

IN THE SUPREME COURT OF UGANDA

AT MENGO

Court: Entebbe, Ug. J.S.C.

CIVIL APPLICATION NO.9 OF 1987

BETWEEN

ROBERT HUBENDE APPELLANT

AND

LINT MARKETING BOARD RESPONDENT

Appeal from Judgment of the High Court
of Uganda at Kampala (Mr. Justice Ekirapa)
dated 9th June, 1987.

in

CIVIL SUIT NO. 1304 OF 1986

FACTS

This is an application on Notice of Motion accompanied by two affidavits of Mulira and Yona Kanyomozi. The application is brought under Rule 9(1) of this Court's Rules for an Order to take additional evidence of Yona Kanyomozi who was not available at the time when the case was heard in the trial court and more specifically on the matters of payment of Shs 6,500,000 which was paid to the said Yona Kanyomozi prior to the hearing of the case in the trial court which formed the basis of the respondent's case in the trial court.

Counsel for the applicant, Mr. Mulira submitted that in his affidavit in paragraphs 4, 5 and 6 he tried to establish the whereabouts of Mr. Kanyomozi in November 1986 but to no avail. He carried his inquiries through a Mr. Charles Mugisha, the Legal Officer of the Lint Marketing Board who was supposed to know the whereabouts of Mr. Kanyomozi. It was not until July 1987 that Mr. Kanyomozi turned up in the Chambers of Counsel and promised to bring to counsel relevant documents regarding the case. After receipt of the documents an affidavit was prepared and eventually sworn on 5th October, 1987. In his affidavit Mr. Kanyomozi stated that in or about the year 1982 he assisted the respondent to raise a loan for the

purpose of purchasing a lorry from the Coffee Marketing Board. In 1983 the lorry was involved in an accident in Kenya. Mr. Kanyomozi assisted again the respondent to provide funds for the repair of the lorry in Kenya. The whole amount, the respondent was supposed to pay him, was Shs 10,075,414/-. There was an agreement between him and respondent that that amount would be raised by selling the lorry. The lorry was sold to M/S Edible Oil and Soap Industries for Shs 12,000,000/- out of which 6,500,000/- was paid to Kanyomozi. It follows that the whole amount owing by the respondent to the Mr. Kanyomozi was not paid. Mr. Kanyomozi stated furthermore that he was living in Nairobi at the time the case was heard in the High Court and he accidentally met counsel on the street in Kampala.

In his submission counsel for the applicant said that the respondent would be unfairly enriching himself at the expense of Mr. Kanyomozi.

There was no affidavit sworn by the respondent or his counsel Mr. Womutuba in rebuttal. However, counsel for the respondent submitted that the affidavit of Mr. Kanyomozi did not disclose sufficient reasons for additional evidence. The affidavit merely stated that he was out of the country at the time of the hearing of the case. As regards the affidavit of Mr. Mulira counsel for the respondent submitted that the affidavit does not disclose why Kanyomozi was wanted and does not disclose the steps taken in search of Kanyomozi. Counsel submitted that all in all there was lack of diligence on the part of counsel. Counsel for the respondent referred to me Karmali Tarmohamed and Another Vs I.H. Lakhani & Co. (1958) E A 567. This authority that deals with the principles on which additional evidence could be granted does also cite Ladd V Marshall 3 ALL ER (1954) p 745 referred to by counsel for the applicant. Sir Kenneth O'Connor P in his judgment in Karmali Tarmohamed and Another (Supra) had this to say:

"The principles upon which an appellate court should admit fresh evidence where the application is not made on the grounds of fraud or surprise are not, I think, in doubt. I take the following passage from the judgment of DENNING L.J., in Ladd V Marshall (1954) I.W.L.R. 1489, at p 1491."

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be uncontroversial".

In the same case Sir Kenneth O'Connor P citing Corbett V Corbett (1953) 2 ALLER at p 72 and referring to the judgment of Berkett L J quoted him as saying:

"It is an invariable rule in all the courts that if evidence which either was in the possession of the parties at the time of the trial, or by proper diligence might have been obtained, is either not produced, or have 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 granting of a new trial".

This principle, as we have seen above, applied equally to additional evidence. The actual trial began on 30th March 1987 and ended on 9/6/87. Counsel for the applicant stated in his affidavit that the search for the whereabouts of Mr. Kanyomozi started in November 1986. It was not until July 1987 that Kanyomozi turned up in counsel's chambers. The appearance of Mr. Kanyomozi in the chambers lends credence to the fact that there was diligence to discover Mr. Kanyomozi who was at the time in Nairobi. Furthermore, it goes without saying that the evidence of Mr. Kanyomozi would have had an important influence to the decision of the court and could be believed if the agreement between Mr. Kanyomozi and the respondent was produced.

Apart from that the memorandum of appeal by the respondent refers to the fact that Mr. Kanyomozi did not give evidence or made a party or given a third party notice to the proceedings in the lower court. To me, that assertion means that there was a miscarriage of justice.

For the above reasons I would grant the application and order that the additional evidence of Yona Kanyomozi be taken by the trial court in accordance with the provisions of Rule 29(3) of this Courts' Rules.

Costs of this application go to the applicant.

DATED THIS ^{5th}----- DAY OF August 1988

David L.K. Lubogo

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Ag. J.S.C.