

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**MISC. APPLICATION .NO. 109 OF 2015 (ARISING OUT OF CIVIL APPEAL
NO. 008 OF 2012)**

KACHRA INVESTMENT COMPANY LTD.....APPLICANT

VERSUS

1. MBALE MUNICIPAL COUNCIL

LOCAL GOVERNMENT

2. ABDU SALLAM LUBOWA

RESPONDENTS

3. MASH INVESTMENT LTD

CORAM: HON, JUSTICE .S. B. K. KAVUMA, DCJ

RULING OF THE COURT

Introduction

This is an application for orders that the applicant be granted leave to adduce additional evidence and for the costs of the application to be in the cause. It is brought by way of Notice of Motion under Rules 30 (1) (b) and (2), 43 (1) & (2) & 44 (1) of the Judicature (Court of Appeal Rules) Directions, S.1.13-10. It is supported by the affidavit of Sadrudin Alani, one of the Directors of the applicant. It is dated 30th April 2015.

Background

The background to the application, as deduced from its affidavit in support, is that the applicant was the unsuccessful party in High Court

Civil Suit No.008 of 2012 where judgment was delivered on 22nd August 2014 and the applicant preferred an appeal against the same.

During the hearing, one of the issues raised was whether the suit land was Plot 15A Bishop Wasike Road or Plot 20, Maluku Road. The 1st and the 2nd respondents denied knowledge of Plot 20 Maluku Road.

At the trial, the 1st respondent relied on a photocopy of the title deed for the land comprised in LRV 502 Folio 6 which was also heavily relied upon by court to deliver the judgment against the applicant. Subsequent to the delivery of the said judgment, on 17th October 2014, the Commissioner Land Registration noticed the abolition of the lease comprised in LRV 502 Folio 6 which had been erroneously issued. By the time the Commissioner communicated the error on LRV 502 Folio 6, judgment had already been issued against the applicant.

A letter on the said cancellation from the Commissioner Land Registration was sent to the Directorate of Land Matters, State House, which office sent a copy of the same to the applicant after the trial in the lower court. The title deed for LRV 502 Folio 6 was admitted in evidence during the trial in the lower court as EX MMCA, despite the fact that the applicant was, during the scheduling in that court, objected to the use of the exhibit because it was a photocopy of the Land's Registry Office copy when the applicant demanded for the original duplicate title for LRV 502

Folio 6 during the trial, the 1st and the 3rd respondents undertook to provide it but they never did.

It is further contended that the additional evidence sought to be adduced, the Newspaper article dated 28th June 2013 and the letter from the Commissioner Land Registration dated 17th October 2014 were not available to the applicant during the hearing of the matter in the lower court.

Reply to the application

In reply to the application, an affidavit dated 16th June 2015 was sworn by the 2nd respondent. He averred, *inter alia*, that during the conferencing, an issue was framed as

to whether the suit plot was Plot 15A Bishop Wasike Road or Plot 20, Maluku Road and the respondents adduced evidence to the effect that the plot was 15A Bishop Wasike and not Plot 20 Makulu Road. He added that a representative of the applicant, Sadrudin Alani, gave evidence in the lower court admitting that he applied for Plot 15A Bishop Wasike Road and not Plot 20 Makulu Road and that a mere Newspaper could not change anything regarding the position of the court. It was basing on the evidence of the applicant and the respondents that the trial Judge was convinced that the suit plot was 15 A Bishop Wasike Road.

He also averred that he was not aware of the advert and that it was made on 28th June 2013 when he had already left the plot since he disposed of his interest in Plot 15A, Bishop Wasike Road between 2010 and 2011.

Representation

At the hearing of the application, the applicant was represented by Mr. Semakula Muganwa Charles, (counsel for the applicant), while the 2nd respondent was represented by Mr. Mutembuli Yusufu (counsel for the 2nd respondent), and the 1st and the 3rd respondents were represented by Ms. Kanyago Agnes, (counsel for the 1st and the 3rd respondents).

The case for the applicant

Counsel for the applicant heavily relied on the affidavit in support of the application and submitted that the additional evidence sought to be adduced was not available at the time of trial. He contended that the letter from the Commissioner Land Registration was issued on 17th October 2014, much after the delivery of the judgment. To him, had that evidence been available, it would have assisted court to have a better perception of the whole matter.

Counsel submitted that additional evidence is admitted if the evidence could not have been obtained during trial, if it has an important influence on the outcome of the appeal and if it appears credible. He argued that these pre-requisites had been brought out in the instant application. He cited the case of **American Express International Banking**

Corporation v Atulkumar Sumant B. [1987] HCB 34.

He prayed that court allows the application.

The case for the respondents

Counsel for the respondents submitted that additional evidence can only be accepted in special circumstances which must be proved and that the power of court to accept it is discretionary.

Counsel contended that the evidence sought to be relied on by the applicant was not new and that it would not have any influence on the appeal. He stressed that at the lower court, an issue was framed as to whether the suit land was Plot 15A Bishop Wasike Road or Plot 20 Makulu Road and that the appellant adduced evidence to prove that the suit property was Plot 20 Makulu Road. He added that the respondents produced a Lease Offer to prove that it was Plot 15A. It was his argument that on the basis of that, the property was established to be Plot 15 A.

Counsel argued that the same issue was before the appellate court Annexure A of the application was a mere advert calling upon the 2nd respondent to pay rent. He noted that this was on the 28th day of June 2013 when the matter was in court. Counsel emphasized that the 2nd respondent did not own Plot 20 but Plot 22 and that sufficient evidence had been adduced by the applicant in regard to Plot 20. To counsel, the advert evidence would not add up to anything. Counsel added that the advert was on behalf of Mbale Industrial Division and not on behalf of Mbale Municipal Council.

Regarding the letter of 17th October 2014, counsel argued that this was after judgment and after the filing of the appeal and to them, the Commissioner's act was irregular and illegal. The Commissioner stated that the land was PLA 502/ Folio 6 and was a Statutory Lease. He noted that at trial, the question was whether the land was a statutory or private lease and that the issue was resolved after the parties had adduced evidence and the Registrar of Titles, one Kakerewe Yusuf, testified that it was a Statutory Lease. Counsel submitted that this was a question of law and not of fact and argued that adducing Annexure B would not

influence the decision on appeal.

He referred to the authorities of General Parts (U) Ltd v Kunnal Karia C. A. Civil Application No. 266 of 2013; Attorney General v P. K. Ssemogerere & Others Constitutional Application No. 2 of 2004.

He stated that the applicant had failed to prove that it is necessary to grant leave to adduce additional evidence as no exceptional circumstances had been proved. He added that the applicant had not proved that they exercised due diligence to access that evidence at the time of trial and failed. He argued further that for additional evidence to be admitted it must be evidence that was available at the time of the trial and yet Annexure B was not available and to counsel, it does not fall within the ambit of additional evidence that can be adduced.

Reply

Counsel for the applicant stated in rejoinder that the respondents had not reviewed the events in the correct order. He stressed that the description of the suit land is a ground of appeal and that the applicant exercised due diligence but the evidence was not available at the time of the trial. He contended that concerning the advert, the Division is part and parcel of the Municipality.

Court's consideration of the application

In the instant application, this Court derives its authority from Rule 30 of the Judicature (Court of Appeal Rules) Directions S.I.13-10, particularly 30 (1) (b) which provides:

“(1) On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction,

the court may—

(b) In its discretion, for sufficient reason, take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner.”

In exercising that discretion, the court is guided by well-established principles. In **American Express International Banking Corporation v Atulkumar Sumant B. Patel [1987] HCB 35**, it was held:

“The principles upon which additional evidence could be granted cited in all these authorities were crystal clear and could not be bent to meet a situation in any given case unless it was shown that such evidence was not available at the time of trial , secondly it should be shown that there was due diligence in obtaining it and thirdly that the evidence would have an important influence on the outcome of the case if produced.”

The Supreme Court authority of Attorney General v Paul .K. Ssemogerere and Others Constitutional Application No. 2 of 2004,

cited a number of authorities which are relevant to the court's discretion to admit

additional evidence and thereafter stated:

“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 Supreme Court, in justifying its reasoning for these stringent conditions further stated:

“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.”

In the instant case, counsel for the applicant’s argument for bringing this application is that at the time of the trial, the controversy as to the identity of the suit land was premised on a photocopy since the respondents had

failed to produce the original although they had undertaken to do so. He also observed that after the judgment had been delivered, the applicant was able to obtain information from the Commissioner Land Registration clarifying that the Statutory Lease registered on Volume 502 Folio 6 was among those abolished by the 1995 Constitution, and as such the Special Certificate of Title that had been issued in 2007 was erroneous.

It is evident to court, from the record and the affidavits and the attached annexures, that indeed the letter of 17th October 2014 clarifying the status of the disputed land came after the 22nd of August 2014 when the judgment was delivered.

Further ,it is discernible from the record that at all the material time efforts were

continually made by the applicant to access this piece of evidence, in vain. I am further satisfied that the additional evidence sought to be adduced is not only relevant but also, if given, would probably influence the final outcome of the appeal. I am further still, satisfied that the evidence sought to be adduced appears credible.

Notably, this application was filed on 5th May 2015, while the judgment of the lower court had been delivered in August 2014. However, given all the peculiar circumstances of this application as revealed hereinabove, I find it a fit and proper one to invoke, as I indeed hereby do, the provisions of **Article 126 (2) (e)** of the Constitution in the pursuit of substantive justice without undue regard to technicalities.

For the above reasons, I find that the application to adduce additional evidence in this case fulfills the special conditions cited in the authorities above. It hereby succeeds. I, therefore, allow the same and order that:

- 1. This Court shall take the additional evidence sought to be adduced by the applicant.**
- 2. The costs of the application to abide the outcome of the appeal.**

I so order

Dated at Kampala this 28th day of October 2015

S.B.K Kavuma

Deputy chief justice