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THE EAST AFRICAN COURT OF JUSTICE

COURT OF FIRST INSTANCE SITTING AT ARUSHA, TANZANIA

APPLICATION NO. 12 OF 2012

(Arising out of Reference No. 2 of 2012)

Coram;Johnston Busingye ,PJ,John Mkwawa,J and Isaac Lenaola,J

EAST AFRICAN LAW SOCIETY …….. APPLICANT

Versus

1. **THE ATTORNEY GENERAL**
   REPUBLIC OF UGANDA……1ST RESPONDENT

2. **THE SECRETARY GENERAL**
   EAST AFRICAN COMMUNITY ……. 2nd RESPONDENT

RULING

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1. The East African Law Society brought this Notice of Motion dated 2nd September 2012 under the provisions of Rule 46(1) of the Rules of Procedure of this Court and save for the prayer on costs, the only substantive Order sought is the following:

"*That this Honourable Court be pleased to grant leave to the Applicant to produce additional evidence in form of documentation and electronic format after the close of pleadings*."

2. The grounds in support are that;

i) At the Scheduling Conference, the parties had agreed and consented that all evidence would be tendered by way of affidavits.

ii) The evidence which "hitherto had been cumbersome to obtain and required the surmounting of diplomatic hurdle and corporate red-tape" has now become available and can be used in the Reference.

iii) The Applicant has all along (including at the time when the Reference came up for Scheduling Conference), been in active negotiations with the persons/institutions with the custody of the evidence in issue in the instant Application, with a view to availing the same to the Applicant for use in the Reference and it was not until 25th June, 2012 that there was a break-through in the negotiations and hence the necessity to make the present Application.

iv) That owing to the wide implications of the outcome of the Reference coupled with the sanctity of the right to be heard, it will meet not only the ends of, but also serve the wider interests of justice to grant the orders sought.

v) This Application is made in good faith and in order to accord the Respondents a chance to respond and/or react to the evidence intended to be used.

vi) This Application seeks to avoid trial by ambush and is geared at achieving a fair and equitable trial.

vii) The Application has been made without undue delay and only as soon as the evidence was made available to the Applicant.

viii) The Respondents do not stand to suffer any loss, prejudice or damage that is likely to outweigh the interests of justice that the fair hearing stands to serve.

ix) The proposed evidence is in the nature of electronic format which was not expressly agreed upon for production at the Scheduling Conference hence the instant Application for leave to adduce the same.

x) It is in the best interests of justice that the leave sought be granted so as to determine the real question in controversy between the parties.

3. In the supporting Affidavit sworn on 3rd September 2012 by James Aggrey Mwamu, the Vice President of the Applicant Society, the same grounds are reproduced and we see no need to repeat them.

4. The 1st Respondent filed a Replying Affidavit sworn on 8th January 2013 by one, Eva Kabundu, a State Attorney in the Chambers of the Attorney General, Ministry of Justice and Constitutional Affairs,Uganda It is her response that at the Scheduling Conference, parties agreed that evidence shall be tendered by way of Affidavits and all parties duly complied with that directive and pleadings have since closed. That the belated attempt at introducing new evidence is meant to boost an otherwise inadequate case which would amount to trial by ambush. Further, to allow introduction of new evidence would render previous proceedings nugatory and parties would be forced to re-conference which would cause undue delay, prejudice the 1st Respondent and defeat the cause of justice.

5. The 2nd Respondents on its part chose not to say anything regarding the Motion, subject of this Ruling.
6. We have taken into account the oral submissions made by learned counsel for the parties and on our part, we deem it fit to opine as follows:-

Firstly, Rule 46 of the Rules of Procedure for this Court specifically outlaws the filing of any documents after pleadings have closed but under sub-Rule 1 thereof, such filing may be done only with the leave and at the discretion of the Court.

7. As we understand the law on the subject, discretion can only be exercised if a party seeking to adduce new evidence meets the threshold set by Lord Denning in the case of **Ladd vs Marshall (1954) C.A. 745** where the learned judge stated as follows:

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

8. We are in agreement with the learned judge's observations and are also in agreement with the position taken by Refer,J. in **Brathwaite vs Chief Personnel Officer H.C. Civil Case No. 687 of 2007** (Barbados) where the Judge agreed with the reasoning in **Ladd (supra)** and stated that the rationale for the decision

was well explained in **Cross and Tapper on Evidence, 10th Ed**. at page 9 where the authors stated as follows:

*"The rule in **Ladd v Marshall** is designed to ensure that litigation is not unduly prolonged, but as such, it is subservient to the principle that a litigant should not succeed from fraud, and in such a case fresh evidence may be admitted notwithstanding the restrictions imposed by the rule, thus avoiding the need to institute fresh litigation to set aside the judgment."*

9. The Learned Judge went even further to argue that even if the threshold in **Ladd** had not been met, exceptional circumstances may require that the prayer for additional evidence may still be granted. She stated as follows in that regard;

***"Phipson on Evidence**(16th ed.) readily accepts the applicability of **Ladd v Marshall** to High Court proceedings and further posits that the powers of a High Court Judge in these circumstances are in fact wider than the Court of Appeal's. At page 360 of Chapter 13 on this subject of the admission of new evidence it states as follows;*

*A trial judge has a discretion to receive new evidence … AND THAT In **Charlesworth v Relay Roads Ltd (2000) 1WLR 230** it was held that the trial judge had the necessary jurisdiction to allow a party to amend his pleadings and to call new evidence in [the] circumstances. Whilst the court held that the **Ladd v Marshall** principles should be in the forefront of the court's mind, it also expressed the view that a trial judge is entitled to be more flexible than the Court of Appeal when considering such an application to admit new evidence. There*

*may be exceptional cases where the application should be granted even though all three **Ladd v Marshall** requirements are not fulfilled."*

We associate ourselves with the above erudite findings and would apply them squarely to the Application before us.

10. Secondly, and in line with the law as expressed above, we see no reason to doubt the Applicant's submission that it was unable to obtain the evidence, now sought to be adduced, before the Scheduling Conference ,and the reasons as elsewhere set out above are not outlandish. In any event, we are also convinced that the evidence is not irrelevant and from a casual reading of the transcripts annexed to Mr. Mwamu's Affidavit, the evidence has a direct bearing on **Reference No. 2 of 2012** and the issues raised for determination therein.
11. Thirdly, we see no prejudice at all if the evidence is admitted as the Respondents have an opportunity to challenge its veracity by putting forward evidence to counter it. The fact that parties may need to re-open their respective cases should not be a bar in the circumstances and we are fortified in that position by the fact that the threshold set by Rule 46(3) of the Rules is much lower than even the one set in the decisions elsewhere discussed above. That sub-rule grants the court very wide discretion to order production of a document in evidence even long after pleadings have closed,if such production is necessary to meet the ends of justice.
12. Fourthly, being a court of first instance, it is best to allow all parties an opportunity to tender all evidence that they deem relevant to enable the court

make a fair and informed decision when it has had the opportunity to examine all possible evidence on the issue(s) placed for determination before it.

In a nutshell,it is our view that the import of Rule 46 (1) is to ensure that no evidence is shut out even after pleadings have closed and to enable the Court exercise discretion whenever necessary to do so and to afford an opposing party adequate opportunity to comment on and rebut the new evidence tendered by the other party and if necessary,file fresh evidence to contradict it.

In conclusion, we find no credible reason to deny the Motion and will now allow it in the following terms;

i) The Applicant, the East African Law Society, shall be granted leave to produce additional evidence in **Reference No. 2 of 2012** pending before this Court for determination.
ii) The evidence to be produced shall be in the form of documentation and also in electronic format.
iii) The additional evidence shall be served upon the Respondents within 21 days of this Ruling.
iv) The Respondents are at liberty to file any evidence in rebuttal within 21 days of service of the additional evidence.
v) Parties will thereafter appear for directions on how to proceed with the matter.
vi) Costs of the Motion will abide the determination of **Reference No**. **2 of 2012**.

Orders accordingly.

Delivered, Dated and signed this 13th day of February, 2013 at Arusha.

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J. Busingye
PRINCIPAL JUDGE

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J. Mkwawa
JUDGE

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I . Lenaola
JUDGE