

**THE REPUBLIC OF UGANDA**

**IN THE SUPREME COURT OF UGANDA AT KAMPALA**

CORAM: OWINY-DOLLO, CJ; OPIO-AWERI, MWONDHA, TUHaise, CHIBITA, JJSC

**CRIMINAL APPLICATION NO. 05 OF 2020**

*(Arising from S.C. Criminal Appeal No. 75 of 2019)*

JOHN MUHANGUZI KASHAKA ..... **APPLICANT**

**VERSUS**

UGANDA ..... **RESPONDENT**

**RULING**

**Introduction**

This is an Application brought under Rules 2(2), 44(1), and 63 of the Judicature (Supreme Court Rules) Directions SI 13-11, section 7 of the 20 Judicature Act, and section 98 of the Civil Procedure Act, seeking orders of this Court granting leave to the Applicant to file, in Supreme Court Criminal Appeal No. 75 of 2019, now pending hearing before this Court, a supplementary record of Appeal containing additional evidence; and also file a supplementary Memorandum of Appeal therein.

**25 Background**

The Applicant was, when he was Permanent Secretary of Ministry of Local Government, convicted for causing financial loss c/s 20(1) of the Anti-corruption Act; for which he had been charged and tried. He was sentenced to 10 years and 10 days in jail; and was disqualified from 30 holding a public office in Uganda for 10 years. He was also ordered, together with others he was convicted with, to refund US\$ 1,719,454.58, to the government of Uganda. Both conviction and

5 sentence were upheld by the Court of Appeal; hence the Appeal to the Supreme Court, from which this application arises.

In the course of the criminal trial, the Attorney General who was not party to the criminal trial, filed High Court (Commercial Court) Civil Suit No. 240 of 2012, against Niko Insurance Ltd.; for the recovery of  
10 certain sums of money owing from them under a performance bond they had made in the contractual transactions for which the Applicant and others were later found guilty and convicted in the criminal trial referred to above. In the civil suit above, Madrama J (as he then was) gave judgment in favour of the Attorney General; having found that no  
15 evidence of fraud had been presented in Court against the government officials who had engaged in the transactions for which the Defendant had executed the performance bond.

The Applicant and the others he was convicted, and sentenced with, appealed to the Court of Appeal against both conviction and sentence.  
20 Justice Madrama was also a member of the coram that sat over the Applicant's appeal in the Court of Appeal; in which the Court of Appeal upheld both conviction and sentence by the trial Court. The Applicant and the others then appealed to this Court; from which the Applicant, blaming his previous counsel allegedly for neglecting to seek recusal of  
25 Madrama JSC from sitting over the Applicant's appeal in the Court of Appeal, has brought this application for leave to file a supplementary record of appeal containing additional evidence, which is the judgment of Madrama J (as he then was) in Civil Suit No. 240 of 2012 referred to herein above. He has also sought leave of Court to file a Supplementary  
30 Memorandum of Appeal.

## 5    Grounds of the Application

The grounds upon which the Application is premised were stated briefly in the Notice of Motion and laid out with detail in the Applicant's Affidavit deponed in Support of the Application. These are as follows:

1. *That during my criminal trial in the Anti-corruption Court, the Attorney General filed civil suit No. 240 of 2012, against NIKO Insurance Ltd in the commercial Court claiming recovery of \$489,650 under a Performance Bond issued by the Defendant Company.*  
.....  
15 3. *That upon hearing the case and evaluation of the evidence on court record, the court presided over by Hon. Justice Christopher Madrama gave judgment in favour of the Attorney General on 24<sup>th</sup> June 2013, having found, in various parts of the judgment, that myself and the other Government officials had acted dutifully and in good faith.*  
.....  
.....  
20 6. *That I am informed by my lawyers which advice I verily believe to be true that the learned Hon. Justice Christopher Madrama, had, during the trial been privy to evidence and exhibits that were also part of the record of Court of Appeal Criminal Appeal No. 723, 734, 735 & 742 of 2014 involving myself.*  
25 7. *That in both H.C.C.S No. 240 of 2012, Attorney General vs NIKO Insurance Ltd and Court of Appeal Nos. 723, 734, 735 & 742 of 2014, common evidence in the form of documentary exhibits was adduced before the Courts.*  
30

5 8. *That I am informed by my said lawyers which advice I verily believe  
to be true that the act of Hon. Justice Christopher Madrama in  
sitting twice where the same issues and evidence to which he was  
privy before, was in breach of the principle of a fair and impartial  
hearing and should have recused himself.*

10 ... ... ...

10. *That whereas in Consolidated Criminal Appeals No.723, 734, 735 &  
742 of 2014, I and my co-accused were represented by various  
Counsels, the sitting of Hon. Justice Madrama as a member of the  
Panel was neither challenged nor raised as an issue before the Court  
by any Counsel.*

15 11. *That the failure by Counsel to raise this issue to the Hon. Judge was  
either a mistake and/or lack of knowledge or inadvertence on their  
part.*

... ... ...

20 ... ... ...

... ... ...

... ... ...

... ... ...

17. *That it is just an equitable that this application be allowed.*

25 The Respondent filed no affidavit in reply to that of the Applicant; but however, its counsel made submissions in opposition to the application.

### **Representation**

At the hearing of the Application, the Applicant was represented by  
30 Counsel MacDusman Kabega; who filed written submissions and made  
oral clarifications in Court. Counsel for the Respondent referred Court

- 5 to the relevant part of the written submissions made by the Respondent in the Appeal in this Court from which this application arises.

## Issues

- 10 1. *Whether the Applicant is entitled to grant of leave to file a supplementary record of appeal with additional evidence.*
2. *Whether the Application merits the grant of the relief sought by the Applicant, to file a supplementary memorandum of appeal.*

## Submissions for the Applicant

Counsel for the Applicant submitted that whereas this Court is not allowed to admit new evidence under r.30 of the Supreme Court Rules, 15 rule 2(2) thereof grants this Court power to admit it in order to meet the ends of justice, where there are exceptional circumstances. See *Kyaggwe Coffee Curing Estate & Anor vs Emmanuel Lukwajju, SC Civil Application No. 12 of 2016; Attorney General & Inspector General vs Afric Cooperative Society Ltd Misc. Appln. 06/2012 (SC); Attorney General v Paul Kawanga Ssemwogerere & Anor S.C Civil Appln No. 2 of 2004*. He conceded that the evidence sought 20 to be admitted was available at the time of Appeal in the Court of Appeal; but failure to adduce it then was due to mistake and/or inadvertence of Counsel for the Applicant at the time.

He submitted that this mistake of Counsel should not be visited on the 25 Applicant; and relied for this on the decision in *Tropical Africa Bank Ltd v Grace Were Muhwana, Civil Application No. 03 of 2012*. He also argued that Justice Madrama's participation on appeal invalidated the subsequent decision of the Court of Appeal in upholding the decision of the trial Court. Counsel finally submitted that the application had been made without 30 delay, soon after receiving instructions. He urged Court to find that exceptional circumstances had been proved; and, thus, allow the application.

## CONSIDERATION BY COURT

### Ground one

We have carefully considered the application, the supporting affidavit, and the submissions made by Counsel for the Applicant. The first order sought in the application is for leave to be granted to the Applicant to file a supplementary record of appeal with additional evidence. The evidence in support of this ground is contained in paragraph 13 of the Affidavit in support of the application, reproduced above; in which the Applicant states that supplementary record of appeal sought to be allowed is the certified judgment of Madrama J in HCCS No. 240 of 2012, which the Applicant contends relates to the same issues in the appeal; hence it is relevant, credible, and believable.

It is manifest from this that the Applicant has brought this application for the admission of new evidence; but under an application for leave to file a supplementary record of appeal. This, we find to be irregular.

Rule 60 (2) of the Rules of this Court provides that the record of appeal: *"shall contain documents relating to proceedings in the trial court and shall also contain copies of the following documents relating to the appeal in the first appellate Court."*

A supplementary record is record of what transpired in the lower Court but was excluded from the record of appeal filed in the appellate Court. It means the record of appeal filed in Court is defective or incomplete.

In the instant case before us, the judgment sought to be admitted by way of supplementary record neither featured at the trial, nor at the Court of Appeal. Noticeably, whereas the rules of this Court provide, under r. 86, for supplementary records of appeal in civil appeals, the

5 rules on criminal appeals have no such provision. The proper course of  
action learned counsel for the Appellant should have taken, was to  
apply for amendment of the memorandum of appeal instead of  
couching it under a supplementary record of appeal. We are not  
satisfied that there exists, any grounds for granting an order to file a  
10 supplementary record of appeal prayed for in the instant matter; and,  
accordingly, we decline to grant leave to file the supplementary record  
of appeal prayed for.

Even if the Applicant had brought a proper application to admit new  
evidence under r.2 (2) of the Rules of this Court, it is clear from the  
15 evidence adduced and submissions made before this Court that the  
judgment sought to be admitted into evidence was available to the  
Applicant long before the Court of Appeal heard the appeal. The  
provision in Rule 30 that additional evidence is not admissible, is  
intended to ensure that litigation comes to an end; and the application  
20 of R. 2 (2) of the Rules of this Court which has a contrary import is only  
applicable in exceptional cases as laid down in the body of authorities  
cited herein.

It should also be pointed out that there is a distinction between mistake  
of Counsel, and failure in judgment by Counsel on what course of action  
25 to take in the pursuit of the interest of the litigant who has instructed  
such Counsel. For the former, the position of the Courts is that such  
mistake or error should not be visited on the litigant. However, in the  
latter, the litigant pays the consequence of the ineptitude of or poor  
judgment by the Counsel.

5 The rules governing admission of new evidence are well settled. In *A.G v Paul K. SSemogere S.C Const. Appln No.2 of 2004*, Court laid down the test for admission of new evidence as follows:

- 10 “(i) *Discovery of new and important matters of evidence which, after the exercise of due diligence, was 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;*
- 15 (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;*
- 20 (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 the evidence sought to be given;*
- (vi) *The application to admit additional evidence must be brought without undue delay.”*

The Court further made it clear that:

25 “*These have remained the stand taken by the courts, for obvious reasons that there would be no end to litigation unless a court can expect a party to put its full case before the court. We must stress that for the same reason, courts should be even more stringent to allow a party to adduce additional evidence to re-open a case, which has already been completed on appeal. The applicant's explanation why the additional evidence now sought to be admitted was not adduced at the trial of the petition or at the appeal to this Court is alleged negligence and incompetence of Mr. Dennis Bireije,*

- 5        Commissioner for Civil Litigation in the applicant's chambers, who was one of the counsel who represented the applicant in both courts.  
          To us, this means that the evidence was available and that with due diligence it could have been adduced at the trial of the petition or on the appeal to this court, but it was not . . . . .
- 10      *Lastly another factor we must take into account is that this application to admit additional evidence was brought several months after the appeal was completed. The judgments in the appeal were delivered on 29/1/2004, and this application was filed in Court on 22/7/2004.*
- 15      *That was not bringing this application without undue delay.*  
          *For these additional evidence in this case fulfills the special conditions we have referred to above. reasons, we are unable to say that the oral application to adduce It must therefore fail and it is accordingly dismissed with costs to the respondents.” (Our emphasis)*
- 20      It is quite evident that the Applicant is merely seeking to bring into contention before this Court the issue of the non-recusal by Justice Madrama from sitting on the appeal in the Court of Appeal; he having handled a civil matter the Applicant believes had biased his mind with regard to the matter before him on a criminal appeal. The law on recusal
- 25      is provided for separately in the Constitution (Recusal of Judicial Officers) (Practice) Directions, 2019. Recusal applications should be brought before Court at the earliest opportunity; which the Applicant herein failed to do. In the case of *Baker v Quantum Clothing Group [2009] EWCA Civ 566*, Jacobs L.J noted that:
- 30      “Finally, we think that this objection simply comes too late. It is not open to a party which thinks it has grounds for asking for recusal to

5       *take a leisurely approach to raising the objection. Applications for  
recusal go to the heart of the administration of justice and must be  
raised as soon as is practicable."*

We find the statement above to be good law. There is an obligation on  
a party who seeks to object, to make the application expeditiously. Any  
10      undue delay in bringing such an application will, in the eye of the law,  
amount to a waiver. According to *Halsbury's Laws of England Volume 61*  
*(2020) 5th Edition*, paragraph 635;

15      *"The right to challenge proceedings conducted in breach of the rule  
against bias may be lost by waiver, either express or implied. There  
is no waiver or acquiescence unless the party entitled to object to an  
adjudicator's participation was made fully aware, or knew, of the  
nature of the disqualification and of his right to object and had an  
adequate opportunity of objecting. However, once these conditions  
are met a party will be considered to have acquiesced in the  
participation of a disqualified adjudicator unless he has objected at  
the earliest practicable opportunity."*

It was clear from the evidence and Counsel's submissions in the instant  
matter before us that the Applicant and his lawyer both knew that Hon.  
Justice Christopher Madrama had handled an earlier matter in the  
25      Commercial Court involving related subject matter, but they apparently  
did not consider it of any consequence on the appeal process. For no  
given reason at all, the issue of recusal was not placed before the  
Justices of Appeal for a decision.

Therefore, since the Applicant herein failed to seize the opportunity  
30      available to it to apply to the Court of Appeal to admit the judgment in  
issue in evidence, since it was available to him during the Court of

- 5 Appeal process, but instead to bring it at the late stage of this Court process, it was an unacceptable inordinate delay. Similarly, the Applicant having failed to request for recusal of the Judge in issue at the Court of Appeal hearing, it would be wrong for this Court to make a declaration that the judge in issue ought to have recused himself from
- 10 hearing the appeal. This would occasion injustice to the Respondent, as it would negate the principle that litigation must come to an end.

## **Ground 2**

The second order sought in the application is for this Court to grant the applicant leave to file a Supplementary Memorandum of Appeal. Rule 15 63 of the Rules of this Court allows for the filing of a supplementary memorandum of appeal. It does not however provide for the conditions to be fulfilled before admitting the supplementary memorandum of appeal. It states:

20 “*The appellant may at any time, with leave of the court, lodge a supplementary memorandum of appeal.*”

The first ground in the intended Supplementary Memorandum of Appeal annexed to the affidavit of the Applicant arises out of the additional evidence which we have declined to admit. The first of the intended additional grounds of appeal is stated as follows:

- 25 1. *That the Honourable Justices of Appeal erred in law to have allowed Hon. Justice Christopher Madrama on the coram of Court, him having heard and decided H.C.C.S No. 240 of 2012 in the Commercial Court, wherein the issues that are raised in this Appeal were conversed before him.*
- 30 In this, it is clear that the Applicant seeks to introduce, by way of amendment of the Memorandum of Appeal, the issue of recusal that

5 was not canvassed at the Court of Appeal; hence, was never deliberated upon by the Court of Appeal. We have made a finding that the judgment in issue cannot properly be part of the Record or even form part of the Supplementary Record. Having found that there was inordinate and inexcusable delay on the part of the Applicant in bringing the  
10 application for recusal, we do not find it relevant to reopen the Court of Appeal decision through an amended Memorandum of Appeal, and delve into the issue whether there were grounds for recusal of the Honourable Justice of Appeal.

It follows, therefore, that our finding with regard to ground one of this  
15 application, rejecting admission of additional evidence from which this intended ground of appeal arises, conclusively disposes of the issue that the Applicant be granted leave to amend the memorandum of appeal to include the ground that one of the Justices on Appeal ought to have recused himself. We therefore also decline to grant leave to file  
20 a supplementary memorandum of appeal with this first ground.

The second ground of appeal in the annexed supplementary memorandum of appeal sought to be allowed was phrased as follows:

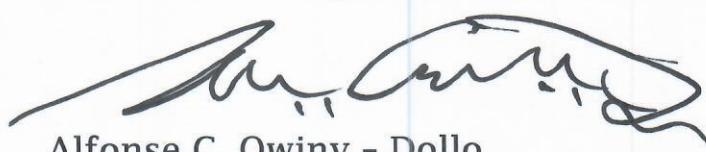
25           2. *That the Honorable Justices of Appeal erred in law and fact when upheld the order of compensation, in joint and equal proportions, as amongst the co-accused and the Appellant.*

It is thus apparent that the second ground is unconnected to the first ground, or to the additional evidence we disallowed, though no submission was made on it. We note that this intended ground of appeal is not an entirely new one raised for the first time in this Court; as it  
30 was raised as a ground of appeal at the Court of Appeal as follows:

- 5        "22. *The learned trial judge erred in law and in fact when she convicted the appellant of causing financial loss c/s 20(1) of the Anti-Corruption Act No.6 of 2009 and sentenced the Appellant to a term of 10 years imprisonment and ordered him to jointly with other convicts to refund the total amount of USD 1,719,454.48 (sic)*
- 10      23. *The learned trial judge erred in law and in fact when she passed an arbitrary and erroneous sentence of compensation of USD 1,719,454.58 which sentence is not prescribed by law."*
- 15      Since it was argued on appeal and a determination made upon it, we allow the Supplementary Memorandum of Appeal, incorporating only the second ground in the proposed supplementary memorandum of appeal, to be filed. In the result this Application succeeds only in one part. The Applicant shall file the Supplementary Memorandum of
- 20      Appeal within 48 hours of the delivery of this ruling, in accordance with the provision of r. 44 (3) of the Rules of this Court. Costs of this Application shall abide the outcome of the Appeal.

Dated at Kampala; this 15<sup>th</sup> day of September 2021

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Alfonse C. Owiny - Dollo

**Chief Justice**

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Rubby Opio-Aweri  
**Justice of the Supreme Court**

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Faith Mwondha  
**Justice of the Supreme Court**



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Percy Night Tuhaise  
**Justice of the Supreme Court**



Mike Chibita  
**Justice of the Supreme Court**