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**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**(COMMERCIAL DIVISION)**  
**MISCELLANEOUS APPLICATION NO. 224 OF 2021**  
**(ARISING FROM CIVIL SUIT NO. 837 OF 2020)**

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**1.SIMBAMANYO ESTATES LIMITED**  
**2.PETER KAMYA .....APPLICANTS**

**VERSUS**

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**1.EQUITY BANK UGANDA LIMITED**  
**2.MEERA INVESTMENTS LIMITED**  
**3.LUWALUWA INVESTMENTS LIMITED**  
**4.THE COMMISSIONER LAND REGISTRATION.....RESPONDENTS**

**BEFORE: HON. LADY JUSTICE SUSAN ABINYO**

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**JUDGMENT**

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This is an appeal brought by Notice of Motion under the provisions of Section 98 of the Civil Procedure Act, Section 33 of the Judicature Act and Order 8 Rule 18(1) & (5) of the Civil Procedure Rules SI 71-1, Order XIA Rule 1(6) & Order 50 Rule 8 of the Civil Procedure (Amendment) Rules 2019 wherein the Applicants seek for orders that:

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1. The orders of the Deputy Registrar granted on 17<sup>th</sup> February, 2021 that the suit abates for failure to take out summons for directions in time be set aside.
2. Civil suit No. 837 of 2020 from which the order in (1) above arises be reinstated.
3. The orders granted in Miscellaneous Application No. 922 be restored unless otherwise varied by court.
4. Costs of this application be provided for.

5 **Background:**

The Applicants jointly instituted a suit against the Respondents vide Civil Suit No. 837 of 2020: Simbamanyo Estates Ltd & Anor Vs Equity Bank Uganda Limited & 3 Others wherein they contended inter alia that the sale and transfer of the Applicant's properties comprised in LHR Volume 2220 Plot 2 Folio 33 Lumumba Avenue known as Simbamanyo House and Kyadondo Block 243 Plots 95, 487, 957,958 and 2794 land at Mutungo known as Afrique Suites Hotel was illegal and fraudulent.

The Respondents were duly served and they severally filed their written statement of defence and that on the 12<sup>th</sup> day of February, 2021, the 2<sup>nd</sup> Respondent through its Advocates M/S Walusimbi & Co. Advocates by a letter applied to the court for an order that Civil Suit No. 837 of 2020 abates under Order XIA Rule 1(6) of the Civil Procedure Rules S.I 71-1 for failure by the Plaintiffs( Applicants herein) to take out summons on time and that the Deputy Registrar on the 17<sup>th</sup> day of February, 2021 ordered that the suit had abated for failure by the Applicants to take out summons for directions on time.

**Facts:**

This appeal is supported by an affidavit of Gad Wilson an Advocate practicing with M/S Kakuru & Co. Advocates deponed under paragraphs 1- 20 and summarized as follows: -

25 That he is aware that the pleadings on the file have never been closed in accordance with Order 8 Rule 18(5) of the Civil Procedure Rules as claimed by Counsel for the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent herein) in that the 1<sup>st</sup> Defendant (1<sup>st</sup> Respondent herein) filed its written statement of defence on the 11/11/2020 and served them on 17/11/2020; the 2<sup>nd</sup> Defendant (2<sup>nd</sup> Respondent herein) filed its written statement of defence on 10/11/2020 and served the Applicants; the 3<sup>rd</sup> Defendant(3<sup>rd</sup> Respondent herein) filed its written statement of defence on 11/11/2020 and was served on them on 13/11/2020 and the 4<sup>th</sup> Defendant(4<sup>th</sup> Respondent herein) filed its written statement of defence on 10/11/2020 and the said defence has never been served on them as the Plaintiff's Counsel.

35 That as one of the Applicants' Counsel together with M/S Muwema & Co. Advocates, they have never been served with the written statements of defence by both the 2<sup>n</sup> and 4<sup>th</sup> Defendants and that he is aware that the Plaintiffs (Applicants herein) are entitled to file a reply to the written statement of defence after the last of the defences has been delivered to them and having not

5 received the last of the defences, the Plaintiffs could not take out summons for directions within the meaning of the law.

That the above notwithstanding, the Applicants' being dissatisfied with the decision of the Deputy Registrar vide Miscellaneous Application No. 922 of 2020 wherein she rejected to grant the Applicants' a mandatory injunction but granted  
10 a prohibitory injunction, filed an appeal against part of the ruling vide Miscellaneous Appeal No. 003 of 2021 which was fixed for hearing on the 22/03/2021 before the trial Judge and that he is aware that an application seeking for summons for directions before the Deputy Registrar could not be  
15 made when the appeal together with the main suit file were before the trial Judge.

That the said order of abatement granted by the Registrar has in effect extinguished all pending proceedings before the trial Judge and has rendered any orders that would be granted, nugatory hence causing injustice to the Applicants and has infringed the Applicants' right to a fair hearing enshrined  
20 under Article 28 of the Constitution.

That the Applicants have demonstrated sufficient cause to warrant the setting aside of the orders of the Deputy Registrar and that the main suit be reinstated; that this application has not been brought without undue delay; that the Respondents will not be prejudiced if the orders sought are granted and that it is  
25 in the interest of justice that the orders sought for be granted.

A supplementary affidavit was filed by the Applicants deposed under paragraphs 1 – 14 by one Njoroge Githinji Martin an associate Advocate with M/S Wameli & Co. Advocates the newly instructed law firm to represent the Applicants.

Mr. Njoroge Githinji Martin reiterated the averments of Mr. Gad in his  
30 supplementary affidavit in reply under paragraphs 1- 5, 10,12 & 13 thereof except paragraphs 6,11 & 14 wherein he avers that the application for the suit to abate for failure to serve summons for directions before the Hon. Deputy Registrar was made prematurely since the parties were still exchanging pleadings on the Miscellaneous Appeal which arose from the main suit and the main file was  
35 before the trial Judge to dispose of the Miscellaneous Appeal to which the Respondents have not yet filed a reply; that he believes that the rationale for extracting summons for direction was to guide court and the parties in setting down the suit for hearing when there is no other application and , or cause pending, arising from the main suit; and that the said Miscellaneous Appeal will

5 be rendered nugatory if this honourable court does not set aside the abatement order issued by the Registrar erroneously.

The 1<sup>st</sup> Respondent deponed an affidavit in reply by Denis Kimanje Kyewalabye an advocate employed as the legal manager of the 1<sup>st</sup> Respondent Bank under paragraphs 1-16 as hereunder: -

10 That the application has no merit, what the Applicants are seeking is not plausible, illegal and has no chance of success.

That he has been informed by his lawyers which information he verily believes that there is no requirement to accord any party a hearing before the court issues an order of abatement and that the suit abated automatically once the Applicants failed to take out summons for direction in time and the said order was done with full regard to all the facts on the court file.

15 That the 1<sup>st</sup> Respondent filed and served its written statement of defence within the prescribed time and served the Applicants who did not exercise their right to respond to the 1<sup>st</sup> Respondent's written statement of defence and did not apply to extend time within which they could respond; that even if the Applicants had not received any written statement of defence from the 1<sup>st</sup> Respondent, which is denied, the Applicants still had a duty to take out summons for directions as the filing of a Miscellaneous Application under a main suit and the conduct of such Miscellaneous Application in any form does not extinguish the mandatory legal obligation of the Applicants to apply for summons for directions and they cannot therefore, claim that their right to a fair hearing was violated.

25 That the Applicants have not demonstrated any cause for setting aside the orders of the Registrar and for the court to reinstate the main suit and that the 1<sup>st</sup> Respondent will suffer prejudice if the orders sought by the Applicants are granted.

35 That the he has been informed by his lawyers which information he verily believes that it would be an abuse of court process for this court to reinstate the main suit by allowing the Applicants to hide behind the filing of Miscellaneous applications and frivolous appeals to deliberately delay the prosecution of the main suit and that it is the very abuse of court process that the court was addressing under Order XIA of Civil Procedure Rules as amended.

The 2<sup>nd</sup> Respondent deposed an affidavit in reply by Sudhir Ruparelia a director to the 2<sup>nd</sup> Respondent under paragraphs 1-14 and summarized as follows: -

- 5 That he has been advised by his Counsel M/S Magna Advocates and M/S  
Walusimbi & Co. Advocates which advice he verily believes to be true and  
correct that:
- 10 i. Under the law, no appeal lies from the order abating the suit, thereby  
rendering the Applicants' appeal and, or application incompetent.
  - 10 ii. The law under which the suit abated provides for remedies which the  
Applicants ought to have resorted to, rendering the appeal and, or  
application incompetent.
  - 15 iii. Once the suit abates, there is nothing to re-instate, rendering the orders  
from this honourable court untenable.
  - 15 iv. The 2<sup>nd</sup> Respondent duly filed its written statement of defence on the 10<sup>th</sup>  
day of November, 2020 and on the 13<sup>th</sup> day of November, 2020, when the  
2<sup>nd</sup> Respondent's Counsel appeared to pick the written statement to serve  
the same on the Applicants, they discovered that the Applicants through  
20 Edward from M/S Muwema & Co Advocates served themselves from the  
court registry which was confirmed by the acknowledgment receipt of  
service with the firm stamp.
  - 25 v. The last day of filing and serving the Respondents' written statement of  
defence to the amended plaint in the head suit was the 28<sup>th</sup> day of  
November, 2020 and that thereafter, the Applicants were entitled to file a  
reply if any to the written statements of defence; prepare and file summons  
for directions unless otherwise any extension of time was granted.
  - 30 vi. The summons for directions in the head suit were not taken by the Plaintiffs  
(Applicants herein) within the 28 days from the date when the pleadings  
were closed or deemed to have been closed and that at the time the suit  
abated, the Applicants had neither taken out summons for direction nor  
sought leave of court for extension of time within which to take out  
summons.
  - 35 vii. The head suit automatically abated and the learned Registrar's  
acknowledgment of the abatement was in the exercise of an  
administrative function and not an adjudication.
  - 35 viii. That the pending appeal did not constitute an automatic stay of  
proceedings in the main suit.
  - 40 ix. That the Applicants engaged a different law firm of Wameli & Co.  
Advocates to specifically handle the appeal and the other firms were  
expected to and ought to have taken out the summons for directions in the  
suit.

- 5 x. The Applicants instead chose to take out a plethora of applications and, or appeals rather than give attention to the substantive suit and that the Applicants are liable for dilatory conduct.

The 3<sup>rd</sup> Respondent deposed an affidavit in reply by Mohammed Golooba an advocate and legal manager of the 3<sup>rd</sup> Respondent under paragraphs 1-13 as follows: -

10 That the 3<sup>rd</sup> Respondent duly filed its written statement of defence on the 13<sup>th</sup> day of November, 2020 and the Applicants herein should have filed their replies to the written statement of defence and taken out summons for directions within the time prescribed by law.

15 That the Applicants did not follow the procedure requisite in pursuance of the main suit electing instead, to pursue Miscellaneous Applications and Appeals which neither had no bearing on nor substitute of the Applicants' statutory duty to take out summons for directions of court within the prescribed time.

20 That the consequence of failure to secure summons for direction, Civil Suit No. 837 of 2020: Simbamanyo Estates Limited & Another Vs Equity Bank Uganda Limited and 3 others automatically abated in accordance with the law and that as a result of the abatement of the suit, the Applicants may not and cannot, in law found an appeal against an order abating the suit and as such, the application herein is without merit, the only remedy available to the Applicants is to take out

25 a fresh suit.

The 4<sup>th</sup> Respondent deposed an affidavit in reply by Bamwite Emmanuel the Senior Registrar of Titles working with the office of the 4<sup>th</sup> Respondent in the Department of Land Registration under paragraphs 1-14 and summarized as follows: -

30 That on the 10<sup>th</sup> day of November, 2020, the 4<sup>th</sup> Respondent filed its written statement of defence and the court signed and sealed it on the 12<sup>th</sup> day of November, 2020.

35 That on the 13<sup>th</sup> day of November, 2020, a one Naika Edward from M/S Muwema & Co. Advocates picked the copy of the written statement of defence from the court registry and that this information was given by the clerk at the court registry.

That from the time the 4<sup>th</sup> Respondent's written statement of defence was served on the Applicants on the 13<sup>th</sup> day of November, 2020, the time within which to file

5 a reply by the Applicants expired 15 days thereafter and that it is not true that the Applicants have a right of reply.

That the appeal on the temporary injunction is not a stay of proceedings and therefore, could not stop the Applicants from filing summons for directions as required by law.

10 That the said appeal vide H.C.M.A No. 003 of 2021 referred to in the affidavit in support and the supplementary affidavit of the Applicants were filed on the 4<sup>th</sup> Day of January, 2021, way after the expiry of the time within which to file the summons for directions and cannot be the reason for the failure to do so as alleged by the Applicants.

15 That the suit rightly abated by the course of law and that this application is an abuse of court process and ought to be dismissed with costs.

The Applicants filed affidavits in rejoinder to the Respondents' replies summarized as hereunder: -

20 That it is not true that the pleadings had closed as pleadings are deemed to be closed when a reply is made to the last of the defences, that the Applicants could only take out summons for directions when the pleadings are closed and that the suit could not have abated until the pleadings are closed.

25 That the filing of a fresh suit where it abates only applies where the suit has rightly been found to have abated and not where the abatement is irregular like in the instant case.

That the 2<sup>nd</sup> and 4<sup>th</sup> Respondents have never served their written statements of defence on the Applicants as the firm only affixes its stamp on documents delivered and served on them at their front desk and not those picked from the court registry.

30 That the appeal against the abatement orders is competent and the Applicants have demonstrated sufficient cause for the orders sought for, which are within the jurisdiction of this court.

### **Representation**

35 The Applicants were represented by Mr. Muwema jointly with Mr. Turyamusiiima of M/S Muwema & Co. Advocates and Solicitors and the 1<sup>st</sup> Respondent was represented by Mr. Katende of M/S Katende Ssempebwa & Co. Advocates, Solicitors and Legal Consultants while Mr. Walusimbi jointly with Mr. Kyazze and Mr.

5 Sserunjogi represented the 2<sup>nd</sup> Respondent, Mr. Opolot represented the 3<sup>rd</sup> Respondent and Mr. Babu Hakim represented the 4<sup>th</sup> Respondent.

Court directed Counsel for the parties herein to file submissions and they complied with the agreed schedules.

**Grounds of the appeal for determination:**

10 The grounds of appeal were rephrased by court, so as to streamline the proper grounds of appeal following the diverse grounds in the submissions of Counsel for the parties herein. The grounds of appeal are as hereunder; -

1. Whether this application discloses sufficient grounds for setting aside the abatement order and reinstatement of Civil Suit No. 837 of 2020.
- 15 2. Whether the orders granted in Miscellaneous Application No. 922 be restored.

Counsel for the Respondents jointly filed submissions in reply to the Appellants submissions on the appeal and raised preliminary objections as follows: -

- 20 I. Whether the Appellants have filed a valid and competent application before this court.
- II. Whether the Appellants have filed a valid and competent appeal before this court.
- III. Whether this court can exercise its inherent powers to set aside the abatement order and, or revive H.C.C.S No. 837 of 2020.
- 25 IV. Whether the Appellants are exempted from applying for summons for directions on the alleged basis that the Respondents did not serve them with their written statements of defence.
- V. Whether the Appellants are exempted from taking out summons for directions on the basis that there was appealing appeal arising from
- 30 H.C.C.S No. 837 of 2020.

I have noted that Counsel for the Appellants in their submissions on the appeal made a recap of paragraph 3 of the 2<sup>nd</sup> Respondent's affidavit in which Dr. Sudhir Ruparelia raised some of the preliminary objections above and Counsel addressed this court in their submissions in rejoinder on the appeal that in their

35 opinion, some of the points raised by the Respondents as preliminary points of law does not meet the required test of what amounts to a point of law.

Counsel relied on the decision of ***Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 at 700*** in which a preliminary objection was



5 defined to consist of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit; to submit that the above points cannot be resolved as preliminary points of law since they constitute the Appellants grounds in support of the appeal.

10 I have carefully scrutinized the preliminary objections above and agree with Counsel for the Appellants to some extent that the said objections do not meet the required test of what amounts to a point of law as defined in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (supra)** and find that objections (iii), (iv) and (v) could conveniently be resolved under the 1<sup>st</sup>  
15 ground of appeal as framed above and not necessarily as preliminary objections on points of law.

I will therefore, disregard the said objections as preliminary points of law.

The preliminary objections (i) and (ii) above are intertwined due to the interchangeable use of the terms application and appeal; these two objections  
20 will be classified as the same objection and the use of the terms Applicants and, or Appellants will be referred hereinafter as Appellants and will be resolved jointly as an appeal and not as an application.

Counsel for the Respondents jointly filed submissions and addressed court on the preliminary objection as to whether the appeal filed before this court is valid and  
25 competent.

Counsel for the Respondents submitted that the appeal filed by Notice of Motion is brought by two distinctive Appellants, the 1<sup>st</sup> Appellant is a company and the 2<sup>nd</sup> Appellant is an individual and that the affidavit in support is deponed by Mr. Gad Wilson joint Counsel for the Appellants in this matter and a supplementary  
30 affidavit in support is deponed by Mr. Njoroge Githingi Martin also an advocate in M/S Wameli & Co. Advocates, a newly instructed firm representing the Appellants in this matter.

Counsel argued that the affidavits are defective and render the appeal incompetent on the following grounds: -

- 35 I. That the deponents of the affidavits in support of the motion, supplementary and rejoinder could only depone as recognized agents or authorized agents of the Appellants and that there is no written authority from any of the Appellants to Mr. Gad Wilson or Mr. Njoroge to the effect that they were authorized by the Appellants or any of them to depone the

5 affidavits on their behalf, that the position of the law is that an affidavit is defective by reason of being sworn on behalf of another person without showing that the deponent had the authority of the other. **(See Bishop Patrick Baligasiima Vs Kiiza Daniel & 16 others H.C.M.A No. 1495 of 2016)**

10 II. That the 1<sup>st</sup> Appellant is a company and Mr. Gad Wilson, the deponent of the affidavit in support of the Motion by the Appellants does not state that he is either a director, secretary or principal officer or holder of a power of attorney duly authorised to depone the affidavit on behalf of the 1<sup>st</sup> Appellant and that in the absence of any authorization, the affidavit is incurably defective. **(See MHK Engineering Services (U) Limited Vs MacDowell Limited H.C.M.A No. 825 of 2018.)**

15 III. That both Mr. Gad Wilson and Mr. Njoroge deponed affidavits merely as advocates and that this offends Order 3 Rules (1) & (2) of the Civil Procedure Rules; a duly appointed advocate is clearly distinguishable from an advocate who has been instructed in the context of Order 3 Rule (1) of the Civil Procedure Rules. That an appointment to act on behalf of the client must be in writing. **(See Mugoya Construction & Engineering Limited Vs Central Electricals International Limited H.C.M.A No. 699 of 2011)**

25 IV. That the affidavit of Gad Wilson contravenes the provision of Regulation 9 of the Advocates (Professional Conduct) Regulations 1979, where an advocate is barred by law from swearing an affidavit in a contentious matter, in which he appears as Counsel as well; that Mr. Gad is on record as Counsel for the Appellants on the proceedings of 12<sup>th</sup> March 2021. That there is no doubt that this is a contentious matter and the net effect of the affidavit in support and the supplementary affidavit are incurably defective, the entire application and, or appeal is rendered unsupported by any affidavit and liable to be dismissed. **(See Nakibira Agnes & Others Vs Kelemera Edward H.C.M.A No. 403 of 2018; Jayanth Amratlal Bhimji & Anor Vs Prime Finance Company Limited H.C.M.A No. 225 of 2008)**

35 V. That Order 50 Rule (3) of the Civil Procedure Rules mandates Registrars to handle interlocutory applications and therefore, appeals would only lie from orders emanating from the exercise of jurisdiction by the Registrars determining an interlocutory application; that the appeal must arise out of a hearing and determination of a matter by the Registrar and only a party

5 aggrieved with the order resulting from the hearing before the Registrar is entitled to appeal to the Judge. **(See *Mohammad Kaliisa Vs Gladys Nyangire Karumu Civil Reference No. 139 of 2013*)**

10 VI. That the suit abated automatically under the provision of Order XIA Rules (2) & (6) of the Civil Procedure (Amendment) Rules, 2019 on account of failure by the Plaintiffs (Appellants herein) to take out summons for directions within the time prescribed by the Rules and that the appropriate remedy under sub Rule 7 is filing a fresh suit, subject to the law of limitation; that the abatement order is not an adjudicative order that is appealable and therefore, the appeal is improperly before this honourable court. **( See *Cahndran & Associates Vs URA H.C.C.S No. 0917 of 2019*)**

15 Counsel for the Appellants in reply submitted that under Order 50 Rule (8) of the Civil Procedure Rules, orders of the Registrar are appealable and that there is numerate judicial interpretation of Order 50 Rule (8) by the courts to mean that all orders issued by a Registrar are appealable to a Judge of the High Court. **(See *Magem Enterprises Limited Vs Uganda Breweries Limited H.C.C.S No. 462 of 1991*); *National Resistance Movement Vs Kampala Modernity & Printers Ltd Misc. Appeal No. 6 of 2016* and *Adonia Vs Mutekanga [1970] EA 429 at 432 Spry J.A* held that:**

25 "... the position as I understand it, is that the courts will not normally exercise their inherent powers where a specific remedy is available and will rarely if ever do so where a specific remedy existed but, for some reason, such as limitation, is no longer available. The matter is, however, not one of jurisdiction. The High Court is a court of unlimited jurisdiction, except so far as it is limited by statute, and the fact that a specific procedure is provided by rule cannot operate to restrict the court's jurisdiction."

30 Counsel argued that the facts of the present appeal and the orders sought clearly invite this court to hear the appeal under Order 50 Rule 8 of the Civil Procedure Rules and the Appellants can therefore not be denied the right to be heard by the trial Judge on an appeal from the abatement order of the Deputy Registrar because the right of appeal is conferred against all orders made by the Registrar under the said Order 50 Rule 8 of the Civil Procedure Rules.

Counsel contended that this court has jurisdiction to entertain the current application as filed.

40 Counsel for the Respondents in rejoinder submitted that what is glaringly clear is that for an advocate to competently depone an affidavit on behalf of the client

5 and, or party, he must be and state that he is an advocate duly appointed to act  
on behalf of the party as is expressly set out in Order 3 Rule (1) and that in the  
case of **Mugoya Construction & Engineering Limited Vs Central Electricals  
International Limited(supra.)** a distinction was made between an advocate duly  
appointed to act as such on behalf of the client and an advocate who has been  
10 given instructions wherein Madrama .J ( as he then was ) held that an  
appointment to act on behalf of the client must be in writing.

Counsel further submitted that the decision in **Mugoya Construction & Engineering  
Limited Vs Central Electricals International Limited(supra.)** is in all fours with the  
current matter before court and since it is not stated that the Appellants ever  
15 authorised the deponents to depone the affidavits on their behalf, the deponents  
are not advocates duly appointed to act on behalf of the Appellants in the  
context of Order 3 Rule (1) neither are they recognized agents in the context of  
Order 3 Rule (2) and that the absence of authority in writing renders the affidavits  
fatally defective.

20 Counsel reiterated their earlier submissions on the position settled by the decision  
of the Court of Appeal in **Mohammad Kaliisa Vs Gladys Nyangire Karumu(supra)**  
on the interpretation of Order 50 Rule (8) and that the decision is binding on this  
court.

I have carefully considered the submissions of Counsel for the parties herein as  
25 above, the laws and the authorities cited in respect of the preliminary objection  
as to whether the appeal filed before this court is valid and competent and find  
as follows: -

The law in which a person(s) may be competent to depone an affidavit is well  
stated under Order 19 Rule 3 (1) of the Civil Procedure Rules as hereunder: -

30 **3. Matters to which affidavits shall be confined.**

(1) Affidavits shall be confined to such facts as the deponent is of his or her  
own knowledge to prove, except on interlocutory applications, on  
which statements of his or her belief may be admitted, provided that  
the grounds thereof are stated.

35 Order 3 (1) of the Civil Procedure Rules provides for persons who are eligible to  
enter an appearance in a matter before any court to consist of a party in person,  
recognized agents of parties and an advocate duly appointed to act on his or  
her behalf and, recognized agents are defined in sub rule 2 of the said Order.

5 In order to comprehend the contention by the Respondents that the affidavits  
deponed by Mr. Gad Wilson and Mr. Njoroge Githingi as advocates instructed in  
this matter and not as advocates duly appointed by the Applicants are  
defective, the provision of the law on who is competent to depone an affidavit  
has been considered as above and should be read together with the provision of  
10 Order 3 Rule (1).

In the instant appeal, Mr. Gad Wilson deponed an affidavit in which he avers that  
he is an advocate, one of the law firms retained by the Applicants and well  
conversant with the facts pertaining to this case and deponed the affidavit in that  
capacity while Mr. Njoroge Githingi deponed a supplementary affidavit in which  
15 he states that he is an associate advocate at M/S Wameli & Co. Advocates the  
newly instructed law firm to represent the Applicants in this appeal and all matters  
arising thereto and is well acquainted with the facts relating to this application  
and the suit and swear the affidavit in that capacity.

I agree with the position of law which is still good law, that an advocate with  
20 knowledge of the facts of the matter before court may swear an affidavit on  
formal and non-contentious matters however, an affidavit sworn by Counsel in  
personal conduct of the matter on substantive matters is fatally defective. (See  
**Regulation 9 of the Advocates (Professional Conduct) Regulations S1 267-2 and**  
**Yunusu Ismail T/A Bombo City Store Vs Alex Kamukamu & others T/A OK Bazaar 1**  
25 **(1992) 3 KALR 113 at 119)**

The questions that ensue are as hereunder: -

- i. What amounts to a substantive matter?
- ii. What is a contentious matter?

A substantive matter refers to the essence of the claim or the subject matter in a  
30 proceeding without which nothing exists. (See **Words and Phrases legally defined**  
**Volume 4: R-Z pg 249)**

A contentious matter on the other hand implies the nature of the work in a  
proceeding. (See **Section 1 paragraph (c) of the Advocates Act Cap 267)**

It is my considered view that substantive matters are usually contentious and this  
35 could have formed the basis or rationale for the mandatory provision of  
Regulation 9 of the Advocates (Professional Conduct) Regulations S1 267-2 which  
provides that: -

5 "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  
10 appearing in any matter, it becomes apparent that he or she will be  
required as a witness to give evidence 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  
15 affidavit on a formal or non contentious matter or fact in any matter in  
which he or she acts or appears."

I agree with Counsel for the Appellants in their submissions in rejoinder on the  
15 appeal that the authorities of **Mugoya Construction & Engineering Limited Vs  
Central Electricals International Limited(supra)**; **MHK Engineering Services (U)  
Limited Vs MacDowell Limited H.C.M.A (supra)** and **Bishop Patrick Baligasiima Vs  
Kiiza Daniel & 16 others(supra)** cited by Counsel for the Respondents are  
distinguishable and will not delve into the distinctions.

20 I am in further agreement with the decision in **Mugoya Construction & Engineering  
Limited Vs Central Electricals International Limited(supra)** where Madrama. J (as  
he then was) made a distinction between an advocate duly appointed to act as  
such on behalf of the client and an advocate who has been given instructions by  
the client and held that an appointment to act on behalf of the client must be in  
25 writing, however, the facts of that case are distinguishable from this appeal; in  
that case, Counsel had deponed an affidavit in his capacity as a recognized  
agent of the Applicant without any authority from the principal while in the instant  
matter, both Counsel deponed affidavits in their capacity as advocates duly  
instructed to represent the Appellants.

30 In addition, Mr. Gad Wilson deponed an affidavit as an advocate for the  
Appellants on facts relating to the manner in which the suit abated, this in my  
considered view is the crux of this appeal and without which this appeal would  
not exist. Those facts constitute what would amount to the subject matter of the  
appeal before this honourable court and therefore, qualify as substantive  
35 matters.

The affidavit deponed by Mr. Gad Wilson on matters of substance in the appeal  
before this court as an Advocate duly instructed by the client as seen above,  
inevitably renders the said affidavit defective.

40 The analysis above on the affidavit deponed by Mr. Gad Wilson as an advocate  
instructed on the matter and not as an advocate duly appointed to act as such

5 on behalf of the Appellants applies to the supplementary affidavit deponed by Mr. Njoroge Githingi as an advocate as well.

For the reasons above, the supplementary affidavit deponed by Mr. Njoroge Githingi for all intents and purposes on this matter is as well found to be defective.

10 In the result, I find that this appeal is incompetent and not proper before this honourable court as the defective affidavits render the appeal incompetent.

Accordingly, the preliminary objection on a point of law by the Respondents is upheld.

15 This appeal is liable to be struck out as required under Order 6 Rule 29 of the Civil Procedure Rules on ground that it has been disposed of on a technicality rather than on merit.

In regard to costs, **Section 27 of the Civil Procedure Act Cap 71** provides as follows:

20 **27(1)** "subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

25 Taking into consideration the above provision on costs and the decision of **Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) HCB 35** where Justice Manyindo (as he then was) held that a successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit.

I find no reason to deny the Respondents costs of this appeal.

30 For the aforementioned reasons, this appeal is struck out with the following orders:

1. Miscellaneous Appeal No. 3 of 2021 for setting aside the orders of the Registrar is dismissed.
2. Miscellaneous Application No. 370 of 2021 for stay of proceedings in Miscellaneous Appeal No. 3 of 2021 is overtaken by events.
- 35 3. Miscellaneous Application No. 718 Of 2021 for stay of execution is hereby dismissed.

5        4. Costs of this appeal; Miscellaneous Appeal No. 3 of 2021; Miscellaneous Applications No. 370 of 2021 and No. 718 of 2021 as above are awarded to the Respondents.

I so order.

Judgment delivered by email this 30<sup>th</sup> day of July, 2021.

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SUSAN ABINYO

**JUDGE**

**30/07/2021**

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