**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA; AT FORT PORTAL CIRCUIT**

**CIVIL APPEAL No. 0002 OF 2010**

**[*Appeal from the judgment and orders of His Worship Charles Sserubuga - Kasese Chief Magistrate; in Kasese Civil Claim No. 004 KDLT of 2006, delivered on the 3rd December, 2009*]**

**1. THE REGISTERED TRUSTEES OF }**
**SOUTH RWENZORI DIOCESE }**
**2. THE BOARD OF GOVERNORS OF } :::::::::::::::::::::::::::::::::::::::::::::::: APPELLANTS**
**BISHOP ZEBEDEE VOCATIONAL }**
**COLLEGE KAMUGHOBE }**

*VERSUS*

**1. BWAMBALE WILSON }**
**2. MUMBERE JACKSON }**
**3. BASISA FREDRICK } :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**
**4. KULE ERISANIA }**
**5. KAMBERE GEORGE }**

**BEFORE: - THE HONOURABLE MR. JUSTICE CHIGAMOY OWINY - DOLLO**

**JUDGMENT**

The Appellants herein brought a claim against the Respondents, at the Kasese District Land Tribunal, founded in trespass. Their contention was that the 1" Appellant founded Bishop Zebedee Vocational College Kamughobe, which the Respondents have wrongfully taken

possession of from the Appellants. Accordingly, they pleaded for a Court declaration that the suit College belongs to them, an order of eviction of the Respondents there–from, and a permanent injunction restraining the Respondents from further acts of trespass onto the suit College or adverse claim. They also prayed for general and special damages. The parties were on common ground that in January 1997, a meeting comprising a number of people, decided to found a private secondary school at Kamughobe owing to the dire need for such an institution in the area. They named the school Bishop Zebedee College, Kamughobe; and indeed it commenced operation.

Later, disagreements broke out between the parties to this suit over ownership of the school. The Claimants contended that this was a Church founded school; and pointed out, amongst other things, that the school began its operations from the Church premises. The Respondents however denied this; contending that while the founding meeting was at the Church premises, it was a community initiative that cut across all religious denominations. After evaluating the evidence adduced before him by either side in proof of their respective claim, the learned Chief Magistrate made a finding that the college was founded not by the Church but by the community of the area; and accordingly dismissed the Claimants' case. The Claimants were aggrieved by this decision; and brought this appeal in which they formulated the following six grounds of appeal:

(1) The trial Chief Magistrate erred both in law and fact when he ruled that the respondents had not trespassed in a school owned and run by the appellants.

(2) The trial Chief Magistrate erred both in law and fact in failing to evaluate both oral and documentary evidence on record presented by the appellants which led him to arrive at a wrong conclusion.

(3) The whole judgment was in total disregard of the evidence adduced by the appellants and generally based on conjectures and presumptions made by the trial Chief Magistrate.

(4) The trial Chief Magistrate erred both in law and fact in holding as he did that the Church of Uganda did not exclusively own the school.

(5) The trial Chief Magistrate totally misunderstood the evidence adduced by PW4, a government official (LC1 Chairman), who had been invited in that capacity, to mean a religious representative of another denomination other than the Church of Uganda.

(6) The trial Chief Magistrate erred both in law and fact in holding as he did that the appellants' claim be dismissed with costs.

As a first appellate Court I have, as is expected of me, subjected the evidence on record to fresh evaluation; and I am of the considered view that I first dispose of ground 3 of the appeal, then I decide on the next course of action. In ground 3, the Appellants complain that the learned trial Magistrate failed to adequately evaluate the documentary and oral evidence before him; and this, they claim, led him to arrive at a wrong conclusion. In his written submissions, Counsel for the Appellants argued that from the testimonies of PW1, PW2, PW3, PW4, and PW5, as well as exhibits PE2, PE3, and DEI, it is clear that the suit school was founded by the Church; something the trial Magistrate failed to appreciate.

Counsel for the Respondents however pointed out that the trial Magistrate went to great length to evaluate the evidence adduced by either side to the dispute; and came to the right conclusion that the school was founded not by the Church of Uganda, but by the community of the area although a Church official was involved in the meetings that gave birth to the school and the school commenced operation from Church premises. I have carefully scrutinized both the records of the proceedings and judgment; and I am satisfied that the trial Magistrate exhaustively evaluated the evidence adduced before him by the parties, and gave convincing reasons for disbelieving the evidence adduced on behalf of the Claimants.

I am unable to differ from his conclusions. However, there are some two or so matters which I find of particular concern. From their pleadings and evidence adduced in Court, the parties were on common ground that the school that was founded in 1997 was named Bishop Zebedee College Kamughobe. In his letter of 30th July 2001, one R. Nsumba-Lyazi acting on behalf of the Permanent Secretary Ministry of Education & Sports, in reply to the proprietors of Bishop Zebedee College Kamughobe who he stated had submitted an application –although unfortunately he did not name who these proprietors were – stated as follows: –

***"PERMISSION TO ESTABLISH AND OPERATE ON LICENSE***

***BISHOP ZEBEDEE COLLEGE, KAMUGHOBE***

*I have the pleasure to inform you that you have been granted ONE YEAR permission to establish and operate on license the above named school in accordance with section 22/23*

*of Education Act 1970. This is effective from 30/07/2001 to 30/07/2002. Within the specified period, you are advised to contact your district education Officer to supply you with the official application forms for Registration, which will be dully filled and submitted to this office for the same. From now onwards, you should arrange for the Ministry of Education Officials to visit and inspect your school."*

Although this Education Officer, acting for the Permanent Secretary, made reference to sections 22/23 of Education Act 1970, he was apparently unaware of the revised edition of Laws of Uganda which came into force on the 31st December 2000, which now located The Education Act in Chapter 127 - Volume VI (Revised Laws of Uganda 2000). In the revised laws, the relevant sections of The Education Act which the officer ought to have cited are sections 23 and 24. It is now section 24 of the Act which provides for grant of a provisional license to operate a school for one school year. However, this error by the Education Officer was of course not fatal to the validity of the license, as it was curable given the fact that the purpose for the grant was unmistakable, and has not been the subject of any dispute.

Be as it may, it is clear from this letter that the Ministry of Education granted a provisional license whose validity was strictly for the one school year specified in the license; and the institution named in the license is Bishop Zebedee College, Kamughobe. I have subjected the record of the proceedings to careful perusal; but have however not come across any evidence whatever, either of the founding, licensing, or issue of a certificate authorising the operation of any school known as Bishop Zebedee Vocational College Kamughobe; or alternatively that Bishop Zebedee College, Kamughobe, which was founded and licensed as stated above, changed names to Bishop Zebedee Vocational College Kamughobe which the second Appellants brought this action purportedly as Board of Governors of.

In the absence of evidence of any lawful change of name, or any at all, whatever Bishop Zebedee Vocational College Kamughobe is, if indeed such institution exists, it is in law different from Bishop Zebedee College Kamughobe which was founded and clearly given a provisional license in accordance with the law; and whose ownership is now bitterly in dispute. Accordingly, the learned Chief Magistrate ought to have non-suited the second Claimants, now second Appellants, who brought the claim in their capacity as Board of Governors of Bishop Zebedee Vocational College Kamughobe instead, as strangers with no cause of action in a dispute over the ownership of Bishop Zebedee College Kamughobe. Although the learned trial Chief Magistrate erred both

in law and fact in this regard, by not addressing himself to this, the Second Claimant however fails also in this ground for this other reason.

The other serious issue that arises from this ground is that of the legality of the disputed school itself. The only uncontroverted evidence before Court was that the disputed school was, as seen above, given the provisional license to operate for one year as a secondary school. There was evidence adduced by the Claimants that in a letter dated 20th November 2005, and which was exhibited as PE1, the school was certified as having been registered and classified. This letter, which was on the Ministry of Education official letter-head, and bore the name of John M. Agaba as its author stated as follows: –

> ***"RE: REGISTRATION AND CLASSIFICATION OF BISHOP ZEBEDEE COLLEGE - KAMUGHOBE***
>
> *This is to authenticate that the above named private secondary school is registered and classified as per the education act 1970 as hereunder:*
>
> *REGISTRATION NUMBER: PSS/B/209*
>
> *REGISTRATION NAME: BISHOP ZEBEDEE COLLEGE - KAMUGHOBE*
>
> *DATE OF REGISTRATION: 18th NOVEMBER 2005*
>
> *CLASSIFICATION: "0" LEVEL SECONDARY SCHOOL*
>
> *REMARKS: MIXED AND DAY*
>
> *Signed*
>
> *John M. Agaba.*
>
> *For. PERMANENT SECONDARY EDUCATION."*

However, the trial Court received a letter written on the 3rd September 2008, by John M. Agaba for Permanent Secretary Ministry of Education & Sports, to the Regional Office Directorate of Education Standard, Mbarara, with copies to the Proprietors of Bishop Zebedee College Kamughobe, in which he disowned the said certification of registration and

classification of Bishop Zebedee College Kamughobe by him. He stated clearly in the letter that the certificate purporting to have been signed by him was a forgery, hence Bishop Zebedee College Kamughobe, was operating illegally. He then gave the following directives: –

*"The school therefore must immediately be closed and the proprietors advised on how to proceed to have the school licensed and registered. You are also advised to contact the office of the Resident State Attorney for advice on how to get the proprietors who uttered this forged document prosecuted. ... ..."*

Mr. Kikomeko, counsel for the Claimants, from whom this letter came to Court as a copy of his letter written to the Education Officer on 15th September 2008, gave a terse response to it. He strongly berated the Education Officer for directing in that letter that the school be closed; a decision he called inappropriate and uncalled for, and amounting to contempt of Court. He accused the Officer of acting under the influence of the Defendants in swearing an affidavit in support of their case. He stated that the issue of fraud and or illegality had been framed by Court for its examination and determination; hence he advised the Officer to desist from intermeddling in a matter being handled by Court. It is worthwhile reproducing the last part of his letter in extenso: –

*"Last but not least in importance, it is the duty of Court once a dispute is before it to order the closure of such an "illegally" operated school! Your affidavit to the defence case, denying that you never registered the issue school (your "signature" is appended thereto) is yet to be thoroughly examined by Court, and you may be summoned in Court wherein the counsel for the plaintiff is entitled to cross examine you on this affidavit and other evidence you may give thereof."*

The affidavit which counsel for the Claimant was referring to had been sworn by the Education Officer on the 20th October 2006, when the suit was still before the Kasese District Land Tribunal. Counsel attached this affidavit to his letter to the Education Officer, with a copy to the trial Magistrate. In the affidavit, the Officer made it clear that he was the person in charge of General Secondary Division in the Ministry; and that in 2005 he was the person responsible for registration and classification of private secondary schools. He denied ever receiving any application for the classification or registration of Bishop Zebedee College, Kamughobe. He

emphatically denied that he ever signed the document purporting the registration at all; and stated that his purported signature thereon was a forgery which called for criminal investigations.

Despite his quite strongly worded letter, from which Court was availed evidence alleging fraud and illegality, counsel strangely never seized the opportunity to have Court summon the Education Officer for cross examination. This was a most unfortunate and costly lapse as the affidavit evidence was, unless it was controverted or otherwise challenged by credible converse evidence, quite damaging to his client's case; more so in the light of the allegation of illegality founded on a criminal act. Equally, once the issue of illegality was brought to the attention of the learned trial Magistrate, he ought to have accorded it precedence over all else. Although in his judgment the learned trial Magistrate was alive to this damaging evidence of illegality, he however only made passing reference to it as follows: –

> *"The certificate of registration produced as an exhibit is challenged in the WSD, Evidence. There is even on record a letter from the Permanent Secretary of Education Mr. Agaba, with an affidavit, cancelling the fraudulent registration of the school. Under the Education Act, S-26 the Ministry can administratively cancel a registration of any school for specified reasons. This Court cannot rely on this purported registration. Counsels for both parties were aware of this letter. It is on record. Courts must act when they become aware of an illegality such as this."*

The Education Act makes special provisions for the setting up of private schools. Section 25 empowers the Chief Education Officer to categorize schools, with appropriate nomenclatures, according to the education to be provided in each school; and this includes the standard, stage, nature, and method of education to be provided in the school so certified. The Chief Education Officer has powers to amend the classification and nomenclature of any school; and where this is done, it must be entered in the relevant register and notice given to the school owner. Needless to say this enables the government to determine the need for establishment of, and to oversee the management of, whatever category of school operating in the country.

Section 23 provides that, prior to establishing a private school, the person desirous of doing so must apply, as a suitable person for establishing such a school, seeking the approval of the Chief Education Officer. The Chief Education Officer must be satisfied that the applicant is of good repute, and has sufficient funds to manage the type of school sought to be established. The

Ministry of Education must further be satisfied that the intended school conforms to the education development plan for its intended area of location, and meets the educational need of that area. A minimum of three people of good standing from the area of the applicant must support the application. Section 24 of the Act provides that the first step in obtaining grant to operate a private school is a provisional license granted to operate a classified school for one school year.

It is after one school year that the proprietors of the school shall, in accordance with the provisions of section 25 of the Act, make an application in writing to the Chief Education Officer for the classification of the school earlier provisionally licensed; and in this application the name of the school owner, the type and range of education proposed to be provided in the school, with classes, standards or forms, and a list of staff with their qualifications, shall clearly be indicated. If after one year the Chief Education Officer is, in accordance with the provision of section 26 of the Act, satisfied that the school provisionally licensed is properly managed then he or she may issue certification of registration and classification; and in accordance with section 27 of the Act, enter particulars of such school in a register maintained for private schools.

Otherwise if not so satisfied then he or she may, in accordance with the provisions of section 26 of the Act, extend the provisional license, but strictly for one school year only; or otherwise order the school to be closed. Section 28 of the Act grants the Chief Education Officer discretionary powers to cancel the classification and registration of any private school upon satisfaction that either the school no longer fulfils the long list of requirements contained in section 23(3) of the Act, or the school is being conducted contrary to other provisions of the Act. Section 29 of the Act makes it an offence to change ownership of the school without prior approval in writing by the Chief Education Officer; and that in such a situation the Chief Education Officer is mandated to close it.

It is clear from the provisions of the law set out above that before a private school begins operation, its ownership must be clearly known to the government. It is therefore rather strange that the provisional license in the instant suit, although it has not been contested, did not name any specific person or persons as the owners of the school. Similarly the impugned certificate of registration did not name anyone as the owner of the school; and was purportedly signed by an officer who was stated to be doing so on behalf of 'PERMANENT SECONDARY

EDUCATION' (sic). There would then be no way that a substantive license, and subsequent classification with a certificate to operate, could be granted before the prerequisite conditions laid down by the Act were satisfied.

Accordingly, and with due respect to the learned counsel for the Claimant, his attack on the Chief Education Officer for directing the closure of the school, despite the fact that the matter was before Court, was ill conceived. There was no order of injunction restraining the Chief Education Officer from doing so. Although the matter was not canvassed at the trial, and was not adequately treated by the learned Chief Magistrate in his judgment, it is a matter of law; hence it can properly, in the interest of justice, be dealt with on appeal. In ***Mistry Amar Singh v. Serwano Wofunira Kulubya [1963] E.A. 408,*** (Privy Council) – which concerned the leasing out of lands in contravention of statutory enactments, the Privy Council stated at p. 413 that:

> *"In his judgment in **Scott v. Brown Doering, McNab, & Co. [1892] 2 Q.B. 724**, LINDLEY L.J.; at p. 728, thus expressed a well-established principle of law: '*
>
> > *'Ex turpi causa non oritur action. This ... legal maxim is … not confined to indictable offences. No court ought to ... allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court ... It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him.'*

The Court reproduced, with approval, a passage from the speech of LORD HERSCHELL in the case of ***In The Tasmania [1890] 15A.C. 223*** where at p. 225 the Lord Justice said that where the first time a point is raised is at the Court of appeal it *'ought to be most jealously scrutinised.'* He went further and pointed out that the: –

> *'Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them in the witness box.'*

The Court also quoted a passage from the decision in the case of ***In Ex parte Firth (1882) 19 Ch. D. 419***; in a case where the matter that was first raised on appeal was one in regard to which however there had been some evidence before the trial Court; JESSEL M.R. said at p. 429 that: –

> *'... the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'*

The proposition of law laid down in ***Makula International Ltd. vs. Cardinal Nsubuga and Another [1982] H.C.B. 11***, is that once an illegality has been brought to the attention of Court, it has to overlook all other issues and focus on resolving such issue of illegality. In ***Alwi Abdulrehman Saggaf v. Abed Ali Algeredi [1961] E. A. 767***, the C.A. relying on the Privy Council decision in ***Perkowski v. City of Wellington Corporation [1958] 3 All E.R 368,*** at p. 373, which had itself relied on the case of ***In Connecticut Fire insurance Co v. Kavanagh, [1892JA.C. 473***, made it clear that a point of law not argued in the Court below may be taken under circumstances where the Court: –

> *"is satisfied that the evidence upon which they are asked to decide established beyond doubt that the facts, if fully investigated would*
> *have supported the new plea."*

On the basis of the evidence on record, the license granted to the school did not conform to the requirements of the Education Act. Had it done so, perhaps the school's ownership might not have been the subject of a contest; or alternatively such contest might have been based on different grounds. Second, it is clear from the evidence adduced that the school that had been licensed and purportedly granted a certificate of operation differs from the one in whose name this action has been brought. It was a secondary school; and yet the Claimants/Appellants have, in Court, all along pursued the matter of a vocational school, whereas there was no evidence whatever that in fact the two names meant one and the same institution by a lawful change of names, or of the purpose of education.

In the light of Mr. Agaba's uncontroverted evidence impugning the certificate of registration, coupled with the grave allegation of commission of the criminal act of forgery, there is sufficient material before me on which to come to the decision, which I hereby do, that the school,

whoever it could be established to be the owners, was or is operating in serious breach of the law; and this is, by itself alone without need for more, good reason on which to disallow the appeal. There was nothing in the law for Mr Agaba to be intimidated by or hearken to the threat from the learned counsel for the Claimants not to close the school. He was rightfully exercising his mandate under the law as the official under whose docket the matter fell.

I find it superfluous to proceed to attend to the other grounds of appeal as my findings on this serious issue of illegality conclusively resolves the matter. I must also here direct the Permanent Secretary Ministry of Education to enforce the law by immediately ensuring that registration of the contested school is so done in accordance with the very clear provisions of the Education Act; and accordingly, a copy of this judgment must be availed to the Permanent Secretary Ministry of Education and Sports for immediate action. It follows that for the reasons given herein above I must, as I hereby do, dismiss this appeal. And because the issue of illegality has been most central in the determination of the matter, I award costs of the appeal and of the proceedings in the Court below, to the Respondents.

**Alfonse Chigamoy Owiny – Dollo**

**JUDGE**

**24 – 05– 2011**