

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

HIGH COURT CIVIL SUIT NO 165 OF 2012

AYEBAZIBWE RAYMOND} PLAINTIFF

VERSUS

- 1. BARCLAYS BANK UGANDA LIMITED }**
- 2. ANGELLA NAMAKULA OFWONO}**
- 3. BALONDEMU DAVID }DEFENDANTS**
- 4. KIGOZI SEMPALA MUKASA OBONYO}**
ADVOCATES }

BEFORE HON MR. JUSTICE CHRISTOPHER MADRAMA

RULING ON PRELIMINARY POINTS

On the 7th of May 2013 when the suit was coming for preliminary hearing/pre-trial conferencing between counsels of the parties, the third defendant's counsel raised two preliminary points for consideration of the court before further proceeding with the conferencing.

Counsel David Oundo Wandera for the 3rd defendant objected to the appearance of Counsel Simon Tendo Kabenge working jointly with Dr James Akampumuza as Counsels for the plaintiffs. His contention is that he has never seen a notice of joint instructions from the firm of Counsel Simon Tendo Kabenge. His argument being that Simon Tendo Kabenge has no right to appear in the court and his appearance contravenes Order 3 rule 1 of the Civil Procedure Rules. Secondly he submitted that Dr James Akampumuza witnessed the caveat lodged on the suit property which had been irregularly lodged. Consequently the third defendant's counsel intends to have him as a witness and therefore submits that Dr James Akampumuza should not appear as a Counsel in this matter. Counsel contended that his appearance contravenes regulation 9 of the Advocates (Professional Conduct) Regulations which prohibit advocates likely to appear as witnesses in the suit from acting in contentious matters. Consequently he concluded that both advocates were incompetent and both should step down and avoid knowingly contravening the law.

In reply Counsel Simon Tendo Kabenge submitted that the objection was reactionary. He had intended to raise a similar objection and was not afforded opportunity to raise the matter earlier. Notwithstanding him went on to reply as follows:

As far as Dr James Akampumuza is concerned, the allegation was an afterthought, misplaced and calculated to delay the progress of the suit. On the defendants list of witnesses as agreed in the joint scheduling memorandum the name of Dr James Akampumuza does not appear anywhere as a witness for the third defendant. Witnessing a caveat or allegation that it was irregularly lodged does not appear anywhere in the defendant's pleadings. Furthermore the list of documents in the joint scheduling memorandum does not list the alleged caveat. Consequently the allegation against Dr James Akampumuza is an afterthought and reactionary. It was a pre-emptory act of reprisal. The rule counsel seeks to invoke does not apply because the advocate in issue is not a witness and the document does not form part of the trial bundle.

Concerning the objection to the appearance of Simon Tendo Kabenge, he submitted that he appeared on record in presence of the plaintiff and introduced himself as counsel for the plaintiff in previous proceedings. On the date of the hearing counsel submitted that the plaintiff was on official duties outside Kampala (Kasese). He further submitted that he handled the conferencing with the participation of the defendant's counsel who raised no such objections. Several correspondences on the court record and addressed to counsel for the defendants are copied to the law firm of Simon Kabenge and Company Advocates without any objection. It was copied to Simon Tendo Kabenge because he was joint counsel. The purpose of the notice of instructions is to notify or provide information of the fact of representation by both firms and whether a litigant has changed instructions. In this case there was no such change. The notice notifies about address for service of court process. Counsel referred to the minutes of the scheduling meeting of 5th of March 2013 which shows him in attendance as counsel for the plaintiff and in the presence of the plaintiff. Furthermore it shows the signature of Jacqueline Kagoya who attended on behalf of the defendant. Counsel Simon Tendo Kabenge attended that meeting and it was strange to hear that the defendants had no notice that he was counsel for the plaintiff. The purpose for notice was achieved a long time ago as counsels for the plaintiff have always known that he jointly represented the plaintiff with Dr James Akampumuza. Furthermore he submitted that the third defendant's counsel has not quoted any statutory law that requires an advocate to issue a notice of joint instructions. Moreover they did not show what prejudice if any their client would suffer if he (Counsel Simon Tendo Kabenge) represented the plaintiff. Lastly instructions and the right of audience in court are not validated by a mere notice of joint instructions and an advocate may even file fake joint instructions. They are questions of fact. In his case he had actual instructions. Furthermore the question of the right of audience before the court is not validated by notice of instructions but by a practising certificate.

In rejoinder the third defendant's counsel submitted that it was not true that they intended to delay the matter. Courts of law must be taken seriously. He contended that the due process of law cannot be ignored. He submitted that the court would set a dangerous precedent to allow counsel who had not filed any document for joint instructions to appear jointly. He contended that even though the name of Dr James Akampumuza was not on the list of witnesses, there was room to apply for any other witnesses with the leave of court. Secondly the witnessing of the

caveat by Dr James Akampumuza has not been denied. Even though the objection was never raised before, it was not time barred and illegality once brought to the attention of the court overrides all questions of pleadings including admissions. Counsel contended that order 3 rule 1 is the applicable law in the circumstances of the case.

In further rejoinder counsel David Sempala associated himself with the submissions of the third defendant's counsel and contended that counsel Simon Tendo Kabenge ought to have filed a notice of joint instructions. He referred to the case of **Makula International versus Cardinal Nsubuga [1982] HCB at page 11** for the submission that an illegality once brought to the attention of court overrides all questions of pleadings including admissions made therein. As far as the objection to Dr James Akampumuza is concerned, the issue of whether he is a witness depends on the wishes of the party who intends to call him as a witness. It follows that the third defendant cannot be estopped from calling Dr James Akampumuza as a witness. Counsel relied on **regulation 9 of the Advocates (Professional Conduct) Regulations SI 267 – 2**.

I have carefully considered the submissions of counsels. I will start with the representation that Dr James Akampumuza is likely to be a witness in the suit on account of having witnessed a caveat. The contention is based on allegation that a caveat was irregularly lodged on the suit property and witnesses by Dr James Akampumuza. The objection to the appearance of Dr James Akampumuza is based on regulation 9 of the Advocates (Professional Conduct) Regulations which provide as follows:

“9. Personal involvement in a client's case

***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 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 informal or non-contentious matter of fact in any matter in which he or she acts or appears.*”**

The rule forbids 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 would be required as a witness to give evidence whether verbally or by affidavit. The rule caters for discretion where the advocate believes that he or she may be required as a witness. In that category the rule is subjective and deals with the belief of the advocate. What will be the situation if another party would like the advocate to appear as a witness in the contentious matter? The second case scenario is when it becomes apparent during the proceedings that he or she will be required as a witness to give evidence whether verbally or by affidavit. The second scenario arises during the representation of the client by the advocate and in the leading of evidence in the case or during the proceedings

generally. Such an advocate will not continue to appear in the matter if it becomes apparent from the proceedings that he or she will be required to give evidence.

I have carefully considered the evidence on the submission of Counsel Simon Tendo Kabenge that the attack on the appearance of Dr James Akampumuza is a pre-emptory attack. This is because the joint scheduling memorandum shows the list of the first, second and fourth defendants witnesses to include three lawyers represented the first, second and fourth defendants. Another counsel for the 3rd defendant stood down from further appearing in court because he had been involved in a transaction related to the controversy in court and may be a witness. I have further considered the admitted documents of the defendants. It includes the certificate of title exhibit P1. It does not include the alleged caveat. The certificate of title shows that the plaintiff is the registered proprietor. I have further checked the amended plaint and did not find any pleading relating to the lodgement of a caveat. The written statement of defence of the third defendant avers in paragraph 5 (b) that before purchasing the suit land, the third defendant conducted a search of the title which was found to have no encumbrances as well as did physical search and there was nothing that prevented the third defendant from purchasing the suit land. Paragraph (c) further provides that at all material times during or before the purchase of the suit property by the third defendant, there was no court order barring the same as alleged and therefore the allegation of backdating the sale or breach of the sub-judice rule is not only wild but far-fetched and misconceived.

The question of whether there were encumbrances on the suit property is at the centre of the controversy as to whether the sale was proper. On the other hand it is a submission from the bar for the third defendant's counsel to suggest or allege that there was a caveat registered on the title deed irregularly. The title deeds attached to the plaint and on court record how the encumbrance of Nile Bank Ltd. The photocopy has an instrument number but seems not to have a date. If there is indeed a caveat irregularly lodged or even regularly lodged on the title deed which forms the subject matter of the civil suit, it would be material evidence on the propriety of the sale the title if any of the third defendant. If such a matter were to emerge from the evidence, it would be appearing from the proceedings that allegedly Dr James Akampumuza would likely be asked to testify about the caveat on the circumstances surrounding it. At this material time, the court cannot conclude on the basis of the materials on the court record that Dr James Akampumuza is likely to be a witness and a material witness at that. It is up to Dr James Akampumuza to consider whether he is likely to have information that relates to the issue of whether there were encumbrances on the suit property by the time there were dealings in it material to the issues in controversy in the suit. In those circumstances, the preliminary point of law on procedure is premature and is overruled. Dr James Akampumuza is put on notice that he might be a material witness if at all he has knowledge about encumbrances of the suit property at the time of the transactions complained about in the suit.

Concerning the second objection about the appearance of Counsel Simon Tendo Kabenge, the question of whether counsel represents a party is a question of fact. It is a matter between and

advocate and the client. The question of notice however, affects the conduct of proceedings for purposes of service of documents and also for purposes of taxation of costs. In the absence of a complaint from the plaintiff, the general rule is that a litigant is entitled to have any counsel or instruct any counsel of his or her choice. Notice of joint instructions is a procedural requirement and absolutely necessary in case any costs are awarded to the parties. It is however not fatal. I agree with Counsel Simon Tendo Kabenge that he has been appearing without objection and has participated in the joint scheduling meetings of the counsels. I have further considered the correspondence from Akampumuza and Company Advocates. In the letter filed on 5 March 2013 it is indicated therein that Dr James Akampumuza who has personal conduct of the matter was indisposed and therefore the joint conferencing could not proceed and should be rescheduled. There is no mention of Counsel Simon Tendo Kabenge. In another letter dated 11 April 2013 Akampumuza and Company Advocates wrote indicating that they are joint counsel for the plaintiff. The letter does not however indicate who the other joint counsel is. The letter is copied to Simon Tendo Kabenge and Company Advocates. A letter from KSMO Advocates filed on court record on 6 March 2013 is addressed to Messieurs Akampumuza and Company Advocates. It was not copied to Simon Tendo Kabenge and Company Advocates.

Regulation 2 of the Advocates (Professional Conduct) Regulations sub regulation 1 provides that no advocate shall act for any person unless he or she has received instructions from that person or his or her duly authorised agent. The question of whether an advocate has a right to appear in court is fundamental to the question of the ethical conduct of that advocate to his client and to the court. This is because an advocate may withdraw from the conduct of the case. Such an advocate is required under regulation 3 (2) of the regulations to give his client and the court and the opposite party sufficient notice of his or her intention to withdraw and to refund to his or her former client such proportionate professional fees as have not been earned by him or her in the circumstances of the case. Regulation 5 of the Advocates (Professional Conduct) Regulations further provides that every advocate shall in all contentious matters either appear in court personally or brief a partner or a professional assistant employed by his or her firm to appear on behalf of his or her client. Under regulation 6 an advocate is personally responsible for the work undertaken on behalf of a client and shall supervise or make arrangements for supervision by another advocate who is a member of the same firm of all work undertaken by non-professional employees. An advocate has a duty not to disclose client's information acquired as a result of acting on behalf of the client. Furthermore an advocate is accountable for the money of a client.

Regulation 41 of the Advocates (Remuneration and Taxation of Costs) Regulations provides that costs of more than one advocate have to be certified by a judge. Under the provision, a certificate of two counsels may be granted in respect of two members or employees of the same firm. It is therefore apparent that a formal notice of joint instructions is necessary. Under the sixth schedule instruction fees may be increased by one half where there is a certificate for more than one advocate as certified by the presiding judge or magistrate as the case may be. In those circumstances, the appearance of counsel Simon Tendo Kabenge without any notice that he is a

joint counsel with Dr James Akampumuza who is clearly the advocate on record according to the pleadings offends the practice of the court. The amended plaint filed on the 18th of May 2012 was drawn by Messieurs Akampumuza and Company Advocates. There is no single pleading that has been drafted by Counsel Simon Tendo Kabenge. He is an invisible counsel as far as the record is concerned. In those circumstances, inasmuch as he may have been instructed by the plaintiff, he will not be permitted to participate in the proceedings unless and until he has filed a notice of joint instructions to appear jointly with Dr James Akampumuza on behalf of the plaintiff. This would make him accountable professionally and orders can be made that may be binding on him. In the circumstances counsel Simon Tendo Kabenge is barred from further appearing in the proceedings unless and until he files the requisite notice of joint instructions to represent the plaintiff. The second preliminary objection on the appearance of Counsel Simon Tendo Kabenge is allowed.

Ruling delivered in open court this 14th day of May 2013

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Simon Tendo Kabenge

Plaintiff in court

3rd defendant represented by Oundo David Wandera.

Asodio Jordan holding brief for David Sempala and Obonyo Richard for the first defendant.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

14th May 2013