

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT GULU  
MISCELLANEOUS CIVIL APPLICATION No. 0136 OF 2018  
(Arising from Civil Appeal No. 044 of 2017)**

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**THE REGISTERED TRUSTEES OF THE } ..... APPLICANTS  
CHURCH OF UGANDA OF KITGUM DIOCESE }**

**VERSUS**

- 10 1. **MRS. PERECI ORYEMA }  
2. **D.D. OLWENY }  
3. **EMMANUEL OPIGE }  
4. **TITO OLWORD }  
5. **EMMANUEL B. ONEKA }  
15 6. **JEREMIYA OPIRA }  
7. **OJERA ONEN }  
8. **MISS AMO }  
9. **OGWANG J. B. } ..... RESPONDENTS  
10. **TINA (CHRISTINE) }  
20 11. **OLWENY PETER }  
12. **LAGUT ABUDONI }  
13. **BENONI OLING }  
14. **SALUME APACO }  
15. **JOHN OBODA }  
25 16. **BONGMIN MICHAEL }  
17. **JOSEPHINE TOOLIT }  
18. **EVARINA ODOTA }  
19. **SIMEON LANGOYA }**************************************

30 **Before: Hon Justice Stephen Mubiru.**

## **RULING**

This is an application under the provisions of section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, and Order 52 rules 1 and 3 of *The Civil Procedure Rules*, for leave to  
5 adduce additional documentary evidence, at the hearing of the appeal. It is supported by the affidavit of a one Rev. Canon Lamto Oryem in which he deposes that although the trial proceeded in respect of LRV 2234 Folio 20 Street No. 31 Chua Block 3 measuring approximately 79.2 hectares, he has since discovered that part of that land is comprised in FRV  
10 50 Folio 24 measuring approximately 50 acres. Furthermore, that some of the respondents are occupying land constituted in the latter title. He has also recently discovered some correspondences indicating that the applicant in the past complained about the second respondent's trespass on their land. Those documents were recently retrieved from the archives of the Church of Uganda in Kampala and could not be retrieved earlier because it had been believed that they had been lost during the LRA war. The new evidence will prove that the applicant has  
15 at all material time been the registered owner of the land in dispute.

In his affidavit in reply, the second respondent opposes the application and instead contends that he is lawfully resident within the 50 acres decreed to the applicant, which he is willing to vacate provided that he is compensated for his developments on the land. On her part, in her affidavit in  
20 reply the first applicant contends that except for the second respondent, she and the rest of the respondents do not live within the 50 acres decreed to the applicant. Therefore, the documents intended to be introduced by the applicant on appeal will not influence the decision of the trial court. In any event, the said documents have all along been in custody of the applicant and could have been obtained by exercise of reasonable diligence. It is not indicated in the affidavit  
25 supporting the application that any efforts were made towards finding and retrieving the said documents. She prayed that the application be dismissed.

In an affidavit in rejoinder, Rev. Canon Lamto Oryem states that the trial court made its decision in what it considered to be land held by the applicant under a temporary license, oblivious to the  
30 fact that the 50 acres were comprised in FRV 50 Folio 24. Unknown to the applicant, the relevant documents were all along available in the archives to the Church of Uganda at Kampala

where they had been transferred after a raid by rebels on the applicant's premises during the insurgency as a result of which many documents of the applicant were burnt.

Submitting in support of the application, counsel for the applicants Mr. Henry Nyegenyi argued  
5 that paragraph 6 of the applicant's affidavit in rejoinder explains that there was a raid by rebels  
on the applicant's premises during the insurgency as a result of which many documents of the  
applicant were burnt. It was believed that the documents now sought to be produced were  
destroyed. During the trial, it is averred in paragraph 7 that they tried the Central archives but  
they could not find them. The title they intend to adduce therefore could not readily be availed.  
10 Once produced in evidence, it will show that there is an overlap of titles; the freehold and a  
leasehold over the same land. The dispute is over the entire land but the counterclaimants did not  
have any title. The raid on the church and the eventual carving out of new dioceses caused the  
applicant to lose track of these documents. They had no knowledge of the existence of the title.  
They had a lease title and they believed it was the only title and it is on basis of that title that they  
15 went to court. Although they were involved in twelve years of litigation during the trial,  
paragraph 7 of the affidavit in rejoinder shows that they took futile steps towards obtaining the  
documents they now intend to adduce. He prayed that the application be allowed.

Submitting in reply, counsel for the respondents Mr. Donge Opar argued that the documents  
20 sought to be introduced on appeal cannot change the decision of the lower court because they all  
relate to the 50 acres of land which the trial court decreed to the applicant. It is the excess of the  
50 acres that was obtained fraudulently. The applicant all along was in possession of the  
documents and they have not indicated what efforts, if any, they made to trace the documents.  
Para 7 and 8 of the affidavit in rejoinder, tries to explain their efforts but this is just an  
25 afterthought. The case was filed by the applicant itself and they should have made due diligence  
before filing the case, which was not done. Right from November, 2017 when judgment was  
passed up to December 2017 when the appeal was filed, a period of over seven months, the  
applicant did not take steps to file this application and this is undue delay. Matters in court must  
end. He pray that the application be dismissed because it has no merit.

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Having perused the pleadings filed by all parties, listened to the submissions of both counsel and addressed my mind to the principles of the law governing applications of this nature, I found the application lacked merit and consequently delivered an *ex tempore* ruling dismissing it with costs to the respondents, undertaking to explain the reasons in more detail in this ruling.

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It is trite that litigation must come to an end. In *Brown v. Dean* [1910] AC 373, [1909] 2 KB 573 it was emphasised that in the interest of society as a whole, litigation must come to an end, and “when a litigant has obtained judgment in a Court of justice.....he is by law entitled not to be deprived of that judgment without very solid grounds.” For that reason, Lord Loreburn LC considered an application for a new trial on the ground of *res noviter*, and said in relation to the exercise of a power to admit further evidence if it was thought “just”, then the evidence;

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Must at least be such as is presumably to be believed, and if believed would be conclusive.....My Lords, the chief effect of the argument which your Lordships have heard is to confirm in my mind the extreme value of the old doctrine “*Interest reipublicae ut sit finis litium*”, remembering as we should that people who have means at their command are easily able to exhaust the resources of a poor antagonist.

The maxim *interest reipublicae ut finis litium* is strictly followed. 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. Courts hence tend to be stringent in allowing a party to adduce additional evidence on appeal, thereby re-opening a case, which has already been completed. On the other hand, courts must administer justice and in exceptional circumstances, new evidence should be allowed. The appellate court should weigh these two interests when determining whether a party may adduce additional evidence not presented at the appeal stage. In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the court. An obligation rests on the parties to adduce any material evidence before the court, and if they fail to do so they cannot require a second hearing to put the matter right.

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Exceptionally, however, justice conflicts with the principle of finality. Evidence sometimes emerges which suggests that the court may have reached the wrong decision in circumstances where it might be unjust not to reopen the judgment. Hence the courts have developed principles for determining when justice requires a case to be re-opened and a new trial ordered. The  
5 jurisprudence is longstanding but the principles were pithily encapsulated over by Denning LJ, as he then was, in *Ladd v Marshall* [1954] 1 WLR 1489 at 1491.

In that case, at the trial, the wife of the appellant's opponent said she had forgotten certain events. After the trial she began divorce proceedings, and informed the appellant that she now  
10 remembered. He sought either to appeal admitting fresh evidence or for a retrial. The Court considered guidelines for the admission of new evidence on an appeal against the background of its availability at the first hearing. Such evidence might be admissible where a witness had made a material mistake and wished to correct it. If a witness had been bribed or coerced into telling a lie and wished to correct it, then a retrial might be appropriate. Per Lord Denning:

15 First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, 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; thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be  
20 incontrovertible. 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 v. Mashall* was approved in *Skone v. Skone* [1971] 1 WLR 817 where the husband appealed, seeking a new trial of a divorce petition following the discovery of fresh  
25 evidence consisting of a bundle of love letters from the co-respondent to the wife clearly showing that, contrary to his sworn evidence, he had committed adultery with her. The court admitted the fresh evidence on grounds that a strong prima facie case of wilful deception had been disclosed, and a new trial was ordered. In that case, Lord Denning said:

30 It is very rare that an application is made for a new trial on the ground that a witness has told a lie. The principles to be applied are the same as those when fresh evidence is sought to be introduced. In order to justify the reception of fresh evidence for a

new trial, three conditions must be fulfilled: first it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; third, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, although it need not be incontrovertible.’

In agreement, Lord Hodson said:

Assuming, as I think your Lordships must for the purposes of this application, that the letters sought to be tendered as evidence are genuine, the basis of the judge’s finding of fact at the trial has been falsified to such an extent that to leave matters as they are would, in my opinion, be unjust.....A strong prima facie case of wilful deception of the court is disclosed....” and “The situation of the wife is or was, however, at the material times a peculiar one in that she was in the opposite camp in the sense that she was anxious not to do anything without the approval of the co-respondent, feeling that her interests were bound up with his. The petitioner was advised by counsel, as I have said, and I find it impossible to hold that in these circumstances it is right to hold that the petitioner failed to exercise due diligence in this matter.

Those principles were followed in *Mzee Wanje and others v. Saikwa and others [1976-1985] I E.A 364 (CAK)* and *Attorney General v. P. K Ssemogerere and others Constitutional Application No. 2 of 2004(SCU)*. In the case of *Mzee Wanje* 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.

The principles and conditions to be followed for the admission of additional evidence on appeal were re-stated by the Supreme Court in *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, Civil Application No. 133 of 2014* and in *Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013* where it held:

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, were 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 evidence sought to be given;
- vi. The application to admit additional evidence must be brought without undue delay.

It was further held in *Karmali Tarmohamed and Another v. T.H. Lakhani and Co. [1958] EA 567*, and *Namisango v. Galiwango and another [1986] HCB.37* that except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available. It is an invariable rule in all the courts that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial

For such a reason, in *Hon. Anthony Kanyike v. Electoral Commission and two others C.A Civil Application No. 13 of 2006, arising from C.A. Election Appeal No. 4 of 2006*, it was decided that fraud was an exceptional circumstance enough in itself to justify leave to adduce additional evidence on appeal to prove that at the trial of the petition, the 3<sup>rd</sup> respondent, fraudulently told a lie to court about his names and that the court believed his lie hence its judgment in his favour. This would be proved by way of evidence of records of entry of the 3<sup>rd</sup> respondent into Senior One at St. Mary's College Kisubi as opposed to the one he used in his Nomination papers for the 23<sup>rd</sup> February 2006 Parliamentary elections for the Constituency. It was also admissible as evidence that elucidated on the evidence that had emerged from or was already on record, to ensure that the ends of justice are attained.

Hence in exceptional cases, the appellate court will under Order 43 rule 22 (1) (b) of *The Civil Procedure Rules* take in evidence at the appellate stage that elucidates on the evidence already on record, as opposed to the introduction of an altogether new matter, that was never raised or does not emerge at all from the evidence already on record (see for example *R. v. Yakobo Busigo s/o Mayogo (194.5) 12 EACA 60* where the Court of Appeal for Eastern Africa made a distinction between new evidence in a trial and evidence adduced to elucidate evidence already on record).

Appellate courts will not admit additional evidence which introduces a matter that is new altogether, which was never raised or does not emerge at all from the evidence already on record. For example in *Regina v. Secretary of State for the Home Department ex parte Momin Ali, [1984] 1 WLR 663, [1984] 1 All ER 1009*, the fresh evidence that was sought to be introduced was clearly available and should have been placed before the trial Judge. On application to the appellate court for its admission as additional evidence, it was held that it was not the function of the court, as an appellate court, to retry the matter on different and better evidence. We are concerned to decide whether the trial judge's decision was right on the materials available to him, unless the new evidence could not have been made available to him by the exercise of reasonable diligence or there is some other exceptional circumstance which justifies its admission and consideration by this court. That was not in this case.



The affidavit in support of the application has attached to it, copies of the documentary evidence sought to be adduced as additional evidence on appeal. I examined the nature of this additional documentary evidence intended to be introduced on appeal. From the affidavit in support and the documents attached, I could safely deduce the import of the documentary evidence the applicants  
5 sought to adduce. They in essence sought to prove that they have since April, 1937 been the registered owners in freehold, of 50 acres out of the 79 hectares of the land in dispute, which the trial court had decided they own under a temporary occupation licence.

That being the case, although it is evidence which on the face of it was capable of belief, the  
10 applicants failed to prove that it is relevant to the grounds to be decided on appeal since proof of such a fact is irrelevant to the determination of the dispute between the two parties to the appeal, yet one of the principles which must be satisfied is that the applicant must show that the evidence is relevant to the issues to be decided. It is not evidence of such a nature which if given, would probably have any influence on the result of the case. It instead is evidence which introduces a  
15 matter that is new altogether, which was never raised or emerged at all from the evidence already on record. If admitted, it would greatly alter the whole shape of the case to make the case decided on appeal entirely or, at the very least, substantially different from that decided at the trial. It would have placed this court in a dilemma of determining, without explanatory testimony, as to how the applicants can be both lessees and freehold title owners of the same  
20 tract of 50 acres of land. This court would in effect have ordered a new trial yet that is not the purpose of proceedings of this nature. In any event, the trial court already found the applicants' exclusive possession of the 50 acres to be justified, albeit on different grounds.

It is further a cardinal requirement in applications of this nature that the evidence sought to be  
25 adduced should be shown to have been discovered as a new and important matter 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 by, the party seeking to adduce it as additional evidence. The only exception is where the evidence elucidates on the evidence already on record, which I have already found that it does not in this case. To avoid this requirement, the applicants argue  
30 that although the evidence was all along available at the central archives of the Church in Kampala during the trial, for some they were unable to locate it and to adduce it in court.

Nowhere in the affidavit in support of the application or in rejoinder is it intimated that a search was conducted at the Land registry, which would be the more reliable source of such information. Information regarding the identity of the person who eventually retrieved the documents, the date and time when they were retrieved and the circumstances of the custody from which they were retrieved, were not provided. It was therefore not proved that the documents were only recently discovered. It is an invariable rule that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, was either not produced, or was not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given on appeal. In general, it would undermine the whole system of justice and respect for the law if it were open to a party to be able to re-run a trial simply because potentially persuasive or relevant evidence had not been put before the trial court.

Furthermore, applications for the admission of additional evidence must be brought without undue delay. The judgment of the court below was delivered in November, 2017. The appeal was filed in December 2017, yet this application was filed ten months later in October, 2018 without furnishing any explanation for the inordinate delay. It is for all the foregoing reasons that I did not find any merit in the application and accordingly dismissed it with costs to the respondents.

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Dated at Gulu this 11<sup>th</sup> day of October, 2018.

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Stephen Mubiru

Judge

11<sup>th</sup> October, 2018.

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