THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISC. APPLICATION NO. 433 OF 2018
(ARISING FROM CIVIL APPEAL NO. 33 OF 2016 AND DIVORCE CAUSE NO. 11 OF 2016 CHIEF MAGISTRATES COURT OF KAMPALA NAKAWA)

EDWARD TIBAHWERWAYO ……..…… APPLICANT

VERSUS

DAISY NAMULI ……..……. RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

Introduction

[1] This Application is brought by Edward Tibahwerayo under **Order 43 rules 22, 23 and 24, Order 10 rule 12, Order 52 rule 2 of the Civil Procedure Rules S.I. 71-1, and Section 98 of the Civil Procedure Act Cap 71**, by way of Notice of Motion, seeking orders that; leave be granted to allow the applicant to adduce additional evidence to enable court make an informed decision on the property owned by the parties which is a serious issue on appeal; that the respondent be ordered to produce a leasehold application document in respect of land located at Kibulu Kiganda, Mubende district which is in her possession; and that costs be provided for.

[2] The grounds for this application are set out in the affidavit of the Applicant, Edward Tibahwerayo, and are briefly that: the applicant filed Divorce Cause No. 33/2016 at Nakawa Chief Magistrates Court but inadvertently omitted to petition court on issue of property belonging to the parties; that at trial issues of property at Mbuya Kinawataka, Nakawa Division, Kibulu Kiganda, and Kalamba continuously came up in the respondent's cross petition but the documents were not in his possession so as to adduce such evidence and believes that the respondent has disappeared with the same documentation; the applicant seeks to adduce additional evidence recently found in respect of the property at Mbuya Kinawataka, shop at Ben Kiwanuka, proceeds from the house at Makerere

Kagugube and prays that court compels the respondent to produce documentation to property in Kibulu Kiganda so as to pronounce itself on the same; that it is in the interests of justice to admit the additional evidence and issue an order of production for the leasehold application in respect of land at Kibulu Kiganda so as to settle all issues in controversy.

[3] The application was not opposed by the respondent whose affidavit in reply only addressed the protection order. Although this would mean that the respondent concedes to the application, under O. 43 r. 22(1) production of additional evidence is not an entitlement so I shall address the application for probity.

Representation

The Applicant is represented by Counsel Robinah Kyamuhangire of M/S Rwakafuuzi & Co. Advocates; while the Respondent is represented by Counsel John F. Ssengooba of M/S Ssengooba & Co. Advocates. Both counsel did not file written submissions.

The case

[4] The Applicant filed Divorce Cause No. 33/2016 and judgment of court was that certain properties were individual properties that belong to the respondent and are not matrimonial property. The applicant has appealed the decision and now seeks to bring additional evidence concerning the properties held to belong to the respondent for court's consideration when determining the appeal.

The issue for determination is; ***whether this Application should be granted.***

Resolution.

The position of the law.

[5] Order 43 r 22 CPR provides that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the High Court unless the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or the High Court requires any

document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the High Court may allow the evidence or document to be produced, or witness to be examined.

[6] It is trite that litigation must come to an end. (See the case of In *Brown v Dean [1910] AC 373*, *[1909] 2 KB 573)*. Considering the new wave of litigiousness as a result of people's awareness of their rights, court would not find time to dwell on the same case for ages simply because a party has since the last decision remembered another piece of evidence and so requires that the case be reopened. In some instances however court in its quest to administer justice may allow fresh evidence if in its discretion the ends of justice may not be met but for the additional evidence. The appellate court must weigh these two interests when determining whether a party may adduce additional evidence not presented at the appeal stage.

[7] A party cannot re-run a trial simply because potentially persuasive or relevant evidence had not been put before the court. An obligation rests on the parties to adduce any material evidence before the court, and if they fail to do so they cannot require a second hearing to put the matter right. This was the view in the case of **Aluma and 2 others v Said Okuti HCMA 12/2016** and that is the set principle.

[8] The exceptions to establish a balance between need for litigation to end and meeting the ends of justice were re-stated by the Supreme Court in *Makubuya Enock William T/a Polly Post v. Bulaim Muwanga Klbirige T/a kowloon Garment Industry, Civil Application No. 133 of 2014* and in *Hon. Bangirana Kawoya v. National Council for Higher Education Misc. Application. No. 8 of 2013* where it was held that an appellate court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

i. Discovery of new and important matters of evidence which, after the exercise of due diligence, were 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:

iii. It must be evidence which is credible in the sense that it is capable of belief;

iv. 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;

v. The affidavit in support of an application to admit additional evidence should have attached to it, proof of evidence sought to be given;

vi. The application to admit additional evidence must be brought without undue delay.

Discovery of new and important matters of evidence

[9] The applicant states in his affidavit that he had not involved the issue of property because all along he had known that the same was family property and as such saw no reason to include the issue in his petition at the time. This is not exactly correct because in his prayers at paragraph 11(b) of the Affidavit in support of the petition he states that he prays that his **share of matrimonial property be disposed to all the children,** thereby inviting court to investigate what matrimonial property was available. In petitions for divorce, it is prudent that all property is dealt with whether it be family or individual property and such evidence must be produced. The evidence was within the applicant's knowledge as he knew about the property at the time of petitioning and would have sought a production order if the evidence was not in his possession.

[10] In *Karmali Tarmohamed and Another v. T.H. Lakhani and Co. [1958] EA 567*, and echoed in *Namisango v. Galiwango and another [1986] HCB.37,* it was held that except on grounds of fraud or surprise, the general rule is that an appellate court will not admit fresh evidence, unless it was not available to the party seeking to use it at the trial, or that reasonable diligence would not have made it so available. It is an invariable rule in all the courts that if evidence which either was

in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for producing that evidence ought to be given by the granting of a new trial.

[11] In my view even when the evidence is relevant, capable of belief and might influence the result of the case, where such evidence was in the knowledge of the applicant who even admits that he saw no reason to include it, the court cannot allow such evidence to be produced. The applicant states that he systematically explained how the property was accumulated over time but this evidence was not considered. The applicant states also that he was shocked to discover that he did not possess any documentary evidence to the properties during the trial. The applicant at that stage of the trial ought to have sought for production of such evidence (which he says the respondent had disappeared with) as he is doing now, since courts are permitted under O. 10 r. 14 to order production of evidence at any time during the pendency of any suit.

[12] The applicant has also attached evidence sought to be given to prove interest in the property at Ben Kiwanuka which he says he came across recently. The only exception to the rule on new and important matters of evidence which couldn't have been produced at the time of the suit or with due diligence is where the evidence elucidates on the evidence already on record (see **Aluma and 2 others v Said Okuti, supra**), which I find that it does not in this case, since as mentioned by the applicant, he systematically explained to the court how the property was accumulated. As such, the evidence already on the record should be clear if it was systematically explained and as the duty of the first appellate court, this evidence will be subject to fresh scrutiny to determine whether it was not considered as the applicant alleges.

[13] Concerning the prayer for a production order for land located at Kibulu Kiganda, the judgment shows that no evidence was availed at the lower court to determine

its status. Paragraphs 34, 35 and 36 of the applicant's affidavit in rejoinder to cross petition addresses issues to do with property and the bequest thereof by the respondent; this was an opportunity to adduce the relevant evidence but the applicant chose not to. It is here submitted for the petitioner that at the time he believed that the respondent had disappeared with the same documentation during her time of desertion. The record does not show that he brought this to the attention of court but chose to keep his belief to himself. He has not convinced court that he applied any due diligence. The duty of the first appellate court is to re-hear the case and subject the evidence to fresh scrutiny (see **Kifamunte Henry v Uganda (Criminal Appeal No.10 of 1997)**) and as such it is important that there be relevant evidence for its just determination. The absence of such evidence at that stage should have been addressed then.

Counsel for the applicant argues that this is a proper case for court to exercise its discretion because the additional evidence if allowed would clarify on who contributed to which property and the level of contribution. She cited the case of **Musisi Gabriel vs Edco Ltd & Anor M.A No. 386 of 2013 where it was held that '….an appeal court has discretion to allow a new point to be taken on appeal but it will permit such course only when it is assured that full justice can be done to the parties.'** I find the case distinguishable from the instant case because this application is not about bringing in a new point but rather new evidence.

[14] In conclusion;

1. This application fails and is hereby dismissed.
2. Each party shall bear their costs.

Dated this 26th day of August 2019

KETRAH KITARIISIBWA KATUNGUKA
JUDGE