

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja
MISCELLANEOUS APPLICATION NO.25 OF 2024
ARISING FROM MISC APPN NO.309 OF 2023
ARISING FROM MISC APPN NO. 306 OF 2023
(ALL ARISING FROM COMPANY CAUSE NO.002 OF 2023)
HON. SSEWANTE UMARU AND 15 OTHERS..... APPLICANTS
VERSUS.

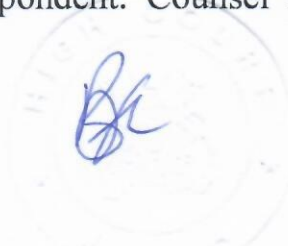

1. BABIRYE YUDAYA	}	RESPONDENTS
2. BURHAN NAMANYA		
3. HUSSEIN SIMBWA		
4. UGANDA MUSLIM SUPREME COUNCIL		

BEFORE: LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
RULING ON A PRELIMINARY OBJECTION

Background

The Applicants instituted Miscellaneous Application No. 25 of 2024 where they sought to be added to some applications before this court. The pleadings were filed and served on the respective parties.

On the 27th day of March 2024 when the matter came up for hearing, Court first held a pre hearing conference in chambers where Counsel Kakeeto Siraje appeared for the Applicants, Counsel Nalukoola Luyimbazi together with Counsel Peter Allan Musoke appeared for the 1st, 2nd and 3rd Respondents and Counsel Musa Kabega, Counsel Adam Kibwanga Makmot together with Counsel Faisal Barikurungi appeared for the 4th Respondent. Counsel Kabega Musa



applied to have the deponent to the affidavit in rejoinder cross examined to which Counsel Kakeeto Siraje applied for a stand over of up to 20 minutes to prepare his witness and also in turn applied to have the deponent to the affidavit in reply also be put on the stand for cross examination.

At the start of the hearing in open Court, a preliminary objection was raised by Counsel Kakeeto Siraje for the Applicants contesting Counsel Musa Kabega and Counsel Adam Kibwanga Makmot's appearance as Counsel for the 4th Respondent in the matter where both advocates are potential witnesses. He further submitted that it is now the law that an Advocate should not act as Counsel and witness in the same case. **He referred Court to the case of Ismail vs Kamukamu and Others [1986-1989] EA 165 (SCU).** He stressed that this is a rule of practice as well as a rule of professional conduct as provided for under **Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267-2.**

Counsel referred Court to **Paragraph 8** of the affidavit in rejoinder and specifically to **annexure B** which is a list of all members of the General Assembly of the 4th Respondent. He pointed to the last page and specifically to items **3** and **8** which listed the names of Counsel Musa Kabega and Adam Kibwanga Makmot as members thereof representing Bunyoro-Tooro and Northern Muslim Regions respectively.

In reply, Counsel Musa Kabega for the 4th Respondent invited this Court to read the provisions of the said regulation verbatim, which he did, and said that the Advocate so to excuse himself from the bar must be intending to be a witness or must be on the list of witnesses and that all pleadings had been closed in the matter and that their names were not anywhere on the list of witnesses and neither did intend to be witnesses at any time in the matter. He also raised an issue that the preliminary objection was not clearly brought out in the said **Paragraph 8** of the affidavit in rejoinder which he also read out verbatim to Court. He further distinguished the Authority of **Ismail Vs Kamukama** and said that in that case,



Counsel had earlier on represented the Respondent and now he had turned around to represent the Applicant which was not the case in the matters before Court.

In further reply, Counsel Adam Kibwanga Makmot acknowledged and admitted that Counsel Musa Kabega and himself were indeed members of the General Assembly of the 4th Respondent and emphasized that they are not engaged in the day to day running of the 4th Respondent and that he appears in these matters in his capacity as the Attorney General of the 4th Respondent and has such roles therewith and that finally, they had been duly instructed by the General Assembly to represent the 4th Respondent and that any Muslim in Uganda is the same as a Member of the General Assembly.

In rejoinder, Counsel Kakeeto Siraje reiterated his position and added that a preliminary objection can be raised at any time before Judgment because it is a matter of law and for that preposition, he relied on **Order 6 rule 28 of the Civil Procedure Rules (CPR)** as amended. He further added that his reading of regulation 9 infers to a potential witness and that the discretion of deciding whether one is or is not, is not only to the Advocate appearing but also Court which must take into consideration all factors surrounding a case and conclude on whether Counsel is or is not a potential witness. He further added that the essence of the said regulation is to avoid conflict of interest and guard the fiduciary relationship between an Advocate and a Client and that the fact that it is an undisputed fact by the said Advocates are members of the General Assembly, they are privy to important information as they share seats with the Applicants who are members of the General Assembly with the 4th Respondent. He prayed that this Court be pleased to uphold the preliminary objection and have the two Counsel excuse themselves.

Determination by Court.



For proper determination of this matter, the Court found it appropriate to frame the following issues arising from the submissions of the parties:

1. Whether the preliminary objection was properly raised before Court.
2. Whether Counsel Adam Makmot- Kibwanga and Musa Kabega have a conflict of interest in the application before this court.
3. What are the remedies available to the parties?

Resolution

Counsel Musa Kabega contended that a preliminary objection raised by the Applicants' Counsel in the manner described above when it was not specifically brought out in the pleadings was not competently raised. Indeed, it is true that the reading of **Paragraph 8** of the affidavit in rejoinder does not clearly bring out the preliminary objection, although the same stems out of the annexure to the said **paragraph 8** which is annexure "B". The main principle governing preliminary objections was dealt with in the case of **Mukisa Biscuit Manufacturing Co Ltd Vs West End Distributors Ltd [1969] 1 EA 696** where it was held that;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit..... A preliminary objection is what in nature used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It can not be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".

I am in agreement with the above holding and I wish to add that under Order 6 r 28 of the CPR, a point of law can be raised at any time of the proceedings and the court is seized with the jurisdiction to determine it. The parties had the opportunity to traverse the point of law and in my opinion, counsel for both parties substantially addressed this court on the respective perspectives on the issue under consideration. I accordingly find that the point of law was properly raised and the court will proceed to determine its veracity.



Issue 1: Whether Adam Kibwanga Makmot and Kabega Musa have a conflict of interest in the application before this court

Conflict of interest is defined in the Black's Law Dictionary, 8th Edition, as: -

- a) A real or seeming incompatibility between one's private interests and one's public or fiduciary duties.
- b) A real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent.

According to the facts of the present case, it is clear that we are not concerned with any incompatibility between the interests of two of a lawyer's clients. There is no allegation by the applicants that they have ever been clients of M/S Kabega, Bogezi & Bukenya Advocates and M/S Makmot Kibwanga & Co. Advocates or any of its advocates. As such, the second part of the definition of conflict of interest as set out above does not apply to the present case. It follows therefore that our concern in the present case is an allegation of the existence of a real or seeming incompatibility between one's private interests and one's public or fiduciary duties to the Court. We therefore have to analyze whether the facts of the present case present such incompatibility.

In *Uganda vs Patricia Ojangole (Criminal Case No. 1 of 2014) [2014] UGHACD 3*, Justice Lawrence Gidudu had this to say on the subject:

"It is both the actual and the perception that counts when tracing conflict of interest in a transaction. It is what a reasonable person would conclude while viewing the transaction from a distance that counts. It is related to rule against bias. The old adage that justice must not only be done [but] must be seen to be done applies to conflict of interest. Conflict of interest ... has also been generally defined as any situation in which an individual



or corporation is in a position to exploit a professional or official capacity in some way for their personal or corporate benefit. Conflict of interest is founded on the existence of a fiduciary relationship between a lawyer and client.”

Therefore conflict of interest in the current context is founded on the existence of a fiduciary relationship between a lawyer and client (***Uganda V Ojangole***). This is further envisaged in the Advocates (Professional Conduct) Regulations, particularly Regulation 10 which I will set out verbatim below for proper illustration;

Advocate’s fiduciary relationship with clients.

“An advocate shall not use his or her fiduciary relationship with his or her clients to his or her own personal advantage and shall disclose to those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients.”

Where a fiduciary relationship exists between parties, conflict of interest will easily be traced. Fiduciary duties are imposed upon a person or an entity who exercises some discretionary power in the interests of another person in circumstances that give rise to a relationship of trust and confidence. In the famous case of ***Bristol and West Building Society v Mothew [1996] EWCA Civ 533; [1998] Ch 1; [1997] 2 WLR 436 [Per Millett LJ]***, it was held that the expression "fiduciary duty" is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties. In this sense, it is obvious that not every breach of duty by a fiduciary is a breach of fiduciary duty.

The court in ***Bristol and West Building Society v Mothew (supra)*** went ahead to define a fiduciary as someone who has undertaken to act for or on behalf of

another in a particular matter in circumstances that give rise to a relationship of trust and confidence. It pointed out that the distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. Such are some of the defining characteristics of a fiduciary.

So, the question that arises from these facts at hand is whether there is any fiduciary relationship in the circumstances. It is affirmative that there are fiduciary relationships in this case. Firstly, there is a fiduciary relationship between the Uganda Muslim Supreme Council, M/S Kabega, Bogezi & Bukenya Advocates, and M/S Makmot Kibwanga & Co. Advocates. This relationship is based on the notion of an attorney-client relationship where the client is the principal and the attorney is the agent. Secondly, there is equally a fiduciary duty between the members of the General Assembly of the Uganda Muslim Supreme Council and the Uganda Muslim Supreme Council in which case the members of the General Assembly are agents and according to its Constitution, constitute the supreme governing organ of the Uganda Muslim Supreme Council.

Having resolved that there are fiduciary relationships in this case, we can then move to determine if there is a possible conflict of interest.

It is alleged by the applicant that there is a likelihood that the advocates of the 4th respondent will testify in the applications before this court which is contrary to Regulation 9 of the Advocates (Professional Conduct) Regulations.

Regulation 9 of the Advocates (Professional Conduct) Regulations provides as follows:

“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 a formal or non-contentious matter or fact in any matter in which he or she acts or appears.”

The above provision has been subject to interpretation in several cases. In ***Uganda Development Bank vs. Kasirye, Byaruhanga and Company Advocates SCCA No. 35 of 1994***, it was held that the regulation aims at distinguishing between an advocate practicing before the court and a witness. In such cases the advocate has to choose either to be a witness or Counsel in contentious matters and not both. The sole criteria are whether the advocate before appearing, has reason to believe that he would be a witness in the case; or having appeared, and finding himself a witness, he ought not to continue to appear.

In **Henry Kaziro Lwandasa vs Kyas Global Trading Co. Ltd, HCMA No. 865 of 2014, Madrama J.** (as he then was) held thus:

“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 once he or she believes that he or she will be required to appear as 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 shall not continue with the representation of a client in the cause or matter."

Clearly, to me, the rule is straightforward. Where an advocate who will be required to appear as a witness also wishes to appear before the court as an advocate, the options are clear in that regard. But that is not the issue before the Court in the present matter. In this case, the advocates of the 4th Respondent namely Adam Kibwanga Makmot and Kabega Musa are members of the General Assembly of the 4th Respondent. Equally, the applicants in this matter are members of the General Assembly of the 4th Respondent as evidenced in Annexure B to the affidavit in rejoinder. The applicants raised a Preliminary Objection that Adam Kibwanga and Kabega Musa are likely to appear as witnesses in the resolution of the dispute pertaining to the activities of the 4th Respondent and cannot therefore continue to represent the 4th Respondent as advocates by virtue of Regulation 9 of the rules.

The applicants have not furnished the court with any evidence indicative of the intent or possibility of the said advocates to be witnesses in this matter. 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 shall not continue with the representation



of a client in the cause or matter. The total import of regulation 9 is that whatever the advocate believes, if it is apparent that the advocate will be required to appear as a witness he or she shall cease to represent the client. Belief of the advocate can only be based on what he or she knows and in this case, it is apparent that the two Advocates at anytime may be later may or shall be required to get on the stand and testify however much they dispute the same vehemently. The question remains as to what is meant about being required to appear as a witness. In the rules of pleading in the **Civil Procedure Rules, Order 6 rule 2** provides that every pleading shall be accompanied by a list of witnesses. In simple terms this means that a person required as a witness is listed as a witness. The rule to list potential witnesses in every pleading is mandatory. In the absence of any of the parties requiring the advocate to be a witness or applying for the leave of Court to do so, then unless the Court requires the advocate to appear as a witness, it cannot be concluded that the advocate will be required by any of the parties to the suit to appear as a witness and in that regard, I agree with Counsel Musa Kabega to that extent.

Nonetheless, it should be noted that in Miscellaneous Application No. 309 of 2023, the applicant (Uganda Muslim Supreme Council) in paragraphs 10 and 11 of the Notice of Motion alleges certain irregularities that were committed by the General Assembly as a result of the Judgment that was rendered by this Court in Company Cause No. 002 of 2023. In paragraph 26 of the affidavit in reply to this application, it is stated that there was a meeting by the General Assembly on 16th and 17th of December 2023. Therefore, several issues are directed towards the General Assembly of the Uganda Muslim Supreme Council that may need to be addressed by its members. This implies that there is a possibility that either party to the applications could call on any member of the General Assembly to adduce



evidence before court. The fact being that Adam Kibwanga and Kabega Musa are members of the General Assembly, there is a likelihood that they can be called upon to give evidence concerning the applications before the court concerning this matter, particularly the conduct of the General Assembly. So, I agree with the submission of counsel for the applicants that indeed there is a possibility of contravening Regulation 9 if Adam Kibwanga and Kabega Musa continue to represent the 4th Respondent .

Be that as it may, there is a matter that should be discerned carefully which concerns how the two members of the General Assembly of Uganda Muslim Supreme Council can be given instructions by the 4th Respondent to represent Uganda Muslim Supreme Council on issues concerning the activities of the Uganda Muslim Supreme Council, the composition, and activities of its General Assembly.

It should be noted that under **Article 1 of the Constitution of the Uganda Muslim Supreme Council**, the supreme legislative body of the Uganda Muslim Supreme Council is stated as the General Assembly. The General Assembly is charged with several functions which include among others overall oversight of the activities of the Uganda Muslim Supreme Council. In simple terms, the General Assembly is the engine and driving force of the Uganda Muslim Supreme Council. The General Assembly is composed of several members as provided for under Article 2 (5) of the Constitution of the Uganda Muslim Supreme Council. The list of members of the General Assembly is furnished under Annexure B to the affidavit in rejoinder which indicates that the current members include the applicants to this application and the current advocates of Uganda Muslim Supreme Council (Adam Kibwanga Makmot and Musa Kabega).

The record shows that M/S Kabega, Bogezi & Bukenya Advocates and M/S Makmot Kibwanga & Co. Advocates received instructions to



represent the 4th Respondent. It should also be noted that the advocates from those respective firms handling the matter are Adam Kibwanga Makmot and Kabega Musa who are members of the General Assembly of the Uganda Muslim Supreme Council. This then raises a question as to whether members of the General Assembly of Uganda Muslim Supreme Council can instruct their law firms to represent Uganda Muslim Supreme Council in this matter concerning the General Assembly.

The real issue therefore is whether the Adam Kibwanga Makmot and Kabega Musa can be a quasi-party/litigant on the one hand and advocate on the other, particularly in a contentious matter. The questions that arise are; first, if a person is permitted to act as both a party/litigant and advocate, how did the person receive instructions and from whom? Secondly, is it possible for a person to act as both advocate and client in the same matter? **Under Section 2(a) of the Advocates Act Cap 267**, “advocate” means any person whose name is duly entered upon the roll. While under **Section 2(b) of the Act**, “client” includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ, an advocate and any person who is or may be liable to pay to an advocate any costs. Clearly from the above definitions, if a person was allowed to represent themselves in a contentious matter, they would be in a position of principal and agent at the same time.

The other issue relevant to the determination of this matter is whether the advocates in question can competently discharge their duties to this Court in the above described circumstances. My learned brother Justice Boniface Wamala in **Ms Quality Uganda Limited T/a Quality Supermarket v**



Uganda Performing Rights Society (UPRS) and 4 Others (Civil Suit No. 444 of 2019) [2021] UGHCCD 165 (16 December 2021) held that;

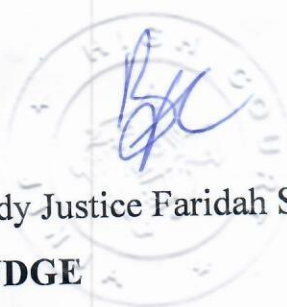
“In my view, the above scenario would be inconsistent with the professional duties of an advocate or the firm of advocates for that matter. Under the law, advocates are officers of the court and owe a duty to the court to see that justice is done. One justification for prohibiting such a fusion of roles is that if an advocate or a firm of advocates are left to act as their own advocates, they may carefully select the evidence which will only support their case strategy to serve their own interest. In such circumstances, their duty as advocates to the court will certainly be compromised. As stated by Justice Madrama in Henry Kaziro Lwandasa vs Kyas Global Trading Co. Ltd (supra), such a situation evokes the American saying that “a lawyer who represents himself has a fool for a client”. Such will certainly not be in the interest of justice.”

I am inclined to agree with the reasoning of Justice Wamala. In this situation, it would be detrimental to the court to hear a matter where two advocates representing Uganda Muslim Supreme Council in this case belong to the supreme body of Uganda Muslim Supreme Council called the General Assembly, concerning the affairs of Uganda Muslim Supreme Council and its General Assembly. There is a likelihood as stated by Justice Wamala that there might be selective use of evidence to benefit the interests of these particular advocates.

That having been said, it is this Court’s considered opinion that there is an apparent conflict of interest that will undermine Counsel Adam Kibwanga Makmot and Musa Kabega’s duties to the Court and the 4th Respondent given their personal interest in the issues before Court emanating from their membership to the General Assembly of the 4th Respondent .

Issue 2: What are the remedies available to the parties?

Having found that there is justification to believe that the representation of the 4th Respondent by Counsel Musa Kabega and Counsel Adam Kibwanga Makmot who are members of the General Assembly of the 4th Respondent and share seats with the Applicants, their continued representation of the 4th Respondent will not achieve the ends of justice and will run counter to the Advocates (Professional Conduct) Regulations. For this reason, Counsel ought to have disqualified themselves from professionally handling this matter and should have appointed other advocates to represent them. Since they have not seen reason to do so, the Court has to disqualify them. I accordingly order that Counsel Musa Kabega and Counsel Adam Kibwanga Makmot are disqualified from representing the 4th Respondent. The costs of this application shall be in the cause.



Lady Justice Faridah Shamilah Bukirwa Ntambi

JUDGE

Ruling delivered in open Court on 15th April, 2024 at 11 am.

