THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISCELLANEOUS APPLICATION NO. 417 OF 2020

(Arising from Miscellaneous Cause No. 242 of 2019)

DR. ISAAC WANZIGE MAGOOLA :::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

MAKERERE UNIVERSITY BUSINESS SCHOOL

PROF. WASWA BALUNYWA :::::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Order 52 Rules 1, 2 and 3 of the Civil Procedure Rules S.I 71-1 seeking orders that:

1. The Respondents' disobedience of a Court Order instructing them to reinstate the Applicant to his office as Dean and Senior Lecturer of the Faculty of Entrepreneurship and Business Administration, and the refusal to refund the Applicant's withheld emoluments during the quashed suspension amounts to contempt of Court.
2. The Respondents be compelled to obey the Court Order by way of punishment in exemplary damages to the Applicant.
3. The Respondents compensate the Applicant in general damages.
4. The 2nd Respondent being the force behind this contempt be committed to civil prison for contempt of court as a deterrent from continued acts of contempt.
5. Costs of the application be provided for.

The application was supported by an affidavit deposed by **Dr. Isaac Wanzige Magoola**, the Applicant, which together with the Notice of Motion sets out the grounds of the application. Briefly, the grounds are that on 29th May 2020, this Court issued a Ruling vide M.C No. 242 of 2019 which quashed the decision suspending the Applicant as a Senior Lecturer and Dean of the Faculty of Entrepreneurship and Business Administration at the 1st Respondent Institution with an order to reinstate the Applicant with immediate effect. The Order was accordingly extracted and served on the Respondents on 12th June 2020 but the Respondents have since then failed, ignored, or neglected to comply with the said Order.

The Applicant avers that the Respondents' conduct amounts to abuse of court process as well as an abuse of the statutory powers given to the 2nd Respondent as a Principal of the 1st Respondent. The said conduct requires the court to coercively compel them to comply and to punish them through award of damages and committal of the 2nd Respondent to civil prison. The Applicant further averred that as a result of the said conduct by the Respondents, he has continued to experience academic, social, and financial embarrassment. It is therefore fair and just that the application is granted with costs.

The application was opposed through an affidavit in reply deponed to by **Prof. Waswa Balunywa**, the 2nd Respondent and Principal of the 1st Respondent, who averred that the application was premature and, upon the advice of their Counsel, the Respondents intended to raise several preliminary points of law against the application. In specific response, the deponent stated that the Respondents did not ignore the Court Order. That being dissatisfied with the ruling of the trial Judge, the Respondents filed a notice of appeal and a letter requesting for certified copies of the proceedings. They further filed an application for stay of execution which was yet to be heard.

The 2nd Respondent further averred that the actions of the Respondents do not amount to contempt since the decision relied on is legally being challenged by way of appeal. The 2nd Respondent also averred that he is not tasked with the reinstatement of the Applicant to his position.

The Applicant filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

At the hearing, the Applicant was represented by Mr. Mukwaya Davis from M/s Waiswa & Co. Advocates while the Respondents were represented by Mr. Lutalo Andreas from M/s Loi Advocates. It was agreed that the hearing proceeds by way of written submissions which were duly filed. Counsel for the Respondents indicated that they intended to raise some preliminary points of objection which were argued at the same time as the merits of the application. I intend to first deal with the preliminary objections since they are directed at the competence of the application.

Preliminary points of objection

Two preliminary points of objection were raised by Counsel for the Respondents, namely that;

(i) The affidavits in support of the application and in rejoinder respectively were commissioned by an advocate who had since been struck off the roll of advocates; and

(ii) The affidavit in support of the application was defective for being undated.

Respondents' submissions on the objections

Counsel for the Respondents submitted that the affidavits in support and in rejoinder were commissioned by a one Augustine Ssemakula who had been suspended from legal practise since 2012 and was therefore not authorized to commission oaths. Counsel relied on the provision under Section 1 (4) of the Commissioner for Oaths (Advocates) Act for the submission that every

commission shall immediately terminate on the holder ceasing to practice as an advocate. Counsel also relied on the decisions in ***Hard Rock Quarry (U) Ltd vs Commissioner Land Registration & Another, HC Civil Appeal No. 115 of 2015 (Jinja HC)*** and ***Prof. Syed Huq vs The Islamic University in Uganda, SCCA No. 47 of 1995*** to support the same legal position.

Counsel therefore concluded that the said affidavits are illegal and once an illegality is brought to the attention of the court, it cannot be ignored or sanctioned by the Court. Counsel prayed to the Court to find that the application is not supported by a valid affidavit as required by law and the same should be dismissed with costs.

On the question of the **undated affidavit**, Counsel submitted that according to Section 5 of the Commissioner for Oaths (Advocates) Act and Section 6 of the Oaths Act, a commissioner for Oaths must state in the jurat at what place and the date when the oath or affidavit is taken. The affidavit in support herein was not dated and is thus incurably defective. Counsel relied on the decisions in ***Balikuddembe Jumba Peter & 2 Ors vs Jjagwe Mbuga & Anor, HC MA No. 976 of 2012, Teddy Namazzi vs. Anne Sibo 1986 HCB 58,*** and ***Time Trader Transporters vs. PPDA & Ors, HCMA No. 02 of 2016***. Counsel prayed that the affidavit be found by the Court to be incurably defective which renders the application unsupported and the same be dismissed with costs.

Applicant's submissions on the objections

Counsel for the Applicant addressed the preliminary objections in their submissions in rejoinder. Counsel submitted that the status of Augustine Ssemakula as an Advocate and a Commissioner of Oaths is not a question of law but of fact. Counsel submitted that the Respondents had not filed any supplementary affidavit with evidential proof of their assertions. Counsel argued that this is not a matter for judicial notice and the Court had not been invited to consider it. Counsel further argued that the submission by the Respondents' Counsel on the point amounted to giving evidence from

the bar and turning into a witness in his own case which is at odds with Regulation 9 of the Advocates (Professional Conduct) Regulations. Counsel also relied on the case of ***Hussein Mohammed vs. Mayanja Bashir & 5 Ors HCCS No. 178 of 2009*** in support of that submission.

Counsel for the Applicant also made and filed supplementary submissions in rejoinder in which they further argued that the decision relied on by Counsel for the Respondents in ***Prof. Syed Huq vs the Islamic University in Uganda (supra)*** was distinguishable from the facts of the present case. Counsel argued that the propriety of the documents signed or filed by an Advocate without a practising certificate were not the ratio decidendi in the ***Prof. Syed Huq case*** as the cited observation was made by the Supreme Court as obiter dictum and did not influence their Lordship's resultant decision at all.

Counsel relied on the case of ***Noble Builders (Uganda) Limited vs. Balwinder Kaur Sandhu, C.A.C.A. No. 70 of 2009*** for the definition of obiter dictum and the position that such an observation is not binding as a precedent. Counsel therefore concluded that the ***Prof. Syed case*** does not have a binding effect on this Court in respect of the observations stated therein. Counsel however invited the Court to consider the dissenting views of **Tsekooko JSC** (as he then was, RIP) in that case, wherein he stated;
"…I have not been able to find a provision in the Advocates Act 1970 which states that pleadings become invalid or illegal if they are signed by an Advocate who does not possess a valid practising certificate. I think that if parliament intended to declare illegal or invalid pleadings signed by Advocates without valid practising certificates the legislature would have said so…"

Counsel further submitted that after review of sections 10, 14, 63 and 68 of the Advocates Act Cap 267, the Learned Justice had observed that the said provisions do not declare invalid pleadings signed by an Advocate who has no practising certificate only that the Advocate would have committed an

offence and would not be entitled to recover costs. The innocent litigant would not be punished and would be given audience by the court and allowed opportunity to conduct his case or engage another advocate.

Counsel further relied on the case ***Jesse Gulyetonda vs. Henry Muganwa Kajura [1996] III KALR 44*** in support of the same position. Counsel concluded that whereas Augustine Ssemakula does not have a practising certificate, the affidavits he commissioned are not invalid since the Applicant is a bonafide litigant and not an accomplice in the offence committed by the Advocate under the Advocates Act 1970. He prayed for this objection to be overruled.

On the issue of the **undated affidavit**, Counsel argued that the case of ***Teddy Namazzi vs. Sibo (supra)*** cited by Counsel for the Respondents was decided in 1986 before the coming into force of the Constitution of Uganda whose position is that substantive justice takes precedence over technicalities as per Article 126(2)(e) thereof. Counsel further relied on the case of ***Nabukeera Hussein Hanifa vs. Kibuule Ronald & Anor HC Election Petition No. 17 of 2011*** where it was held that defects in the jurat or any irregularity in the form of an affidavit cannot be allowed to vitiate an affidavit in view of Article 126 (2)(e) of the Constitution which stipulates that substantive justice shall be administered without undue regard to technicalities. The court also held that the judge has wide discretionary powers to order an undated affidavit to be dated in court or that the affidavit be re-sworn before putting it on record and may penalize the offending party in costs. Counsel invited Court to adopt this progressive position in the ***Nabukeera case***.

Respondents' submissions in surrejoinder

Because the objections were raised by the Respondents' Counsel in their submissions in reply, the Respondents were entitled to make a rejoinder after the response by the Applicant's Counsel. Counsel for the Respondents did so by way of submissions in surrejoinder. Counsel submitted that the

matter involving Augustine Ssemakula and the impugned affidavits is a matter of law and not an opinion or a matter of fact. Counsel relied on the decision of **Obura J.** (as she then was) in ***M/S Job Connect (U) Ltd vs. DFCU Bank Ltd, HC Misc. Applic. No. 627 of 2014*** where she stated that *"… questions of illegality are so serious that they require further investigation and action by courts of law … it is abundantly clear from that ruling that Mr. Ssemakula Augustine was suspended from legal practise for a period of two years with effect from 31st August 2012. It therefore follows that any affidavit purportedly commissioned by him during the period of his suspension would be incurably defective and Court can only strike it out … In the circumstances, I find that the affidavit is incurably defective, and it is accordingly struck out thereby leaving the application unsupported."*

Counsel for the Respondents further submitted that they had verified Mr. Ssemakula's status on the Roll of Commissioner for Oaths though a letter from the Chief Registrar which clearly indicated that he was barred from legal practise since 2014 and has not been reinstated by the Disciplinary Committee of the Law Council. Counsel submitted that a supplementary affidavit to that effect was not necessary. Counsel contended that once an illegality is brought to the attention of court, the court cannot simply fold its hands. Counsel prayed that the affidavit in support be found illegal and incurably defective, struck off the record and the Court should find that the application is not supported by any affidavit evidence.

Counsel for the Respondents further submitted that if this Court is to adopt the approach suggested in the case of ***Nabukeera Hussein Hanifa vs. Kibuule Ronald (supra)***, the Applicant should be condemned in costs.

Court Determination

Let me begin by pointing out that whereas I am persuaded by the decision in ***Nabukeera Hussein Hanifa vs. Kibuule Ronald & Another HC Election Petition No. 17 of 2011*** and bound by the decision in ***Saggu vs. Roadmaster Cycles (U) Ltd [2002] 1 EA 258***, to the effect that an undated

affidavit is curable under Article 126 (2) (e) of the Constitution, the position on an affidavit commissioned by an advocate that has been struck of the Roll of Advocates appears to be different.

Section 1 (4) of the Commissioner for Oaths (Advocates) Act Cap 5 clearly provides that every commission shall immediately terminate upon the holder ceasing to practice as an advocate. This point was well underscored by the Supreme Court in the case of ***Professor Syed Hug vs. The Islamic University of Uganda, S.C.C.A No. 47 of 1995***, wherein **Wambuzi CJ** (as he then was) agreed with the decision of the Court of Appeal to the effect that *"... a practicing certificate is issued for a particular year and if the advocate is suspended from practice, his commission to practice as a Commissioner for Oaths would be terminated ..."*

It was argued by Counsel for the Applicant that the status of Mr. Augustine Ssemakula as an advocate or not was a question of fact that required evidence which evidence has not been adduced before the Court. Counsel for the Applicant attacked the Respondents' Counsel for leading evidence from the bar instead of deponing to a supplementary affidavit. I must say that I am in total disagreement with the Applicant's Counsel over this assertion. The fact that Augustine Ssemakula was suspended and later removed from the Roll of Advocates is well over-written on the wall and is before the Court, not simply as evidence but, as findings by a number of courts of record. The cases in which the same personality has been found to have been involved into practice without being on the roll of advocates include ***Standard Chartered Bank (U) Ltd vs. Mwesigwa Geoffrey Philip HCMA No. 477 of 2012*** **(Madrama J.);** ***M/S Job Connect (U) Ltd vs. DFCU Bank Ltd, HC Misc. Applic. No. 627 of 2014*** **(Hellen Obura J.)**; and ***Hard Rock Quarry (U) Ltd vs Commissioner Land Registration & Another, HC Civil Appeal No. 115 of 2015*** **(Luswata J.)**.

The references and findings by the courts in the above named cases have not been challenged or reversed. No evidence has been adduced that the

situation has since changed. As such this is a settled matter that requires no evidence. In effect, it a judicially noticed fact. The fact that the situation has not changed to date is reinforced by a letter that has been drawn to the Court's attention by the Respondent's Counsel dated 18th September 2020 from the Chief Registrar to the effect that Mr. Augustine Ssemakula was barred from practice since 2014 and has not been reinstated by the Disciplinary Committee of the Law Council to practice again.

The contents of the above letter cannot be defeated by the argument of the Applicant's Counsel challenging the manner in which the same was brought to the Court. The letter points to and confirms an illegality that cannot be ignored once it is brought to the court's attention. As such, as long as the authenticity of the said letter is not in issue, the manner in which it was brought to the court's attention becomes irrelevant. Secondly and equally important, the letter points to facts that have already been subject of court decisions and are thus judicially noticed.

That being the case, this Court needed no further evidence regarding the status of Mr. Augustine Ssemakula being a person who since 2012 was suspended from legal practice and has since 2014 been struck off the roll of advocates. As per the legal position above stated, he could not act as a Commissioner for Oaths and an affidavit commissioned by him is not only incurably defective but is also illegal.

It was further argued by Counsel for the Applicant that even if the Court was to agree that the affidavits in issue were commissioned by a person who had ceased to practice as an advocate, the effect would not to be to invalidate the affidavits but penalize the purported advocte and allow the innocent litigant an opportunity to make their case before the Court. Counsel relied for this argument on the decision in ***Jesse Gulyetonda vs. Henry Muganwa Kajura [1996] III KALR 44*** and on a distinction of the applicability of the decision in ***Prof. Syed Huq vs the Islamic University in Uganda (supra)*** to the facts and circumstances of the present case.

I have read the decision in ***Prof. Syed Huq vs the Islamic University in Uganda (supra)*** and, with due respect, I have not seen the basis of Counsel for the Applicant's reasoning that the holding of the Supreme Court on the matter was by way of orbiter dictum. The matter was handled as a preliminary point and that does not make it orbiter dictum. I find this argument by learned Counsel for the Applicant misconceived.

I also find that Counsel for the Applicant cited the decision of ***Jesse Gulyetonda vs. Henry Muganwa Kajura (supra)*** out of context. It is clear from the reading of the said decision that the court was dealing with an advocate who had not renewed their practising certificate. The Learned Judge clearly stated that it was clear that an advocate who neglects to renew his certificate does not get de-registered on that account alone; he remains an advocate. That was the court's basis of finding that pleadings made and filed by such an advocate do not by that singular fact become invalid or incompetent. The court reasoned that the relevant provisions of the Advocates Act were directed towards the professionals and not meant to penalize innocent litigants. The ratio decidendi in the above decision is clear to me. An advocate without a valid practising certificate is still an advocate; he/she is still on the roll of advocates. On the other hand, a person who has been struck off the roll of advocates is no longer an advocate. The reasoning and holding of the court in the above cited case cannot therefore apply to the latter individual who takes the position of an impostor.

I am not even persuaded by the argument of the Applicant's Counsel that the Applicant as an innocent litigant should not be penalized on basis of the conduct of a person who purported to be an advocate whereas not. This argument is least persuasive. This is because, the said person has been under that status since 2012; a period of 08 years up to the time of filing this application. It is sheer lack of due diligence on the part of the Applicant and most especially of his advocates to still use the same imposter as a Commissioner for Oaths. This is not excusable conduct on the part of the

Applicant and his advocates.

In all therefore, the affidavit in support of the application is incurably defective for having been purportedly commissioned by a person who was not an advocate at the time of the purported commissioning. The affidavit cannot be cured even by the wildest extension of the principles of substantive justice. It simply has to be struck out. The law is that an application by Notice of Motion that is unsupported by affidavit evidence is incompetent. See: ***Kaingana v Dabo Boubou 1986 HCB 59***. Consequently, the application cannot be considered on its merits for being incompetent before the Court. I accordingly strike out the application with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 28th day of June 2021.

Boniface Wamala
JUDGE