

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

**CIVIL APPLICATION NO.133 OF 2014**  
**(ARISING OUT OF CIVIL APPEAL NO.122 OF 2013)**

**MAKUBUYA ENOCK WILLIAM**

**T/A POLLY POST .....APPLICANT/APPELLANT**

**V E R S U S**

**BULAIMU MUWANGA KIBIRIGE T/A**

**KOWLOON GARMENT INDUSTRY.....RESPONDENT**

**CORAM: A SINGLE JUSTICE**  
**HON. JUSTICE RICHARD BUTEERA**

**RULING:**

This is an application brought by way of Notice of Motion under Article 126 of the Constitution, Rule 2(2) of the Judicature (Court of Appeal Rules) Directions S1 13-10, Rule 30 of the Judicature (Court of Appeals Rules) Directions S1 13-10 and Section 80(1)(d) of the Civil Procedure Act Cap 71.

It seeks for orders that:

- 1) The applicant be allowed to adduce additional evidence to be relied upon during the hearing of Civil Appeal No.122 of 2013.**
- 2) Costs of the application be provided for.**

The application is supported by an affidavit sworn by the applicant and is based on the following grounds:-

- 5 a) **The intended additional evidence was not available to the trial judge during the hearing of Civil Suit No.37 of 2013 by reason of negligence of counsel engaged to represent the applicant.**
- 10 b) **The intended additional evidence was within the possession of the applicant's former lawyers who did not bring the same to the attention of the trial judge due to their negligence.**
- c) **The intended additional evidence is credible, material and relevant to the issues in Civil Appeal No.122 of 2013.**
- 15 d) **The additional evidence is to enable this Honourable Court reach a fair and just decision and to avoid multiplicity of suits.**
- e) **The respondent is not likely to suffer any injustice and/or prejudice if the application is granted.**
- 20 f) **It is in the interest of substantial justice that this application be granted so that the applicant can be given a right to be heard.**

At the hearing learned counsel, Mr. Medad Segooona and learned counsel Mr. Mpairwe Tumwebaze, appeared for the applicant.

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Learned counsel, Mr. Frederick Mpanga and learned counsel, M/s Dorothy Kabugo appeared for the respondents.

The background facts to this application are briefly the following: -

- 5 The applicant's counsel was in possession of the additional evidence and by negligence failed to bring it to the notice of the trial judge at the High Court. The intended additional evidence is on the record of appeal as annexures A1, A2, A3, B, D1 and DII. The applicant regards the additional evidence as material and relevant in Civil Appeal No.133/2014 pending before this Court.

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Counsel for the applicant, submitted that the failure to adduce the additional evidence was by negligence of the appellants' counsel which should not be visited on the appellant.

- 15 Counsel's submission was that if the additional evidence was adduced the Court would have been found that the case was res judicata.

Counsel contended that allowing the applicant to adduce additional evidence will not prejudice the interest of the respondent who is in any case already aware of the same and is in possession of the evidence.

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The application was opposed by both counsel for the respondent. Learned Counsel, Dorothy Kabugo, submitted that the application should be dismissed with costs as the purported additional evidence does not qualify to be allowed.

- 25 Counsel submitted that the application did not meet the required standard for Court to allow additional evidence to be adduced.

Counsel submitted that the additional evidence was not new. It was always in the possession of the applicant and his lawyer.

5 Counsel further submitted that the failure to adduce the evidence was not a result of negligence by counsel for the appellant. It was because counsel for the applicant, then knew that the evidence was irrelevant to the subject matter before the trial court. That counsel for the applicant had deliberately left out the evidence and he was not negligent. Counsel contended that there was no evidence adduced  
10 to show that counsel was negligent. That the allegation was an afterthought. According to counsel, the application to adduce additional evidence was being used to raise a new cause of action that was not before the lower court.

Counsel contended that the application to adduce additional should not be allowed  
15 as the parties at the lower court suit are different from the parties before this Court and the applicant was not party to the lower court suit.

Counsel for both parties submitted that the application was properly before this court and it was a matter over which a single judge has jurisdiction to handle.

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The decision of the Court:

This application was brought under article 126 of the Constitution, Rule 2(2) of the Judicature (Court of Appeal Rules) Directions S 13-10, Rule 30 of the Judicature  
25 (Court of Appeals Rules) Directions S1 13-10 and Section 80(1) (d) of the Civil Procedure Act Cap 71.

At the hearing of this application I asked both counsel to address Court on whether this was a matter that should be handled by a single judge.

Both counsel submitted that a single judge has the jurisdiction to hear the  
5 application.

I have studied the provisions of the law under which the application is premised and also considered the submissions of both counsel on this issue of jurisdiction of this Court sitting as a single judge.

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Under Section 80 of the Civil Procedure Act, as an appellate Court this Court has the power to take additional evidence or to require that additional evidence be taken. Under Rule 30 of the Rules of this Court this Court may in its discretion, for sufficient reason, take additional evidence.

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S.12 (1) of the Judicature Act provides as follows:-

**“A single Justice of the Court of Appeal may exercise any power vested  
in the Court of Appeal in any inter locutory cause or matter before the  
20 Court of Appeal.”**

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Rule 53(1) and (2) of the Court of Appeal Rules S.1 No.13-10 provides for applications that may not be heard by a single justice. This application is not one of those listed under Rule 53(2) that may not be heard by a single justice.

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I agree with both counsel, therefore, that a single judge may hear an application for allowing of additional evidence.

The question, however, is whether in the circumstances of the instant case this application should be handled and disposed of by a single judge.

The principles and conditions an appellate court has to consider in order to exercise its discretion to allow an application such as the present one have been stated by the Supreme Court in the case of **Hon. Bangirana Kawoya vs National Council of Higher Education Misc. Application No.8 of 2013.** The Court with approval quoted its earlier decision of **The Attorney General versus Paul K. Ssemwogerere and Others, Constitutional Application No.2 of 2004 (SCC 2/04) unreported.** Where the Court quoted various authorities and eventually held as follows:-

**“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;

5 (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;

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

15 **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.”**

20 I have considered the conditions and standards set for admission of additional evidence. I have also considered the circumstances of the instant case and the nature of additional evidence sought to be adduced.

25 I find the issue of the additional evidence here is intertwined with other issues that go to the whole substance of the appeal. Allowing or not allowing admission additional evidence in this matter would in terms of justice be best considered and

adjudicated upon by the Court which will have the capacity to determine the appeal finally.

I have taken note of the fact that both in the Attorney General vs Paul Ssemwogerere (supra) and Hon. Amifa Bangirana Kawooya vs The Attorney General (supra), when handling the applications the Court was sitting as a full Court. I also find that the six principles that the Court has to consider before exercising its discretion on whether or not it admits additional evidence are quite substantial. The Court's determination of the issue has a critical impact on the disposal of the whole appeal.

I find that for attaining the ends of justice, the discretion to allow or not to allow the additional evidence should be exercised by the full Court which has power to determine the appeal rather than by a single judge.

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I, therefore, under rule 2 (2) and rule 53(1) of the Court of Appeal rules refer this application to the full Court for determination.

The costs of this application shall abide the outcome of the main appeal.

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Dated at Kampala this 31<sup>st</sup> day of July 2014.

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Hon. Justice Richard Buteera  
**JUSTICE OF APPEAL.**