THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

HOLDEN AT MBALE

HCT-04-CV-MC-004-2014

KASAJJA ROBERT……..……..APPLICANT

VERSUS

1. **NASSER IGA**
2. **ABDU NGOBI…….…….RESPONDENTS**

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

RULING

This is an application by Notice of Motion under Article 139 (1) Section 14(1) of the Judicature of the Act, Section 98 of the Civil Procedure Act, Section 55, 57, 58, 66 and 80 of Advocates Act, Regulations 8 and 10 of the Advocates (remuneration and Taxation of Costs) Regulations 8 O.52 r.1, 2, and 3 of the Civil Procedure Rules. The application seeks for orders that the attached Advocate/Client Bill of

costs be taxed, judgment be entered for the sum certified to be due and costs of this application.

The grounds *interalia* are that the applicant received instructions from the respondents to demand equity Bank (U) Ltd to quit and handover vacant possession of the premises comprised in FRV. 667 Folio 11 Plot No. 406 Block 2 Kibuku County, Pallisa District, among other instructions, which instructions were successfully executed by the applicant on their behalf. The application is supported by an affidavit in support and a supplementary affidavit in support by the applicant. On record are three affidavits in reply and two affidavits in rejoinder thereto.

In his submissions, the applicant raised preliminary objections as to the competence of affidavits in reply.

He argued that Regulation 9 of Advocates (Professional Conduct) Regulations and Rule 7 of the Commissioner for Oaths Rules in the Schedule, and the case of ***Ismail T/a Bombo City Stores v. Alex Kamukamu & Ors T/a Bazari (1992) 3 KALR 113(SC-U) 119***, stand against an Advocate acting as counsel and witness in the same case. He faulted the respondent's affidavit in reply commissioned by Nsereko Saudah as Advocate and Commissioner for Oaths. His argument was that

M/s Nsereko-Mukalazi & Co. Advocates are the same Advocates representing the respondent in this application. He argued that in view of Regulation 9 and Rule 7 above it was illegal and irregular for the advocates above to commission the said affidavits and therefore the same must be struck out with costs.

He also attacked **Edward Ocen**'s affidavit in reply for being irregular because an affidavit in reply can only be sworn by a party to a matter in court. A third party like **Edward Ocen**, can only swear a supplementary affidavit whether in support or reply. He prayed that this affidavit as well be struck out.

Respondents did not address this objection in their reply to the applicant's submissions. This omission was pointed out in the appellant's submission in rejoinder.

I will therefore first determine this objection and if it is found legally sustainable, make relevant orders regarding the entire application.

The first question to determine here is whether the Respondents' affidavits in reply offend Regulation 9 of the Advocates (Professional Conduct) Regulations and Rule 7 of the Commissioner for Oath Rules.

Regulation 9, imports the legal position that counsel cannot be a witness in the same case his representing.

I have gone through the offending affidavits that are the subject of contention. The law requires an examination of an affidavit sworn by such counsel in a matter to be examined to find out whether it depones to only formal and not substantive matters. A distinction also needs to be drawn between counsel who swears an affidavit in his own names in a case he is defending, and counsel who is representing a party who swears an affidavit and Counsel commissions it, as a Commissioner for oaths; yet the same affidavit depones to matters which allude to counsel as a possible witness.

The quoted case of *YUNUSU ISMAIL T/A BOMBO CITY STORE V. ALEX KAMUKAMU & OTHERS T/A OK BAZARI (1992) 3 KALR 113 (SCU),* discusses scenarios when the behaviour of Counsel who depones such an affidavit is found offensive.

The principle is that it is wrong for counsel to act as such and at the same time give evidence by affidavit.

I find that the affidavits in reply by 2nd Respondent and 1st Respondent, are deponed and witnessed by **Nsereko Saudah**, who is named as a Commissioner for oaths.

M/s Nsereko- Mukalazi & Co. Advocates appear as the counsel who prepared the affidavit. 1st respondents affidavit in paragraphs 39, 40, 41, thereof depones that, the contents of the deponents information in part of his affidavit are advice given him by the same Nsereko-Mukalazi & Co. Advocates. The import of this is that this firm holds vital information as witnesses for the respondents. This offends Regulation 9 above. It also offends Rule 7 of the Commissioner for Oaths Rules (Schedule) which as argued by applicant requires a Commissioner for Oaths before taking oaths to satisfy himself that the person named as the deponent and the person before him are the same. This requirement makes a Commissioner for Oaths a potential witness, should any issue arise requiring his/her clarification in court orally on what transpired before him as Commissioner while administering oath. This goes against the standard rule referred to by counsel in the case of *R. V. Secretary for State for India (1941) 2 ALL ER 546* that:

> "*It is trite law that an Advocate should not act as counsel and witness in the same case.*"

That being the position, then can court act on the affidavits in support filed in by 1st and 2nd Respondents?

The court in the *Yunusu Ismail* case above, guided that:

> "*this regulation shall not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non contentious matters in which he acts or appears…..*"

This regulation limits counsel to only formal non contentious matters.

In the first and 2nd Respondents' affidavits, there is reference to matters in contention for example in paragraph 39 of **Nasser Iga**'s affidavit the entire client-Advocate relationship is what is in issue- yet, **Iga** bases his belief on this important matter on information supplied by Nsereko Advocates. This is a contentious matter which I believe the affidavit above offends, by bringing the lawyer in as a potential witness; yet he/she is representing the respondents. The same scenario goes for 2nd Respondent's affidavit in paragraph 5 and 9.

I therefore agree with applicant's objections to these two affidavits on those grounds. They offend O.19 r.3 (1) of the Civil Procedure Rules.

The affidavit of **Edward Ocen** is misplaced as an "affidavit in Reply". It could have been attached as a "supplementary affidavit" because **Ocen** is unknown to the pleadings; to which he is replying. The Bank which he works for was not sued as a party, at this stage the affidavit is strange.

This preliminary objection is therefore sustained.

That be as it is, the applicant still must prove the application as per the quoted cases of *Shelton Okobo v. Standard Chartered Bank U Ltd (1992) 2 KALR 115*, and *Management Committee of Rubaga Girls School v. Dr. Bwogi (1999) KALR 586*.

These cases held that:

> "1. *Whether respondent filed an affidavit for reply or not it is still the applicant's duty to put up a credible case. Failure so to do does not defacto improve the applicant's case. Applicant must therefore prove his application*."

The applicant has shown in his application that he offered services to the Respondents as an Advocate, which created an Advocate-Client Relationship.

However in response, respondent has through submissions drawn to the attention of court, a fundamental point of law, which applicant has conceded to in the submissions in rejoinder.

It has been conceded to by applicant that it is true that at the time he got in touch with respondents in the year 2012, he had not yet obtained a Practicing Certificate neither had he enrolled as an Advocate.

The question therefore is, what was the fate of this revelation regarding this whole matter?

Respondents had objected to the proceedings on grounds above.

They referred court to section 55 of Evidence Act calling for Judicial Notice of this fact. They asked this court to take Judicial Notice that applicant was enrolled on 27th February 2013. This fact is not denied by applicant in his rejoinder. It is therefore proved.

Commenting on the effect of the above fact (now admission), the Respondents referred to Section 65 of the Advocates Act to argue that applicant was not an Advocate at time he purportedly executed the services. He was not an Advocate, neither did he have a Practising Certificate. His view is that Section 65 (1), (2), (3) are in mandatory terms. He further referred to Section 59 of the Advocates Act, to further argue that:

> "*No costs shall be recoverable in any suit, proceedings or matter by any person in respect of anything done, the doing of which constitutes an offence under this Act*."

He also referred to the case of *Makula International v. His Eminence Cardinal Nsubuga (1982) HCB Page 11*, that:

> "*an illegality once brought to the attention of court overrides all questions of pleadings including any admissions made thereon*."

Applicants in rejoinder however as pointed out, admitted the fact of having not enrolled until 27th .2.2013, further, he conceded that he got a Practising Certificate on 07.5.2013. (See Annextures A^1, B_1, and C^1). He then attempts to argue that he handled client business for Respondents after the issuance of a Practising

Certificate for which he is entitled to payment. The rest of his argument from page 3 to 6 of his pleadings is an attempt to argue that court should strike off the items he handled before enrollment, and allow him to recover for items that he handled while holding a valid Practising Certificate.

With due respect, the above argument does not comply with the common law adage that:

"*He who comes to equity must do so with clean hands*."

The law is that parties must conform to their pleadings.

In *Gandy v. Casper Air Charta Ltd (1956) 23 EACA 139, and in Patel v. Fleet Transport Co. Ltd (1980) EA 1025 (CA-K)*, while commenting on pleadings generally and referring to the above case *SPRY- on Civil Procedure in EA*, states that:

i) " As a general rule, relief not founded on the pleadings will not be given.

ii) While the general rule is that parties should be bound by their pleadings, an incorrect description of a particular fact should not be fatal where the particulars of the claim have been given with reasonable precision.

The applicant in his Notice of Motion supported by his affidavit pleaded that he is an Advocate who offered respondents services for which he laid claim. His

affidavit testifies that he got instructed on or by March 2012 (see paragraph 7 of affidavit in support). The affidavit and Notice of Motion are silent on his new admission that he only got enrolled on 27.February 2013.

The attempt to move court therefore to ignore parts of his pleadings and deal with items under Exhibit "D" and items 18 to 43 of Exhibit "E" and ignore 1-17, so as to circumvent section 65 and 69, and ***Makula***'s case (supra) is unacceptable. This is trying to depart from one's own pleadings which is contrary to the Civil Procedure Rules. (See O. 6 r.6 and 7 of the Civil Procedure Rules).

If this had been disclosed, then equity would have aided applicant. Just as Respondent's affidavits were caught by the Rules to be irregular, applicant's pleadings are also shown to be irregular and in contravention of Section s65 and 69 of the Advocates Act. I am therefore unable to agree with applicant's conclusion and prayer in his submission in rejoinder that 'court orders Exhibit I to be taxed by the taxing officer and sum certified to be due be entered in judgment. The holding in the case of ***Makula International v. Cardinal Nsubuga*** (supra) does not leave this court with any option, once faced with such illegal conduct. This was an illegality committed by a person who was not an Advocate, masquerading as one. He tried to use the rules to his advantage and when caught, retracted and tried to hide under the same rules so as to gain from a transaction soiled with illegality

from its onset. Advocacy is a noble profession. It has rules. The procedures are known; you do not offer legal practice when not authorized.

The Advocates (Renumeration and Taxation of costs) Regulations are made under the Advocates Act, which specifically refers to enrolled Advocates.

For all reasons above am unable to grant this application. It shall be dismissed. Owing to irregularities committed by both Counsel for applicant and Respondents in conducting their work as Advocates and as officers of this court, I award no costs. Each party shall bear their own costs. I so order.

Henry I. Kawesa

JUDGE

17.03.2015