THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL AT KAMPALA

ELECTION PETITION APPLICATION NO.0027 OF 2017
(Arising out of Election Petition Appeal No.088 of 2016)

CORAM: HON. MR. JUSTICE S.B.K. KAVUMA, DCJ
HON. MR. JUSTICE RICHARD BUTEERA, JA
HON. MR. JUSTICE ALFONSE OWINY-DOLLO, JA

MUJASI MASABA BERNARD ELLY .....APPELLANT

V E R S U S

1. **MAGOMBE VINCENT**
2. **ELECTORAL COMMISSION.....RESPONDENTS**

RULING OF COURT:

This is an application for leave to adduce additional evidence in the hearing of Election Appeal No.88 of 2016 and the Cross Appeal.

The fresh/additional evidence is in form of certified declaration of results forms (hereinafter referred to as DR Forms) for the election for District Chairperson, Mbale in respect of 7 polling stations;

The grounds upon which the application is based are contained in the Notice of Motion and in the affidavit of the applicant attached to the Notice of Motion.

The grounds, according to the Notice of Motion are the following:-

1. **The intended evidence, consisting of results of the 7 polling stations of the election for Mbale District Chairperson, was excluded by the trial Judge from consideration during the hearing of Election Petition No.0017 of 2016.**
2. **The results of the said polling stations of <u>Makhai, Busoba Primary School, Lwaboba Presbetarian, Muambe T.C, Namatala Catholic Church M-N Mbanga polling station and Busiu trading Centre A-M</u> clearly indicate that the applicant was the winning candidate at each of these polling stations contrary to what is contained in the Results Tally Sheet which merely swapped the results and made the 1st respondent winning candidate.**
3. **The applicant's lawyers in the lower court only attempted to place the said results contained in Declaration of Results Forms before the trial Judge by irregularly annexing the same to their final written submissions and as a result, they were never considered by the trial judge in arriving at her decision to nullify the applicant's election.**
4. **The exclusion of the said results contained in 7 Declaration of Results Forms greatly prejudiced the applicant on grounds that he was the winning candidate in each of those polling stations yet the Final Results Tally Sheet swapped his results and made the 1st respondent the winning candidate at each of the said polling stations.**
5. **The intended evidence of the results of the 7 polling stations contained in their certified Declaration of Results Forms is basically and materially from the Electoral Commission, the 2nd respondent, whose officer was summoned before court but blocked from presenting the same although he had them in his possession.**
6. **The intended evidence is credible, material and relevant to the issues in Election Petition Appeal No.88 of 2016, and consequently the**

Appeal and Cross Appeal, which will enable this Honourable Court to reach a fair and just decision.

7. **That it is in the interest of justice that the applicant/cross appellant be granted leave to adduce additional evidence on appeal.**

Representation:

Learned counsel, Mr. Byabakama Jude together with Mr. Kirumira Arthur, appeared for the applicant, while learned counsel, Mr. Sserunjoji Nasser, appeared for the 2nd respondent.

The 1st respondent was represented by learned counsel, Mr. Tebyasa Ambrose together with Mr. Yusuf Mutembuli and Mr. Nabende Isaac.

Submissions of counsel for the applicant

Counsel submitted that the results of the seven polling stations which were excluded by the trial Judge should be admitted as additional evidence by this Court under Rule 2(2) of the Judicature Court of Appeal Rules together Rules 30(1)(b) of the mentioned rules.

Counsel contended that Rule 2(2) of the Rules of this Court vests inherent power in the Court to ensure that ends of Justice are met. According to counsel, Rule 30(1) of the Court rules specifically provides that on appeal from the High Court to this Court, the Court may in exercise of its discretion and for sufficient reason take additional evidence.

Counsel relied on the authorities of **Misc. Application No.06 of 2012** (arising out of) **Civil Appeal No.5 of 2003, The Attorney General and The Inspector General of Government vs Afric Cooperative Society Ltd; Reference No.90/2003 (arising out of Civil Application No.17/2003); F. Zabwe vs Oreint**

Bank and 5 Others SCCA No. of 2006 (unreported). In support of their position that the additional evidence should be admitted in the instant application.

According to counsel, when the lower court has declined to take evidence, that it ought to have admitted, then this Court as an appellate court can and should take such evidence as additional evidence. According to counsel, in the instant Application the additional evidence of the 7 polling stations should be admitted as they would have helped the Court to establish the winner of the contested elections.

Counsel submitted further that the trial Judge erred when he declined to admit the DR Forms for the 7 polling stations as exhibits on the ground that the applicant was bound by his pleadings and the appellant never mentioned the 7 stations in their pleadings and therefore could not raise them in evidence. He faulted the learned trial judge for declining to admit the DR Forms in spite of her earlier order compelling the 2nd respondent to avail certified copies of all DR Forms for Mbale District in respect of the electoral contest between the appellant and the 1st respondent.

Submissions of counsel for the 1st respondent.

Counsel opposed the application for admission of additional evidence.

He submitted that the legal principles for allowing additional evidence by this Court as an appellate court are now well settled and the instant application does not satisfy those principles. He referred this Court to the principles the Supreme Court stated in the authorities of **Hon. Anifa Bangirana Kawooya vs National Council for Higher Education SCMA No.8/2013** (unreported) and **G.M. Combined (U) Ltd vs A.K. Detergents and 4 others SCCA No.7 of 1998** (unreported).

Counsel contended that additional evidence is taken on appeal in exceptional circumstances and usually where such evidence was not available at the time of trial and could not have been obtained using reasonable diligence. The evidence has to be credible and would be likely to influence the result of the case.

Counsel contended further that **Rule 15 of the Petition Rules of the Parliamentary Election Petition Rules** requires that all evidence at the trial for and against the Petition must be by affidavit. In the instant case, there was no single affidavit alluded to by the applicant as having been filed in the lower court to annex the evidence that is sought to be admitted now on appeal. What is on record is the unconventional manner in which counsel for the applicant sought to bring these DR Forms before the court by annexing them to the final submissions of the respondent now applicant. Counsel submitted that evidence cannot be adduced through submissions. Evidence can only be adduced through affidavits in Election Petitions and that was not done in this case.

Counsel submitted further, that in the instant case the petitioner specifically complained that there was an interchange of results in 19 polling stations. The trial Judge knew that was the case he was handling and that was the case the 1st respondent knew he was defending.

The elections for the entire Constituency were not in contention. There was no need for any party to adduce evidence in respect of the entire 426 polling stations since they were not in issue and that was why the trial Judge restricted the cross examination of the Returning Officer to 19 polling stations which were contested. That was also the reason why only DR Forms for the 19 polling stations were admitted in evidence.

According to counsel the DR Forms for the 7 polling stations were correctly rejected by the trial Judge since elections for the 7 polling station were never contested. The applicant never applied to amend his pleadings and he only attached the DR Forms to his submissions which was procedurally erroneous. The DR Forms for the 7 polling stations were not in respect of any issue before the trial Court.

The decision of Court:

This Court has power, as a first appellate court, under Rule 30(1)(b) of the Rules of this Court to admit additional evidence. This power is not contested in this Application. What is contested is whether the applicant has satisfied the Court that in the circumstances of the instant Application, the Court should exercise its discretion and allow the applicant to adduce the contested additional evidence.

The Supreme Court has had occasion to elaborately state the principles under which additional evidence can be admitted by an appellate court in **Hon. Anifa Bangirana Kawooya vs the National Council for Higher Education** (supra) where it held:-

> **"In Attorney General v. Paulo Ssemogerere & Ors. Supreme Court Constitutional Application No.2 of 2004, this court, cited several persuasive authorities which have dealt with this issue of when additional evidence may be admissible on appeal. These include,** ***Ladd vs Mashall (1954) 3 All ER 745 at 148 Skone vs Skone (1971), 2 All ER 582 at 582; Langdale vs Danby (1982) 3 All ER 129 AT 137 Sadrudin Shariff vs Taarlochhan Singh (1961) EA.72, Elgood vs Regina (1968) EA 274; American Express International vs Atulkimar S. Patel, Application No.8B, of 1986 (SCU) (unreported); Karmali v Lakhani***

(1958), EA.567 and Corbett (1953), 2 All ER 69. **The court then held as follows (at page 11 of the ruling.)**

> ***'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 mattes 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 to 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 court went on to give the rationale for these principles as follows:

> ***'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 up its full case before the court.***

For resolution of the instant Application, we shall proceed to assess whether:

The instant Application satisfies the principles enumerated above for admission of additional evidence. The first principle to consider is whether

the evidence the applicant is seeking to adduce as additional evidence is new and was not within the knowledge of the applicant and could not, with due diligence, have been produced at the time of trial of the petition by the applicant?

We have perused the affidavit of Bernard Elly dated 2nd June 2017 in support of the application for adducing the additional evidence. He does not state in the affidavit that the evidence sought to be adduced was new or that he could not have accessed the same for production when he filed the Petition.

Counsel for the applicant conceded that the evidence was not new. The evidence according to counsel, was available at the lower Court but the same was erroneously not admitted at the trial and should now be admitted since it ought to have been admitted by the lower Court.

The evidence according to counsel, ought now to be admitted not as new evidence but as additional evidence that ought to have been admitted by the lower Court and was erroneously not admitted. Counsel submitted that the evidence, should now be admitted on appeal as it would elucidat the evidence on record.

It will be useful for us to state the facts in respect of the evidence the applicant now seeks to adduce through the instant Application.

At the hearing in the trial Court, the Judge ordered the DR Forms for all the 427 Polling Stations in Mbale District to be produced on application by the 1st respondents' counsel.

The 1st respondent had challenged the election results in respect of 19 polling stations.

The trial Judge then ruled that the relevant DR Forms for the Petition before Court were those in respect of the 19 contested polling stations. The trial Judge only admitted those in evidence and ruled that the other polling stations were not relevant to the issues at the trial.

The applicant never raised any issue in the pleadings at the trial Court in respect of the 7 polling stations whose DR Forms they are now seeking to adduce. They only brought up the DR forms for the 7 polling stations when they annexed those DR Forms to their final written submissions. The applicant never applied to Court specifically to admit the DR Forms for the 7 polling stations which were originally not contested and not pleaded. The trial Judge rejected the DR Forms as he found them a departure from the pleadings and he also ruled that their admission at that stage in that manner was irregular and would prejudice the respondent.

In the circumstances described above, are the DR Forms for the 7 polling stations relevant and would this Court admit them as additional evidence. The Supreme Court in **Hon. Anifa Bangirana Kawooya** (supra) stated the principles upon which additional evidence can be adduced on appeal are premised. The Court stated that the rationale was that **"there would be no end to litigation unless a Court can expect a party to put up its full case before Court."** Evidence therefore should be limited to issues before the court.

This rationale is further re-enforced in our view by the Supreme Court decision in the case of **Interfreight Forwarders (U) Ltd vs. East African Development Bank[1990-1994] EA 117** when it held:-

> **"The system of pleadings is necessary in litigation. It operates to define and deliver it with clarity and precision the real mattes in**

controversy between the parties upon which they can prepare and present their respective cases and upon which the Court will be called upon to adjudicate between them. It thus serves the double purposes of informing each party what is the case of the opposite party which will govern the interlocutory proceedings before the trial and which the Court will have to determine at the trial. ***See Bullen and Leacke and Jacob's Precedent (12ed) at 3.*** **Thus, issues are formed on the case of the parties so disclosed in the pleadings and evidence is directed at the trial to the proof of the case so set and covered by the issues framed therein. A party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on a case not so set up by him and be allowed at the trial to change his case or set up a case inconsistent with which the alleged in in the pleadings except by way of amendment of the pleadings."**

The results or the 7 polling stations for which the applicant seeks to adduce DR Forms as additional evidence were never challenged. The stations were not at all in contention at the trial.

The applicant never applied to the trial Court to amend his pleadings to challenge results in respect of those stations. He only attempted to bring them on board as evidence by annexing them to his final submissions. In the instant case, the parties had closed their case in the trial. Evidence adduced at the level of final submissions would certainly prejudice the respondents as they would have no opportunity to answer to or challenge the evidence adduced so late and irregularly in the trial process.

The Court of Appeal of Kenya when faced with a situation similar to the one before us **Civil Appeal NO.219 of 2013 Independent Electoral and**

Boundaries Commission and 2 Others vs. Steven Mutinda Mule and 2 Others relied on a Nigerian Supreme Court case as authority to hold that parties are bound by their pleadings and we quote:

> **"In the first, ADETOUN OLADEJI (NIG) LTD VS. NIGERIA BREWERIES PLC S.C 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows:**
>
> ***'... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.'***
>
> **Other Judges on the case expressed themselves in similar terms, with Judge Christopher Mitchell JSC rendering himself thus:**
>
> ***'In fact, the parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.'***

We find the stated legal principles above sound and persuasive.

Counsel for the applicant sought to rely on the Supreme Court Case **Misc. Application No. 06 of 2012 Attorney General and Another vs. Africa Cooperative Society Ltd.** We find that this case is distinguishable from the instant case.

In the **Attorney General vs. Africa Cooperative Society Ltd** (supra) the application was not merely to allow the applicants to adduce additional evidence.

It was to be allowed to adduce additional evidence that would elucidate on evidence already on record. The Supreme Court considered that:-

> **"Given the exceptional circumstances of this case as pointed out earlier in this ruling, our considered view is that admitting the full report of the IGG in evidence will elucidate on the summary report already on record and enable this court to finally determine the issues raised on appeal. In that context, the report is not additional evidence but evidence necessary to elucidate evidence already on record. We allow its admission."**

The summary report was already properly on record of the lower court.

On the facts of the instant case there was no evidence properly on the record of the lower court that was sought to be elucidated by the applicant. We have already found that the trial Judge had justifiably rejected DR Forms from the 7 polling stations so they were not properly on court record.

Counsel for the applicant also attempted to rely on **Mulla The Code of Civil Procedure Act V of 1908** for the DR Forms of the 7 polling stations to be admitted, but we find that the principle stated in Mulla on page 514 is:-

> **"In case any document is refused to be admitted into evidence by the trial Court, it is always open to the appellant to take resort to O41, r 27 of the Code of Civil Procedure to bring those documents. If the court, from whose decree the appeal is preferred, has refused to admit evidence which ought to have been admitted."**

The position of the law stated above in **Mulla** is that the evidence on appeal should be the evidence that sought to be admitted ought to have been admitted by the lower court. In the instant application the applicant tried to adduce evidence

in their written submissions in respect of a matter that was not in contention at the trial. We do not find that the trial Judge ought to have admitted such evidence; and therefore cannot admit it as additional evidence onappeal. The situation in the instant application, was not in relation to evidence that the trial court ought to have admitted. The principle stated above in **Mulla The Code of Civil Procedure Act,** is therefore not applicable to the facts of the instant application.

We find that the application before us does not fulfill the first condition on which additional evidence could be admitted as stated in the case of **Hon. Anifa Kawooya** (supra).

The next principle to consider is whether the evidence sought to be adduced as additional evidence is relevant to the issues:-

Counsel for the 1st respondent submitted that the trial Court had considered the manner in which the evidence in consideration was sought to be brought before the trial Court and the learned trial Judge ruled that it was not admissible. According to counsel, the trial Court had made its ruling and the applicant had made this a ground of appeal in his cross appeal. The appellant having appealed on the matter should await the determination of his cross appeal. He submitted that in view of the ground 2 of the Cross Appeal which raises the same issue this application is premature. Counsel was of the view that since the contest in the lower court was in respect of 19 polling stations, evidence of the 7 polling stations that were not contested and was not in dispute could not be in issue at the trial Court or the appellate court.

We would agree with counsel for the 1st respondent that the applicant raised the matter of rejection of the contested evidence in his Cross Appeal. This Court

would consider the propriety of the rejection of that evidence at the trial Court when handling that as a ground of appeal in the applicant's Cross Appeal.
We find it premature to handle the issue here when it is pending as an issue in the Cross Appeal.

Having found that the issue would appropriately be handled as a ground of appeal when handling the Cross Appeal we find it not necessary to assess the other elements on which admission of additional evidence could be admitted on appeal as the matter will be resolved in resolution of the Cross Appeal.

The application is hereby dismissed for the reasons above stated.

The costs will be in the cause.

Dated at Kampala.....29th.....this day of.....August.....2017.

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Hon. Justice S.B.K. KAVUMA
DEPUTY CHIEF JUSTICE

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Hon. Justice Richard Buteera
JUSTICE OF APPEAL

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Hon. Justice Alfonse Owiny Dollo
JUSTICE OF APPEAL