

UGANDA / JUDGMENT

# Kisoke and Another v Katalihwa

## (Miscellaneous Application No. 118 of 2022) [2023] UGHCCD 103 (17 April 2023)

[2023] UGHCCD 103

## COURT

HC: Civil Division (Uganda)

## BEFORE

Wagona, J

## CASE / FILE NUMBER

Miscellaneous Application No. 118 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
MISC. APPLICATION NO. 118 OF 2022 (ARISING FROM M. A NO. 20/21 & CIVIL SUIT  
NO. 008 OF 2015)

1. ALICE KISOKE

2. KISEMBOEDSON ::::::::::::::::::::::::::::::::::: APPLICANTS

VERSUS

KATALIHWU RUHUNGA ::::::::::::::::::::::::::::::::::: RESPONDENT

HON. JUSTICE VINCENT WAGONA RULING

### Introduction:

- 1. The Applicants brought this application under Section 98 of the Civil Procedure Act, Order 44 rule 22 (2) and Order 52 rule 1 of the Civil Procedure Rules seeking orders that:
- 1. The Applicants be allowed to produce and adduce additional evidence by way of documentary evidence namely:
  - (i) General Receipt No. 264614 to Kisoke Samson William on 1st July 1974.
  - (ii) General Receipt No. 264615 issued to Kisoke Samson William on 1st July 1974.



- (iii) Letter to Land Officer dated 19th April 1991 from the Commissioner Lands directing the Land Officer Fort Portal to send out a lease offer to William Kisoke.
- (iv) Map showing approximate site of 300 acres issued to William Kisoke
- (v) Letter to the Sub County Chief and Chairman R. CIII Kihura dated 7th February from the District Executive Secretary Kabalore informing him that the District Land Committee will visit lands applied for including the one of Kisoke William.
- (vi) Sales Agreement dated 22nd May 2005 between Kaahwa Stephen and Kisoke S. W
- (vii) Sale Agreement dated 5 th April 3008 between KitongoleBatakaKweterana and Kisoke S. W.
- (viii) Letter from the sub country chief Kihura dated 4th November 2008 addressed to David Kataha.
- 2. Costs of taking out the application.

### **Grounds and evidence in support of the application:**

- 2. The grounds of the application are particularized in the of the Applicants and are:
- 1. That the Respondents sued the Applicants before the Chief Magistrate's Court of Kyenjojo Vide FPT – 00 – CV – CS – 008 OF 2016 over a piece of land and the matter was determined in favour of the Respondent.



- 2. That before the late Kisoke Samson Willaim, husband to the 1st Applicant passing on, he had started a process of bring the land under the operation of the Registration of the Titles Act and he was the one who was keeping documents at a place the 1st applicant did not know at the time of hearing the suit and she did not have documents relating to the lease as well as the sale agreements for the land.
- 3. That she came across the various documents that the late kept which she wants to rely on as additional evidence. That during hearing in the trial court, the 1st applicant was not in possession of the said documents and thus was unable to produce and adduce them in evidence but now they are available and very crucial and vital for the determination of the dispute.
- 4. That it is fair, reasonable and in the interest of justice that the application is allowed. These facts were supported in all material particulars by the 2 nd Applicant.

### **Reply of the Respondent:**

- 3. The Application was opposed by the Respondent through his affidavit in reply and the supplementary affidavit on the grounds:

- 1. That he filed FPT 00 CV CS No. 008 of 2016 against the Applicants and a one BagumaYolamu. That the matter was decided in his favour and he executed the said judgment against BagumaYolamu who gave him possession of 50 acres.



- 2. That the current application is intended to delay litigation and hearing of Civil Appeal No. 20 of 2021. That the judgment was delivered on 26th August 2021 and Civil Appeal No. 20 of 2021 was filed on 29th September 2021 out of time.
- 3. That the documents the Applicants intend to adduce at trial were not listed among the list of documents nor are they relevant to the issues which court was called upon to determine. That the late Samuel owned land neighboring the suit land and what was in dispute was the neighboring land.
- 4. That in their written statement of defense filed by Applicants, they had attached the documents they now seek to adduce on appeal as annexure B, C, D, E and F. That the applicants did not plead acquisition of land by purchase and allowing them to tender sales agreement shall be a departure from the pleadings.
- 5. That BagumaYolamu who is the administrator of the estate of the late Kalinte Yavani willingly handed over to the Respondent approximately 50 acres after losing the case. That execution in the matter from where the appeal arises is complete and the application was brought after inordinate delay.
- 6. That the land owned by the applicants' is different from the one in dispute and neighbors the suit land and in 1990 the Respondent was recognized among the people whose land was to be inspected by the District Land Committees.



- 7. That this application was filed when Civil Appeal No. 20 of 2021 was already a backlog and it is fair, just and equitable that the application is dismissed with costs.

### Representation and Hearing:

- 4. **M/s Ngaruye Ruhind, Spencer & Co. Advocates** appeared for the Applicants while **M/s Ahabwe James and Co. Advocates** appeared for the Respondent. Both parties proceeded by way of written submissions upon directions given by court whose submissions I have considered extensively herein.

### Issues:

- 5. The issues are as follows:
- 1. Whether leave should be granted to the applicants to adduce additional evidence on appeal.

- 2. Remedies.

### Submissions of the parties:

6. **Issue 1: Whether leave should be granted to the applicants to adduce additional evidence on appeal.**

### Submissions of the Applicants:

7. Learned Counsel for the Applicants contended that the guidelines to follow in considering whether to grant leave or not were laid down in **Aluma & 2 others Vs. Okuti, Misc. Application No. 0012 of 2016** which made



reference to the case of **Hon. Bangirana Kawoya Vs. National Council for Higher Education, Misc. Application No. 8 of 2013** and **Makubuya Enock William T/a Polly Post Vs. Muwanga Kibirige T/a Kowlon Garment Industry, Civil Appeal No. 133 of 2014** thus:

- (a) Discovery of new and important matters of evidence which after exercise of due diligence were not within the knowledge or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.
- (b) It must be evidence relevant to the issues.
- (c) It must be evidence which is credible in the sense that it is capable of belief.
- (d) 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.
- (e) The affidavit in support of the application to admit additional evidence should have it attached to it as proof of evidence to be given.
- (f) The application to admit additional evidence must be brought without undue delay.
- 8. Counsel also invited court to the decision of **Brown V Dean (1910) AC 373** that although litigation must come to an end, it is in the interests of justice that the Applicants' new evidence be admitted if it is vital in proving who is the rightful owner of the suit land. That the documents attached by the applicants have a big impact on the case. Learned Counsel contended that the application satisfies the rules above.



### Submissions of the Respondent:

- 9. Learned Counsel for the Respondent agreed with the rules laid down by Counsel for the Applicants and cited the case of **Attorney General Vs. Byaruhanga John & 2499 others, Misc. Application No. 239 of 2021** that supports the said position.

- 10. Learned Counsel argued that the rationale behind those principles was to curtail delays and put an end to litigation. That this is a 2021 appeal and it was almost 2 years when the appeal was not prosecuted and the same is now backlog and thus prayed that instead of allowing the application the appeal should be dismissed under Order 43 rule 31 of the Civil Procedure Rules.
- 11. That the documents which the applicants seek to adduce on appeal were attached to their written statement of defense and thus they were within the applicants' full knowledge and thus this application falls short of satisfying the conditions for grant of leave to bring additional evidence on appeal.
- 12. That further, the documents the applicants seek to adduce have no relevance to the case and thus cannot be taken to be believable and credible. That the annexures and documents alluded to are divorced from the written statement of defense filed by the Applicants in court.



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- 13. That for the defense filed in court, the applicants claimed to have acquired the suit land as first occupants. Thus the sales agreements alluded to by the applicants are a departure from their pleadings and cannot be admitted. That the documents attached to the application have no bearing at all to the appeal under adjudication by court.
- 14. That the application was brought after inordinate delay. That the appeal from which the current application arises is already backlog. That the Respondent is in occupation of the land specifically for the portion handed over by Baguma and the judgment was executed thus the current application is a waste of courts time and the same does not meet the test for grant as highlighted in the decided case. Counsel asked court to be pleased to dismiss the application with costs to the Respondent.
- 15. On 31.03.2023 when the case came up for mention for the court to track compliance with the court's directions for fillings of the parties, Counsel Ngaruye Ruhindi prayed that the affidavit in reply, supplementary affidavit and submissions of the applicant be struck out and not be considered by court because they were filed and served outside of the time provided in the directions of court.



### CONSIDERATION BY COURT:

- 16. In the interests of the substantive justice of the matter, I have decided to consider all the filings of both parties.
- 17. Order 43 rule 22 of the Civil Procedure Rules provides that:

**\*Production of additional evidence in the High Court\***

- \*(1)The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court but if;-\*
- \*(a)The Court from whose decree the appeal is preferred has refused to admit the evidence which ought to have been admitted; or\*
- \*(b)The High Court requires any document to be produced of any witness to be examined to enable it to pronounce a judgment or for any other substantial cause, the high court may allow the evidence or document to be produced, or witness to be examined.\*
- (2)\*Wherever additional evidence is allowed to be produced by the High Court, the court shall record the reason for its admission\*.
- 18. Therefore under order 43 rule 22, the High Court has the discretion to allow parties to adduce additional evidence on appeal in exceptional circumstances. It should not be open to a party to make fresh allegations at the stage of appeal. An appellate court should not be permitted to travel outside the record of the lower court and take additional evidence on appeal



except in exceptional circumstances. (**Smt Ganga Devi & others Vs. Bhagwan Das & others**, 2014 (106) ALR 295)\*\*

- 19. The Supreme Court has in a number of authorities laid down the factors to consider in allowing or disallowing leave to adduce additional evidence. In the **Supreme Court Misc. Application No. 16 of 2015, Micheal Mabikke Vs. Law Development Centre**, the Supreme Court referred to its earlier decision of **Attorney General Vs. Paul Kawanga Semwogerere, Supreme Court Constitutional Application No. 2 of 2004** where the Court laid down the following as the considerations in granting or denying leave to produce additional evidence:
- \*(a)Discovery of new and important matters of evidence which after exercise of due diligence were not within the knowledge or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence.\*
- \*(b)It must be evidence relevant to the issues.\*
- \*(c)It must be evidence which is credible in the sense that it is capable of belief.\*
- \*(d)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.\*
- \*(e)The affidavit in support of the application to admit additional evidence should have it attached to it as proof of evidence to be given.\*



## 20. In Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3

Others [2018] eKLR the Supreme Court of Kenya laid down the following broader principles for allowing additional evidence which are persuasive:

\*(a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;\*

\*(b) it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;\*

\*(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, 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;\*

\*(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;\*

\*(e) the evidence must be credible in the sense that it is capable of belief; (f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;\*

\*(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;\*

\*(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;\*



\*(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;\*

\*(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;\*

\*(k) The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."\*

- **21. A party shall not be permitted to adduce additional Evidence which is intended to patch up the weak points in the case or remove a lacuna created in the case.(See Smt Ganga Devi & others Vs. Bhagwan Das & others, 2014 (106)).**

- 22. In **Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others** (2019) eKLR the Court of Appeal of Kenya made these profound observations: \* "It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal."\*



- 23. In **Karmal Tarmuhamed& Anor Vs. I. H Lakhani & Company** (1956) E. A 567/568), It was stated that: \* "Courts should be more stringent to allow a party adduce more evidence on appeal to re-open his or her case on appeal. 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 a party seeking to use it at trial or that reasonable diligence would not make it available. Additional evidence should elucidate the evidence already on record in order to meet the ends of justice. The Applicant must demonstrate that there are exceptional circumstances warranting admitting evidence on appeal." (See also Micheal Mabikke & LDC (supra).\*
- 24. The applicants seek to adduce the following as additional evidence on appeal:
- (a) General Receipt No. 264614 to Kisoke Samson William on 1st July 1974.
- (b) General Receipt No. 264615 issued to Kisoke Samson William on 1st July 1974.
- (c) Letter to Land Officer dated 19th April 1991 from the Commissioner Lands directing the Land Officer Fort Portal to send out a lease offer to William Kisoke.
- (d) Map showing approximate site of 300 acres issued to William Kisoke
- (e) Letter to the Sub County Chief and Chairman R. CIII Kihura dated 7th February from the District Executive Secretary Kabalore informing him



that the District Land Committee will visit lands applied for including the one of Kisoke William.

- (f) Sales Agreement dated 22nd May 2005 between Kaahwa Stephen and Kisoke S. W
- (g) Sale Agreement dated 5th April 3008 between Kitongole Bataka Kweterana and Kisoke S. W.
- (h) Letter from the sub country chief Kihura dated 4th November 2008 addressed to David Kataha.
- 25. The applicants contend that the above evidence could not be adduced at trial because it was not in their possession during trial and thus seek leave to adduce the same on appeal.

- 26. The Respondent on the other hand contended that save for the agreements, all the other documents were attached to the defense filed by the Applicants and as such it is not new evidence. That as for the agreements, they have no relevance to the dispute before court and it constitutes a complete departure from the original pleadings.
- 27. I have reviewed the joint written statement of defense filed by the Applicants in the lower court on 29th April 2016. The Applicants contended under paragraph 4 (a) that; "The 1st defendant is the lawful owner of the suit land equivalent to 300 acres having been the first settlers together with the late husband Kisoke Samson William in 1973 who later went and"



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\*applied for the same from the district land board at Fort Portal, paid inspection fees and lease offer was ordered for. See annexures A, B, C1 and C2.\*

- 28. Annexure A was a lease offer dated issued on 19th April 1991 issued to the late William Kasoke in respect of 300 acres at Kitongole, Kihura, Mwenge, Kabarole District. Annexure B is a communication by His Worship Boniface Wamala to the effect that the L. C court had no jurisdiction in Local Council Case No. 09/2008, a letter by the District Executive Secretary Kabarole communicating to the Sub County Chief Kihura that he was to visit the land, a general receipt and a lay out of the land (map).
- 29. The documents that the applicants seek leave to adduce as additional evidence on appeal are the same documents which the applicants listed thus:
  - (i) General Receipt No. 264614 to Kisoke Samson William on 1st July 1974.
  - (ii) General Receipt No. 264615 issued to Kisoke Samson William on 1st July 1974.
  - (iii) Letter to Land Officer dated 19th April 1991 from the Commissioner Lands directing the Land Officer Fort Portal to send out a lease offer to William Kisoke.
  - (iv) Map showing approximate site of 300 acres issued to William Kisoke



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- (v) Letter to the Sub County Chief and Chairman R. CIII Kihura dated 7th February from the District Executive Secretary Kabaloro informing him that the District Land Committee will visit lands applied for including the one of Kisoke William.
- 30. I find that the above documents are not new evidence. The documents were within the applicants' full knowledge before and during trial. This evidence cannot qualify as new and important matters of evidence which after exercise of due diligence were not within the knowledge of the applicants or could not have been produced at trial at the time of the suit.

The Applicants had these documents but preferred not to adduce the same during trial. The present application in this regard appears to be an effort to reopen the case of the applicants to adduce evidence on appeal which is intended to patch up the weak points in the case or remove a lacuna created in the case at trial. There is no evidence on the trial record or application herein, that there had been an attempt to tender-in the evidence and the same was rejected by the trial court.

- 31. The following documents appear to be new evidence: a sales Agreement dated 22nd May 2005 between Kaahwa Stephen and Kisoke S. W, Sale Agreement dated 5th April 2008 between Kitongole Bataka Kweterana and Kisoke S. W and a letter from the sub country chief Kihura dated 4th November 2008 addressed to David Kataha.



- 32. The court is however not satisfied regarding the relevance of the above documents to the case of the applicants as originally presented. The applicants never alluded to such purchase in the written statement of defense or at trial. I find that allowing the applicants to adduce such evidence on appeal would be a complete departure from the original pleadings. It is settled law that a party cannot be allowed to succeed on a case that is not put forward by him or her in the pleadings.
- 33. In the same vein a defendant cannot be allowed to adduce evidence or put forward a defense which is not pleaded in his or her written statement of defense. Further a party cannot be permitted to plead or set up a ground of appeal which does not stem from the pleadings and the evidence adduced during trial. Doing so would allow parties to argue fresh cases on appeal which is barred by the civil procedure rules.
- 34. The agreements dated 22nd May 2005 and 4th November 2008 are not supported by the pleadings. The applicants claimed they acquired the land as first settlers. They never alluded to any subsequent purchase. Therefore, these agreements appear to be an afterthought sought to be brought as additional evidence on appeal.
- 35. In the result, I find that the applicants have failed to satisfy the requirements set out by law to warrant grant of leave to adduce additional



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evidence on appeal. This application therefore fails and it is accordingly dismissed with costs awarded to the Respondent.

It is so ordered.



Vincent Wagona **High Court Judge FORT-PORTAL 17.04.2023**



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