

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA  
HOLDEN AT MBALE**

**Miscellaneous Application/Appeal No. 0032-2013  
(An Appeal from Misc. Application No. 201 of 2011)**

**HAJJI MUSA HASAHYA.....APPELLANT  
VERSUS**

**1. OWORI & CO. ADVOCATES  
2. MADABA, MODOI & CO. ADVOCATES.....RESPONDENTS**

**BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA**

**JUDGMENT**

This appeal is brought under section 62 of the Advocates Act and Regulation 3 of the Advocates (taxation of costs) Appeal and References) Regulations SI 267-5. It arises from a matter where appellant on behalf of the estate of the late **Yunusu Miya** and Respondents aver that they were instructed to represent the estate in the matters. As a result of the representation Respondents filed an application for taxation of the Advocate/client Bill of costs. The appellant contested the claims before the Deputy Registrar, but the Registrar overruled him and ordered that the bill of costs be taxed and that the appellant pays the costs personally. The appellant was dissatisfied and appealed to this court.

The appellant raised 8 grounds of appeal. Both the counsel for applicants and Respondents chose to argue the grounds chronologically in the order of presentation in the summons.

The law applicable has been well articulated by both counsel in the submission. I agree with the statement of the principle of law that the burden of proof lies upon the party who alleges a certain fact to prove that fact to the required standard of the

court. The burden of proof is always on the plaintiff to prove the case on a balance of probabilities.

### **ISSUE 1 (GROUND 1)**

#### **Whether the learned Registrar erred when she ordered that the appellant personally pays costs for Misc. App.201/2011**

It was argued for appellant that as an administrator, he had to take steps to preserve and protect the estate. In doing so, he had to object to the Respondent's claim which had an effect on the estate. The case of *Solo David & Another versus Pagali Abdu Civil Appeal No. 0027 of 2009*, was quoted to support the above actions of the applicant.

However the first Respondent argued that section 27 of the CPA, gives the Judge/Registrar discretion to decide whom and out of what costs should be paid. He referred to the pleadings and argued that it is appellant's flimsy grounds of denying Respondents their costs from the estate; that led to the application which the Registrar heard and used her discretion to order him to personally pay the costs. The 2<sup>nd</sup> Respondent also did not differ from the above line of argument.

The entire record, and lower court proceedings show that the appellant instructed the 1<sup>st</sup> Respondent to represent him in a number of cases. 2<sup>nd</sup> Respondent also handled cases which according to minutes on record were to be paid costs from the proceeds of the Estate. The findings of the Registrar were guided by those records and by virtue of section 27 (1) CPA, the Registrar had discretion to decide that the appellant personally pays the said costs. The defence that he was trying to protect the estate from waste is not tenable, since as an administrator he was meant to facilitate the payment to respondents, not to block it. The case of *SOLO V. PAGALI*, therefore is not applicable to this scenario which is distinguishable from

the one discussed by **Hon. J. Musota**. Actually if applicant was to follow the **SOLO V. PAGALI** case above, then he would have taken steps to ensure that earlier acts done by Respondents on behalf of the estate are regularized and their costs paid.

For the reasons above, I find that this ground is not proved and the issue terminates in the negative.

#### **ISSUE 2(GROUND 2):**

**Whether the learned Registrar erred when she disregarded the applicant's contention that the 1<sup>st</sup> Respondent had accepted the sum of Ug. Shs.3,000,000/= in full and final settlement of its fees and are stopped from claiming any costs.**

I have reviewed the record, pleadings and submissions regarding this ground of appeal. I have also examined the law. It is denied by appellants that they ever agreed with Respondent to offset the balance of payment of legal costs from the estate. However the record of proceedings before the Registrar shows that appellant offered no evidence to satisfy or substantiate the denial. The Registrar therefore did not have any contrary evidence to satisfy the required standard of proof to show that the agreed amount was shs.3,000,000 (Three million) only. That be as it is, the Advocates Act under section 50 thereof provides that an agreement for contentious business can be entered between counsel and client excluding any claim by the Advocate in respect of business to which it relates other than a claim for such costs as are expressly excepted therefrom. (section 50 (2) (b) (ii)).

The 2<sup>nd</sup> Respondent distinguished this claim as being a claim for legal costs as distinguishable from legal fees, which are negotiated between client and Advocate. Whatever the case, there was no enough evidence by appellants led before the

Registrar to sway her from allowing the costs as put in the bill. I do not find her in error when she granted these costs. I agree with the Respondents, and disagree with appellant. These costs were proved and I find that this ground does not succeed. The issue terminates in the negative.

### **GROUND 3(ISSUE 3):**

Whether the learned Registrar erred when she wrongly based her decisions on minutes that were forged and ignored the original minutes.

It is the appellant's contention that the minutes relied on were forged and are not the true and original minutes in "*so far as there is inclusion of **Alima Miya** on page 2 yet she didn't attend the meeting.....*"

The learned trial Registrar is faulted for observing that the attached minutes advised that a family meeting was held to resolve the feud, and that it was agreed that costs be borne by the estate. The appellant faulted the Registrar for ignoring all references by him to the allegations of this forgery and instead basing her decision on the forged minutes.

The Respondents on the other hand argued that the burden of proof of fraud is upon the party alleging it to prove it. Relaying on the case of **Wamiha Saw Milling Co. Ltd v. Walone Timber Co. (1962) AC 101**, where fraud was defined as an act of dishonesty.

They reviewed the record and invited court to find that "*no act of dishonesty*" was proved by appellants.

With due respect, the original record, contains arguments across the bar raised before the Registrar denying the minutes as authentic. However no independent verification was available in court either by independent evidence of a court

finding, or another copy or set of minutes that contradicted what was before court. Apart from statements in submission, no evidence was led before the Registrar to show that the minutes were forged. Merely asserting that the minutes are forged does not amount to proof on a balance of probability that what one says is true. Similarly, am unable to find anything on record that I can base on to reach a different finding from that of the learned trial Registrar, on the minutes. The fact that the minutes show that applicant be appointed an administrator which indeed was done, that letters of Administration be applied for by him and another which was done, is in itself proof that what court considered were minutes of the meeting that the Respondents also attended as Advocates. This ground therefore fails, and the issue terminates in the negative.

#### **ISSUE 4(GROUND 4)**

**Whether the learned trial Registrar erred when she ruled that the Advocates were licensed Advocates during their representation of the Estate:**

Appellant claimed that Respondents had no practicing Certificate at time of instruction. Both Respondents argued that the appellant did not provide any proof before the court, save his mere allegations. In rejoinder appellant contends that this burden shifts once a party mentions the fact. The statement of the appellant of the law on that point is flawed.

The law of evidence is that he who alleges a fact must prove its existence. See section 101 of the Evidence Act. Also the case of *Jovelyn Bamgahare v. Attorney General SCCA No. 28 of 1993*, where **Manyindo DCJ** (as he then was) stated that where the plaint discloses questions of fact that had to be proved by evidence; he who asserts must also affirm.

In the above scenario the appellant raised the issue which needed specific proof. The Registrar would not have led evidence on his behalf.

Section 101 of the Evidence Act states that;

*“ whoever desires any court to give Judgment as to any legal right or liability dependent on the existence of facts he who asserts must prove that those facts exist.”*

Clearly appellant failed to prove the said facts. The Registrar was therefore right in her findings. This ground fails as well and the issue found in the negative.

#### **ISSUE 5 AND 6(GROUNDS 5 AND 6)**

These grounds were to the effect that the firm of Madaba, Modoi & Company bill of costs was wrongly taxed in absence of clear instructions. It was also faulted on grounds that a one **Kalifani** who instructed the firm was not an Administrator of the Estate.

With due respect to appellant’s submissions on these grounds, I do not find support for the assertions from the court records. The court records clearly indicate that while appellant instructed the firm of Owori & Co. (1<sup>st</sup> Respondent) – the firm of Madaba was instructed to handle cases for a one **Ali Miya** and one **Kalifani**. All these cases concerned the estate in controversy. All these parties including appellants commenced their cases in court before becoming the legal Administrators of this Estate. The record shows that after the family meeting attended by both firms of Advocates the family resolved on the appellant and **Ali Miya** to become joint Administrators. The argument therefore that 2<sup>nd</sup> Respondent had no instructions is, also not founded on available evidence. The Registrar therefore did not commit any error in allowing to tax the bill of costs of the 2<sup>nd</sup> Respondents.

Grounds 5 and 6 do fail as well.

#### **ISSUE 7 (GROUND 7)**

**That the learned trial Registrar wrongly struck out the affidavit of the appellant's co- Administrator Ali Miya dated 20<sup>th</sup> December 2011 and erred when she relied on the affidavit of the Co- Administrator dated 9<sup>th</sup> January 2012.**

Appellant's view is that it was wrong for the learned trial Registrar to expunge the first affidavit by **Ali Miya**, and relaying on the subsequent one. Respondents argue that what the learned trial Registrar did was correct.

Appellants do not point out any law, rule or regulation which the learned trial Registrar offended when she expunged this affidavit. If it was procedurally incorrect, it was not shown what Rule of procedure was violated. It remained a mere opinion by counsel. The learned trial Registrar was in control of her court and had the discretion to accept or reject the affidavit as the justice of the matter dictated. In a situation where the deponent denies an affidavit, that he is not the author, and that the signature is forged, and replaces it with one he claims is his own, what right does the court have to force the affidavit on him? The court is an independent arbiter and only deals with the evidence before it judiciously. The learned trial Registrar was therefore right to expunge the affidavit in the circumstances. This ground also fails.

#### **GROUND 8 (ISSUE 8)**

**Whether the learned trial Registrar erred when she did not consider the appellant's contention that he had not been served with the demand notice dated 10<sup>th</sup> August 2011 for a claim of UG X 100,014,000**

Appellant argues that Respondents did not comply with requirements of section 57 of the Advocates Act, which required that appellant be served with a notice together with the bill of costs one month before taking the matter to court. Further that an affidavit of service would have been served together with the application to have the bill of costs taxed. They argued that this omission was fatal and the learned trial Registrar would have found the bill incompetent.

In response, it is Respondents' case that the required notices were issued and the suit brought after one month.

The court record shows that in response to Miscellaneous Application 201 of 2011 from which this appeal arises, the Respondents filed a notice of motion supported by an affidavit sworn by **Owori**. The affidavit has in paragraph 8 a reference to repeated notices that the lawyers sent out to the appellant. The pleadings have annexure 'B' which is a demand notice by Madaba & Company dated 14<sup>th</sup> August 2011 and Exhibit 'E' from the same firm which is a claim for professional services. Another demand notice is annexed as Exhibit 'D' by Owori and Co. Advocates and on it attached a profession services claim jointly filed by both firms. The question for this court to determine is whether these documents offend the requirements of section 57 of the Advocates Act, to tender the subsequent actions illegal, and hence to have them vacated on the strength of the quoted case of ***Makula International v. Cardinal Nsubuga***.

The requirement for notice is aimed at informing the parties that the lawyer has a bill against them which should be honoured. The period of 30 days is to enable the parties ample time to pay.

From the pleadings before court, these notices in my view were sufficient to give appellant the anticipated notice under section 57 of the Advocates Act. I notice from the pleadings that notices were issued in August 2011 and the suit filed on 11<sup>th</sup> November 2011. The 30 days rule was not violated. I therefore do not find any illegality on record brought to the attention of court. I find that the learned Registrar was not at fault to accept the bill as stated. This ground fails as well.

Finally I do not find any merit in the appeal as all the grounds thereof have not been proved. I therefore dismiss the appeal with costs to the Respondents. I so order.

**Henry I. Kawesa**

**JUDGE**

**10.01.2014**

