THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. APPLICTION NO. 19 OF 2016

ARISING OUT OF CIVIL SUIT NO 240 OF 2014

1. **SANYWA TWAHA**
2. **MGUGU ABEY:: APPLICANTS**

VERSUS

MTN UGANDA LTD:: RESPONDNET

BEFORE: LADY JUSTICE LYDIA MUGAMBE

RULING

1. This application is brought under Order 46 rules 1, 3 and 8 of the Civil Procedure Rules, section 82 of Civil Procedure Act and section 33 of the Judicature Act for orders that the ruling of this court dated 24th June 2015 be set aside, save that it is a public interest suit and costs be provided for.

2. The Applicants are represented by Mr. Shaban Sanywa of M/s. Sanywa Wabwire & Co. Advocates and the Respondent is represented by Mr. Idot Augustine of M/s. Kampala Associated Advocates.

3. The application is supported by the affidavits of both Applicants. The grounds for the application are briefly that civil suit No. 240 of 2014 was dismissed by this court on 24th

June 2015. Since then, the Applicants have discovered new and important evidence of the agreement for the specific performance sought, the application is brought in good faith, is not expressly or impliedly prohibited by any law and it is just and equitable that it is granted.

4. The first Applicant deponed a supplementary affidavit in rejoinder in which he averred that he discovered that there exists the detailed agreement of terms and conditions that the Respondent issues to all its customers that he had no knowledge about when filing the head suit and that he discovered the said agreement after perusing the Respondent's defence in civil suit No. 600 of 2016 Najjemba Joyce v. MTN Uganda Ltd, which was issued after the determination of civil suit No. 240 of 2014.

5. The application was opposed by the Respondent through the affidavit in reply of Mr. John Bosco Ssempijja the Senior Manager, Commercial and Litigation at the Respondent. Mr. Ssempijja averred that the alleged discovery of new and important evidence vide an agreement between the Respondent and its mobile money customers forms neither new nor important evidence to warrant the exercise of the court's review powers. Further that the agreement alleged as new and important evidence by the Applicants was available and in the possession of the applicants at the time of filing civil suit No. 240 of 2014 as the agreements are given to all customers of the Respondent upon subscription for the services and therefore would not be new to the Applicants as users of the service and that the said agreements do not address the preliminary objection to invite court to review its decision.

6. The Applicants deponed affidavits in rejoinder. They averred that at the time of filing civil suit 240 of 2014 the Respondent was using a different format of the agreement and after filing the suit, the Respondent changed the format and that the agreement discovered is very crucial to the determination of the parties' rights.

7. Section 82 of the Civil Procedure Act provides that 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 (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.

8. Order 46 rule 1 of the Civil Procedure Rules provides that any person considering himself or herself aggrieved—(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of a new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her, may apply for a review of judgment to the court which passed the decree or made the order.

9. Rule 3 provides that; (1) where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application. (2) Where the court is of opinion that the application for review should be granted, it shall grant it; except that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his or her knowledge, or could not be adduced by him or her when the decree or order was passed or made without strict proof of the allegation.

10. In **Meera Investments Ltd v. Andreas Wipfler T/A Wipfler Designers & Co. Ltd HCMA No. 163 of 2009** it was held that in an application for review, an aggrieved person must prove; (1) that there is a discovery of new and important facts; (2) there is an error apparent on the face of record, or (3) any other sufficient cause.

11. The Applicants seek court to invoke its review powers on the ground that they have discovered new and important evidence that they did not have at the time the main suit was dismissed. They rely on the different agreements adduced. The first agreement is attached as annexure B to the second Applicant's affidavit in support of the application. The second agreement is attached as annexure Z to the second Applicant's affidavit in

rejoinder and the third agreement is attached as annexure A to the first Applicant's supplementary affidavit. I have carefully looked at these agreements. Whereas they are different in format, the agreements are essentially the same in content except for annexure A which is more detailed.

12. In all these agreements, there is a clause on tariffs which is to the effect that the Respondent would charge for each transaction effected from a customer's account basing on the tariff guide available at the Respondent's website or published from time to time. Indeed the second Applicant acknowledges in paragraph 5 of his affidavit in rejoinder that agreements B and Z only differ in format but are general and standard in terms and conditions of use.

13. The Applicants contention that these agreements constitute a discovery of new and important evidence is lacking in my view. This is because the change in the format of these agreements did not change their content at all and I see no substantial difference in the tariff clause in all these agreements which is the applicable clause to this application. In addition the Applicants have failed to demonstrate the bearing that these agreements would have on their cause of action in the main suit. The applicants have also not adduced any evidence to prove that these agreements were not available to them despite exercise of due diligence at the time of filing civil suit 240 of 2014. This ground has not been proved by the Applicants.

14. In a letter dated 3rd July 2017, the Applicants informed court that the Respondent had effective 15th June 2017 modified its tariff guide to read "deposit free" and that this was a violation of basic standard of honesty on the proceedings ongoing and that the Applicants case would be prejudiced. I disagree with the Applicants and I am of the opinion that the Respondent in so doing was following the directive issued by this court in paragraph 9 of its ruling of 24th June 2015 to do more in enhancing clarity of its message and information for the wider public.

15. Basing on all the above, because the Applicants adduce no sufficient ground for review, have failed to prove that the agreements constitute new and important evidence; the application is dismissed with costs for the Respondent.

I so order

Lydia Mugambe
Judge
10/01/2018.