THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT KAMPALA

[CORAM: TSEKOOKO, KATUREEBE, KITUMBA, TUMWESIGYE, KISAAKYE, JJ.S.C]

CIVIL APPLICATION NO. 13 OF 2009

NSEREKO JOSEPH.
KISUKYESARAH
HAJI MUNJI & OTHERS ::APPLICANTS

AND

BANK OF UGANDA:::RESPONDENT

{Application arising from Judgment of the Supreme Court at Kampala (Odoki, C.J, Tsekooko, Karokora, Mulenga and Kanyeihamba, JJSc.) in Civil Appeal No. 010f2002 dated 21st March, 2003}

This is a ruling on a preliminary objection raised by Counsel for the respondent (I3ank of Uganda) on 12th October, 2010, when the application was called for hearing. The objection was made against an application filed by Nsereko Joseph, Kisukye Sarah and Haji Munji (1st, 2nd and 3rd applicants) and others, who are all former employees of the respondent, the Bank of Uganda, seeking for the following orders:

"1. ***THAT this Honourable Court grant the Applicants leave to adduce additional evidence which is to be the basis for orders to alter, vary and/or review its judgment in Civil Appeal No.1 of 2002.***

2. ***THAT this Honourable Court be pleased to exercise its inherent powers to recall and alter, vary and/or review its judgment in Civil Appeal No.1 of 2002.***

3. ***THAT costs before the lower courts and appeal before this court and for this application be provided for. "***

The application was brought under rule 2(2) and 42(1) and (2) of the Supreme Court Rules and is based on the following grounds, set out in the Notice of Motion:

"(a) ***There has been a discovery of new and important evidence which after the exercise of due diligence had not been within the knowledge and/or could not have been produced at the time of the suit and/or the appeals.***

(b) The applicants believe this evidence to be relevant to the issues that were heard and determined during the appeals and if adduced, will necessitate this Honourable Court to recall and alter, vary and/or review its judgment in Civil Appeal No.1 of 2002.

(c) It is in the interests of justice that this Honourable Court grants the applicants leave to adduce additional evidence and to thereafter alter, vary and/or review its judgment in Civil Appeal No.1 of 2002."

The application is also supported by an Affidavit sworn by Raphael Odongo Layika who was one of the persons on whose behalf the representative suit was brought.

Before considering the merits of the objection raised, we have considered it necessary to give the following background to this application. A representative suit, H.C.C.S No. 961 of 1998 was brought on behalf of the applicants and several other former employees of the respondent bank, seeking to determine their pension benefits. The High Court ruled in favour of the applicants.

The respondent appealed to the Court of Appeal in Civil Appeal No. 72 of 2001, which overturned the decision of the High Court and ruled in favour of the respondent. The applicants appealed to this Court in Civil Appeal No.1 of 2002. This Court disposed of their appeal on 21st March 2003, ruling in favour of the Respondent Bank.

After the decision of the court, parties failed to agree on the number of employees entitled to pension. This Court decided to call counsel for both sides to address it on the disputed matters. Counsel addressed court on 18th November 2003. In its ruling delivered on 16th January, 2004, this Court clarified its judgment as hereunder:

> *"1.* ***Since the suit was a representative action on behalf of the Bank 0f Uganda Veterans Association, all Appellants who qualified/or pension as at 3d[h] November* 1994 *should be paid their pension.***

2. ***Bank of Uganda staff records shall form the basis for identification of Appellants who qualified for pension.***

3. ***The pension scheme operating at the time of retirement, which was 3d[lt] November 1994, shall govern the calculation of the amount of pension to each Appellant.***

4. ***Although the appeal to this Court was dismissed, the Appellants whose rights to pension were not affected by the dismissal, shall not be required to pay costs in this Court and Courts below.***

5. ***The Bank of Uganda shall pay pension directly to all Appellants who are entitled. "***

The matter was apparently put to rest until the present Civil Application No. 13 of 2009, which is the subject of this ruling, was filed by the applicants in this Court. The hearing of the application was set for the 1i[h] October 2010. The applicants were represented by Dr. Henry Onoria of *M/s* WEB Advocates, while the respondent was represented by Mr. Masembe Kanyerezi from MMAKS & Co. Advocates.

At the commencement of the hearing, Mr. Kanyerezi raised a preliminary objection to the Application. He contended that the applicants' prayer seeking court's leave to allow them to adduce additional evidence, which would in turn be the basis of variation of the Court's judgment which was passed in 2003, was not provided for under the law. He based his objection on Rule 30(1) of the Judicature (Supreme Court) Rules which prohibits this court from taking additional evidence on a second appeal.

He further contended that the judgment which Applicants were seeking to modify was made in 2003, and yet, the court would not have had powers to grant the order to adduce additional evidence even if the appeal was still pending before it. He submitted that the court cannot have more power to take additional evidence after disposing of the appeal, when it did not have those powers when hearing the appeal.

Dr. Onoria, counsel for the applicants, on the other hand conceded that there had been an error in the rules they cited in their application and that the proper rules should have been Rule 2(2) and Rule 42 of the Judicature (Supreme Court) Rules. He argued that Rule 30 on which counsel for the respondent was relying only applies during the hearing of an appeal but could not apply in an appeal where a party discovers new evidence that he wishes to bring before the Court after the appeal has been disposed of.

He further argued that the applicants were seeking to bring entirely new evidence that came to their knowledge after their appeal before the Supreme Court had finally been disposed of and that was why they were relying on Rule 2(2) to invoke the inherent jurisdiction of the Court to allow their application for an order to adduce new evidence. He urged Court to overrule the objection to enable his clients' application to be heard on its merits.

Rule 30(1) of the Supreme Court Rules, provides as follows:

> ***"Where the Court of Appeal has reversed, affirmed or varied a decision of the High Court acting in its original jurisdiction, the court may decide matters of law or mixed law and fact, but shall not have discretion to take additional evidence. "***

We have considered the submissions of both counsel with respect to the preliminary objection raised. With respect, we are not persuaded by counsel for the applicants with regard to the application of rule 30(1) of the Judicature (Supreme Court) Rules. The rule clearly prohibits this Court from taking additional evidence while it is hearing appeals emanating from the Court of Appeal. The relevant clause reads that *' ... shall not have discretion to take additional evidence.* ' The rule does not make any exception with respect to this prohibition.

Secondly, the Rule envisages situations where this court is hearing an appeal emanating from the Court of Appeal. In this case, both sides conceded that there is no such appeal, since the substantive Civil Appeal No. 1 of 2002 was finally disposed of by this court in 2003.

We now turn to the second argument raised by learned counsel for the applicants that their application is brought under rule 2(2) of the Judicature (Supreme Court) Rules. This rule provides as follows:

> ***"Nothing in these Rules shall be taken to limit or otherwise affect the inherent powers of the court, and the Court of Appeal, to make such orders as may be necessary for achieving the ends of justice or to prevent abuse of the process of any such court, and that power shall extend to setting aside judgments which have been proved null and void after they have been passed, and shall be exercised to prevent an abuse of the process of any court caused by delay. "***

While it is true that this rule preserves the inherent jurisdiction of this court to make such orders as may be necessary for achieving the ends of justice, the applicants must demonstrate how they fall under the ambit of this rule.

The applicants clearly indicate in their application that it arises from the judgment of this court in Civil Appeal No.1 of 2002, which appeal was disposed of in 2003. Hence they do not have a pending appeal before this court.

Secondly, although they claim that the application arises from the judgment made in Civil Appeal No. 1 of 2002, it is evident from their pleadings (the notice of motion and the supporting affidavit) that they are seeking for this court's leave to adduce new evidence which they discovered six years after the appeal had been disposed of. The contention of Dr. Onoria that the evidence the applicants seek to adduce was discovered six years after the appeal was decided, does not satisfy the provisions of either Rule 2(2) or any law of which

In fact the ends of justice, would, in our opinion, demand that there should be an end to litigation and that parties should abide by the decision pronounced by this court, which is the last appellate court.

We agree with counsel for the respondent that this application is incompetent. We accordingly strike it out for being incompetent. Since the applicants are acting in representative capacity, we would not condemn them in costs but instead order that both parties meet their respective costs.

Dated at Kampala this.... 21st day of.. November 2011

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Hon. Justice J.W.N. Tsekooko
Justice of the Supreme Court

Hon. Justice B. M. Katureebe
Justice of the Supreme Court

Hon. Justice C.N.B. Kitumba
Justice of the Supreme Court

Hon. Justice Tumwesigye
Justice of the Supreme Court

Hon. Justice Dr. Esther M. Kisaakye
Justice of the Supreme Court