

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISC. APPLICATION NO. 0781 OF 2023
[ARISING FROM CIVIL APPEAL NO. 96 OF 2020]

NAKKU ABBEY MAKUBUYA

APPLICANT / APPELLANT

V

SUUNA SHAFIK

RESPONDENT

BEFORE: HON. LADY JUSTICE P. BASAZA - WASSWA

R U L I N G

Representation:

Ms. Nampala Elizabeth for the Applicant / Appellant.

Mr. Luzinda Ali and Mr. Abubaker Ibrahim for the Respondent.

Introduction:

[1] This is a Ruling arising out of an application brought by the Applicant: **Ms. Nakku**, who is also the Appellant in **Civil Appeal No. 96 of 2020** in this court.

Appeal No. 96 of 2020 itself arises out of the original Civil Suit No. 43 of 2014 in the **Chief Magistrates Court of Mengo**. That original suit shall hereinafter be referred to as '**the original Suit**').

Masabikwa 30/6.

[2] In her application, brought under **Section 98 of the Civil Procedure Act¹**, and **Order 43 Rule 22 and Order 52 Rules 1 & 3 of the Civil Procedure Rules²**, Ms. Nakku seeks that she be granted leave to adduce additional evidence in Civil Appeal No. 96 of 2020. She also seeks that the costs of her application be in the cause.

Background:

[3] In the original suit, Ms. Nakku sued Mr. Suuna, contesting ownership of an unregistered piece of land measuring **50ft by 67ft, by 590ft by 6 ft, located at Lugala LC 1 Village, Lubyā Parish, in Lubaga Division in Kampala District** (hereinafter referred to as '**the suit land**'). She contended that she owns the suit land and that Mr. Suuna is a trespasser. She sought for an eviction order against Mr. Suuna, a permanent injunction, general damages, interest and costs of the suit.

[4] Judgment was delivered in the original suit against Ms. Nakku, and being the unsuccessful party, she filed an appeal to this court vide **Civil Appeal No. 96 of 2020**.

The Applicant's case:

- [5] The gist of Ms. Nakku's present application and supporting affidavit is;
- i) That she seeks to adduce additional evidence comprising of the following documents:
 - a) A letter from her lawyers; M/s Century Advocates dated February 8, 2021

M. Nakku 30/6.

¹ Cap 71

² S.I 71-1

- b) A Handwriting expert's report dated June 11, 2021.
 - c) A Plaint in C/s No. 1015 of 2011 filed by a one Ssebaduka Samuel against National Housing and Construction Company Ltd (**NHCC**) for trespass.
 - d) A lease agreement between Buganda Land Board and NHCC executed in 1996.
- ii) That after filing her appeal she discovered the said three documents that she describes as '*New and important evidence*'.
 - iii) That her application has been brought without undue delay.

The Respondent's answer:

[6] By his affidavit in reply, Mr. Suuna opposed the application, and answered:

- i) That the said Handwriting experts report could have been secured by Ms. Nakku during the trial in the original suit.
- ii) That the purported '*New evidence*' was within Ms. Nakku's knowledge during the trial in the original suit.
- iii) That Ms. Nakku has not just discovered now, that she was paying Busulu to the Buganda Land Board.
- iv) That through the exercise of due diligence, the purported '*New evidence*' would have been adduced by Ms. Nakku during the trial, but she is seeking to make a fresh case on appeal to fill up omissions and patch up weak points.
- v) That allowing the application shall seriously prejudice him.

The Applicant's Rejoinder:

[7] Ms. Nakku re-joined:

M. Nakku 30/6.

- i) That the '*New evidence*' was not in her possession at the time of hearing the original suit, and that she discovered it after the Judgment in the original suit was delivered.
- ii) That the '*New evidence*' does not introduce a fresh case, but elucidates the evidence that is already on the court record.

Submissions by Counsel

[8] Ms. Nampala, learned Counsel for Ms. Nakku argued that since the dispute in the original suit involved fraud, this a proper case for court to grant leave to the Applicant to adduce new additional evidence on appeal. That the new evidence sought to be adduced exposes that fraud, including forgeries conducted to grab the suit land from Ms. Nakku, and elucidates on the earlier evidence adduced by The Applicant.

For her proposition, learned Counsel cited the case: **Hon. Anthony Kanyike v the Electoral Commission & Ors³**.

[9] Learned Counsel: Mr. Luzinda and Mr. Abubaker argued in reply for Mr. Suuna, that such a Handwriting expert's report would not be additional evidence that could not have been procured, with due diligence, during the trial in the original suit. Counsel pondered why Ms. Nakku did not engage the Handwriting expert during the six (6) year period of the trial? They also questioned why the said expert was engaged after the Judgment was delivered against Ms. Nakku, and

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³ COA Civil Appeal No. 013 of 2006, Arising from Electoral Appeal No. 04 of 2006

argued that the report is only intended to fill up an omission or patch up weak points in Ms. Nakku's case.

- [10] Learned Counsel submitted in respect of the plaint in C/s No. 1015 of 2011 involving Sebadduka, that the case does not prove that Sebadduka owned the suit land. That the parcel of land in that case and the parcel of land in the present appeal are two different parcels of land. They argued that no judgment is rendered in that case, and that the plaint evidence is not useful.
- [11] For the lease agreement between NHCC and Buganda Land Board, Counsel argued that it is, and is not in issue who the registered proprietor of the suit land is or was. That such lease agreement between NHCC and Buganda Land Board has no evidential value at this stage.
- [12] Learned Counsel further argued for Mr. Suuna that there was inordinate delay in bringing the present application. That Ms. Nakku appealed against the Judgment in 2020, and she secured the Handwriting expert's report on June 11, 2021 yet filed this application on April 11, 2023. That fraud was also not pleaded by Ms. Nakku in C/s No. 43 of 2014.
- [13] In their conclusion, learned Counsel argued that Ms. Nakku has failed to prove exceptional circumstances that would warrant the leave of court to her to adduce additional evidence.
- [14] In rejoinder, Ms. Nampala argued for Ms. Nakku that the '*New evidence*' is not voluminous and it discloses a strong *prima facie* case of wilful deception which expose fraud and forgery against Mr. Suuna that he committed to steal the suit land from Ms. Nakku. That such '*New evidence*' is not introducing a new case on

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[18] I have very carefully evaluated the grounds upon which Ms. Nakku seeks this Court's leave to produce the said additional evidence, and I find that she has failed to show substantial cause that would warrant that the said leave be granted.

[19] First, as correctly pointed out by learned Counsel for Mr. Suuna, the original suit was not an action in alleged fraud. Rather it was an action in alleged trespass. The arguments by Ms. Nampala about fraud as a justification for the grant of this court's leave, are with due respect, misplaced.

[20] I also further agree with learned Counsel for Mr. Suuna, that had Ms. Nakku and her lawyers used due diligence, they would have engaged the said handwriting expert during the course of the trial. They had more than ample time to do so, but did not, and cannot be allowed to do so at this stage.

[21] Similarly, I also find that all the documents that Ms. Nakku seeks to be adduced as additional documents, if produced, will not have an important influence in the outcome of the present appeal.

For example, I see no bearing on the appeal before this court, that the plaint in C/s No. 1015 of 2011, and or the other documents like the lease agreement between the Kabaka of Buganda and NHCC, will have. Mr. Sebadduka (PW3) told the lower court in his evidence in the original suit that the suit land had disputes. I fail to see how Mr. Sebadduka's pleadings in C/s No. 1015 of 2011 will change, vary or add to that, let alone, assist this appellate Court. That position that the suit land had disputes is already on the record of the lower Court.

Decision of Court:

[22] **In the final result, this application fails, and is accordingly dismissed with costs to the Respondent.**

[23] The parties shall proceed to file their written submissions in **Civil Appeal No. 96 of 2020** in the following manner:

- i) The Appellant: Ms. Nakku shall file her written submissions within two (2) weeks from the date of this Ruling, in any case not later than July 14, 2023.
- ii) The Respondent: Mr. Suuna shall file his written submissions within two (2) weeks from July 14, 2023 in any case not later than July 28, 2023.
- iv) Any submissions in rejoinder shall be filed within one (1) week from July 28, 2023.
- v) All written submissions shall be uploaded on the Judiciary ECCMIS Portal within the timelines given, and shall not be more than five (5) sheets each, and in a font size not smaller than font size 12.

I so order,

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**P. BASAZA - WASSWA
JUDGE**

June 30, 2023

Ruling delivered via email to the parties, and uploaded on the Judiciary ECCMIS Portal.

Sent to: centuaryadvocates@gmail.com, muwanguziabby@gmail.com,
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