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THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 130 OF 2017

(ARISING FROM CIVIL APPEAL NO. 288 OF 2016)

NSABWA HAM.....APPLICANT

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VERSUS

1. APOLLO WASSWA BASUDDE

2. ISAIAH KALANZI

3. ROSEMARY WANYANA.....RESPONDENTS

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(CORAM: REMMY KASULE, JA, KENNETH KAKURU, JA & HELLEN OBURA, JA)

RULING OF THE COURT

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This application is brought by way of Notice of Motion under Rule 43 (1) and (2), Rule 1 (2) and (4) of the Judicature (Court of Appeal Rules) Directions, SI.13 -10, S.98 of the Civil Procedure Act and Article 126 (2) (e) of the Constitution of the Republic of Uganda 1995 (as amended). It seeks for orders that this Honourable Court be pleased to grant leave to the applicant to adduce new evidence on appeal and the costs of this application be provided for.

The grounds in support of the motion are set out therein as follows:-

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" 1. THAT the applicant is the lawful Administrator of the Estate of Sepiriya Rosiko Kaddu Mukasa (Deceased).

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2. THAT, on 19th September 2016, the applicant obtained a letter from the Assistant Registrar of the High Court (Family Division) which clearly states that "It is therefore likely that the grant presented did not originate from this court and it's a forgery", hence an illegality which should be addressed by this honourable Court.

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1. THAT the applicant exercised due diligence but was not able to obtain such confirmation of forgery from the High Court before the conclusion of the High Court Proceedings.

2. That the basic assumption common to both parties has clearly been falsified by the subsequent evidence provided by the Assistant Registrar of the High Court.

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3. *That the new evidence would have influence on the outcome of the case if produced in the Court of Appeal.*

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4. *That to refuse such evidence would affront to common sense and a sense of justice.*

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5. *That it will serve the interests of justice and prevent an abuse of process if the applicant is permitted by this Honourable Court to adduce new evidence before this Honourable Court (sic)."*

The application is supported by the affidavit of the applicant dated 24th May, 2017. It expounds on the grounds already set out in the Notice of Motion.

20 At the hearing of this application learned Counsel *Mr. David Gureme Mushabe* appeared for the applicant while learned Counsel *Mr. Richard Nsubuga* appeared for the respondents.

25 Mr. Mushabe submitted that the applicant obtained Letters of Administration to the estate of the Late Sepiriya Rusiko Kaddu Mukasa on 25th August 2008, issued by Hon. Justice Joseph Murangira of the High Court of Uganda. He further submitted that the respondents produced at the trial Court Letters of Administration in respect of the same estate dated 8th May, 2002.

30 The applicant now seeks to introduce new evidence to show that the Letters of Administration held by the appellants (respondents herein) were obtained through fraud. Counsel submitted that the applicant, on 19th September 2016 obtained a letter written by the Assistant Registrar Family Division of the High Court, Ms. Atukwasa Justine, which, counsel submitted, confirms that Letters of Administration in respect of the estate of the Late Sepiriya Rusiko Kaddu Mukasa issued to the respondents on 8th May 2002 were likely to have been forged.

Counsel contended that the above information could not have been obtained earlier.



5 Further that, there was a common assumption that the said grant existed at the time of the trial which is no longer the case, and that special circumstances exist for this Court to allow this application.

10 Mr. Nsubuga opposed the application. He contended that, had the applicant exercised all due diligence at the trial, he would have obtained the information he now seeks to adduce. Counsel submitted that the letter the applicant intends to adduce was obtained in September 2016 and the evidence contained therein is not relevant to the issues at hand before this Court. Furthermore, that the evidence is not credible and cannot in any way influence the result of the appeal.

15 We have listened carefully to both Counsel. We have also read the Court record and the authorities cited to us. It is settled law that, an appellate Court may exercise its discretion to allow additional evidence to be adduced only in exceptional circumstances, which include:

20 *“(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;

(ii) It must be evidence which is credible in the sense that it is capable of belief;

25 *(iii) 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;*

(iv) 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.”

30 See: **Ladd vs Mashall (1954) 3 All ER 745; Attorney General vs Paul K. Ssemogerere and others, Supreme Court Constitutional Application No. 2 of 2004; Anifa Kawooya vs National Council for Higher Education, Supreme Court Miscellaneous Application No. 8 of 2013.**



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The letter sought to be adduced as additional evidence in this case is dated 19th September 2016. This letter is written by an Assistant Registrar of the Family Division of the High Court in response to the applicant's request. It is averred by the applicant in paragraph 3 of the affidavit in support of the application that the letter states that, "*It is therefore likely that the grant presented did not originate from this court and it's a forgery*". The applicant contends that this is an illegality which should be addressed by this Court.

This application raises the following issues; whether: this letter constitutes '*discovery of a new and important matter*', its '*relevant to the issues*', its '*credible*', its '*likely to influence the result of the case*' and the application was '*brought without undue delay*'.

15 As regards the issue of '*discovery of a new and important matter*', we are of the considered view that the facts set out in the letter could have been ascertained before or during the trial. It is not clear from the pleadings and the attachments when the letter requesting for certification of the respondents' Letters of Administration was written to the Family Division of the High Court. Counsel for the applicant tactfully left out that letter of request and only attached the response. It is possible that the letter was written before or after the judgment was delivered on 5th May 2016 and an application for review of the same was made. Whatever the case may be, the applicant could have still obtained this letter and adduced it in court at the time of the suit if due diligence had been exercised because such information was at all material times available on a public record, in a Court of law, and as such cannot be said to have been '*discovered*' after the delivery of the Judgment.

In any event, if the alleged forgery the letter seeks to prove, is based on the disparity of the respondents' names as they appear on the computer printout from the Court Case Administration System (CCAS), the computer printout was already part of the record at the trial as stated in paragraph 13 of the affidavit in reply to this application. All the applicant's counsel needed to do was to submit on that disparity and allege forgery during the trial. Actually we find that no evidential value was added to the computer printout by the letter of



5 the Assistant Registrar which, in our view, merely gave her speculative opinion on the matter without any expertise on the subject of forgery.

We also note that the trial Judge in his ruling on the application for review made a finding based on the evidence of His Lordship Kibuuka Musoke that the grant was a forgery and the Letters of Administration granted to the respondents was revoked on that basis. We therefore
10 find no new and important matter in the letter sought to be adduced as the issue of forgery was already canvassed at the trial and decided upon.

On the issue of relevance, we have had the opportunity to peruse the grounds of appeal as set out in the memorandum of appeal and we have failed to see any to which the additional evidence would be relevant. All the grounds appear to us to be challenging the trial Judge's
15 jurisdiction to hear the application for review after having been transferred to another division of the High Court, the procedures that were followed and the new evidence considered during the review as well as the findings and orders made in the ruling in disregard of the earlier findings and orders made in the judgment reviewed.

As regards credibility of the evidence, we find that the evidence may not be credible as the
20 only basis upon which the Assistant Registrar arrived at a conclusion that the Letters of Administration was likely to have been forged, is the discrepancy in the names on the computer record and on the Letters of Administration.

On the probability of influencing the result of the case, in view of our finding on the issues of relevance and credibility, we find that allowing the additional evidence sought to be adduced
25 would have no due influence on the result of the appeal.

Finally on whether this application was brought without delay, we note that the judgment of the trial court was delivered on 5th May 2016 and an application for review was subsequently made and a ruling in favour of the applicant was delivered on 31st October 2016. The Notice of Appeal against the ruling and orders was filed on 4th November 2016. This application was



5 then filed on 25th May 2017, a period of 6 months and 3 weeks after the notice of appeal was filed. Ordinarily, a period of 6 months and 3 weeks would not be considered undue delay.

10 However, in the circumstances of this case, our finding is that there was dilatory conduct. It is noteworthy that the applicant received the record of appeal that was filed on 20th December 2016 and filed his Conferencing Notes on 10th February 2017. Three days later on 13th February he also filed his Trial Bundle and sat back. Upon being served with the hearing notice for the appeal issued by the Deputy Registrar of the Court on 12th May 2017, the applicant filed this application on 25th May 2017. To us this appears to be an afterthought which lends credence to the respondents' allegations that the applicant is resorting to delaying tactics as averred in paragraphs 18, 19 and 20 of the affidavit in reply to this application. We
15 therefore find that there was undue delay in bringing this application in the circumstances of this case.


On the whole, we find no merit in this application and we hereby dismiss it with costs.

We so order.

Dated at Kampala, this 13th day of OCT. 2017.

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HON. MR. JUSTICE REMMY KASULE
JUSTICE OF APPEAL

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HON. MR. JUSTICE KENNETH KAKURU
JUSTICE OF APPEAL

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HON. LADY JUSTICE HELLEN OBURA
JUSTICE OF APPEAL

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