

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

MISC APPLICATION NO 490 OF 2022
(Arising from CIVIL APPEAL NO. 349 OF 2020)
(Arising from H.C.C.S No. 204 of 2009)

1. PROGRESSIVE GROUP OF SCHOOLS LTD
2. AB'AMOOTI INVESTMENTS LTD
3. KAAHWA ERISA AMOOTI ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

1. ABSA BANK (U) LTD (formerly
BARCLAYS BANK OF UGANDA LTD
2. LUYANZI ACADEMIC FOUNDATION LTD :::::::::::RESPONDENTS

CORAM: HON. JUSTICE RICHARD BUTEERA, DCJ
HON. JUSTICE CATHERINE BAMUGEMEREIRE, JA
HON. MR. JUSTICE STEPHEN MUSOTA, JA

RULING OF COURT

This application was brought under *Rules 2(2), 30 (1)(b), 43(1), and (2), and 44(1) of the Judicature (Court of Appeal Rules)* seeking orders to be permitted to file further evidence in the form of a Bank Statement of Account and a Power of Attorney to form part of the record to show that the respondents committed fraud and illegalities before and at the time of sale of the suit properties. The application was supported by the affidavit of ~~Kahwa Eriisa Amooti~~ ^{Applicant} the 3rd Applicant and a director in the 1st and 2nd ~~Respondent~~ companies. On the part of the Respondents, **Kalid Mpata** swore an affidavit in reply.

At the hearing of the Application, the applicants were represented by Mr. Ntende Frederick Samuel of Ntende-Owor and Co. Advocates, Mr. Balondemu Godfrey, Mr. Ruzima Derrick and Mr. Emwogu Gerald of Branmark Advocates. Mr. Ssembatya Ernest of MMAKS Advocates appeared for the respondents.

The parties asked Court to adopt their submissions which they had filed and served. Court granted the prayer.

BRIEF FACTS OF THE APPLICATION

Briefly, the facts as can be deduced from the record of appeal are that the 1st Appellant applied for a loan from the 1st Respondent. The 1st Respondent evaluated the 1st Appellant's application and granted her (two) banking facilities of UGX. 650,000,000/- each. The facilities were subject to compliance by the 1st Appellant with terms and conditions of the facility letter including perfecting the security procedures for Plots 43, 72 and 89, Kyadondo Block 226 belonging to the 2nd Appellant and Plot 966 Kyadondo belonging to the 3rd Appellant.

The Appellants in accordance with the terms of the loan facility executed securities as required and the 1st Respondent commenced disbursements of the loan funds. It is however alleged that the 1st Respondent only disbursed UGX. 650,000,000/-. The 1st Respondent then prepared a new offer letter for a loan facility of UGX. 1,395,092,871/-. The Appellants claim that the 1st Respondent did not effect the disbursement of this new facility. Before the expiry of the term period under any of the facility letters and after receipt of substantial amount to offset the loan from the 1st Appellant, the 1st Respondent recalled the loan. They thereafter commenced the

enforcement of the mortgage, advertised the property for sale and eventually effected a sale. The Appellants claim that this sale was illegal and fraudulently done. In 2009, the applicants filed High Court Civil Suit No. 204 of 2009 against the Respondents seeking among others protection against the enforcement of the mortgage. They contended that the purported sale and transfer of the securities by the 1st Respondent as mortgagee was illegal, unlawful and a breach of the loan and mortgage deed. Further, that the Respondents fraudulently sold and transferred the securities to the 2nd Respondent. The High Court dismissed that suit. The applicants filed in this Court, **Civil Appeal No. 349 of 2020** against the decision of the High Court. The present Application emanates from the said Appeal.

APPLICANTS' SUBMISSIONS

Counsel for the applicants submitted that the guiding principles which Court takes into consideration in granting or refusing to adduce additional evidence have been considered and decided by the Supreme Court in several cases. They listed the principles to 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.

Counsel cited the cases of *G.M Combined (U) Ltd Vs A.K Detergent Ltd & Others, SCCA No.7 of 1998; Attorney General Vs Paul Kawanga Ssemwogerere & Anor, SC Civil Application No.2 of 2004; and Attorney General & Anor Vs Afric Cooperative Society Ltd, SC Misc Application No. 06 of 2012* to support the above proposition.

On the issue of the statement of account, counsel for the applicants submitted, based on the affidavit evidence of **Kahwa Eriisa Amoóti**, that at the time of hearing at the lower Court, the statement of account which the applicants sought to be admitted was in the possession/custody of the 1st Respondent. Counsel contended that the said evidence was a continuation of evidence of a statement of account Ex. D16(1)/G1 already on record and that it elucidates the same. In that regard, counsel cited the case of *G.M Combined (U) Ltd Vs A.K Detergent Ltd & Others* (supra) to support the proposition that evidence may be allowed for purposes of elucidating evidence already on record, and that the same would not be regarded as additional evidence.

Counsel for the applicants further submitted that the evidence sought to be adduced in the form of a statement of account would also assist Court in properly resolving issues arising in Grounds 1,2,3 and 7 of the main appeal.

Further, that the statement of account will show Court that there was no deposit to the loan account of sale proceeds after sale of the applicants' property by the 1st Respondent.

On the issue of the Power of Attorney sought to be adduced, counsel for the applicants' submitted, basing on the affidavit evidence of Kaahwa Erisa Amooti that the said evidence was at all times in the possession/custody of the 1st Respondent. That the same was never within the applicants' knowledge and/or could not be produced by them at the time of hearing the original suit. Counsel further submitted relying on paragraph 9 of the said affidavit that the Power of Attorney confirmed the applicants' averments that the sale of the suit properties by the 1st Respondent to the 2nd Respondent was illegal and tainted with fraud. Counsel contended that this evidence satisfied the discovery of new and important evidence principle.

Counsel further submitted that if admitted, the additional evidence would elucidate on evidence of a sale agreement (**Exh. A**) already on record to show that there were several illegalities and fraud committed by the respondents in the process of sale of the suit mortgage properties. Basing on paragraph 8 of the affidavit of Kaahwa Erisa Amooti, counsel for the applicants submitted that the Power of Attorney sought to be adduced showed that the 1st Respondent Bank nominated and appointed specified persons to act as its Attorneys and representatives in executing such a sale. That, **Angelina Namakula Ofwono**, a signatory to the impugned sale agreement was not one of the specified persons in the said Power of Attorney. That she did not, at the material time, hold any power and/or authority under the said instrument to execute the impugned sale agreement on behalf of the 1st Respondent. Counsel contended that the

sale agreement clearly showed on the execution page that the persons who purported to sign on behalf of the 1st respondent, did so, acting under authority granted by Power of Attorney. Counsel further contended that proof of fraud and/or illegality would invalidate all the transactions and it was in the best interest of justice that the said evidence was admitted for evaluation by the Court. In that regard, counsel cited ***Makula International v His Eminence Cardinal Nsubuga & Anor, CACA No.4 of 1981*** for the principle of illegality once brought to the attention of the Court. Counsel further submitted that the Power of Attorney sought to be adduced was certified as a true copy of the original by URSB and prayed that the same should be admitted as credible and authentic in the absence of contrary cogent evidence.

Counsel further submitted that for the reasons already given, the evidence would have an influence on the result of the main appeal and that the applicants had attached copies of the statement of account and Power of Attorney onto the affidavit in support.

Lastly, counsel for the applicants submitted that the evidence sought to be admitted was filed approximately (6) months before fixing hearing of the main appeal and as such, it had duly been brought before court and would not prejudice the respondents. Counsel prayed that this is a good case for Court to exercise its discretion to grant the applicants leave to adduce the additional evidence sought to enable the proper, effective, just and final determination of the matters in controversy.

SUBMISSIONS OF RESPONDENT

Counsel for the respondent seems to have been in agreement with the Applicants on the law applicable as enunciated in **Rule 30(1)(b)** and in the **Semogerere case** (Supra). In his submissions, counsel for the respondents gave a history of the suit and pointed out that out of the 3 law firms that represented the Applicants in the High Court lasting 11 years, none sought for these documents. Counsel argued that whereas the Appeal was filed in December, 2020, this Application was filed in February 2022 a period of (11) months after filing of the appeal. He submitted that the Applicants were guilty of dilatory conduct and that no sufficient reason was given for this Application to be granted.

Counsel for the Respondents further submitted that the applicants neither stated that they had discovered new and important matters of evidence nor that such information was not within their knowledge. He argued that no diligence at all was exercised for obtaining these documents, or any attempt made to make any inquiries about them during the course of the trial. Counsel further argued that the applicants were merely attempting to do what they ought to have done in the trial Court and that this was never the intention of Rule 30(1)(b). Lastly, Counsel for the Respondents submitted that the applicants in their evidence at the trial acknowledged having borrowed money from the 1st Respondent, having pledged securities for the borrowings, and having authorized the 1st Respondent to dispose of some securities and appropriate the proceeds towards reduction of their debt. Accordingly, the documents sought were of no relevance to the determination of the dispute/Appeal. Against that background, Counsel

for the Respondents prayed that the Court be pleased to dismiss the Application with costs.

CONSIDERATION OF ISSUES

The crux of this application is whether there should be admission of additional evidence by this court.

The applicable law is **Rule 30(1)(b) of the Rules** of this Court which empowers this Court for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court or by a commissioner. The rule provides that;

“30. Power to reappraise evidence and to take additional evidence.

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

(a); and

(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.”

The issue of taking additional evidence on appeal was considered and decided upon in in the case of **Attorney General Vs Paul Kawanga Ssemwogerere & Anor, SC Civil Application No.2 of 2004** wherein the Supreme Court provided the following guidelines that an appellate court may consider while exercising its discretion:

- 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 underlying principle is that there must be an end to litigation. However, consideration must be given to **Rule 2(2)** which calls upon this court to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of due process.

The case for the applicants is that the additional evidence sought to be adduced will elucidate on evidence already on record. They seek to introduce (2) documents, a Power of Attorney and a Statement of Account in particular.

Regarding the statement of account, the applicants' contention is that already on record is a part of the statement of account sought to be adduced. In paragraph 4 of the supporting affidavit of **Kaahwa Eriisa Amooti**, it is evident that a Statement of Account **Exh D16(i)** was relied on

in the High Court by both the applicants and the 1st Respondent. This fact was indeed admitted by the Respondents in paragraph 13 of the affidavit in reply by one **Kalid Mpata** a legal officer with the 1st Respondent. He stated as follows;

“13. That the Statement of Account were tendered in evidence as DEX16(i) and DEX (ii) and forms part of the Record of Appeal at pages 163 to 165 and 166 to 167”.

Additionally, counsel for the Applicants submitted that the Statement of Account sought to be adduced would assist Court in properly resolving issues arising in **Grounds 1,2 3 and 7** of the Appeal. Further, that the Statement of Account would show Court that there was no deposit to the loan account of sale proceeds after sale of the Applicants' property by the 1st Respondent. Grounds 1,2 and 3 of the Memorandum of Appeal all relate to how much money was actually disbursed by the 1st Respondent to the 1st Applicant and therefore, the level of indebtedness. Ground 7 relates to whether or not the 1st Respondent applied the proceeds of sale of the suit mortgage property towards settlement of the 1st Applicant's debt.

We note that on the record, are two (2) Statements of Account said to be of the 1st Applicant but containing inconsistent information. These are **Exh D16(i)** on pages 163 to 165, and **Ex D16(ii)** on pages 166 to 167. What the applicants seek to adduce is a continuation of **Exh D16(i)**. From the brief facts as stated in the background, the crux of the Civil suit is the dispute surrounding how much money was actually disbursed by the 1st Respondent to the 1st Applicant and the actual state of indebtedness. This dispute can only be properly resolved upon evaluation of the relevant

statements of account. In the circumstances, we are of the opinion that the evidence sought to be adduced shall throw light on the case for the Court to better understand the correct position of the parties' financial dealings. This will be made possible by allowing the evidence of the other remaining part of the Statement of Account already on record to be adduced for Court to study and make a proper determination of the matter.

A quick perusal of the Statement of Account sought to be adduced further reveals that no money was deposited on the said account after the sale of the suit properties which was conducted on the 29th August, 2009, per sale agreement, (**Ex. A**). We find it necessary to study the 1st Applicant's full Statement of Account to enable the Court satisfy itself as to whether or not the proceeds of sale were applied by the Respondents towards settlement of the debt.

Our evaluation of the evidence makes it clear that the evidence being sought to be admitted is intended to elucidate evidence already on record, that is to say, a copy of the statement of account is already on record. The full Statement of Account would only help give a complete picture of matters already on record. It is our considered opinion, that this will not prejudice the respondents.

In the case of *Rex v. Yakobo Busigs s/o Mavego (1945) 12. EACA 60* which was cited with approval in *G.M Combined (U) Ltd Vs A.K Detergent Ltd & Others* (supra), 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. Court stated thus:

“Realising that such jurisdiction must always be exercised with great care, (The King v. Robinson [1917] 2 KBD 1098), we are of the considered opinion that this is a proper case for its exercise. Quite apart from the fact that the evidence shall throw light upon the case (The King v. Robinson) (supra) this is not a question of directing new evidence to be taken but merely of directing the elucidation of evidence already on the record...”

We are of the considered opinion that the principle stated in that case is applicable to the instant case. The additional evidence of the 1st Applicant's Statement of Account is not new evidence (as clearly admitted by the 1st Respondent in the affidavit of Kalid Mpata) but evidence taken for purposes of elucidation of evidence already on record, namely the 1st Applicant's Statement of Account **Ex D16(i)**.

The other document that the Applicants sought to adduce in evidence is a Power of Attorney bearing Instrument No. 8486/05. Counsel for the Applicants submitted that the Applicants sought to include the Power of Attorney as evidence in support of claims of illegality and fraud by the Respondents in the process of sale of the suit property. Counsel contended that if admitted, the Power of Attorney would show that the 1st Respondent's officials acted outside the mandate of the said Instrument. In that regard, counsel cited the cases of ***Fredrick J.K Zaabwe v Orient Bank & Ors SCCA No.4 of 2006***; and ***Williams v Turner (2008)-QSC 327*** for the proposition that “a power of attorney was to be strictly construed”.

Perusal of the affidavit of Kaahwa Erisa Amooti shows serious allegations of illegality and fraud which if found to be true, would have serious

implications on the outcome of the Appeal. The Respondents strongly argued against admission of the Power of Attorney. In his affidavit in reply, Mr. Mpata Kalid states in paragraph 12 as follows:

“That the Applicants led no evidence in relation to the Power of attorney now sought to be discovered and at no time before or during the trial (including at the scheduling conference) did the applicants seek for discovery of this document, whether by application to the Court or during cross examination of any of the defence witnesses.”

We note that other than this statement, the 1st Respondent did not dispute the authenticity of the Power of Attorney and neither did they adduce any evidence to controvert the same. We are not persuaded by arguments of Counsel for the Respondent that the Applicants led no evidence on the Power of Attorney at trial or that the Power of attorney is not necessary for the determination of the Appeal as stated in the affidavit of Mr. Mpata Kalid under paragraph 15. To the contrary, we do think that this Power of Attorney is crucial for determination of the question of legality of the sale. We do think that since the sale agreement (**Exh. A**) for the sale of the suit mortgage property is already on record, it is important for the Power of Attorney to be adduced to shed more light on whether the sale agreement was executed in conformity with the law. Further, under **Rule 30** (supra), this Court has power to take additional evidence for sufficient reason. As earlier noted, **Rule 2(2)** (supra) calls upon this court to make such orders as may be necessary for attaining the ends of justice or to prevent abuse of due process.

It is our considered opinion, that admission of the said documents for consideration of the Appeal, would help in attending the ends of justice especially in light of the allegations of illegality and fraud. The Respondents will not be prejudiced in any way given the facts of their knowledge and creation of the said documents. We observe that the lawyers who represented both Respondents in this Court and at High Court, had knowledge of the existence of the said documents.

More particularly, the Powers of Attorney sought to be adduced were drawn by Counsel for the Respondents. Likewise, the Sale Agreement to be elucidated upon was also drawn by Counsel for the Respondents. **Regulation 17 of the Advocates (Professional Conduct) Regulations**, requires of an Advocate not to allow Court to be misled. Specifically, **Regulation 17 (1)** provides:

“An advocate conducting a case or matter shall not allow a Court to be misled by remaining silent about a matter within his or her knowledge which a reasonable person would realise, if made known to the court, would affect its proceedings, decision or judgment.”

Thus, in the instant case, Counsel for the Respondents had a professional duty not to remain silent about the documents sought to be admitted. We accordingly see no prejudice in admitting the documents

We have in the earlier paragraphs provided reasons to justify admission of the documents which are the subject of the instant Application. Accordingly, this Application is allowed.

Costs shall abide the outcome of the Appeal.

Dated at Kampala this 8th day of May 2023



RICHARD BUTERA

DEPUTY CHIEF JUSTICE



CATHERINE BAMUGEMEREIRE

JUSTICE OF APPEAL


STEPHEN MUSOTA

JUSTICE OF APPEAL