

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION
MISC. CAUSE NO. 053 OF 2014

KAMPALA UNIVERSITY ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

**NATIONAL COUNCIL FOR
HIGHER EDUCATION ::::::::::::::::::::::::::::::::::: RESPONDENT**

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

At the commencement of the hearing of this application, one Silas Make Otuke was allowed to join the proceedings as an interested party. He is represented by both M/s Kenneth Akampulira & Co. Advocates, Solicitors & Commissioner for Oaths and M/s Karuhanga Kasajja & Co. Advocates. Through his advocates, he raised a preliminary point of law that the instant application is an abuse of court process and should not be entertained by this court. The reason for this is that the order extracted by the applicant in Constitutional Application No.12 of 2014 arising out of Constitutional Application 11 of 2014 and Constitutional Petition 10 of 2014 and relied upon by the applicant in this Cause as a ground for grant of Judicial Review remedies is “fake” and “forged”. Therefore the interested party prayed that the instant suit be dismissed with costs.

It is further contended that the applicant materially altered the orders of court which amounted to forgery yet it went ahead to use the same order to file this application and used the same to obtain an interim order from the deputy registrar in Misc. Application 175 of 2014.

That in light of the glaring fraud, the forged order, the use of it in evidence and the fact that the applicant has benefited from it and continues to benefit from the same, then this application should be dismissed without delving into the merits of the main application and with costs.

In reply the applicant through its lawyers M/s Crane Associated Advocates opposed the preliminary objection by the interested party and prayed that it be dismissed or overruled with costs. The applicant contended that the order complained of was extracted, endorsed and duly given by the Deputy Registrar of the Constitutional Court under the seal of court. If there were errors they cannot be held against the innocent applicant. That the errors were for the first time pointed out during the hearing of Misc. Application 175 of 2014 and henceforth the applicant stopped relying on the said order and the Deputy Registrar pointed out that he was not going to rely on that order in his ruling. Thereafter the applicant duly amended the pleadings in Misc. Cause 53 of 2014 to exclude the contested order and the amendment was allowed by the consent of the parties.

The applicant further contended that the issues raised in the preliminary point of law cannot be disposed of as such because even if allowed, it cannot dispose of the whole suit because the amended Notice of Motion enumerates 14 grounds one of which relies on the order made by Justice Elizabeth Musoke.

Finally that the interested party has distorted the record and fabricated evidence. That the preliminary points raised have been overtaken by events in view of the amended pleadings.

In rejoinder the interested party reiterated his preliminary points of law insisting that the impugned order was fraudulent and fake since the applicant abandoned it. That the amendment did not cure the illegality or fraud and once the same is drawn to the attention of court, the suit has to simply be dismissed.

The respondent said nothing about the objections.

I have considered the preliminary objection raised by learned counsel for the interested party and the response by counsel for the applicant.

And as rightly submitted by the applicant, the pleadings in Misc. Cause 53 of 2014 and Misc. Applications 175 of 2014 that contained the order complained of have since been overtaken by the amendment in Misc.

Cause 53 of 2014 which was allowed by consent of all the parties to this suit including the interested parties and the advocates.

Once the amendments were consented to by all parties and allowed by court, the issue of the contested order ought to have ended there. It was held; and I agree, in **Eng. Yashwant Sipra & Another Vs Sam Ngudde Odaka & 4 others HCCS No. 365 of 2007** Kiryabwire J (as he then was) that:

“where an objection can be cured by amendment with adequate provision as to costs, then it is a more efficient use of the court’s time that the amendment be secured at the earliest opportunity.”

This is what happened in this case. None of the parties should turn back on their consent.

Secondly, as rightly submitted by learned counsel for the applicant the point raised as a Preliminary point of law cannot be disposed of as such. It is trite that a preliminary objection is in its nature referred to as a demurrer. It must raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion. See: **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd [1969] EA 696** as per Sir Charles Newbold.

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 e.g. an objection to the jurisdiction of the court, or a plea in limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration. Therefore where a preliminary point of law is raised either on the basis of disputed facts which would require extrinsic evidence to be led by parties at a full trial, or where even if allowed, it cannot dispose of the whole suit then it cannot be disposed of as such.

In the case under consideration, the facts on the basis of which the preliminary point of law was taken out are disputed. It is disputed as to whether the learned Deputy Registrar of this Division relied on the impugned order in his ruling in Misc. Application 175 of 2014. The point at which the applicant noted the error in the order is also disputed. This court cannot of certainty determine whether the order complained of is “Fake” or “forged” since both parties agree that it was issued under the hand of the learned Deputy Registrar of Constitutional Court and under the seal of that court. Whether the applicant acted malafide in relying on the said order is also in dispute.

As rightly submitted by learned counsel for the applicant, all these matters and more require evidence to be led by parties at full trial to prove their respective assertions.

A preliminary point of law should be such a point which disposes of the whole action if upheld. The points raised by the interested party would not have an effect of disposing of this matter since the application before me is not based on the Constitutional Court Order but rather questions about how the respondent conducted itself in the process leading to its decision of 30th April 2014.

In his submissions, learned counsel for the interested party said that the applicant forged the Constitutional Court Order which he used in High Court proceedings. That once a forged order has been used in proceedings, the court will not venture into the merits of such an application but will dismiss the case immediately. That an illegality once brought to the attention of court over rides all questions of pleadings.

I don't agree with the proposition by learned counsel. The correct position of the law is as has been put by learned counsel for the applicant. Fraud or forgery whenever alleged must be proved to the required standard, which is beyond a mere balance of probabilities. By implication therefore, fraud cannot be determined as a preliminary point without hearing evidence. The case of **Haba Group (U) Ltd Vs Commissioner Uganda Revenue Authority & another Misc. Cause No. 83 of 2011** relied upon by the interested party is distinguishable from the present case because the consent judgment

in that case was disowned by the High Court where it allegedly originated from. Secondly that case was solely based on the forged consent judgment which is not the case here.

In the instant case, the order complained of has not been disowned by the Constitutional Court that issued it, neither has the learned Deputy Registrar who signed it been heard to say the impugned order is not the one he signed. In any case an extracted order with errors does not automatically lead to the conclusion that it is forged. Determining issues which have far reaching consequences as preliminary points will result into a failure of justice.

It is also erroneous for the interested party to make submissions regarding proceedings in Misc. application 175 of 2014 which application is not before this court. Decisions by a registrar can only be challenged by way of reference or appeal. In the amended Notice of Motion particularly in ground 5 thereof, reference is made to the order of Lady Justice Elizabeth Musoke. Its affidavit in support by one Ambassador Professor Abdul Katerega in paragraph 30 also mentioned the said High Court Order.

For the reasons I have outlined, I am inclined to overrule the preliminary objection raised by the interested party with costs. The objection was uncalled for and simply increased costs and wasted court's time.

Misc. Cause No. 53 of 2014 shall be set down for trial on its merits. I so order.

Stephen Musota

J U D G E

15.09.2014