the applicant submitted, correctly in my view, that the suit under which the application is brought for adducing additional evidence which gave rise to Civil Appeal No. 060 of 2010 in which additional evidence is intended to be adduced, was decided on a point of law of lack of cause of action and was not dismissed as per the ruling of the Retired Lady Justice Ann Magezi dated 26/02/2010. Counsel submitted that the additional evidence they had

applied for was set out in paragraph 23 (a) to the effect that while the former owners were applying for a repossession certificate to the suit premises, they went to the Land Registry and got a 6th November 1995 certified copy of the Registry copy which they used to get the repossession certificate. It was that copy which they used to file HCCS No. 570 of 2002 where they sought eviction orders which has not yet been granted.

The learned counsel submitted that under paragraph 23 (b) of the affidavit, the Registry copy clearly indicated that the property was subject to an encumbrance by the then Grindlays Bank (U) Ltd a fact which the repossessors ought to have known. The learned Counsel contented that according to paragraph 23 (c) of the affidavit, a special certificate of title was later processed and issued directly in the names of the Respondent on the ground that the original had got lost. As contained in paragraph 23 (d) counsel contented that it had been discovered that the government of Uganda had paid and retrieved the original title from Grindlays Bank (U) Ltd and it was in possession of the DAPCB. Counsel submitted further that the suit property was among the eighty (80) properties the government had retrieved in respect of which it has an interest. The learned counsel concluded that the suit property had now been allocated to the applicant in a letter dated 19/10/2012.

For the above reasons the learned counsel submitted that this was a proper case where court should have the additional evidence referred to above admitted/taken for the just disposal of the appeal and settlement of all matters arising.

The learned counsel referred this court to the case of **Attorney General versus P.K Ssemogerere and others, Supreme Court, Constitutional Appeal No. 002 of 2004** which lays down the principles which court has to follow while considering an application for adducing additional evidence.

Mr. Alex Rezida who appeared for the Respondent opposed the application, contending that the alleged additional evidence had nothing to do with the appeal or Civil Suit No. 223 of 2010 from which the appeal arose. The learned counsel submitted that the substance of Civil Suit No. 223 of 2010 and the subsequent appeal it gave rise to, facts admitted by the plaintiff in paragraph 6 of the affidavit in support of the application was:

(i) A claim for costs of improvements carried out on the aforesaid property.

(ii) The value of goods distressed upon after the applicant failed and /or refused to pay rent for part of the premises it occupied on the suit property.

The learned counsel contended that the above claims of the applicant were not about legal proprietorship of property. Counsel accordingly submitted that the additional evidence which was basically land titles pointed to questions of legal proprietorship which was neither the concern of the aforesaid Civil Suit nor the current appeal. It was accordingly the Respondent's submission that the alleged additional evidence was seeking to introduce a new cause of action, that is, the bonafides of repossession for which the applicant had no locus standi at all. The applicant was only a tenant and its claims arose from the said tenancy. It would be absurd for a tenant to start questioning legal proprietorship of the property at this stage. Moreover under paragraph 4 and 5 of the affidavit in support, the applicant clearly admitted that the property, subject of the additional evidence was indeed repossessed by its former Asian owners and no question about it arose or ought to arise in the appeal. The learned Counsel emphasized that if at all the government had paid money to Grindlays Bank (U) Ltd as alleged by the appellant, it would be the government as the aggrieved party and the one with locus to commence any action in respect to the repossessed property. The learned counsel concluded that additional evidence should only be taken in the discretion of court only in exceptional cases.

Decision of the court.

The need to adduce additional evidence has been a long time common law practice. The courts of law have long championed the doctrine that **interest republiceae ut sit finis litium,-** *it is the interest of the state that there be an end to litigation*. The background of the above doctrine is that 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. On the other hand, courts must administer justice and in exceptional circumstances, new evidence should be allowed. The appellate court should weight these two interests when determining whether a party may adduce additional evidence not presented at the original trial.

The principles to be applied by the Appellate court when considering whether to call an additional evidence was laid down since decision of **Lord DENNING** in the case of **Ladd VS Mashall** [**1954] IWLR 1491:-**Those principles are as follows:-

(1) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trail.

(2) 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.

(3) 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 vs Mashall** was approved in **Skone VS Skone [1971 IWLR 817]**. In East Africa it was followed in **Mzee Wanje and others vs Saikwa & others [1976-1985] I.E.A 364 (CAK) and A.G vs P.K Ssemogerere & others Constitutional Application No. 2 of 2004(SCU).**

In the case of **Mzee Wanje (Supra)** 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.**

In Uganda, **Rule 30 of the Court of Appeal Rules** grant the Court of Appeal discretionary power to hear additional evidence, for sufficient reasons. The above rule is the handmaid of **Article 126 of the Constitution** which advocates that in adjudicating cases the courts should apply the principle of substantive justice. That in essence means that the role of the Court of Appeal is not only about law but about justice.

Sufficient reasons were defined by the **Supreme Court in Attorney General VS Paul K. Ssemogerere & others, Constitutional Application No. 2 of 2004.** In that case, the Supreme Court relied on the authorities in **Ladd vs Mashall and Skone VS Skone (Supra),** among others, and observed that an appellate court may exercise it discretion to adduce 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 adduce additional evidence should have attached to it proof of the evidence sought to be given.

(vi) The application to adduce additional evidence must be brought without undue delay.

As noted from above, the court expanded the principles in Ladd VS Mashall and emphasized the doctrine that litigation should come to an end in the following terms:-

> ***"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 in 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 reopen a case, which has already been completed on appeal"***

In the instant case, what I consider strange is that the appeal which is under investigation arose out of a ruling on a preliminary point of law of lack of cause of action. The matter did not go on trial on its merits. No evidence was adduced by the parties. The trial court struck out the plaint after looking at the pleadings and the annexures thereto. In legal parlance additional evidence would presuppose that there was evidence adduced at the trial. Since no evidence was led, the applicant's case does not fall within the ambit of the court of Appeal rule 30 (1) (b) of the Court of Appeal rules and the case of **AG. VS P.K Ssemogerere & others (supra)**.This is because the role of the appellate court

in the instant matter would not be reappraising evidence but would be determining whether the plaint discloses a cause of action. That role would be accomplished by only looking at the plaint and its annexures. See **Tororo Cement Co. Ltd vs Frokina International Ltd Civil Appeal No. 2 of 2001 (SC**).That task does not require any evidence or additional evidence however formidable it may be. Therefore, I find the intended additional evidence not relevant to the trial on appeal and would not influence the appellate court because it has no bearing on the issues on appeal. The same also lacks credibility because it is a stranger to the proceeding in so far as it brings in a new cause of action by vesting in the applicant proprietary rights over the suit property. The original cause of action was based on the claim that the Respondent was responsible to compensate the applicant by the fact that he inherited all liabilities in respect of the suit property from the former owners. In the new cause of action the applicant is challenging the process of repossession.

Again, what is strange here is that it is the government of Uganda which would be dispossessed and the one that would have locus standi to apply for additional evidence as the interested party. In **Mudasi VS Uganda [1999] EA 193 (SCU)** it was held that an application to call additional evidence must be made by the interested party.

The applicant being a stranger to the process of repossession is not an interested party and cannot competently move court for additional evidence.

For those reasons I find that the application misplaced, grossly misconceived, a misdirection and premature. It is accordingly dismissed with costs.

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Hon. Justice R.A Opio, JA.
11/11/2013

11/11/2013

Moses Kuguminkiriza for the applicant
Bwayo Richard for the Respondent, Applicant's managing Director is not Resp .
Ruling read in open court.

Moses Kuguminkiriza I am instructed to appeal the ruling, I pray for the typed copies of the ruling.

Court: Pick the ruling on Tuesday next week at 2:00 pm

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Hon. Justice R.A Opio, JA.
11/11/2013