**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT JINJA**

**CIVIL APPEAL NO. 008 OF 2018**

**(Arising out of the Chief Magistrates Court of Iganga Civil Suit No. 0174 of 2010)**

**IGANGA TOWN COUNCIL**

**Now IGANGA MUNICIPAL COUNCIL…….APPELLANT**

**VERSUS**

**PAUL MUWEREZA…….……..…..RESPONDENT**

**JUDGMENT ON APPEAL**

**BEFORE HON. LADY JUSTICE EVA K. LUSWATA**

This is an appeal from the decision/ruling of His Worship Robbs William Komakech, Chief Magistrate, Iganga delivered on 15/12/2015.

## Background

The respondent, Paul Muwereza and two others sued the applicant, Iganga Municipal Council (hereinafter the Council) and another in Civil Suit No. 174/2010 (hereinafter the main suit) for breach of contract and an award of damages with respect to bids and contract in respect of civil works and management programs in the Council. At commencement of the hearing, Muwereza's counsel raised a preliminary objection against the *locus standi* of the firm of advocates of Okalang Law Chambers representing the appellant. It was argued that before presenting the defence, the law firm did not go through the statutory procuring process in contravention of the Local Government Public Procurement and Disposal of Public Assests Regulation SI 139/2006 and the Local Government (Amendment Schedules) ST 48/2001. It was

argued in reply for the Council that the objection was *res judicata*, having earlier been raised during the hearing of Misc. Application No 5/2013, when the Council applied for an order to set aside an *exparte* judgment and orders of the main suit. That application was successful.

In his ruling, the trial Magistrate agreed that the firm which did not have written approval of the Attorney General filed the written statement of defense illegally. The defence was struck out with costs, and thus this appeal presented on six grounds that:-

i. **The learned trial Magistrate erred in law when he entertained a point of law which was *res judicata* thus reaching an illegal decision that occasioned a miscarriage of justice.**

ii. **The trial Chief Magistrate erred in law when he made a finding that the appellant's lawyers did not have approval from the Attorney General to represent it without any evidence from the respondent availed to Court**

iii. **The learned Chief Magistrate erred in law when he misrepresented the wording in Regulation 27 of the 3rd Schedule of the Local Government Act by him adding words like *"Consent", "Approval"* and *"written approval"* to the said regulation as if amending the Regulation, thus causing illegality and miscarriage of Justice.**

iv. **The learned trial Magistrate erred in law in striking out the Appellant's written statement of defence without regard to the Advocate's Act as amended and thus causing an illegality and miscarriage of Justice**

v. **The learned trial Magistrate erred in law and fact when she failed to properly weigh, and evaluate the evidence and apply the law to the facts thus arriving at a wrong decision of dismissing the suit.**

vi. **The trial Magistrate erred in law when he exhibited bias against the Appellant's advocates and when he ignored the Appellant's Counsel's**

**submission when the deadline for filing of the submission had not been fixed and/or expired and the same had been filed on 14/12/2015 at 9:30am and not 6:45pm as Court Registry did not open at 6:45pm.**

**Duty of the Court**

My powers and limits as a first appellate Court are well documented. Even in a case like this one where no evidence was adduced, I must reconsider the points of law raised for Mr. Muwereza the respondent and what was given in defence, and then draw my own conclusions. In doing so, I am not bound necessarily to follow the trial Court's findings of fact or law if it appears that the court clearly failed in some way to take account of particular circumstances and probabilities. See for example **Panyda Vrs R** and **Selle & Anor Vrs Associated Motor Boat Company Ltd & Anor (1968) EA 126.**

**Resolution of the grounds of appeal:-**

**Ground 1**

Going by the submissions of either counsel, the doctrine of *res judicata* was not in dispute. It is provided in Section 7 of the Civil Procedure Act that:

*"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try the subsequent suit or the suit in which the issue has been subsequently raised and has been heard and finally decided by that court".*

It is further clarified that the matter in issue must have been raised by one party in the earlier suit and either expressly denied or admitted by the other. It is also the law that

any matter which might and ought to have been made a ground of defence or attack in the former suit shall be deemed to have been a matter directly or substantially in issue in that suit.

In M/A 5/2013, the Council sought and succeeded to have the *exparte* judgment in favour of Mr. Muwereza in the main suit set aside. It was an interlocutory application under the same action. It would be enough that the issue of the firm's competency to represent the Council was raised, considered by the Court, and a decision made.

I have perused the record in M/A 5/2013 and confirmed that Mr. Muwereza's counsel did on page 7 of the record raise issue with Mr. Okalang's presence in the main suit as defence counsel. His arguments then, and now, were that Mr. Okalang's services were not procured in accordance with the law pertaining to Local Government Councils and set rules. Ms. Kanyange the trial Magistrate then did address that objection. She stated that:

*"As regards issue raised of Okalang chambers not having approval of the Attorney General, to represent the District, this point was raised in another file and the same Court had an opportunity to look at the approval from the Attorney General so I find that he is competent to represent them.*

In my view, and in this I agree with the Council's advocate, this was her final decision on the matter of one of the matters directly in issue before and her and between the same parties (as those litigating here). Her decision was to overrule that objection. There was no appeal against that decision, and with respect, H/W Komakech, of a similar rank, had not powers to question or vary it, only the High Court could, on appeal. The lengthy submissions made for the respondent here, should have been presented to H/W Kanyange, even though the substantive application was for setting

aside an *exparte* judgment, since one of the parties raised it and expected a decision on it.

Accordingly the first ground of appeal succeeds.

**Ground 2**

I agree with the position of the law espoused in Section 110 of the Evidence Act that he/she who asserts a fact must prove it. It is true as stated by the Council's advocate that no evidence was adduced to support the objection that Mr. Okalang had no requisite approval to present the Council's defence. Going by Regulation 27 such approval by the Attorney General would be in writing and in the possession of Mr. Okalang as the counsel duly approved. However, he had no duty to attach it to the pleadings and any party contesting it, would have the window of demanding for the same through discovery proceedings, or moving Court for an order in similar terms. None of that was done, and it would be incorrect for the trial Magistrate to make a finding that it did not exist when no evidence was presented before him to that effect.

Again the lengthy submissions by Mr. Muwereza's counsel on this point was misplaced here. Those are arguments that should have been put before H/W Kanyange when that objection was first presented. There would be merit in the argument that the main suit was filed well before Justice Basaza's decision in **Isiko Moses Vrs Iganga Municipal Council M/C No. 2/2015** and any authorization held by Counsel Okalang then, would not act retrospectively to an earlier action. I believe however that the **Isiko's** case was quoted not for that purpose but as a precedent to show that no party is entitled to make allegations against the opposite party without proof. As pointed out by my sister Judge, it would be a baseless allegation and thus disrespectful. The

Judge's other comments about respect for seniority of advocates, is an accepted standard practice that every lawyer is taught in ethics.

Ground two accordingly succeeds

**Ground three**

I do agree with the Council's advocate that the import of Regulation 27 is to direct the concerned local government to procure the services of legal counsel in consultation with the Attorney General. It is true that the law did not provide the manner in which such consultation will take place or whether procurement could only commence after written approval was given. However, that law should be read in context with Regulation 86(2) of the Local Government Public Procurement and Disposalof Public Assets Regulation which provides that:

*"A contract document, purchase order, letter or tendering attendance or other communication in any form of conveying the acceptance of a tendering that binds a procuring and disposing entity to a contract with a tender (in this case the Council), shall not be issued prior to…approval by relevant agencies including the Attorney General".*

I am inclined to believe that Government business is carried out using formal communication that is in writing. Once the local Government engages the Attorney General with reference to procurement laws, they would expect a formal communication from that office by way of approval. It must be that evidence that the firm earlier argued (in ground one) to have held and which was never presented to Court as proof of the objection raised for Mr. Muwereza. The same firm cannot turn around to deny its existence or claim that it is not specifically provided for in the law. The trial Magistrate only made reference of what would ordinarily be expected from

the Attorney General, but did not necessarily import "command" words into the law as claimed by the Council's advocates.

Ground 3 accordingly fails.

**Ground 4**

I observe that appellant's counsel misquoted the provisions of Section 14A (1)(b) Advocate's Act, as amended by Section 13 of Act 27/02. The correct version is that:

Where an advocate is denied audience or authority to represent a party by any court..... then

*"No pleading….or other document made or action taken by the advocate on behalf of a client shall be invalidated by any such event; and in the case of any proceedings, the case of the client shall not be dismissed by reason of any such event".*

It is on that basis that the Council's advocate argues that even without authority to represent the Council (which is contested), the written statement of defence that the firm filed for the Council, is saved by that provision. I respectfully agreed and hold that the Magistrate erred when he made the decision to strike out the appellant's written statement of defence.

The above notwithstanding, I would hasten to add that There is contrary legislation which empowers a Court to invalidate pleadings filed by advocates when made in error. The examples are many but the few that come to mind would be pleadings filed out of time, or in contravention of certain laws. Further, pleadings that amount to an illegality cannot be saved by the above provision for it is now settled that an illegality (brought to the attention of any Court) unravels all pleadings, claims and entire proceedings. See **Makula International Vrs His Emminence Cardinal Nsubuga Wamala (1982) HCB 11.** In this case, it was enough to have discharged Mr. Okalang

but maintained the proceedings. As it were, even the discharge of Mr. Okalang was wrong.

Ground 4 accordingly succeeds.

**Ground 5**

It appears from the record that although the parties agreed to file written submissions for part of the objection, no definite time lines were given for filing the same. Be it as it may, it was inconsiderate for the council's advocates to have filed their submissions just a day before the date the Magistrate had scheduled to deliver his ruling. None the less, I see nothing in his ruling to suggest that the Magistrate ignored those submissions or treated counsel's arguments with bias. As pointed out by their colleague, the Magistrate did refer to a set of proceedings attached to those proceedings, an indication that he read and considered them. His evaluation of the submissions was mainly on points of law and not biased.

Accordingly, I find no merit in ground 5 and it fails

The Council has succeeded on three out of the five grounds raised. In my view, ground one was the substantive ground and should have been enough to address their grievance against the trial Magistrate's decision. Having found that the issue of Mr. Okalang's mandate as an advocate in the matter was *res judicata*, the written statement of defence that his firm filed on behalf of the Council should not have been struck off.

Accordingly, I would move to allow the appeal in part by reversing the decision of H/W Robbs William Komakech that struck out the written statement of defence in respect of Civil Suit No.174/2010. I would in addition make an order to reinstate the

defence on that record and order that the file be returned to the Chief Magistrate's Court of Iganga for hearing of the matter to continue.

Each party shall bear their costs of the appeal.

I so order.

**……..**

**EVA K. LUSWATA**

**JUDGE**

**25/1/2021**