

UGANDA / JUDGMENT

Basalirwa & 3 Others v Namakula & 3 Others (Miscellaneous Application 141 of 2023) [2024] UGHC 272 (25 April 2024)

[2024] UGHC 272

COURT
High Court of Uganda

BEFORE
Jacqueline Mwondha, J

CASE / FILE NUMBER
Miscellaneous Application 141 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MUKONO MISCELLANEOUS APPLICATION NO.141 OF 2023 ARISING FROM CIVIL APPEAL NO.006/2023 (ORIGINAL NJERU COURT CIVIL SUIT NO.53/2018)

- 1. BASALIRWA RONALD
- 2. OKELLO GEOFFREY
- 3. MUKASA ISAAC MATEGA
- 4. DDAMBA MARTIN:::.....

VERSUS

1. NAMAKULA DIMINTILIYA 2. NALUBEGA HADIDA NABWIRE JANE 3. BWIRE ALIFAYIRI 4. WERE KENNEDY:::.....

BEFORE HON. LADY JUSTICE JACQUELINE MWONDHA

RULING

This application was brought by M/S Munulo and Co. Advocates under Order 52 rule 1, Order 43 rules 22, 23 and 24 of the Civil Procedure Rules and Section 33 of the Judicature Act and

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Article 126 of the Constitution of the Republic of Uganda 1995 as amended.

The application was brought seeking orders that;

- 1. The original will of the late OUMA TOBBY MULUMYA be produced and admitted as evidence under this appeal.
- 2. Fresh documentary evidence of documents containing the late OUMA TOBBY MULUMYA'S signatures be produced in court and a trial be conducted on them on appeal and if necessary, all the relevant documents and the will be forwarded to a forensic expert for ascertainment of the authenticity of the disputed will of the said deceased.
- 3. Fresh oral evidence incidental to or arising from the foregoing and or relevant necessary for arriving at a proper decision by the court be heard under the appeal.
- 4. Costs of this application be provided for.

The grounds upon which this application is established include;

1. Through the original will of the late OUMA TOBBY MULUMYA was produced in court by Busera Jacob, but due to incompetence of the applicant's/ defendants' counsel M/s Angela Nakato who unknown to the applicants lacked a practicing certificate and seemed to be ignorant of court procedures never applied to court to have the will exhibited on court's records yet her mistakes/ negligence cannot be visited on the applicants who engaged competent chambers to handle

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defense vis M/s KAGWA BALISNAYUKA DAVID their PARTNERS AND CO. ADVOCATES.

- 2. The late OUMA TOBBY MULUMYA'S signature on his contested will was unfairly compared only with his purported signature on the purported marriage certificate of the 2nd respondent Nalubega Hadija Nabwire Jane yet after judgement in the lower court, the appellants/applicants discovered several documents authentically signed by the said deceased and the applicants, now want the deceased's signatures in those documents compared with the one assigned to the deceased under the marriage certificate tendered in court by the second respondent visa vis the deceased's signature on the contested will and if necessary such relevant documents be subjected to verification by forensic experts before this appellant court can come up with a fair, reasonable and balanced final judgement in the matter.
- 3. It is in the interest of justice and equity to grant this application more so as a deceased's will be a very important document regarding which, the deceased has no further chances or opportunity of being heard on the same and can thus only be rejected or discarded after serious and justified considerations by court but not shallow or flimsy considerations as was the case on the lower court.

The applicants framed two issues for determination.

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1. Whether the application discloses substantial causes for grant of leave to the applicants to adduce further oral and documentary evidence on appeal.

The applicants firstly submitted that they blame the mishandling of their defense in the lower court on their former lawyer who was incompetent, unqualified, negligent and unlicensed and was assigned to them by a competent. That a competent and qualified licensed lawyer would have not left a forged marriage certificate to qualify for comparison with the late Bobby's signature on the Will while keeping silent throughout the court proceedings or without asking his clients to seek for other documents containing the late Bobby's signature for comparison purposes.

That it is the duty of all competent courts of law in Uganda to verify whether or not any advocates appearing before them are qualified to practice hence it is the court's duty to demand a practicing certificate for each lawyer appearing before courts. That in the instant case the lower court neglected its duty in that regard hence opening gates for a quack lawyer to fleece the applicants and thus spoil their case for which the applicants should not be penalized by court on appeal.

The applicants relied on the Supreme court case of Ggolooba Godfrey v Harriet Kizito Civil Appeal No.007 of 2006 where it was held that the mistakes or oversight of counsel should not be visited on his or her client.

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In regard to the admission of further evidence on appeal counsel for the applicant submitted that it is well settled that additional evidence is taken on appeal in exceptional circumstances, the exceptional circumstances are usually that the evidence was not available at the time of the trial or could not have been obtained using reasonable diligence and that the evidence is credible and likely to influence the result of the case.

It was counsel for the applicants' submission to treat it as a special circumstance where a competent law firm instructed by the applicants' instead allocated to them a quack/ fake, unlicensed and negligent lady purporting as an advocate but ended up ruining her client's case due to her lack of qualifications and experience in handling court litigation.

That the documents the applicants seek to adduce on appeal were not known to them during the prosecution of the main suit yet due to the negligence by their purported counsel the original documents like TOBBY's will and his Kenyan National Identity card and kitambuliso were never tendered in court as exhibits, though Mr. Busera produced them in court which after observing the same returned them to him while the quack counsel looked on in silence throughout the trial.

That the questions regarding the sources of the documents should be reserved till the applicants produce the said documents in court upon granting of this application by court but apart from the contents of the same documents indicate their sources or origin.

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More to this, the applicants also submitted that since they have ably indicated to the court that the 2nd respondent's marriage certificate contains a forged signature of the deceased, it should not close its eyes to such illegality.

That all the new documents sought to be relied on under this appeal clearly unveil the signature on the marriage certificate as totally different from the genuine signature of the late TOBBY MULUMYA hence admitting the new documents on appeal shall strongly influence the decision of the appellate court on this matter.

Counsel for the applicants further stated that it is unfortunate the lower court's decision was hinged on the said forged marriage certificate thus causing a miscarriage of justice to the applicants and the beneficiaries of the deceased's will which injustice can only be solved by admitting the said new documents and the deceased's will as exhibits on appeal and all these are exceptional circumstances.

Counsel for the applicant also submitted that regarding the forged marriage certificate in *Makula International Ltd V Cardinal Nsubuga and Another* (1987) HCB it was held that a court of law cannot sanction what is an illegality once brought to the attention of the court, it overrides all questions of pleading, including any admissions previously made thereon. That the failure to grant this application shall tantamount to sanctioning the illegal marriage certificate.

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In response counsel for the respondents first raised a preliminary objection to the supplementary affidavit in rejoinder filed in court in 22nd November, 2023 for being barred in law because by the time the same was filed in court, the pleadings in the applications had closed upon Basalirwa Ronald swearing an affidavit in rejoinder. He cited the case of *Surgipharm(u) limited V Uganda Investment Authority and Another* HCMC where it was held that "where pleadings have closed in a matter that has proceeded by way of affidavit evidence, a party would not be at liberty to file a supplementary affidavit after the closure of pleadings without seeking the court's leave and giving the other party an opportunity to respond to the additional averments." Counsel for the respondents prayed that the supplementary affidavit be struck off the record with costs.

In relation to the merits of this application specifically whether the application discloses substantial cause for grant of leave to the applicants to adduce further oral and documentary evidence on appeal it was the averment of counsel for the respondents that the applicants rightly cited Order 43 rule 22(b) of the Civil Procedure Rules SI 71-1 as giving court discretion to allow

additional evidence on appeal. Counsel for the respondents cited the case of Micheal Mabike v Law Development Centre C. O. A Misc. Application No.16 of 2015 where court laid down the grounds upon which additional evidence may be allowed to include:

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- 1. 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 parties seeking to adduce the additional evidence
- 2. It must be evidence relevant to the issues
- 3. It must be evidence which is credible in the sense that it is capable of belief
- 4. 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. The affidavit in support of an application to admit additional evidence should attach to it, proof of the evidence sought to be given and the additional evidence must be brought without undue delay.

It was the respondents' submission that Civil Suit No.53 of 2019 against the applicants and the applicants filed a defense to the suit and the hearing commenced on 12th / 02 / 2019 and took a period of 5 years to the delivery of the Judgement on 20th October 2022. That during the hearing the will of the deceased was tendered in court by the plaintiffs and all the first 4 defense witnesses were cross examined on the will after which the applicants closed their case and court gave directions on submissions, after the directions the applicants after 4 years of hearing the case they sought to call 5th witness by the names of Jacob Busera to give evidence about the

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authenticity of the will, leave was granted to the applicants and their 5th witness testified throughout the hearing, the applicants were not represented by one advocate but by 3 namely Kagwa Balisanyuka, Nalugwa Robinah, Nakato Angel.

That Busera Jacob did not have the original will as the applicants are falsely alleging in their affidavit in support of the application and in their submissions as the applicants' lawyer who they are falsely accusing asked DW5 if he had the original will of the deceased and he told court that he gave the will to a one Koloneri Mawuda who was deceased at the time and that DW5 did not have a copy of the original will in court. Thus it is not true that the original will was presented in court by DW5/Busera Jacob.

That the will of the deceased had been tendered in court and when the will was allegedly presented the Magistrate observed it and returned it to DW 5 because the will had already been tendered in court and could not be tendered for the second time. That the original will sought to be tendered as additional evidence on appeal is not new evidence, it was evidence available and in possession of the applicants during the trial and even without any due diligence the evidence was in possession of the applicants alleged.

It was further submitted that the documents attached to the application do not meet the test under the law for allowing additional evidence as the documents sought to be brought as new evidence were available and could have been easily attained by a diligent litigant since all the applicants knew the offices in which the 2610418024

deceased served and they knew that he used to sign several documents, the objection to the signature was put on the plaint thus putting the applicants on notice that they had to prepare their defense. Having failed to exercise due diligence, they cannot seek to reopen the trial as it is against the principle litigation must come to an end and consequently prayed that the application be rejected.

Furthermore, counsel for the respondents contended that the applicants requiring court to allow them make a forensic report on the signatures on the documents sought to be tendered in court as additional evidence means that the additional evidence without the said report is irrelevant, not credible and incapable of being believed and cannot influence the decision of the court.

It was also counsel's averment that there was delay in the bringing of the application since the applicants have not sought to adduce such evidence after 6 years from the commencement of the suit. That judgment was on 20th October 2022 but it has taken the applicants a period of over a year to file the application.

The respondents also submitted that the applicants' accusations against the lawyer concern an error of judgement and not mistakes or incompetence, if courts are to base on the opinion of the new lawyer to allow additional evidence then litigation will never come to an end, the applicants too had the duty to adduce their evidence at the trial which they had never done. Counsel concluded by praying that the application be dismissed with costs.

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In rejoinder, counsel for the applicants firstly addressed the preliminary objection raised by the respondent and submitted that DW5 who swore the supplementary affidavit in this matter is not a stranger to the case as he testified in the lower court and he was not guided by the applicant's quack lawyer to have the original will of the deceased and other documents tendered yet he come to court with them including the Late Tobby's Kenyan National Identity Card and Kenyan Kitambuliso both containing the deceased's authentic signature. That his supplementary affidavit will therefore not cause any miscarriage of justice if admitted for purposes of receiving the original will of the deceased on the court record in addition to the other documents for purposes of comparison of the signature said to belong to the late TOBBY with that on the second

respondent's marriage certificate.

That a retrial on the said documents shall avail the respondents a chance to cross examine the applicants on the said documents hence no miscarriage of justice shall be occasioned to the respondents. Counsel for the applicant further enjoined the court to administer equity under Section 14 of the Judicature Act Cap 13 and consider the supplementary affidavit being objected to in the interest of fairness and justice. Counsel also stated that the cited Section 33 of the above act under this application can be relied on by this court to permit the said supplementary affidavit and application itself.

In regard to the merits of the application counsel for the applicants submitted that the applicants were unaware of the fact that they were

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being represented by a quack lawyer who had no practicing certificate hence in law they were not represented at all. That the case authorities cited by counsel for the respondent are not applicable to the instant case because the in the cited cases the advocates who erred were qualified/licensed advocates unlike in the instant case.

Counsel for the applicants cited Section 11 (3) and 16 of the Advocates Act Cap 267 and noted that it is the duty of court to ensure that advocates who appear before them are licensed to practice law which the lower court did not do.

That it is in the interests of justice for this court to allow this application more so as the applicants were not lawfully represented in the lower court yet the quack lawyer who represented them illegally mishandled their case by not taking steps to challenge or consult the applicants regarding the purported signature of the late TOBBY on the second respondent's marriage certificate by not inquiring from the applicants if they had any documents containing the authentic signature of the deceased and even failed to have the original will tendered in as an exhibit although produced by DW5 in court.

That contrary to counsel for the respondent's misleading submissions the will was formally tendered in court as an exhibit as the learned trial magistrate at Page 9 of the judgement stated that " apparently there is no evidence on record confirming the original will left behind by the late Ouma Timothy Mulumya as all the defendants who made mention of the purported will only refereed to photocopies W Nurside 41 2024

of the will except for DW 5 who told court that he gave the original will to his brother Koleneri Mawuda however no original copy of the will was ever presented in court".

That if the respondents' counsel claims that the original will was exhibited on court record as PEXH NO.2 as alleged at page 3 paragraph 2 from the bottom of his submissions, then this is a grave contradiction in the trial court's proceedings visa vis its judgement which should not be visited on the applicants by rejecting their instant genuine application.

Counsel further contended that court should not close its eyes to an obviously forged signature of the late Bobby on the 2nd respondent's marriage certificate to defeat justice in this matter. That several documents containing the deceased's authentic signature have been produced and these will rule out the possibility of the signature on the marriage certificate being that of Bobby.

That the high court of record cannot sanction such a naked fraud by declining to grant this application and cited *Makula International Ltd V Cardinal Nsubuga and Anor* (1982) where it was held that a court of law cannot sanction what is illegal and illegality once brought to the attention of the court overrides all questions of pleading including any admission made thereon.

In conclusion counsel submitted that in the interests of justice this application should be granted and the matter be retried regarding the new documents adduced in the application vis a vis the original will of the Late Bobby and the purported marriage certificate.

ANALYSIS

Order 43 rule 22(b) of the Civil Procedure Rules S. 171-1 stipulates that parties to an appeal shall not be entitled to produce additional evidence whether oral or documentary in the High Court but if the High Court requires any document to be produced or any other substantial cause, the High court may allow the evidence or document to be produced or witness to be examined.

In relation to whether the application discloses substantial causes for grant of leave to the applicants to adduce further oral and documentary evidence on appeal, the crux of the applicants' submission was that they were let down by their former lawyer who had no practicing certificate and did not apply to court to have the original will, kitambuliso and National Identity card of the deceased tendered in court. That if the unlicensed lawyer had consulted any of the applicants upon the production of the marriage certificate they would have informed her that the deceased's signature on the marriage certificate was a forgery. They submitted that they hunted for and found documents signed by the deceased and are now desirous of adducing them as additional evidence on appeal to challenge the forged signature on the marriage certificate.

In exceptional cases, the appellate court will 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. *Aluma Micheal Bayo and 2 others v Said Nasur Okuti Miscellaneous Application No.0012 of 2016*.

In *Hon. Bangirana Kawoya vs National Council of Higher Education Misc. Application No.8 of 2013* it was observed that; "An appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- 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:

- It must be evidence relevant to the issues: \$(ii)\$
- It must be evidence which is credible in the sense that it \$(iii)\$ is capable of belief
- The evidence must be such that, if given, it would probably \$(iv)\$ have influence on the result of the case, although it need not be decisive

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- The affidavit in support of an application to admit \$(v)\$ additional evidence should have attached to it, proof of the evidence sought to be given
- The application to admit additional evidence must be \$(vi)\$ brought without undue delay.

The applicant in his affidavit in support of the application stated that their incompetent lawyer failed to apply for tendering in court the original deceased's will as an exhibit even though it was produced before court by Jacob Busera, leaving court to resolve that the original will was never exhibited in court though the learned trial magistrate held it and observed it and thereafter returned it to Jacob Busera.

In *Aluma Micheal Bayo and 2 others v Said Nasur Okuti* Miscellaneous Application No.0012 of 2016 Mubiru J noted that litigants are only absolved of acts or omissions of their advocates that occur in the course of their professional work which no member of the profession who was reasonably well-informed and competent would have done or omitted to do.

The failure of the applicants' counsel to formally apply to have the original will of the deceased tendered as the one with the knowledge of the proper court procedures as opposed to the applicants who lack the required legal knowledge regarding the same points to failure of

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the lawyer to do what a member in the legal profession would have done in the circumstances.

I have considered the conditions set for admission of additional evidence together with the circumstances of the instant case and the nature of additional evidence sought to be adduced specifically the other documents signed by the deceased.

It is clear that the signatures on all the documents the applicants are seeking leave to adduce are similar not only to each other but also to that on the purported will of the deceased.

Such evidence will be relevant to the appeal as it will provide an opportunity for proper comparison and investigation to be made. For the above reasons I find merit in this application and it is hereby allowed.

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

I SO ORDER

Wewords

JACQUELINE MWONDHA JUDGEW/wordly 2024

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