

5 2] The application filed by M/s Sage Advocates and opposed by M/s
Rwaganika, Baku & Co. Advocates is premised upon 16 grounds.
which are contained in the notice of motion. Some of those
grounds were in fact a narrative of the facts of the case, and I
therefore paraphrase as follows:

- 10 i. That the respondent filed HCCS No. 027 of 2009 in the
High Court of Uganda in Mbarara against the applicant
for recovery of land among others.
- 15 ii. That on the 25th October 2016, judgment in HCCS No.
027 of 2009 was delivered by His Lordship Justice
David Matovu in favour of the respondent
(Kahangirwe).
- 20 iii. That in his judgement, the honorable trial Judge
heavily relied on Exhibit PI which is a judgment dated
02nd August 1966 which court found out to be a
certified true copy and a genuine court document.
- 25 iv. That the trial court held that though the applicant
herein wasn't a party to the said 1966 suit, he is bound
by the said decision.
- v. The applicant being dissatisfied by the decision of the
trial court filed Civil Appeal No. 03 of 2017 Turyareeba
Yonah v Kahangirwe Eliab in this honourable court.
- 30 vi. Applicant has discovered new and important matters
of evidence which after the exercise of due diligence,
could not have been produced at the time of hearing in
the lower courts.
- vii. The evidence relates to the issues in the appeal mainly
the validity and authenticity of the alleged judgment of
the Magistrates' Court at Kayonza in Civil Suit No. 036
of 1966 E Kahangire v Z. Katyoko & Anor.
- 35 viii. That the applicant lodged a complaint with the office
of the Hon Chief Justice on the ground that the
judgment in alleged Civil Suit No. 36 of 1966 E
Kahangirwe v Katyoko & Anor which the High Court
heavily relied on was a forgery and never existed.
- 40 ix. That the Chief Justice through his Personal Assistant
a one Natwijuka Aloysious B wrote to the Magistrate
Grade One Ntungamo a letter dated 16th October 2017

5 to confirm the authenticity of the judgment in Civil Suit No. 36 of 1966.

- x. That in his Letter to the Personal Assistant to the Chief Justice dated 17th October 2017, the Magistrate Grade I Ntungamo confirmed that there are no records
10 concerning the case file for Civil Suit No. 36 of 1966 and further that the basis under which the judgment from Kayonza court was certified by the Magistrate court in Ntungamo is unknown.
- xi. The evidence is credible and thus capable of being
15 believed and the same wasn't available during the hearing of HCCS No.027 of 2009.
- xii. The admission of the new evidence does not in any way prejudice the Respondent.
- xiii. The evidence, if admitted, would have an influence on
20 the result of the appeal.
- xiv. It is in the interest of justice that the Applicant be permitted to adduce additional evidence.
- xv. The application has been brought without delay after the discovery of that evidence.
- 25 xvi. It is in the interest of Justice that this application be granted and costs abide the final outcome of the appeal.

3] Mr. Turyareeba Yonah the applicant swore an affidavit in support
30 of the motion in which the above grounds were amplified. He added that the genesis of the conflict dates way back on 9/9/2003 when he filed a complaint in the LCI Court of Omukibare Village, against the respondent, Kahangirwe Eliab who is his brother. The complaint was decided in Turyareeba's favour and an appeal by
35 Kahangirwe was declined by the LCII Court, Kyobwe Parish on grounds that the complaint was *res judicata*. Kahangirwe's appeal to the Chief Magistrate's Court Mbarara succeeded on grounds that the LCII Court was not constituted when they denied the appeal before them. The Magistrate ordered Kahangirwe to pursue

5 a retrial. Kahangirwe instead filed HCCS No. 27/2009 in Mbarara High Court (hereinafter the suit).

4] Turyareeba further deposed that at the hearing of the suit, Kahangirwe relied heavily on a judgment purportedly delivered in Civil Suit No. 36 of 1966 of the Magistrate's Court at Kayonza (hereinafter the Kayonza suit and Kayonza judgment). He contended that the suit never happened, an issue he labored to raise at the trial and even attempted to contest, but was ignored. That before a judgment was rendered in the suit, he tried but failed to trace the origins of the Kayonza judgment from its Court. That he continued with that search until he discovered a new and important matter that there has never existed a suit from which the Kayonza judgment emanated. He considered that since the Kahangirwe introduced that evidence in his pleadings and then relied on it in his submissions, it heavily influenced the decision of the High Court and is also likely to influence the decision of this Court, on appeal.

5] That following his discovery, Turyareeba lodged a complaint with the office of the Chief Justice and on 17/10/2017, he received confirmation from the Grade 1 Magistrate Court at Ntungamo that no records were found concerning Civil Suit No. 36/1966 of Kayonza Court or the Kayonza judgment. He considered the information from the Court credible, and that its admission on appeal does not prejudice Kahangirwe for he still retains a right to rebut it and that it should assist the Court to finally adjudicate the matters before it. He concluded that the application which was

5 presented without inordinate delay ought to be allowed to meet the interests of justice.

6] Mr. Kahangirwe who was represented by M/s Rwaganika, Baku & Co. Advocates opposed the application. He in that respect deposed
10 to facts in the affidavit in reply. He stated that the dispute has been the subject of trials in several courts including the Kayonza Grade III Court. That the subject matter, a piece of land, was a gift from his late father. That at some point, he filed the Kayonza suit against Katyoko and Nzaire, which he won and both men were
15 evicted. He then occupied the suit land uninterrupted until 2004, when Turyareeba using the judgment of the LCIII Court of Kayonza, regained occupation of it. That the decision of the Kayonza Court was eventually nullified by the Chief Magistrate of Mbarara on appeal with an order that the Turyareeba pursues his
20 appeal before the LCIII Court, but he did not do so.

7] Mr. Kahangirwe admitted that in the suit in the High Court, he relied on the judgment of the Kayonza suit which was admitted as his exhibit without contest from the applicant. That in addition, during the proceedings at Mbarara, he called his father Mr. Elifaz
25 Rutagaruhira as a witness, and the latter gave unchallenged evidence that Nzaire and Katyoko were defendants in the Kayonza suit and were both evicted during execution of the judgment. That in addition, one David Twahirwa another witness also testified that he was acquainted with and confirmed as authentic, the
30 signature of E. R. Rwamutemba the Magistrate who signed the judgment of the Kayonza suit. That the High Court was satisfied

5 with that un challenged evidence and delivered judgment in Mr. Kahangirwe's favour, now on appeal. Therefore, that the allegations that he forged the judgment in the Kayonza suit or committed illegalities is baseless.

10 8] Mr. Kahangirwe concluded that Turyareeba delayed in fixing his appeal in this Court, and also filed this application 7 (seven) years late, and only as an afterthought. Further, that the application does not meet the principles that a Court considers before granting leave to adduce additional evidence, and ought to be dismissed with costs.

15 9] In an affidavit in rejoinder, Turyareeba stated that he had occupied the suit land long before his father died and that the respondent lost the case in the LCI Court of Omukibare Village. That the essence of this application is that the existence or not of the judgment in the Kayonza suit is a question of law that this
20 Court should decide and its admission at the trial without contest was a mistake of his former lawyers that should not be visited on him. Even then, at the trial he contested the judgment as being a nullity for rising out of a non-existing suit. Further that he first came to know that the judgment did not exist after judgment of
25 the High Court was delivered, and its certification by a Magistrate in another Court raises suspicion of its existence. Further that the handwriting expert's report used only seeks to verify the authenticity of signatures but not existence of the judgment or its origins.

5 **Applicants submissions**

10] Mr. Turyareeba's counsel introduced his submissions by giving a detailed background of suit which begun in the LCI Court of Omukibare. I traversed those facts in the background. Counsel emphasized that the Judge considered the Kayonza judgment as an authentic document and therefore the applicant, although not party to the proceedings, was bound by it. That it was after the judgment that the applicant made a complaint to the Chief Justice of its existence and received certified confirmation that it did not. He then submitted that the new matter they seek to introduce into the appeal is that confirmation.

11] Counsel argued strongly that from the facts, the only logical conclusion is that, at the time the Judge made his decision in the suit, neither Turyareeba nor the Court were aware that the Kayonza judgment did not exist in the court records. Counsel argued that considering the grounds in the memorandum of appeal, it is clear that the matters he wished to introduce directly related to the issues in the appeal.

12] Turning to the application, counsel drew Court's attention to the law that allows the Court to admit additional evidence and some cases that had discussed it. He cited for example, **Commissioner Land Registrar & Anor versus Lukwajju, SC Civil Application No. 12/2016, Liberty Construction Ltd versus Lamba Enterprises Ltd, CA Civil Application No. 318/2021 and Bismillah Trading & Anor versus Falcon Estates, CA Civil**

5 **Application No. 328/202 8.** Out of those precedents, counsel pointed out what he believed were the conditions that his client needed to fulfil before what he considered new and important matters of evidence. Counsel continued that the information in issue having been obtained from the Chief Justice, the head of the
10 Judiciary and acting in his supervisory role, it is credible and is capable of influencing the result of the appeal. He in addition considered that this application was presented without inordinate delay soon after Turyareeba's current lawyers discovered the anomaly.

15 **Respondent's submissions**

13] As a precursor to his submissions, Mr. Rwaganika gave a brief history of the dispute and previous litigation to solve it. He conceded that the High Court Judge based his decision on the judgment of the Kayonza suit which was delivered by the late E.R
20 Rwamutemba on 2/8/1966. That during the process of execution of the High Court judgment, Turyareeba filed Miscellaneous Application No. 196/2016 in which he relied on the same evidence he now seeks to adduce as additional evidence. That in order to rebut allegations in that application, Kahangirwe filed affidavits of
25 Sebuwufu Erisa a handwriting expert, and another by David Twahirwa, the latter who was acquainted with the late E. R. Rwamutemba's signature. Both witnesses confirmed it as a judgment authored by Rwamutemba, and also confirmed his signature.

- 5 14] Counsel then pointed us to the established principles that a Court
should consider before allowing additional evidence to elucidate
that which is already filed on record. He cited for example, **AG &
Anor versus Afric Cooperative Society Ltd, SC Misc. App. No.
6/2012** and **Hon. Anifa Bangirana Kawoya versus National**
10 **Council for Higher Education, SC Misc. App. No. 8/2013.**
Counsel also drew our attention to the documents that are the
subject of this application and added that the impugned judgment
is not attached to the letters from the office of the Chief Justice.
He in addition noted that the responses to the inquiry by
15 Turyareeba were made with "*lightening speed*" which raises issues
of credibility. He wondered how a search for records dating back
to 1966 could be achieved in just one day.
- 15] Counsel further contended that nothing was shown by his
Worship Magomu to confirm that the case number and parties
20 under it did not exist. Further that Natwijuka Aloysius B, and His
Worship Magumu the authors of **TY9** and **TY10**, should have
sworn affidavits to own those documents and to explain their
conclusions. In counsel's view, Turyareeba was aware of the
impugned documents because they were mentioned in the
25 Kahangirwe's pleadings in respect of the suit filed in 2009. In
addition, that evidence was adduced at the trial in the High Court
that Katyoko and Nzaire were evicted from the suit land as a result
of the same judgment. That the applicant who was aged 25 years
and in school at the time the judgment in the Kayonza suit was
30 delivered, ought to have known about it.

5 16] Counsel added that Turyareeba had not given sufficient reasons
to sustain the orders he sought, and as a contemnor of an order
of the Chief Magistrate's Court of Mbarara, the Court should not
entertain him. That both parties in fact relied on the impugned
documents in Misc. App No. 196/2016, an application Turyareeba
10 filed to contest the taxation proceedings, and as such, they cannot
be classified as new and important matters. That nothing was
shown that there was contest to the judgment in Kayonza being
adduced in the High Court and therefore, the application is
misconceived. In conclusion that the application was filed with
15 inordinate delay, 7 (seven) years after the information was
obtained from the office of the Chief Justice in 2017.

Applicant's submissions in rejoinder

17] In rejoinder, applicant's counsel generally reiterated his earlier
submissions. He added in particular that Kahangirwe did not
20 dispute the fact that a complaint was lodged with the Chief Justice
and followed up by H/W Natwijuka Aloysius his personal
assistant, as well as H/W Magomu who wrote back to the Chief
Justice to confirm there were no records to confirm the existence
of the Kayonza suit. That all that information was provided by
25 judicial officers acting in their official capacities. He emphasized
that evidence that attempted to confirm the existence of the
judgment in the Kayonza suit, or its admission as an exhibit in
the High Court suit, is not enough to confirm its existence. He
continued that conferencing of the appeal did not bar a party from

5 adducing additional evidence if such evidence is necessary to determine the main issues in dispute in the appeal.

18] Counsel stated in conclusion that his client had presented a proper case for this Court to allow the prayer to adduce additional evidence. Conversely, Kahangirwe did not demonstrate that he would be adversely affected by such evidence which was infact relevant to the issues for determination, and which stand to influence the outcome of the appeal.

Decision of Court

19] Mr. Turyareeba Yonah seeks leave of the Court to adduce additional evidence in his appeal. He states that the evidence only came to his knowledge after the decision at the High Court was rendered. He considers the evidence pivotal and should assist the Court to fully and fairly adjudicate upon the issues raised in the appeal. Conversely, it is stated for Mr. Kahangirwe that Turyareeba who is in contempt of an earlier court order should not take benefit of further orders of a court. Further that he was aware in time of the matters he wishes to adduce, and does not fulfil any one of the criteria set down before such an order can be granted.

20] The application is presented under Rule 30(1)(b) of The Judicature (Court of Appeal Rules) Directions (hereinafter Rules of Court) which provides as follows:

"On any appeal from a decision of the High Court acting in the exercise of its original jurisdiction, the court may

5 *in its discretion, for sufficient reason, take additional evidence."*

21] It is evident that the powers given here are discretionary, and for the Court to be invoked, there must be sufficient reason adduced. Both counsel quoted substantial authority in which criteria that must be considered before an appellate court can admit new evidence was given, I will follow the Supreme Court case of **Commissioner Land Registration & Anor versus Emmanuel Lukwajju (Supra)**, which in turn followed **AG versus Paul Kawanga Semwogerere & Anor, Civil Application No. 12/2016** and **AG & IGG versus Afric Cooperative Society Ltd, Civil Application No. 12/2016**. It was held that:

" an Appellate Court may exercise its discretion to admit additional evidence only in exceptional circumstances, which include:

- 20 (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;*
- 25 (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;*
- 30 (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;*
- 35 (vi) *The application to admit additional evidence must be brought without undue delay.*

5 22] In this matter, the applicant seeks to adduce two documents into the appeal, namely: -

- 10 i. A letter dated 16/10/2017 in which the personal assistant of the Chief Justice writes to the Magistrate Grade I Ntungamo Court with a request that they are certain whether the records a Magistrate relied upon to certify the Kayonza judgment exist. (Annexure **TY9** to Turyareeba's affidavit).
- 15 ii. A letter dated 17/10/2017 by the Magistrate Grade I Ntungamo Court responding to the personal assistant of the Chief Justice stating that after cross checking with records, he confirmed that Kayonza Grade III Court once existed, but that there were no records concerning the file. (Annexure **TY10** to Turyareeba's affidavit)

20 23] In paragraphs 14 and 15 of his affidavit, Turyareeba stated that he begun to search for records to prove the authenticity of the Kayonza judgment before judgment of the High Court was delivered. That he continued with that search after judgment was rendered until he approached the office of the Chief Justice and
25 lodged a formal complaint. His evidence is that he first came to know of the non-existence of the Kayonza judgment on 17/10/2017, when the Magistrate Grade I Ntungamo Court notified the personal assistant of the Chief Justice that no records existed concerning the file.

5 24] The decision of the High Court was attached to this application. It
is evident that although the Judge considered the evidence of
other witnesses presented by Kahangirwe at the trial, he also
substantially relied on the Kayonza judgement when resolving the
issue of whether Kahangirwe owned the suit land. He held at page
10 2 and 3 of his judgment as follows:

*“The said suit land was according to the Plaintiff and PW2
Elifaz Ruta Garuhira the subject of a court case in 1966
between the Plaintiff on the one hand and a one Katyoko and
Nzairu on the other.*

15 *This court has seen a certified copy of the Judgment of His
Worship E.R Rwamutemba Magistrate Grade III delivered on
2nd August 1966 which is exhibit P1. This court finds this
judgment to be a genuine court document.*

20 *Although the Defendant was not a party to the decision in Civil
Suit No 36 of 1966 he is bound by the decision of the parish
court of Kyobwe where the Defendant was a party and which
decision was admitted in this case as exhibit P3. The parish
court of Kyobwe upheld the judgment of the Magistrate Grade
III in Civil Suit No 36 of 1966.*

25 *It is important to state that in his Judgment the magistrate
found as follows: -*

30 *“PW1 was Y. Bazarirabusha, the father of the plaintiff
who told this Court that he was the one who had given
the land in question to the plaintiff and therefore he
knew it very well”.*

5 25] I would find correct the submission that evidence may rebut the existence of the Kayonza judgment and is therefore an important piece of evidence that is relevant to the outcome of the appeal.

10 26] However, my findings above are not sufficient to secure the orders sought. The cardinal rule is that litigation must come to an end and it is only in the most deserving cases that matters of evidence can be resurrected at the point of an appeal. Turyareeba must satisfy the court that the information he has discovered about the Kayonza judgment was not in his knowledge at the trial, or that he could not have come to that knowledge even after exercise of
15 due diligence.

20 27] I have confirmed from Turyareeba's affidavit that the Kayonza judgment was first mentioned, and was also attached to the plaint and amended plaint that Kahangirwe filed in the High Court on 6/4/2009 and 29/2/2012 respectively. It was again attached to Turyareeba's affidavit as **TY6**. The Kayonza judgment was delivered on 2/8/1966 by E.R. Rwamutemba, a Magistrate Grade III, to determine a suit between Kahangirwe (as plaintiff) and Z. Katyoko and Nzaire (as defendants). The Magistrate found that the latter were in trespass of undescribed land within his jurisdiction, and which was the property of Kahangirwe.
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28] In paragraph 8 of his defence to the suit, Turyareeba contested the Kayonza judgment contending that it was not an authentic document and had been forged. In the amended defence, he changed that to say that if the judgment existed, Kahangirwe was

5 party to that suit, not in his personal capacity, but as a
representative of his family's interests. Paradoxically, he
maintained that not being a party to those proceedings, he could
not be bound by the Kayonza judgment. I have noted however that
his contention that during the trial he contested the Kayonza
10 judgment from being admitted as Kahangirwe's evidence, was not
borne by the record.

29] At page 27 of the certified record of the High Court, on 3/3/2005,
Kahangirwe as PW1, mentioned the Kayonza judgment in his
evidence and even identified it. His counsel Mr. Rwaganika applied
15 to tender it into evidence. There was no actual contest to that
application. Mr. Katembeko the defence lawyer only commented
that the judgment of 1966 was certified in 2004. The Kayonza
judgment was then admitted into evidence as PW1. When
presenting his case in defence, Turyareeba denied knowledge of
20 the suit of 1966 or its judgment contending that the judgment was
not authentic. However, Turyareeba and his two witnesses
admitted knowing both Nzaire and Katyoko and the fact that both
were ever in possession of the land in dispute.

30] I can deduce from the above facts that Turyareeba came to know
25 about the judgment early enough in the suit. He also knew at the
same time, that it was a pivotal piece of evidence used to bolster
the claim against him. Thus, the onus was on him to adduce
evidence to rebut it. He claims that during the trial, he began his
search or inquiry to confirm the existence of the Kayonza
30 proceedings and judgment at the Kayonza Magistrate's Court.

5 However, he adduced no evidence to that fact. The Kayonza judgment and attendant record of the Magistrate Grade III Court are all public documents and his search for them would have entailed a fairly transparent process including correspondence between him and the relevant court. There is still no evidence of
10 his alleged search after the High Court judgment, up until 17/10/2017 when in **TY9**, His Worship Natwijuka addressed his inquiry to the Ntungamo Magistrate's Court. Turyareeba or his advocates should have known early enough in the suit that the most obvious place to locate information about the Kayonza
15 judgment was in the relevant Court. In my view, he has not demonstrated that they had exercised due diligence to produce that evidence at the time the case was heard in the High Court.

31] It may be argued that the contents of **TY10** may be credible and thus capable of being believed. It is in fact a public document and
20 according to Section 73(iii) of the Evidence Act, would require no further proof. However, it cannot be dispelled that HW Magomu's conclusions may have been the result of a hastily done search, which he reported the very same day he received the inquiry from the Chief Justice's office. This is a 1966 judgment, properly
25 certified by a Court, which is expected to be the custodian of such information. HW Magomu admitted that the Kayonza Grade III Court once existed but did not give any details of the records he looked at before coming to the conclusion that the file of the case did not exist. It may entail a revisit of that search and other

5 processes that should have best been handled at the trial, but not
by this Court, on appeal.

32] I also find the timing of filing this application rather suspect.
Turyareeba claims to have learnt of the information regarding the
Kayonza judgment in October 2017. Although that was after he
10 filed the appeal here, he only raised the need to adduce this
evidence when he filed this application on 8/11/2023, which is
nearly six years later. He appeared to have been galvanized to
revive the appeal only after Kahangirwe's lawyers moved the Court
to fix its conferencing. He has not explained that inordinate delay,
15 which in my view, strongly discounts the strength of his case.

33] For the reasons given above, I am not persuaded that it is in the
interests of justice to allow the application. Turyareeba had ample
opportunity to produce that evidence during hearing of the case
at the High Court. Even when he came to know of that evidence,
20 he did not act diligently to file this application. Allowing it would
be prejudicial to Kahangirwe's appeal.

34] In conclusion, the application is dismissed and costs shall bide
the outcome of the appeal.

DATED at Kampala the^{15th}.....day of^{FEB}.....2024.

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EVA K. LUSWATA
JUSTICE OF APPEAL