

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 40 OF 2018

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(Arising from Election Petition Appeal No. 32 of 2016)

LUBEGA DRAKE FRANCIS APPLICANT

VERSUS

1. KALEMBA CHRISTOPHER

2. ELECTORAL COMMISSION RESPONDENTS

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CORAM: Hon. Justice Alfonse Owiny-Dollo, DCJ

Hon. Justice Kenneth Kakuru, JA

Hon. Justice Christopher Madrama, JA

RULING OF COURT

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This is an application by notice of motion brought under *Rule 2(2)* of the Judicature (Court of Appeal Rules) Directions, *Section 33* of the Judicature Act and *Sections 82* and *98* of the Civil Procedure Act.

The applicant seeks the following orders:-

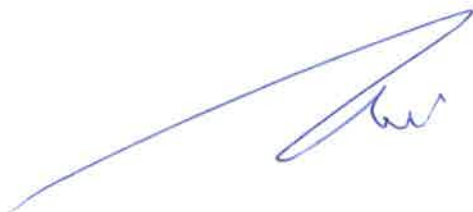
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- 1. The orders in the Judgment delivered by Justices SBK Kavuma, Alfonse Owiny-Dollo and Richard Buteera on the 19th day of January 2018 in Election Petition Appeal No. 32 of 2016 be reviewed and set aside.*
- 2. Costs of the application be provided for.*

The grounds in support of this application are set out in the Notice of Motion and affidavit of the applicant are briefly that:-



1. *The Justices erred in law and fact when they held that the conduct a person who gains admission to a university well knowing that the certificate used to gain the said admission is legally barred or inadequate for that admission is not fraud.*
- 5 2. *The Justices erred in law and fact when they held that a University Certificate obtained in contravention of the law is valid and all the subsequent qualifications stemming from it are valid.*
3. *The Justices erred in law when they held that a candidate in an election petition cannot impeach the illegal qualification of the winning candidate of the same*
10 *election in an election petition but can only do so through an ordinary plaint and only against the awarding institution.*
4. *The Justices erred in law and fact when they held that the respondent did not bribe voters in spite of the overwhelming evidence on court record without citing any evidence to support their contradicting decision.*
- 15 5. *The Justices erred in law and fact when they came to a conclusion that the respondent had resigned his position as RDC Lwengo rejecting the 4 salary pay slips from the Accountant General's Office that proved payment salaries for four months before nomination but erroneously holding that his salary account was*
20 *No. 6010000037 of Centenary Bank yet it did not bear any salary transaction at all.*
6. *The Justices erred in law and fact when they granted Miscellaneous Application No. 31 of 2016 to adduce additional evidence yet it did not meet the required standard for court to allow additional evidence to be adduced as the said additional evidences had always been with the knowledge and possession of the*
25 *applicant and his lawyers and the said application to adduce additional evidence was being used to raise a new cause of action that was not before the lower court.*



7. *It is in the interest of substantive justice that the Honourable court reviews or varies the order/ruling.*

Representations

When the application came up for hearing *Mr. Jude Mbabali* learned Counsel appeared for the applicant while *Mr. Justin Ssemuyaba* learned Counsel appeared for the 1st respondent and *Mr. Tumwesigye* learned Counsel appeared for the 2nd respondent. The parties agreed to file written submissions.

Applicant's case

Mr. Mbabali for the applicant in his written submissions, referred to *Section 82* of the Civil Procedure Act Cap 71 to support the application brought to this Court to review its own Judgment. He contended that, the limitations for an application for review to stand are, such application should disclose discovery of a new and important matter of evidence which after the exercise of due diligence was not within the knowledge of the person considering himself aggrieved or could not be produced by him at the time when the decree was made. Secondly, that any person who considers himself aggrieved on account of some mistake or error apparent on the face of the record may apply for review of the Judgment. Further that, this Court derives powers to review its own Judgment from *Rule 2(2)* of the Rules of this Court.

He relied on *M/s Northern Indian Caterers (India) Ltd. Vs Lt. Governor of Delhi 1980 AIR 674* in which it was held that "it is well settled that a party is not entitled to seek a review of a Judgment delivered by that Court merely for the purpose of rehearing and a fresh decision of the case."

Counsel abandoned grounds 4 and 6 raised in the Notice of Motion and maintained grounds 1, 2, 3 and 5. In respect of grounds 1 and 2, Counsel contended that, the learned justices of appeal erred in law and fact when they held that the 1st respondent's conduct of gaining admission to a university well knowing that the

certificate he used to gain the said admission was legally barred and inadequate did not amount to fraud, further that a University Certificate and all the subsequent qualifications obtained in contravention of the law were valid.

5 He submitted that, it was not in dispute that the 1st respondent obtained only one credit in the "O" level certificate which he used to apply for entry into Kampala University for a Certificate in Social Work and Social Administration in 2008, he then used the said Certificate to apply for a Diploma in Social Work and Social Administration. He then used the said diploma to apply for a Bachelors degree in Public Administration in the same University.

10 Counsel contended that, the law which dictated the minimum requirements for admission to a University using an O-level certificate was *The University and Other Tertiary Institution (Minimum Entry Requirements for Admission to Universities or Other Tertiary Institutions) Regulation, S1 63 of 2007*.

It stipulates as follows;-

15 *"the minimum entry requirement for admission to an ordinary certificate program is the Certificate of Education (UCE) with at least 3 credits obtained at the same sitting."*

20 He argued that the 1 respondent's academic qualifications were all invalid since he did not meet the minimum entry requirement and as such his election was null and void for want of the requisite academic qualifications. Further that, the 1st respondent's conduct applying for a certificate with only 1 credit instead of the required minimum 3 was an act of fraud. He relied on *Waimiha Saw Milling Co. Vs Wione Timber Co. Ltd (1962) AC 101* in which it was held that fraud means actual fraud or some act of dishonesty. In addition, that the Supreme Court in *Gole Nicholas*
25 *Davis Vs Loi Kageni Kiryapawo S. C. Election Appeal No. 19 of 2007* held that Article 80 of the constitution of the Republic of Uganda 1995 stipulates that one must have



A-Level standard or its equivalent in order to qualify for nomination and election for Parliamentary seat. He asked Court to have the Judgment of their Lordships reviewed and set aside as it contradicts the established legal principles and Judgments set by the Supreme on fraud.

5 In respect of ground 3, Counsel contended that, it was an error for Court to hold that the 1st respondent's academic qualification could only be impeached through ordinary plaint and not an election petition. He submitted that, Article 86 of the 1995 Constitution of Uganda mandates the High Court to hear and determine any question as to whether a person has been validly elected as a Member of Parliament.

10 The Court has power to determine a petition where it is alleged that a person was not qualified for elections on grounds that the papers he presented for nomination purpose was not valid. For the above proposition he relied on *Abdul Balingira Nakendo Vs Patrick Mwendha, Election Petition Appeal No. 9 of 2007*.

15 On ground 5, Counsel contended that, the learned Justices erred when they came to a conclusion that the 1st respondent had resigned his position as RDC Lwengo, they rejected the 4 salary pay slips adduced from the Accountant General's Office that produced salary payment for four months prior to nomination. Further that the learned justices erroneously held that the 1st respondent's salary account was No. 6010000037 of Centenary Bank yet when critically analysed the said account did
20 not bear any salary transaction. He argued that, this was an error or mistake which ought to be corrected.

He asked Court to allow the application for review.

1st respondent's reply

25 Mr. Ssemuyaba for the 1st respondent submitted that, this matter was already adjudicated upon by this Court and as such it is *res judicata* and that this Court is barred by the principles of estoppel by record and judgment and it is *functus officio*.



He contended that, the applicant is purporting to raise a review and smuggle a fresh appeal over the same matter that was already decided by the Court of Appeal and as such, this Court cannot hear an appeal on its own Judgment.

5 Counsel raised a preliminary point of law, he argued, the application is incompetent as it is brought under *Section 33* of the Judicature Act and *Sections 82* and *98* of the Civil Procedure Act. *Section 33* of the Judicature Act is very clear that it is only the High Court that shall exercise such jurisdiction vested in it by the Constitution, therefore the above provision cannot be applied to the Court of Appeal. He cited *Baku Raphael Obudra and another Vs Attorney General, Supreme Court Constitutional*
10 *Appeal No. 1 of 2003*.

In addition, Counsel contended that, *Sections 82* and *98* of the Civil Procedure Act are not applicable to this application before this Court since *Section 1* of the Civil Procedure Act provides that the act shall extend to proceedings in the High Court and Magistrates Courts and not the Court of Appeal. He argued that, the applicant
15 has not shown that there is some new or additional evidence and a set of facts that have been discovered for the Court of Appeal to reverse its own decision. He asked Court to dismiss the application with costs.

2nd respondent's reply

20 *Mr. Tumwesigye* Counsel for the 2nd respondent contended that, this application was brought under a wrong law and that the remedy sought is non-existent. He argued that, *Section 33* of the Judicature and *Sections 82* and *98* of the Civil Procedure Act only apply to the High Court and Magistrates Courts.

He submitted that, whereas this Court has powers under *Rule 2(2)* of the Rules of this Court to set aside judgments which have been proved to be null and void, the
25 judgment in the instant case has not been found to be null and void, therefore this



Court cannot exercise such powers to set aside the Judgments as prayed by the applicant.

Counsel contended that, the Court of Appeal may under *Rule 35(1)* of the Rules this Court correct *inter alia* any error arising from accidental slip or omission in its Judgment in order to give effect to what was its intention at the time of giving Judgment, however in the instant case the applicant is not seeking to correct errors on the face of record or an arithmetical error or accidental slip, he is seeking to correct errors of law and fact which this Court can only entertain when they come before it in form of an appeal from a lower Court. He argued that this application is a disguised appeal and this Court cannot rehear an appeal of its own decision. He further submitted that, the Court of Appeal is the final appellate Court in election matters. He cited *Livingstone M. Sewanyana Vs Martin Alikier Misc. Application No. 40 of 1991, Orient Bank Vs Fredrick Zaabwe and Another Civil Application No. 17 of 2001, Kakhamishi Brothers Ltd Vs R. Raja & Sons (1960)EA 313 and Baku Raphael Obudra and another Vs Attorney General, Supreme Court Constitutional Appeal No. 1 of 2003.*

Counsel argued that, *The University and Other Tertiary Institution (Minimum Entry Requirements for Admission to Universities or Other Tertiary Institutions) Regulation, S1 63 of 2007* which the applicant cited is not applicable to this application. He contended that the 1st respondent's qualifications were not obtained by fraud and there is no evidence adduced by the applicant to prove his allegations. He cited *Joy Kabatsi Kafura Vs Anifa Kawooya Election Petition No. 025 of 2005*

Finally, Counsel argued that the slip rule should not be used to smuggle in an appeal to the same Court to hear an appeal on its own decision. Counsel asked Court to dismiss the application with costs.

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Court's consideration

We have carefully read the submissions filed by all parties, we have also read the affidavits on record and the authorities cited and relied upon by Counsel.

5 This application was brought under *Rules 2(2)* of the Rules of this Court, *Section 33* of the Judicature Act, *Sections 82* and *98* of the Civil Procedure Act which we shall quote hereunder;

Section 33 of the Judicature Act provides as follows:-

10 *“The High Court shall, in the exercise of the jurisdiction vested in it by the Constitution, this Act or any written law, grant absolutely or on such terms and conditions as it thinks just, all such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties may be completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.”*


15 *Section 82* of the Civil Procedure Act provides that;-

“82. Review

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

20 *(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order on the decree or order as it thinks fit.”*



Section 98 of the Civil Procedure Act provides that;-

"Nothing in this Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

5 It is not clear why this application was brought under *Section 33* of the Judicature Act and *Sections 82* and *98* of the Civil Procedure Act which we find inapplicable before this Court. The general principle of law is that a Court of law becomes *functus officio* in a case it has entertained and made a final decision disposing of it finally. See: *Shah Vs Dhavanchi [1981] KLR 561*.

10 The only circumstances under which this Court may be asked to re-visit its decision are as set out in *Rules 2(2)* and *36(1)* of the Rules of this Court which stipulate as follows:-

Rule 2(2) provides that;-

15 *"Nothing in these Rules shall be taken to limit or otherwise affect the inherent power of the court, or the High Court, to make such orders as may be necessary for attaining 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 abuse of the process of any court caused by delay."*

20 On the other hand, *Rule 36* provides that;

"Correction of errors

25 *(1) A clerical or arithmetical mistake in any judgment of the court or any error arising in it from an accidental slip or omission may, at any time, whether before or after the judgment has been embodied in a decree, be corrected by the court concerned, either of its own motion or on the application of any interested*



person so as to give effect to what was the intention of the court when Judgment was given."


The *locus classicus* case on the slip rule is *Lakhamshi Brothers Ltd. vs. R. Raja and Sons (1966) E.A 313 at 314* in which Sir Charles New bold held as follows;-

5 *"I would here refer to the words of this court given in the Raniga case (1965) EA at p.703 as follows: 'A court will, of course, only apply the slip rule where it is fully satisfied that it is giving effect to the intention of the court at the time when judgment was given or, in the case of a matter which was overlooked, where it is satisfied, beyond doubt, as to the order which it would have made*
10 *had the matter been brought to its attention."*

The circumstances in which this Court will exercise its jurisdiction and recall its Judgment are, where Court is satisfied that it is giving effect to the intention of the Court at the time when judgment was given or in the case of a matter which was overlooked See: *Orient Bank Vs Fredrick Zaabwe and another Supreme Court Civil*
15 *Application No. 17 of 2007.*

As rightly cited by Counsel for the 2nd respondent, this Court in *Ahmed Kawooya Kaigu Vs Bangu Aggrey Fred, Court of Appeal Civil Appeal No. 3 of 2007* laid out the scope of the slip rule. It held that *Rule 36(1) and (2)* of the Rules of this Court entitles the Court to correct its Judgments where there are clerical or mathematical
20 mistakes or accidental slips. The error or omission must be an error in expressing the manifest intention of the Court. Court cannot correct a mistake of its own in law or otherwise even when apparent on the record.

On the look at the applicant's Application and supporting affidavit, it is clear that this is not a proper application for the slip rule. All the grounds in support of the
25 application are on an error of fact and/or law. In *NPART vs. General Parts (U)*



Ltd. Misc. Appl. No. 8 of 2000 the Supreme Court held that this was not a proper case for the application of the slip rule and observed that -

5 *"The jurisdiction of this Court to recall its judgment and correct or otherwise alter it, however, is not limited to the slip rule. It may also be exercised under its inherent power, which is set out in Rule 1(3)...*

...we are inclined to agree that, where appropriate circumstances exist for the exercise of its inherent power, this Court would not be inhibited by Rule 29 (1) to receive additional evidence."

10 Whereas this Court possesses such inherent powers, the Court of Appeal is the final appellate Court in election matters and as such, this application is an abuse of court process. We must note that an appeal is a creature of statute and there is no inherent appellate jurisdiction. The applicant in this case however, seeks to have this Court adjudicate on matters already decided upon by this Court. This is a disguised appeal and this Court cannot sit in an appeal of its own Judgment. It is
15 clear that the grounds set out in the application are pointing out errors of this Court on matters of law and fact and these, in our view, are not conversed by the slip rule.

The judgment of this Court is not a nullity and there are no grounds showing that it is. Any errors of law do not mean that a judgment with alleged errors is a nullity. Rule 2(2) of the Rules of this Court in the circumstances cannot be invoked.

20 It is also clear that, both under the inherent powers and under the slip rule, the Court's jurisdiction is circumscribed and must not be invoked to circumvent the principle of finality of the Court's decisions.

We therefore find that this application was brought in bad faith and is an abuse of Court process. This application is therefore dismissed with costs to the respondents.

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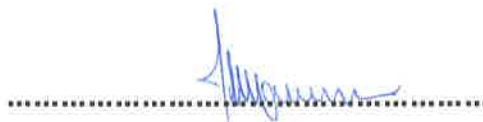
Dated at Kampala this 15th day of April 2019.

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**Alfonse Owiny-Dollo,
DEPUTY CHIEF JUSTICE**

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**Kenneth Kakuru
JUSTICE OF APPEAL**

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**Christopher Madrama
JUSTICE OF APPEAL**

