

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 716 OF 2020**

1. MUSA NSUBUGA

2. ANTHONY TENYWA ::::::::::::::::::::::::::::::::::: PLAINTIFFS

VERSUS

1. ABSA BANK (U) LTD

2. ISAAC LUKAKAMWA ::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

RULING ON PRELIMINARY OBJECTION

Introduction

This ruling is in respect of a preliminary objection raised by Counsel for the 2nd Defendant on the legal representation of the Plaintiffs. The brief background of the dispute is that the Plaintiffs instituted Civil Suit No.716 of 2020 seeking recovery of UGX 160,000,000/= (Uganda Shillings One Hundred Sixty Million Only), a declaration that the 1st Defendant Bank through its agent the 2nd Defendant negligently and willfully refused to open fixed deposit accounts for the Plaintiffs respectively for the total sum of UGX 160,000,000/=: that the 1st Defendant Bank breached its duty of acting in utmost good faith and several consumer guidelines issued by Bank of Uganda, general damages, interest and costs of the suit.

Representation

Learned Counsel Opio Moses of M/s Sekabanja & Co. Advocates represented the Plaintiffs while Learned Counsel Yusuf Mawanda of M/s

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5 AF Mpanga Advocates represented the 1st Defendant and Learned Counsel Derrick Bazekuketta of Gem Advocates represented the 2nd Defendant.

On 11th December, 2023, when this matter came up for hearing, Counsel for the 2nd Defendant raised a preliminary objection to the effect that
10 Counsel Opio Moses and the lawyers at M/s Sekabanja & Co. Advocates are potential witnesses in this suit and thus are barred by **Regulation 9 of the Advocates (Professional Conduct) Regulations SI No. 267-2** from appearing as advocates in the matter.

15 Court directed the parties to file written submissions. The Defendants were directed to file their submissions by 30th December, 2023, Plaintiffs to file their submissions by 25th January, 2024 and submissions in rejoinder were to be filed by 7th February, 2024. Counsel for the 2nd Defendant duly filed his submissions on 29th December, 2023 and the same have been
20 considered.

Counsel for the Plaintiffs did not file submissions as directed by Court.

25 In the case of ***Uganda Telecom Ltd Vs ZTE Corporation SCCA No.3 of 2017***, the Supreme Court held that a trial Court has the discretion to dispose of a preliminary point either at or after the hearing however, that the exercise of this discretion depends on the circumstances of each case.

30 Considering the above, I shall proceed with the determination of the preliminary objection so raised.

Issues for determination

1. Whether Counsel for the Plaintiffs is a potential witness in Civil Suit No. 716 of 2020?

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2. What remedies are available to the parties?

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5 2nd Defendant's submissions

In submission, Counsel for the 2nd Defendant contended that **Regulation 9 of the Advocates (Professional Conduct) Regulations**, prohibits an advocate from appearing before any Court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit. Counsel stated that in the instant case, the Plaintiffs and their lawyers seek to rely on a document that was made at M/s Sekabanja & Co. Advocates Chambers, negotiated by M/s Sekabanja & Co. Advocates and signed by Mr. Opio Moses, Counsel in personal conduct for the Plaintiffs in this suit.

15 Counsel for the 2nd Defendant further submitted that the moment Counsel Opio Moses sought to rely on the impugned agreement and attached it to the Plaintiffs' trial bundle, he ought to have known that should the document's authorship, content and implications come into issue, he and his associates in making it would opt out of the realm of Counsel, into that of a witness. Counsel referred this Court to the case of ***Sudhir Ruparelia Vs MMAKS Advocates, AF Mpanga Advocates (Bowmans Uganda), Crane Bank Limited (In Receivership) and Bank of Uganda Misc. Application No.1063 of 2017*** and quoted its holding at pages 8-9.

25 Counsel for the 2nd Defendant insisted that Counsel Opio Moses ought to have known as early as 5th July, 2023, when the matter came up for scheduling and he was informed in open Court, that questions concerning the disputed document alleging to be minutes of a meeting, its authenticity, authorship and contents had arisen and that he would have to opt out of the realm of Counsel into that of a witness.

Counsel for the 2nd Defendant maintained that on 11th December, 2023, Counsel Opio Moses informed the Court that he signed the document as

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5 a witness, hence he was testifying from the bar as to the authenticity of the document and that he ought to have recused himself and the whole firm from the conduct of the matter once he filed a trial bundle with the disputed document or when it was brought to his knowledge that he should disqualify himself as Counsel.

10 Counsel referred to other cases which upheld the decision in the case of **Sudhir Ruparelia Vs MMAKS Advocates and Others (supra)** including **Justice Acungwire Vs Mumtaz Kassam and 2 Others Civil Suit No.339 of 2019** in which the Court held that;

15 *“By virtue of their position as legal counsel of the DAPCB, M/s Guma & Co. Advocates are potential witnesses in the case before me. This would be in breach of Regulation 9 of the Professional Conduct Regulations (supra). In the case of **Sudhir Ruparelia (supra), Hon. Justice David Wangutusi** while deciding that MMAKS Advocates and AF Mpanga Advocates (Bowmans Uganda) were conflicted, put it in these words:*

20 *“His status as a potential witness has been known since the dispute arose. This being the position, any continued appearance in a matter where it is now obvious that he and his firm’s staff are going to be required as witnesses for the Defendant would constitute a conflict of interest and deprive the Defendant of a chance to ably defend himself.”*

25 Counsel also cited the cases of **Linyi Huatai Battery Manufacturing Company Limited Vs Musa AF Enterprises Company Limited HCMA No. 573 of 2020 at pages 8-9** and **Arthur Busingye & Anor Vs Gianluigi Grassi & Anor HCMA No.203 of 2013 at pages 3-4.**

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5 Counsel for the 2nd Defendant further submitted that the rationale for **Regulation 9 of the Advocates (Professional Conduct) Regulations** was clearly stated in the case of ***Uganda Development Bank Vs Kasirye, Byaruhanga and Co. Advocates Supreme Court Civil Appeal No.35 of 1994*** in which the Court held that;

10 *“It is meant to be an act and protection to Counsel. It is intended also as a safe guard for the Court. If an advocate is to give evidence, then as any other witness, he should stand cross examination. If during the process, there is any lapse of honesty, accuracy, or credibility, the Court would have before it an advocate*
15 *appearing in the case, who was shown to be unreliable. He is an officer of the Court. He would not only spoil his general character, but it would make it difficult for him to represent his clients, since the Court might not be able to trust his advocacy. It is therefore much better that the two roles be separated.”*

20 Analysis and Determination

I have considered the submissions of Counsel for the 2nd Defendant together with the authorities cited therein. As already stated above, Counsel for the Plaintiffs did not fail submissions as directed by Court.

25 **Regulation 9 of the Advocates (Professional Conduct) Regulations,** stipulates that;

30 *“No advocate may appear before any Court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes*
apparent that he or she will be required as a witness to give

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5 *evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.”*

10 The purpose of the above provision has been discussed in several cases including **Uganda Development Bank Vs Kasirye, Byaruhanga & Co. Advocates (supra)**, wherein **Wambuzi CJ** held that;

15 *“It is generally accepted that the main intention of this regulation is that an Advocate should not act as Counsel and witness in the same case.”*

20 In the case of **Henry Kaziro Lwandasa Vs Kyas Global Trading Co. Ltd, HCMA No.865 of 2014, Christopher Madrama J** (as he then was) explained that;

25 *“The regulation bars an advocate who may be required to appear as a witness to give oral or affidavit evidence in any contentious cause or matter from appearing before any Court or tribunal hearing the matter. The regulation is permissive on one part and mandatory on another part... The first duty is placed on an advocate and is subjective in that it is upon the advocate, based on his or her belief about the facts and circumstances of the case that he or she will be required to appear before the Court or tribunal as a witness, to decide whether to represent a party in the proceedings. This first part of the regulation is couched in permissive terms and imposes a duty on an advocate to step down*
30 *once he or she believes that he or she will be required to appear as*

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5 a witness...The second part of regulation 9 however, makes it
imperative for an advocate to cease appearing for a client when it
appears or becomes apparent during the proceedings that he or
she will be required to give evidence in the cause or matter before
the Court or tribunal. When it becomes apparent, the advocate
10 shall not continue with the representation of a client in the cause
or matter.”

Considering the above authorities, it is trite that an Advocate should not
act as Counsel and witness in the same case. In the instant case before
me, Counsel for the 2nd Defendant objected to the admission of PEX.11 as
15 presented by PW1 contending that Counsel Opio Moses’ name appears on
the said document and that he is a potential witness hence he is barred
by **Regulation 9 of the Advocates (Professional Conduct) Regulations**
to continue representing the Plaintiffs in this matter. Counsel Opio Moses,
during the hearing of the suit on 11th December, 2023, stated that he is
20 not a potential witness in this matter since he only witnessed the meeting,
and that the same will not prejudice the 2nd Defendant’s case as there is
nothing contentious.

I have looked at the said document in issue being a copy of the minutes of
25 a meeting allegedly held on 24th February, 2020 at M/s Sekabanja & Co.
Advocates, wherein it inter alia states that;

*“Lukakamwa Isaac acknowledges the fact that he took and received
a sum of UGX 160,000,000/= from Musa Nsubuga and Anthony
Tenywa which he is willing to pay back.”*

30 The said minutes were signed by both Plaintiffs, the 2nd Defendant, a one
Rita Aceng Ogwang and Mr. Opio Moses. I note that the alleged meeting

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5 was held at the Chambers of M/s Sekabanja & Co. Advocates. The contents of the said minutes therein indicate the sum of money said to have been received by the 2nd Defendant and the proposed payment plan. However, the 2nd Defendant on the other hand disputes the authenticity of the document whose original was not produced in Court. Although
10 Counsel Opio Moses, while in Court stated that he was only a witness, the aforementioned minutes of the meeting that allegedly took place on 24th February, 2020 do not reflect that assertion. Mr. Opio Moses' name appears on the list of the people who signed the minutes. The minutes though, do not reflect who was the Chairperson or Secretary of the
15 meeting.

Having considered the contents of the minutes, the assertion that the meeting was held at the Chambers of M/s Sekabanja & Co. Advocates and the signatures thereto, it is apparent that Counsel Opio Moses attended
20 the meeting where the issue of payment of UGX 160,000,000/= and the mode of payment was allegedly discussed. I respectfully disagree with Learned Counsel for the Plaintiffs that there is nothing contentious in the minutes. The contents therein go to the root of this matter and Counsel Opio Moses is a potential witness having attended the meeting where it is
25 alleged that the 2nd Defendant acknowledged that he received money amounting to UGX 160,000,000/= and that he is willing to pay it back. The presence of Mr. Opio Moses as Counsel for the Plaintiffs in this matter will certainly deprive the 2nd Defendant of a chance to ably defend himself. It is reasonable for the 2nd Defendant to perceive Counsel Opio Moses and
30 the firm of M/s Sekabanja & Co. Advocates as being in possession of facts or knowledge that could give undue advantage to the Plaintiffs to the prejudice of his case.

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5 Having considered the cases of ***Justice Acungwire Vs Mumtaz Kassam & 2 Others (supra)*** and ***Sudhir Ruparelia Vs MMAKS Advocates & Others (supra)***, and as explained by **Christopher Madrama J** (as he then was) in ***Henry Kaziro Lwandasa Vs Kyas Global Trading Co. Ltd (supra)***, though Counsel for the Plaintiffs contended that he would not be
10 a witness, I find that the questions raised regarding the authenticity and contents of the minutes, put Counsel Opio Moses in the realm of a potential witness and hence he is barred by **Regulation 9 of the Advocates (Professional Conduct) Regulations** from continuing to represent the Plaintiffs as their Advocate.

15 In the premises, and in the interest of justice, Counsel Opio Moses and the lawyers at M/s Sekabanja & Co. Advocates are consequently disqualified from providing legal representation to the Plaintiffs in High Court Civil Suit No. 716 of 2020. Accordingly, the preliminary objection is sustained.

20 I so order.

Dated, signed and delivered electronically this **15th** day of **February, 2024.**

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Patience T. E. Rubagumya

JUDGE

15/02/2024

8:30am