IN THE EAST AFRICAN COURT OF JUSTICE AT ARUSHA

APPELLATE DIVISION

***(Coram: Philip K. Tunoi, V.P; James Ogoola, JA and L*iboire Nkurunziza, JA)**

APPEAL NO. 1 OF 2013

BETWEEN

THE ATTORNEY GENERAL OF THE REPUBLIC OF UGANDA.....APPELLANT

AND

1. THE EAST AFRICAN LAW SOCIETY.....1ST RESPONDENT

2. THE SECRETARY GENERAL OF THE EAST AFRICAN COMMUNITY.....2ND RESPONDENT

(Appeal from the Ruling of the First Instance Division at Arusha, Tanzania (Johnston Busingye,P.J; John Mkwawa J, & Isaac Lenaola J, dated 13th February 2013 in ***Application No. 12 of 2012****)*

JUDGMENT

I. INTRODUCTION

1. This is an interlocutory appeal against the Ruling of this Court's First Instance Division dated 13th February 2013, by which that Division granted leave to the East African Law Society (the "1st Respondent") to adduce additional evidence in the form of documentation; and in electronic format in Reference No. 2 of 2012.

2. Dissatisfied with the above Ruling, the Attorney General of the Republic of Uganda (the "Appellant") appealed that Ruling to this Appellate Division. He proffered the following three grounds for the Appeal, namely that the Learned trial Judges of the First Instance Division erred in law:

   (i) when they misapplied the principles governing the reception of new evidence;

   (ii) when they unduly exercised their discretion in predetermining the relevance of the additional evidence;

   (iii) by occasioning prejudice on the Appellant when they allowed additional evidence to be adduced by the 1st Respondent while the case was pending highlighting of the Parties' submissions and delivery of the judgment.

3. At the Scheduling Conference of this appeal, the above three grounds of appeal, were consolidated into the following single ground:

Whether the learned trial Judges of the First Instance Division properly exercised their discretion in allowing the 1st Respondent leave to adduce additional evidence?

II. BACKGROUND

4. On 31st May, 2011, the 1st Respondent lodged a Reference before the East African Court of Justice seeking redress for various breaches of the provisions of the Treaty for the Establishment of the East African Community ("the Treaty"), allegedly perpetrated by the Attorney General of the Republic of Uganda.

5. The Reference pertains to the walk-to-work protests undertaken by Ugandan Citizens in various cities of the Country following the results of the disputed 2011 General Elections.

6. It is alleged that at the time of the scheduling conference, the evidence relating to this Application was in the custody of third parties. It could have been anticipated to have that evidence brought up, yet it was not known then if the same would be availed by the third parties who were seized of it.

7. At the close of the pleadings, a Scheduling Conference was held before the trial Court on 23rd February, 2012, at which the parties agreed, *inter alia,* that all evidence would be adduced by way of Affidavit.

8. All along (including the time when the Reference came up for the Scheduling Conference), the 1st Respondent had been in active negotiations with the persons and institutions in whose custody the evidence was, with a view to availing that evidence to the Applicant for use in the Reference. It was not until as recently as 25th June, 2012, that there was a break-through in the negotiations; and, hence, the necessity to make the Application to the First Instance Division to admit the additional evidence.

9. The evidence which had hitherto been cumbersome to obtain and required the surmounting of both diplomatic hurdles and corporate red-tape, has now become available for use in the Reference.

10. The proposed evidence is in electronic format. Such evidence and format were not expressly agreed upon at the Scheduling Conference; hence the Application for leave to adduce the same.

11. The electronic evidence contains live scenes of the walk-to-work processions, the subject matter of the Reference, as well as the demeanor of the parties (particularly so of the representatives of the 1st Respondent).

12. The 1st Respondent believes that this new electronic evidence is pivotal to the proper determination of the issues in controversy between the parties; as it would assist the Court to gain a clearer picture of the nature of the Treaty violations alleged in the Reference.

13. The said evidence, authored by the NTV Uganda, a media house with national coverage within the Republic of Uganda, was sought to be produced by Mr Julius Ssenkandwa, a Journalist from the NTV station. Annexed to the Application and marked JAM 1 was a certified translation and sworn statement by Ms Deborah Gasana, an Advocate based in Kampala, as to the contents of the video footage.

14. On 13th February, 2013, a panel of three Judges of the First Instance Division ruled that while Rule 46 of the Rules of Procedure of this Court prohibits the filing of any further documents after pleadings have closed, sub-rule 1 thereof, allows such filing to be done with the leave and at the discretion of the Court. Accordingly, the Court exercising its discretion granted the Applicant (now the 1st Respondent) leave to adduce the additional evidence in the form of documentation and also in electronic format. The Appellant, aggrieved by the Ruling of the First Instance Division, filed the instant Appeal.

III. THE APPELLANT'S SUBMISSIONS

15. The Appellant contended that the trial Court improperly exercised its discretion in granting the 1st Respondent leave to adduce additional evidence. In support of that contention, the Appellant cited the case of **American Express International Banking vs. Atul [1990-1994] EA 10 (SCU**), which elaborates the circumstances under which an appellate court can interfere with the exercise of the discretion of a trial Judge, namely:

(i) where the Judge misdirects himself with regard to the principles governing the exercise of his discretion;

(ii) where the Judge takes into account matters which he ought not to consider; or fails to take into account matters which he ought to consider;

(iii) where the exercise of his discretion is plainly wrong - see: **The Abidin Daver [1984] All ER 470.**

16. Having cited the above circumstances, the Appellant contends that the Learned trial Judges:

(i) misdirected themselves with regard to the principles governing the exercise of their discretion in allowing new evidence;

(ii) took into account matters which they ought not to have taken into account, and failed to take into account matters which they ought to have taken into account; and

(iii) that, therefore, their decision was wrong.

17. The Appellant contended that the trial Judges improperly exercised their discretion by allowing the 1st Respondent to adduce new evidence without sufficient, reasonable or even credible cause, if at all. He asserted that the 1st Respondent did not state or provide sufficient, reasonable or even credible grounds for failing to file the additional evidence within the time-frame agreed at the Scheduling Conference. Instead, the 1st Respondent merely stated in paragraph 8 of his Affidavit

that the evidence which hitherto had been cumbersome to obtain and had required the surmounting of diplomatic hurdles and corporate red tape, has now become available and could be used in the Reference. According to the Appellant, no elaboration whatsoever was ever made of the "*diplomatic hurdles*" nor of the "*corporate red tape*" alleged by the 1st Respondent.

18. The Appellant further challenged as vague the 1st Respondent's statement (in paragraph 7 of his affidavit) that he had *"all along been in active negotiations with the persons/institutions in whose custody the evidence was... and that it was not until 25th June, 2012, that there was a breakthrough...."*. The Appellant contended that, indeed, the entire Application was vague and did not clearly state the grounds upon which it was based.

19. The Appellant argued that, James Aggrey Mwamu's affidavit failed to explain any reason for delay; and laid no basis on which the trial Court could have exercised its discretion consistent with the conditions in the case of **Ladd vs. Marshall (1954), CA 745**. Accordingly, there was no reason at all for the trial Judges to reach the conclusion that:

> "*they saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence, now sought to be adduced, before the Scheduling Conference, and the reasons as elsewhere set out above are not outlandish***.**"

20. The Appellant contended that the Application should have failed:

    (i) even on the first ground of **Ladd vs. Marshall** *(supra*) alone for failing to show why the evidence could not have been obtained with reasonable diligence for use at the trial; and

    (ii) with regard to the principles set out in **American Express Int. Ltd Banking Corp vs. Atul** (*supra)* in accordance with which their discretion had to be exercised.

21. He argued that the 1st Respondent did not present to the Court the evidence they intended to adduce nor the proposed affidavit of Mr. Julius Ssenkandwa for consideration and assessment, to enable the exercise of the trial Judges' discretion in allowing or disallowing the evidence under the second and third tests of **Ladd vs. Marshall** *(supra*). Without the affidavit of Mr Julius Ssenkandwa, the Court was left blind; unable to make any determination one way or the other. Furthermore, the evidence of Ms. Gasana was not what was intended to be produced before the Court. The evidence presented at the time of the Application must be the very evidence adduced at the trial. Otherwise the entire enterprise is open to abuse and becomes self-defeating. In this regard, he cited the case of the **Attorney General vs Paul K. Ssemwogerere, Zachary Olum & Juliet Rainer Kafire - Constitutional Application No. 2/2004: (Supreme Court of Uganda**) outlining the principle that:

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

22. The Appellant submitted that the trial Judges took into account a matter that they ought not to have taken into account, in as much as they treated Mr. Mwamu's affidavit as if it were a substitute of Mr. Julius Ssenkandwa. Conversely, they failed to take into account matters which they ought to have taken into account, namely the fact that the evidence sought to be adduced had not been presented for consideration. Therefore, there was no way the trial Judges could have properly exercised their discretion under the second and third tests of **Ladd vs. Marshall** (*supra*).

23. Furthermore, the purported evidence was not new or fresh evidence at all. The electronic evidence shows the video material was derived from the internet video sharing website "You Tube". Therefore, it was not true that the evidence was unavailable at the time of conferencing, since the videos were readily available for downloading by the general public immediately.

24. For the above argument, the Appellant relied on the case of **Charles Ian Walter Braithwaite and Chief Personnel Officer, Public Service Commission and Attorney General, No. 687/2007 (Supreme Court of Judicature, Barbados),** in which the Judge having given due consideration to the tests of **Ladd vs. Marshal** (*supra*), declined to exercise her discretion to admit new, fresh evidence after the matter had almost come

to a close; on the grounds that the proposed evidence was not new evidence, but late evidence. Additionally, as the proposed evidence was not new evidence, the 1st Respondent deliberately deponed falsehoods. According to the (Ugandan) case of **Sirasi Bitaitana & 4 Others vs Emmanuel Kananura [1977] HCB 34** an affidavit which contains falsehoods naturally becomes suspect; and an application supported by a false affidavit is incompetent. Therefore, the trial Court should have struck out the affidavit of Mr. James Aggrey Mwamu for falsely deponing that he was submitting new evidence when the evidence was not new.

25. The Appellant submitted that since the Learned trial Judges were wrong in the exercise of their discretion, their decision (1) had the effect of altering the nature and character of the Reference; (2) allowed the 1st Respondent to re-plead its case; (3) rendered nugatory the entire Reference; (4) required submissions to be done afresh; (5) materially altered the agreed terms of the conferencing; (6) caused extreme prejudice to the Appellant; and (8) in effect, caused a mistrial. See **Petition No. 5/2013 (Supreme Court of Kenya): Raila Odinga vs. Independent Electoral and Boundaries Commission, Ahmed Issack Hassan, Uhuru Kenyatta & William Samoei Ruto,** in which the Supreme Court rejected the "further affidavit" (on consideration of time constraints) on the ground that the material in the affidavit would have the effect of changing the nature and character of the petition.

26. The Appellant argued that the Reference was supported by three Affidavits which narrated four incidents: one at Mulago roundabout, Kampala; one at Kasangati; and, two at Kireka, Kampala. However, the evidence now sought to be adduced (as per the transcript and the electronic format videos), completely opens up the Reference to include hundreds of incidents.

27. The Appellant emphasized that even in **Ladd vs. Marshall** (*supra*) the evidence sought to be adduced was the specific evidence of a single witness, Mrs. Smith, regarding an instance of perjury. He further stated that other cases in the Commonwealth, and specifically in the East African region, cover instances where a specific document is sought to be produced - see **Karmali Tarmohamed & Another vs. IH Lakhani & Co. (1958) EA 567-574; Taylor vs Taylor (1944) 11 EACA 46; Corbertt vs Corbertt (1953) 2 AER 72; G.M. Combined Ltd vs. A.K. Detergents Ltd, Civil Appeal No. 7/1998 (Supreme Court, Uganda).**

28. The Appellant contended that, without prejudice to his other arguments, even if consideration were to be given to admission of the electronic evidence, it should have been allowed to the extent only that the evidence shed light on the four incidents that had already been mentioned in the affidavits filed prior to conferencing.

29. The Ruling and orders of the trial Court had the effect of rendering nugatory the entire conferencing, proceedings, hearing, submissions and posture of the case. Accordingly, should the new evidence be allowed to stand, then the entire

case shall have to be opened up afresh involving vast new pleadings, re-conferencing, re-hearing evidence and submissions. On this basis alone, the decision was wrong and the Application should have been dismissed. This has put the Appellant at a disadvantage. He had adduced evidence in rebuttal on the grounds produced in the original affidavit, when suddenly the scope was widened and the character and nature of the evidence changed. The sum total of all these effects and consequences caused a mistrial. The only remedy would, therefore, be for this Appellate Division to order a retrial.

30. The Appellant contended that in granting the Application and in allowing the 1st Respondent leave to adduce new evidence, the learned trial Judges have constituted a separate and independent cause of action, which is barred by limitation. In this regard, he submitted that:

    (i) the 1st Respondent was in violation of the limitation period of two months by more than one year and a half; and

    (ii) each incident cited and sought to be adduced as new evidence, represents and constitutes a separate cause of action in respect of which relief may be sought individually. However, such relief may only be sought in accordance with the law of limitation. see **Attorney General of the Republic of Kenya vs. Independent Medical Legal Unit, EACJ Appeal No. 1/2011:** in which

the Reference was struck out on the basis that it was filed out of time.

31. There must be an end to litigation. In the event that a new cause of action arises, the persons involved have the freedom to pursue their cause in Court in a separate action. No prejudice would be occasioned against the 1st Respondent if the alleged new evidence were rejected, since it is actionable by the persons involved.

32. In light of all the above grounds and arguments, the Appellant prayed this Honourable Court to order that:

(i) the Learned trial Judges improperly exercised their discretion in allowing new/additional evidence contrary to the principles and tests outlined in **Ladd vs. Marshall** (*supra)*;

(ii) the Appellant has made out its case in accordance with the principles in **America Express International Banking vs. Atul** (*supra)* and, therefore, the Ruling of the trial Court be set aside/overturned; and

(iii) the matter be remitted to the First Instance Division for conclusion on the merits.

IV <u>THE RESPONDENT'S CASE</u>

33. The 1st Respondent cited the principles that the trial Court took into account in arriving at their decision, namely:

Ladd vs. Marshall *(supra) and* ***American Express International Banking vs. Atul*** *(supra)* exercising its discretion to grant them leave to adduce the additional evidence.

34. He also cited the case of **Mbogo vs. Shah (1968) EA 10 (SCU)** at p.96 where NEWBOLD, P., stated the following principles, which an appellate court applies when deciding whether or not to interfere with the exercise of a trial Judge's discretion:

> *"... a court of appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion, and that as a result there has been a miscarriage of justice."*

35. The 1st Respondent further cited the following case laws stipulating conditions precedent before a court can allow an application for additional evidence:

(i) the evidence was not available at the time of trial or could not be obtained with reasonable diligence - see **Karmali Tarmohamed & Another vs. I.H. Lakhani & Co [1958] EA 567**) *(supra*);

(ii) the evidence must be credible and of such a nature that it would have an important influence on the results of the

case - see **G.M. Combined (U) Ltd vs. A. K. Detergents** (*supra*);

(iii) the evidence must be patently credible, though it need not be incontrovertible - see **G. M. Combined (U) Ltd**. (*supra*).

36. Given the above Principles, it is the duty of Counsel to avail to the Court all necessary documentation, including that which he could not have obtained at the time of filing the Reference, to enable the Court to reach a just decision. It is also the duty of the Court to do justice to the parties, and to arrive at a just decision after reviewing all the evidence - **Aggarwal [1965] E.A**. The 1st Respondent argued that, the test was whether the Attorney General of Uganda suffered any injustice by the trial Judges' exercise of discretion. He cited **Shah vs. Allu [1974] 14 EACA 46,** where the Privy Council observed that:

> *"There has been injudicious exercise of discretion or an exercise of discretion at which no judge could reasonably have arrived where injustice has been done to the party complaining."*

37. This Court should therefore, uphold the decision of the trial Judges as they took into account the above principles in arriving at their decision.

38. The 1st Respondent submitted that they are not aware of any format of disclosure expected by the Appellant and what details were expected and not indicated. He argued that

NTV is a media house in Uganda which broadcast the incidents referred to, and which had the evidence that was sought to be adduced.

39. To the averment that the trial Court did not assess the evidence intended to be adduced, the 1st Respondent contended that it filed that evidence in Court and served it on the Appellant, giving him notice to adduce his evidence in rebuttal, which he did not do. In any event, the Appellant has not lost the chance to bring evidence in rebuttal, if he wishes to. Indeed, the new evidence was the basis upon which the trial Court made its decision for allowing the additional evidence.

40. The 1st Respondent brought to the attention of this Court the fact that Mr. Julius Ssenkandwa, the journalist who reported on the incidents, is within the jurisdiction of this honourable Court, and can be summoned for cross examination as to the content of the electronic evidence.

41. To the averment that the new evidence introduced new incidents and new causes of action in the Reference, the Respondent stated that the Reference referred to diverse dates within which the acts complained of took place in Uganda. Therefore, he was at liberty to adduce evidence from any corner of the diverse dates referred to in the Reference. The evidence does not introduce a new cause of action; neither does it alter the Reference. Rather, it is intended to prove those incidents.

42. To the averment that the trial court allowed additional evidence to be adduced when the case had effectively closed, the 1st Respondent argued that a case only closes after judgment has been pronounced by the court. Before judgment, the Court is at liberty to hear the parties or to require them to adduce further facts in proof of their allegations. The instant Reference was still pending the fixing of the date for the commencement of the hearing in accordance with Rule 53(3) of the Court Rules. The parties were to appear before the Court to take dates for the hearing. Accordingly, this matter was now only at a preliminary stage; and the new evidence could be tested at the next hearing of the case. In any event the Parties were allowed by law to seek further and better particulars.

43. The 1st Respondent invoked Rule 1(2) of this Court's Rules of Procedure on the inherent power of the Court to make *"such orders as may be necessary for the ends of justice".*

44. In light of all the above, the 1st Respondent prayed that this honourable Court:

(i) dismisses this appeal;

(ii) finds that the learned trial Judges properly exercised their discretion in allowing additional evidence to be adduced in accordance with the principles enunciated in **Ladd vs. Marshall** (*supra*);

(iii) order that the matter be remitted to the First Instance Division for hearing on the merits.

IV. ANALYSIS

45. **Did the 1st Respondent provide sufficient, reasonable or even credible grounds for failing to file the evidence sought to be adduced within the trial framework agreed at the Scheduling Conference?**

46. The Appellant contended that the 1st Respondent did not state or provide sufficient, reasonable or even credible grounds for failing to file the evidence sought to be adduced and that neither did they provide elaboration to the alleged "*diplomatic hurdles and corporate red tape.*"

47. For his part, the 1st Respondent submitted that, it is the duty of counsel to avail the Court all necessary documentation, including that which he could not have obtained at the time of filing the reference, to enable the Court reach a just decision. Furthermore, they argued that they are not aware of any format of disclosure expected by the Appellant; nor of any details expected which are not indicated.

48. The Court has perused the 1st Respondent's Application and the supporting Affidavit of James Aggrey Mwamu. In that Application, the 1st Respondent stated that*:*

> *"he has all along including the time when the reference came up for the Scheduling Conference, been in active negotiations with the persons/institutions in whose custody the evidence is with a view to avail the same to the Applicant for use and it is not until recently 25th June, 2012 that there has been a breakthrough on the negotiations. The evidence which*

hitherto had been cumbersome to obtain and required the surmounting of diplomatic hurdles and corporate red-tape, has now become available and can be used in the Reference."

49. In his Affidavit, James Aggrey Mwamu stated, *inter alia,* that:

"to his knowledge at the time of the scheduling conference, the evidence to which this application relates was in the custody of third parties and that it could have been anticipated to have brought up the issue and yet it was not known if the same could have been available as it has now."

50. From the above observations, it is evident that, the 1st Respondent did provide grounds for his having failed to file the evidence sought within the time framework agreed at the Scheduling Conference. Whether those grounds were *"sufficient, reasonable and credible*" was a determination to be made within the discretion of the trial Judges. The Judges did indeed consider those grounds in detail. At the end of their consideration, they concluded that:

"They saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence it sought to adduce before the Scheduling Conference, and the reasons as elsewhere set out are not outlandish."

51. We find that, the Learned trial Judges did not, improperly exercise their discretion in granting the Application and in allowing the Applicant to adduce the new evidence. We also find that the Application was neither vague nor was it unclear in stating the grounds upon which it was based - as

contended by the Appellant. Moreover, we disagree with the Appellant's contention that the Affidavit of James Aggrey Mwamu failed to explain the reason for the delay in filing. We conclude therefore, that a basis was laid on which the Learned trial Judges could exercise their discretion. It was on that basis that, the Learned trial Judges expressed their firm conclusion that:

> *"they saw no reason to doubt the Applicant's submission that it was unable to obtain the new evidence, and the reasons as elsewhere set out are not outlandish."*

52. Indeed, the 1st Respondent gave an extensive elaboration of the '*diplomatic hurdles'* and '*corporate red tape'* during the hearing of the Notice of Motion on 16th January, 2012. This is clearly evidenced by the trial Court's Record of Proceedings in which the 1st Respondent states that, they had to employ diplomacy and go around red tape to obtain the evidence, and that the *"red tape or… the diplomacy"* was a question of how this evidence was obtained. They declined to disclose how they finally got the evidence. First, because it may have been through the wrong channels, not officially sanctioned; but still yielding usable evidence. Second, because they did not wish to compromise the security of anyone involved in the release of that evidence.

53. From all the above explanations, we find that the Learned trial Judges did not misdirect themselves with regard to the principles in accordance with which they exercised their discretion. Their exercise of discretion was consistent with the

standards laid out in **American Express International Ltd Banking Corp vs. Atul** (*supra*) and with the first test of **Ladd vs. Marshall** (*supra).*

54. **Did the 1st Respondent present to the Court the evidence they intended to adduce?**

55. The Appellant argued that the 1st Respondent did not present to the Court the evidence they intended to adduce and, therefore, there was no way the Learned trial Judges could have assessed the evidence and thereby exercised their discretion properly in allowing or disallowing production of the evidence under the second and third tests of **Ladd vs. Marshall** (*supra*).

56. Furthermore, the Appellant contented that since the proposed Affidavit of Mr. Julius Ssenkandwa was not produced in evidence, the Court was left blind and could not make any determination. He further argued that, the evidence of Ms. Gasana was not that which was intended to be produced before Court.

57. On the face of it, the Appellant's above contentions appear seductively attractive and eminently valid. On closer examination, however, there is more to it than meets the eye.

58. We need to be clear in our minds as to the process for admitting this new evidence. That process requires a two-pronged approach. First, the Court needs to address the application to admit the new evidence as a p*rima facie* case. At that initial stage, the Court needs to satisfy itself of whether

the evidence sought to be adduced is relevant and helpful (i.e. whether, if it is admitted, it will add value to the prosecution of the case).

59. Only after the evidence is admitted, will the Court then proceed to the next stage - namely, substantive consideration of the merits of that evidence. The Party adducing the new evidence will at that stage need to attest to the accuracy of that evidence; to its authenticity/genuineness and (especially if it is e-evidence), the assurance that it has not been interfered with whether the evidence can stand alone, or whether it needs corroboration; etc. The opposing Party, for his part, will at this stage do all in his power to oppose, rebut, counter and clarify these details of the new evidence. It is on the basis of these opposing views and submissions on the merits that the Court will adjudicate the evidentiary value of the new evidence. It is for this reason that the two distinct stages are to be distinguished.

60. In the instant Appeal, the matter in the trial Court had gone only through the first stage, when the Appellant, aggrieved by the Court's Ruling, brought the matter to appeal before us. The second stage will be attained only if we deny this appeal and remit the matter back to the First Instance Division for consideration of the new evidence on its merits.

61. In response to the Appellant's above contentions, the 1st Respondent countered that the evidence was filed in Court and was indeed duly served on the Appellant, giving him notice to adduce any counter evidence of his own. He submitted that,

this was the evidence on the basis of which the trial Court arrived at its decision.

62. It is manifestly clear that the evidence in contention was filed in Court together with the Application on **3rd September, 2012**, and the Court's Ruling on that Application was rendered on **13th February, 2013** - five months and two weeks after the filing. On this basis, we reject the Appellant's contention that the evidence was not filed in Court. We are satisfied that the Learned trial Judges had sufficient time and opportunity to assess the evidence and, thereby, properly exercised their discretion in reaching their decision.

63. Having read paragraph 12 of the affidavit of James Aggrey Mwamu, we find nothing in it indicating that the 1st Respondent had proposed to produce the affidavit for Mr. Julius Ssenkandwa.

64. We cannot, therefore, conclude that the 1st Respondent had failed to produce to the Court the evidence he intended to adduce. We are also of the view that, contrary to the Appellant's contention the Learned trial Judges did not read and make reference to the wrong Affidavit.

65. We would also agree with the 1st Respondent's suggestion that, since Mr. Julius Ssenkandwa, the journalist who reported the incidents, is within the jurisdiction of this honourable Court, he can be summoned for cross examination as to the contents of the new evidence.

66. **Did the Learned trial Judges improperly exercise their discretion by relying on false evidence?**

67. The Appellant argued that the electronic evidence shows the video material was derived from the internet video sharing website *"You Tube"* and was available for download by the general public ever since the time of this Court's conferencing. He added that, since the proposed evidence was, therefore, not new evidence, the 1st Respondent deliberately deponed a falsehood. Therefore, the learned trial Judges improperly exercised their discretion by relying on false evidence.

68. It is our observation that electronic evidence and the transcription thereto which was adduced before the trial Court, was certified on 27th August, 2012 by Deborah Gasana, an advocate of the High Court of Uganda. The Affidavit of Mr. James Aggrey Mwamu further states that the evidence was acquired on **25th June, 2012** through prolonged negotiations with third Parties who were in custody of it. From these observations, we cannot make a finding (as the Appellant would have us do), that the 1st Respondent deponed a falsehood, or that the trial Judges improperly exercised their discretion by relying on evidence that was not new.

69. **Did the Ruling and Orders of the Learned Trial Judges have the effect of rendering nugatory the entire conferencing, proceedings, hearing, submissions, as well as the general posture of the case?**

70. On this, we associate ourselves with the findings of the Learned trial Judges. They, as the Trial Court, were alive to the fact that the introduction of this new and extensive evidence was likely to lead to a reopening of some aspects of the pleadings. They found no prejudice at all to the Appellant if the evidence were admitted - in as much the Appellant would have the opportunity to challenge the content and veracity of that evidence by putting forward its own evidence to rebut and counter the new evidence. In its Ruling the Court clearly and categorically emphasized the fact that although the Parties may need to re-open their respective cases, that should not be a bar in the circumstances of this case. They then, ruled that it was best to allow all the Parties an opportunity to tender all evidence that they deem relevant, to enable the Court make a fair and informed decision after having had an opportunity to examine all possible evidence on the issue(s) placed before it for determination.

71. In this regard, the trial Court was fortified by and very much alive to the import of Rule 46(1) of the EACJ Rules of Procedure. That Rule states that:

> *"After the close of the written proceedings, no further documents may be submitted to the court by either party except with leave of the Court".*

Concerning the Rule, the Court observed that:

> *"the objectives of that exception to that Rule is to ensure that no evidence is shut out even after pleadings have*

closed. It does so by enabling the Court to exercise discretion whenever necessary to do so, to grant or withhold leave to submit documents after the close of proceedings. Moreover, the Court offers an opposing Party adequate opportunity to comment on and rebut the new evidence tendered by the other Party, and if necessary to file fresh evidence to contradict it."

72. **Does the new evidence constitute separate and independent cause(s) of action barred by the law of limitation?**

73. We are satisfied after perusing the Court Record and the Parties' written submissions, that the new evidence does not in any way constitute new causes of action. The evidence elaborates on the riots that erupted when the people engaged in walk-to-work protests against the high cost of fuel, transport and cost of living generally. In effect, the new evidence adduced only portrays different incidents of walk-to-work spanning the period between 11th and 28 April 2011 - all which are well documented in the substantive Reference (**Reference No. 2 of 2011**).

74. This was not a new cause of action, as asserted by the Appellant. Indeed, when looked at which strict scrutiny, the so-called *"new evidence"* was not all that *"new"* at all. In this connection, there is a distinction between new evidence in a trial and evidence adduced to elucidate, expound, or clarify evidence already on the Court's record.

75. In the instant Reference, the Court was already seized of the 1st Respondent's Affidavit listing at least four incidents of the walk-to-work protests (namely; Nateete, Kasangati and Kawempe), spanning various dates of a tense and explosive political season. The 1st Respondent then sought to adduce further evidence (of the electronic type), to add to the evidence already on the record. As it turned out, that further evidence merely added more incidents to the same walk-to-work protests - this time spanning the additional dates of 11th - 18th April, 2011.

76. In our considered view, what has transpired here is simply an increase in the number of incidents to the same transaction of walking-to-work – with the possibility of showing (live) more crowds, faces, demeanor and protestors; and the reaction of the security personnel, the nature and kind of weapons used, etc. In short, the new evidence would presumably add to the quality and quantity of the evidence already filed on the Court's record. To that extent, that was no different, in its effect, from adducing "*more and better particulars*" of the evidence already adduced and recorded in the prior proceedings -[see: **Rex vs. Yakobo s/o Mayenga, (1954) 12 EACA 60,** quoted in **M. Combined (U) Ltd** (*supra*), in the Judgment of ODER, JSC. As has been said elsewhere, the *"new" evidence",* directing the elucidation of evidence already on the record, merely "*throws light upon the case"*– **The King vs. Robinson (1917) 2 KBD 1098.**

77. In this regard, we are further fortified in our above holding, by the practice and experience of the International Court of Justice, whose interpretation and application of Article 52 of its Statute, and Article 56, para 1 of its Rules seem to suggest that: "each and every document not submitted during the written proceedings would constitute a 'new' document." [See ZIMMERMAN: **A Commentary (supra), pp. 1131 – 1132]**.

78. **Administering Substantive Justice**

79. The EACJ is a Court of Justice. Its role is expressly and intrinsically stipulated in Article 23(1) of its founding Document: the EAC Treaty, as being:

> *"a judicial body which shall ensure the adherence to law in the interpretation and application of and compliance with this Treaty*."

80. Secondly, by its Rules of Procedure (Edition of April, 2013) the Court is specifically clothed with the inherent authority to do justice - beyond anything else. Rule 1(2) of those Rules provides that:

> *"Nothing in these Rules shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."*

81. This is the **first** Rule, coming as it does literally upfront (i.e. ahead) of all the other Rules of this Court. This is both symbolic and symptomatic of the importance and value

ascribed to the role of justice in the Court's firmament of functions. Like its Biblical counterpart (requiring believers *to love*), to do **justice** is the *"first* "and the *"greatest*" Commandment for this Court.

82. In the instant Appeal, the Appellant made a great deal out of the fact that at the Scheduling Conference before the trial Court, the Parties agreed to limit all evidence to Affidavit form, and not by other format (especially e-evidence) as now belabored by the 1st Respondent. Additionally, the Appellant bemoaned the fact of admitting the new evidence "*after the closure of the pleadings*."

83. However, in our considered view, all this is to quibble over procedural technicalities of the case. The heart and substance of the case calls for consideration and attention beyond the technical. The Court needs to do a balancing act - oftentimes a delicate one – between the competing interests of procedural fairness *versus* substantive justice. The substantive justice of the case calls for a higher and nobler level of deliberation by this Court. Accordingly, even if the Conferencing *"agreement*" of the Parties had the rigid and strict effect that the Appellant ascribes to it that would not deter or preclude a Court of Justice, such as ours, from ordering otherwise - if to do so is deemed *"necessary for the ends of justice*." In the instant Appeal, the trial Court needed to weigh the overall potential for value-added in admitting the proposed e-evidence, as against the Parties' earlier agreement to exclude all non-Affidavit evidence. The trial Court found that the need to admit the new

evidence (in order to answer authoritatively and conclusively all the issues and questions in dispute), far outweighed the earlier agreement to exclude all other evidence adduced in other than Affidavit format.

84. In our view, to arrive at a just conclusion of the dispute, indeed outweighs by far the perceived need to mechanically and robotically adhere to a particular technical format founded in a mere procedural *"agreement"* of the Parties emanating from a scheduling conference. In cases such as this, where the new evidence is *critical* to the determination of the case at hand, the Court's currency should invariably be tendered in **substance** over *form*. On this proposition, therefore, we agree entirely with the manner and extent to which their Lordships of the First Instance Division exercised their discretion.

85. Likewise, and for the same reasons of substantive justice, we agree with their Lordships decision to admit the e-evidence even after the closure of the proceedings in the underlying Reference. First, Rule 46(1) specifically allows such admission *"with the leave of the Court"*. Their Lordships were more than persuaded to exercise their statutory discretion under Rule 46(1) to grant the requisite *"leave"* for admission of this e-evidence.

86. Secondly, in exercising their discretion as they did, their Lordships were advancing the cause of the first and greatest Commandment of this Court, namely: to do justice without undue regard to the technicalities of the law – a principle and philosophy which in the Appellant's own jurisdiction of

Uganda, has been elevated to Constitutional status: under Article 126(2) of the Constitution of Uganda (1995)– see also Deputy Chief Justice LETITIA MUKASA KIKONYOGO's favourable upholding of that principle in the case of **Ebrahim Kassim vs. Habre International Ltd. Ref. No.16 of 1999, Supreme Court of Uganda (unreported);** and Justice ODER's holding in **G. M. Combined (U) Ltd.** (*supra*) in support of the same principle. Interestingly, the dispute in the appeal in that Ugandan case (as in the instant appeal before us), involved the exercise of the lower Court's discretion in admitting additional evidence.

87. Elsewhere, in the East African Region, the above Constitutional position is the same: see Article 159(2)(d) of Kenya's Constitution (2010); and Article 107A (2) of Tanzania's Constitution.

88. The EACJ has no "*Evidence Act*" of its own. Moreover, being a supranational Court, it cannot use (let alone rely on) the Evidence Acts of its respective Partner States. It must rely on its Treaty; Protocols (if any, on this subject); its own Rules of Procedures (such as Rule 46); International Conventions of a general nature (such as the Vienna Convention on the Law of Treaties; as well as the practice and jurisprudence of similar International judicial tribunals.

89. The jurisprudence of the International Court of Justice (ICJ) on aspects of the above point is quite helpful. The relevant evidential rule of the ICJ on this point is Article 56 of that

Court's Rules (which is virtually identical to our EACJ Court Rule 46). It provides in relevant parts, as follows:

"1. *After the closure of the written proceedings, no further documents may be submitted to the Court by either party except with the consent of the other party or as provided in paragraph 2 of this Article. The party desiring to produce a new document shall file the original … with the Registry, which shall be responsible for communicating it to the other party and shall inform the Court. The other party shall be held to have given its consent if it does not lodge an objection to the production of the document.*

2. *In the absence of consent of the Court, after hearing the parties may, if it considers the document necessary, authorize its production.*

3. *If a new document is produced under paragraph 1 or paragraph 2 of this Article, the other party shall have an opportunity of commenting upon it and of submitting documents in support of its comments.*

4. *No reference may be made during the oral proceedings to the contents of any document which has not been produced in accordance with Article 43 of the Statute or this Article, unless the document is part of a publication readily available.*

5. ……"

90. The ICJ has over a long period of time decided many cases involving the application of Article 56 of its Rules. Notable among the earliest such cases was the **Nottebohm Case (Second Phase) ICJ Reports [1955], pp.6,9, 25** - in which, the Court allowed Guatemala to file a number of new documents - including some not consented to by Liechtenstein. However, the Court reserved Liechtenstein the right to comment on the new documents and to file further documents in support of its comments, after having heard Guatemala's contentions. The Court was satisfied that a reasonable explanation had been furnished from the belated submission of the documents, and on that basis allowed their production – see **Nottebohm Case, II Pleadings 35, 44-64**.

91. The predecessor Court to the ICJ (the PCIJ), for its part, took an even more lenient, non-formalist approach - namely:

> *"The Court thought it preferable not to allow the objection as to the admissibility [of the new documents]...because the settlement of an International dispute could not be made to depend mainly on a point of procedure."- see* ***The Free Zones Case, Eighth Annual Report, PCIJ, Series E, No.8, pp. 267-268.***

92. In 1953, the Court issued a strict Practice Direction **(ICJ Yearbook 1953-1954, p.104)** to the effect that submission of new documents after the conclusion of the written proceedings is permissible *only in exceptional circumstances* and in conformity with the conditions laid down in the Rules. In 2002, the Court went even further by adopting Practice

Direction IX (available at http://www.icj.org.), which was even more strict than the earlier Practice Direction of 1953.

93. Nonetheless, the Court has continued its flexible attitude in exercising its discretion toward accepting new documents/evidence. Among the numerous cases in which the Court has so acted in more recent times, are the following three notable ones, which particularly, stand out because of their relevance to the instant Appeal before us:

- **Kasikili/Sedudu Island Case ICJ Reports [1999-II], pp. 1045, 1051 (para.7)** - in which each party produced new documents with the consent of the other. In addition, Namibia availed itself of Article 56, para.3 of the Rules, and submitted comments on some of the documents produced by Botswana.

- **La Grand Case,ICJ Reports [2001],pp. 466, 470, 471 (para 6, 9) -** in which the USA objected to Germany's submission of certain documents. The Court decided to authorize their production without hearing the matter. However, since Germany gave notice of such production at a very late stage, the Court gave the USA the opportunity to submit its new documents together with any comments, both at the hearing, as well as later in writing after their closure.

- **Armed Activities on the Territory of the Congo (Uganda) CR 2005/2 (11 April 2005), p.9** - in which both parties having exchanged certain documents (in

October, 2003), the Court decided that those documents did not form part of the case file, and could not, therefore, be referred to in oral arguments pursuant to Article 56(4) of the Rules. However, when both parties expressed the desire to produce new documents – and neither party objected to the other – their respective Counsels were informed that they would be free to refer to the new documents during the oral proceedings.

94. In all the above jurisprudence, it is quite clear that the ICJ practice has been flexible and accommodating to the issue of admitting into evidence new documents, well beyond the prescribed deadline for their production. In particular, evidence submitted out of time is admissible in two distinct situations:

(i) if the other party consents; or

(ii) if the Court in the absence of such consent, decides not to exercise its discretionary power to reject it.

95. The ICJ has consistently and quite frequently, done so, notwithstanding its expressed reason for having prescribed Article 56 of the Rules in the first place - namely "*not to acquiesce in avoidable delays*" (see SHABTIA ROSENNE: **The Law And Practice of The International Court, 1920-2005 Fourth Edition, Vol.III, p.1267, (Martinus Nijhoff Publishers: Leiden/Boston).**

96. Indeed, Article 56, para 4 of the ICJ Rules (quoted above), clarifies that after the closure of the written proceedings, a

party can introduce documents that are *"part of a publication readily available."* Thus, parties can always refer to published materials that are in the public domain, even if they have not introduced that material during the written proceedings. The explanation for this being that:

> *"...where a document is readily available, neither the party nor the Court will be surprised to see it referred to. Hence, Libya, at the provisional measures stage of the* ***Lockerbie Cases****, could submit a considerable amount of newspaperreports after the close of the written proceedings."*- see ANDREAS ZIMMERMANN, CHRISTIAN TOMUSCHAT & KARIN OELLERS-FRAHM (Editors): **The Statute of the International Court of Justice – A Commentary, Oxford Commentaries on International Law (Oxford University Press, 2006), p.1132; -** see also ROSENNE: **Law And Practice of the ICJ** (*supra*).

V. CONCLUSION

97. In our opinion and in light of all the above:

(a) The Appellant has failed to demonstrate that the Learned trial Judges misdirected themselves in granting leave to the 1st Respondent to adduce the new evidence. We find that the trial Judges did act within their discretion and in accordance with the Law and the established principles and standards governing the exercise of judicial discretion.

(b) No prejudice will be occasioned the Appellant from the admission of the new evidence in as much as a reasonable

opportunity will be provided to him to respond to and to rebut the new evidence.

(c) The Appeal is dismissed. The matter is remitted to the First Instance Division for determination of the Reference on the merits. The costs of this Appeal shall be in the cause.

It is so ordered.

Dated and delivered at Arusha this 16th day of January 2015.

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Philip K. Tunoi
VICE PRESIDENT

(Hon Justice Phillip K. Tunoi was not present in Arusha at the pronouncement of this Judgment -see Rule 109 (2) of the Court's Rule of Procedure)

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James Ogoola
JUSTICE OF APPEAL

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Liboire Nkurunziza

JUSTICE OF APPEAL