

5

The Republic of Uganda

In the High Court of Uganda Holden At Soroti

Miscellaneous Application No. 78 of 2022

(Arising from Civil Suit No. 003 of 2016)

1. Elogu Gideon

10

2. Agudo Penninah ::: Applicants

Versus

Ocen John ::: Respondent

Before: Hon. Justice Dr Henry Peter Adonyo

15

Ruling:

1. Introduction:

This is application was brought by way of a Notice of Motion under sections 98, 96 and 79 (1) (b) of the Civil Procedure Act, Cap 71, section 33 of the Judicature Act, Cap 13 and Order 52, Rules 1 and 3 of the Civil Procedure Rules SI 71-1 for orders that;

a) The Applicants be granted leave to appeal Civil Suit No. 003 of 2016 out of time.

b) Costs of the application be provided for.

25

The grounds of the application are set out in the application and enhanced in the supporting affidavit deposed by Elogu Gideon the 1st applicant which include the following;

a) That the respondent filed Civil Suit No. 003 of 2016 in the Chief Magistrate's Court of Katakwi Holden at Amuria against the Applicants for trespass to his seven acres of land, a declaration that

30

- 5 the suit land belonged to him, a permanent injunction, general damages and costs of the suit.
- b) That on 21st September 2021, the court delivered a judgement in the absence of both applicants and their lawyer without notifying any of us.
- 10 c) That the applicants got to know about the judgement on 10th May 2022, when the respondent and his agents started cutting trees and cultivating the suit land.
- d) That the applicants could not file an appeal in time.
- e) That this application is brought without inordinate delay.
- 15 f) That the court has the discretion to extend the time within which to commence an appeal/file a memorandum of appeal.
- g) That the respondent will not suffer prejudice if this application is granted and the applicants should not be denied justice.
- h) That failure to lodge an appeal in time has been caused by the
20 mistake of the court which did not notify the applicant of the judgement date and it also made a judgement without visiting the locus as agreed.
- i) That the applicants have been advised by their lawyer's M/s Omongole and Company Advocates, which advice they verily believe
25 to be true that to ably lodge and prosecute the intended appeal, they have to first apply before this Honorable Court for extension of time

5 within which to lodge the appeal since they have sufficient cause for
the fact that delayed it.

j) That it is only fair, equitable and in the interest of justice that the
orders sought in this application are granted.

In reply to the application, Oculi John, the respondent stated as follows;

10 1) That he had been advised by his lawyer's M/s Menya and Company
Advocates whose advice he verily believes to be true that at the
hearing of the application, they will raise a preliminary objection on
points of law regarding the competence of the application before the
court.

15 2) That in response to paragraphs 3,4,5,6 and 7 of the affidavit in
support of the application, the respondent shall contend that the
issues being raised by the applicants in the present application can
only be discerned by the court had the applicants attached the
proposed copy of the memorandum of appeal.

20 3) That the contents of paragraphs 3,4,5 and 6 are denied and the
respondent shall aver that the contents of the said paragraphs shall
be treated as naked lies because the applicants were present on the
day judgment was passed except that the copy of the judgement is
silent and that is why the applicants are taking advantage to the
25 abridge their dilatory conduct in bringing this application.

- 5 4) That in reply to paragraphs 3,4,5 and 6, the respondent contends that the judgement was delivered on the 15th September, 2021 and not 26th September, 2022 as alleged by the applicants.
- 10 5) That the applicants are hiding behind none attendance of court when the judgement was delivered which does not amount to an excuse in law as it was their duty to keep checking with the court on the progress of their case.
- 15 6) That in specific reply to paragraphs 8, 9 and 10 of the affidavit in support, and following the advice of his lawyers which advice he believes to be true, that the advice given to the applicants by their lawyers does not reveal that the applicants are in any way aggrieved by the judgement and findings of the lower court.
- 20 7) That the applicants' conduct in failing to file an appeal in time amounts to deliberate dilatory conduct which cannot be visited on the court and this application is merely an afterthought, having seen the respondent beginning to enjoy the fruits of the judgement.
- 25 8) That the applicants' application for leave does not reveal the grounds of appeal and therefore the allegation by the applicants that their appeal has merit with the likelihood of success is merely speculative in the absence of the appeal itself.
- 9) That the application unreasonably took nine months before deciding to apply for an extension of time to appeal.

5 10) That the applicants' dilatory conduct is a guise to play delaying tactics and frustrate the respondent from enjoying the fruits of the judgement.

11) That the applicants' application for extension of time within which to appeal is not merited because the suit land having already been
10 declared to the respondent by the lower court, the respondent took full possession of the same rendering this application moot able.

12) That the respondent contends that he will be greatly inconvenienced and prejudiced if this application is granted and if the court is inclined to grant the same, it should be granted with costs to
15 the respondent.

In rejoinder to the affidavit in reply, Oculi Gideon the 1st applicant stated as follows;

a) That our omission to attach a copy of the proposed memorandum of appeal is not fatal and not a legal requirement in the determination
20 of this application.

b) That he denies the contents and maintains that the judgement was delivered on 15th September 2021 in their absence and that of their lawyer without notifying them.

c) That there was no way the applicants would know about the
25 judgement date without being notified personally or through their lawyers.



- 5 d) That they are aggrieved with the judgement and that is why they
have applied for leave to appeal out of time having not known about
the delivery of the judgement at the time it was delivered.
- e) That their failure to file an appeal in time does not amount to
deliberate dilatory conduct as there is sufficient ground for failure
10 to do so.
- f) That they maintain that their appeal has a likelihood of success and
that the grounds of appeal shall be listed in the memorandum of
appeal after leave of this Court.
- g) That the respondents will not be inconvenienced and prejudiced if
15 this application is granted without costs to the respondents.

2. Representation:

The applicants were represented by M/s Omongole and Company
Advocates while the Respondent was represented by M/s Menya and
Company Advocates.

20 3. Issues for determination:

- a. Whether the Applicants should be granted leave to appeal
Civil Suit No. 003 of 2016 out of time.
- b. Who bears the costs of this application?

4. Resolution:

25 a. Submissions:

The parties filed written submissions which have been considered. In his
submissions, the respondent raised a preliminary point of law in regard to
the competence of this application arguing that this application is invalid
for the affidavit in its support was incurably defective having been
30 commissioned by counsel without a valid practicing certificate.

5 In making this assertion, the respondent relied on the case of ***Alfred Olwora versus Uganda Central Cooperative Union Limited, Civil Appeal 25 of 1992***, where the Supreme Court referred to provisions of section 14 (1) of the Advocates Act, Cap 267 and held that,

10 ***“... any advocate whose name has been entered on the roll is required by section 10 of the Advocates Act to have in force a valid practicing certificate before he practices in court. Such a certificate is only valid for a year and expires 31st December next after the issue, and is subject to renewal. It is an offence under section 14(1) of the Advocates Act for an advocate to practice without a valid practicing certificate.***

15 ***In Prof. Syed Huq versus Islamic University in Uganda Civil Appeal No. 47 of 1995 where Wambuzi C.J (as he then was) held that the Court of Appeal considered the provisions of section 2 of the Commissioner for Oaths (Advocates) Act and concluded:***

20 ***“The Act itself states in clear terms that the commission must be issued to a person who is a practicing advocate which means a commission can only be in existence when a particular advocate to whom it was granted is in possession of a valid practicing certificate as required by section 10 of the Advocates’ Act. Justice Wambuzi CJ further held that;***

- 25
- 30 ***1. An advocate is not entitled to practice without a valid practicing certificate;***
 - 2. That advocate whose practicing certificate has expired may practice as an advocate in the months of January and February but if he does so***

5 *he will not recover costs through the courts for any work done during that period. The documents signed or filled by such an advocate in such a period are valid;*

10 *3. An advocate who practices without a valid practicing certificate after February in any year commits an offence and is liable to both criminal and disciplinary proceedings. The documents prepared or filed by such an advocate whose practice is illegal, are invalid and of no legal effect on the principle that courts will not condone or*
15 *perpetuate illegalities.”*

Counsel for the respondent then invited the court to have the impugned affidavit expunged for being incurably defective having been commissioned by an advocate without a practicing certificate.

20 Counsel for the applicant was silent in her submissions in rejoinder regarding this preliminary objection despite referring to it as baseless and without merit in paragraph 2 of the affidavit in rejoinder deposed by Elogu Gideon, the 1st Applicant.

The respondent in his raising the preliminary point of law relies on
25 Section 14 (1) of the Advocates Act and other authorities including *Alfred Olwora Versus Uganda Central Cooperative Union Limited, Civil Appeal No. 25 of 1992* and *Prof. Syed Huq Versus Islamic University in Uganda Supreme Court Civil Appeal No. 47 of 1995* whose holdings have the effect that an affidavit commissioned by an
30 advocate purporting to be having a valid practicing certificate or purporting to be properly commissioning the affidavit is not in accordance with the law.

5 The law and authorities upon which the respondent's submission is anchored upon that is Article 14(1) of the Advocates Act, Cap 267 and the cases of *Alfred Olwora Versus Uganda Central Cooperative Union Limited, Civil Appeal No. 25 of 1992* and *Prof. Syed Huq Versus Islamic University in Uganda Supreme Court Civil*
10 *Appeal No. 47 of 1995. Alfred Olwora (supra)* and *Prof. Syed Huq (Supra)* are Supreme Court decisions which were decided prior to 2002 when Section 14A of the Advocates Act, as amended in 2002 was done.

15 Counsel for the respondent in his submission referred to a letter from the Chief Registrar of the Courts of Judicature that confirmed the fact that counsel Engwau Steven George who commissioned the applicant's affidavit in support of the application, last renewed his practicing certificate in 2018. The applicants' affidavit in support of the Notice of Motion was commissioned on the 2nd June 2022.

20 Counsel for the applicant did not submit on the preliminary objection, however, the respondent in his affidavit in rejoinder stated that the preliminary objection is baseless and without merit.

The contention, therefore, is in regard to the validity of the Affidavit commissioned by Mr. Engwau Steven George as a Commissioner for
25 Oaths when he did not have a valid Certificate to practice as an advocate. Commissioning of affidavits by an advocate is provided for by Section 1 of The Commissioner for Oaths (Advocates) Act, Cap. 5. As far as is relevant to the matters under consideration, the section states as follows:

30 **1. Appointment of practicing advocates as commissioners for oaths.**

- 1) **The Chief Justice may, from time to time, by commission signed by him or her appoint persons being practicing advocates who have practiced as such**

5 for not less than two years in Uganda immediately prior
to making any application for appointment and who are
certified to be fit and proper persons by two other
practicing advocates to be commissioners for oaths,
and may revoke any such appointment; but the power
10 to revoke a commission shall not be exercised till the
commissioner in question has been given an
opportunity of being heard against any such order of
revocation.

2) Not Applicable

15 3) Not Applicable

4) Each commission shall immediately terminate on the
holder ceasing to practice as an advocate” (emphasis
mine)

From the above provision of the law, the appointment of an advocate as a
20 Commissioner for Oaths is *inter alia* dependent upon his/her being a
"practicing advocate" at the material time.

Therefore, there is no doubt that possession of a valid practising certificate
issued pursuant to Section 11 of the Advocates Act is a key qualification
criterion at the appointment stage. In *Hon. Lokeris Samson vs*
25 *Komol Emmanuel and the Electoral Commission CA Election*
Petition Appeal No. 009 of 2021 Justice Muzamiru Kibeedi held that;

30 “Upon appointment, the Commissioner signs the Roll of
Commissioners and the law that governs the discharge of
his/her mandate as a Commissioner for Oaths is the
Commissioners for Oaths (Advocates) Act, there is no
provision in the Commissioners for Oaths (Advocates)
Act that the Commission expires annually and/or that it
should be renewed annually. Instead, it is provided that

5 *the commission continues to be valid until revoked by the
Chief Justice under Section 1(1) of the Commissioners for
Oaths (Advocates) Act, or until it is terminated on the
holder "ceasing to practice as an advocate" pursuant to
10 Section 1 (4) of the Commissioners for Oaths (Advocates)
Act.*

*The Supreme Court of Uganda had occasion to consider
the phrase "ceasing to practice as an advocate" in Prof.
Sved Huq Vs The Islamic University in Uganda, SCCA No.
15 47 of 1995 (Unreported) where Wambuzi , C.J who wrote
the leading judgment stated:*

*" Be that as it may and with respect, I think there
was some misconstruction of the provisions of
section 2 (now section 1) of the Commissioners for
Oaths (Advocates) Act. It is quite correct that a
20 commission granted under section 2 lasts until it is
revoked or until the grantee ceases to practice as an
advocate, "Ceasing to practice" in subsection (4)
does not mean the expiry of the advocate's
practising certificate It is common knowledge that a
25 practising certificate is issued for a particular year
and expires on the 31st December of that year
irrespective of the date of issue. If therefore, an
advocate gave up his legal practice in April to do
other business or is suspended from practice, his
30 commission to practice as Commissioner for Oaths
would be terminated in April when he gives up the
practice or when he is suspended and not on 31st*

5

December when his practising certificate expires.”
[Emphasis added]

10

15

20

25

30

The above decision is still good law and binding on this court under the doctrine of Stare decisis. I can simply add that to hold that the expiry of the annual Practising Certificate issued to advocates under Section 11 of the Advocates Act automatically terminates the Commission under Section 1 (4) of the Commissioners for Oaths (Advocates) Act would inevitably imply that each year an advocate whose Commission was terminated on account of the expiry of the Annual Practising Certificate as an advocate on the 31st of December of the preceding year but who still desires to continue being a commissioner for oaths after renewal of his Practising certificate as an advocate must lodge a fresh application for appointment to the Chief Justice under Section 1(1) of the Commissioners for Oaths (Advocates) Act and fulfill all the other conditions set out for qualification for a fresh appointment of a Practising advocate as a Commissioners for Oaths. This is an absurdity which could not have been intended by the law makers.”

Justice Muzamiru Mutangula Kibeedi, JA who gave the leading judgment in ***Hon. Lokeris Samson (above)***, however, went on to point out that;

“... the expiry of the Practising Certificate granted to an advocate under Section 11 of the Advocates Act on the 31st day of December of the year of issuance does not ipso facto terminate the Commission of the concerned advocate ...”

5 In relation to the facts at hand, whereas I may have been persuaded to
agree with counsel for the respondent to the extent that the affidavit in
support of the Notice of Motion was defective for not being commissioned
by an advocate without a valid practicing certificate for he ceased to
possess a valid practicing certificate in 2018, I am persuaded and bound
10 by the Court of Appeal decision in *Hon. Lokeris Samson* (above) that
the validity of the Commission granted to an advocate under Section 1 of
the Commissioners for Oaths (Advocates) Act is not dependent on the
existence of a valid Practising certificate on the part of the Commissioner
for Oaths.

15 Consequently, I would proceed to conclude and hold that the lack of
renewal of a practicing certificate as an advocate by Mr. Engwau Steven
George who did so as a Commissioner for Oaths does not invalidate the
affidavit in support of this application which I find valid.

That notwithstanding, the applicability of Section 14A of the Advocates
20 (Amendment) Act 2002 as pointed by counsel for the respondent is of
interest. The provision of the said law is as follows;

Section 14 A of the Advocates (Amendment) Act, 2002: Protection of
clients of advocates;

(1) **Where-**

25 (a) **an advocate practises as an advocate contrary to
subsection (1) of section 14; or**

(b) **in any proceedings, for any reason, an advocate is
lawfully denied audience or authority to represent a
party by any court or tribunal; then-**

30 (i) **no pleading or contract or other document made or
action taken by the advocate on behalf of any client
shall be invalidated by any such event; and in the case**

5 **of any proceedings, the case of the client shall not be dismissed by reason of any such event;**

 (ii) the client who is a party in the proceedings shall, where necessary, be allowed time to engage another advocate or otherwise to make good any defects arising out of any such event."

10

(2) Any advocate not in possession of a valid practising certificate or whose certificate has been suspended or cancelled and who practises as an advocate, commits professional misconduct; and the Law Council or any person may make a complaint to the Disciplinary Committee in respect of the misconduct; and paragraphs (b)(i) and (b)(ii) of subsection (1) shall apply with necessary modifications.

15

(3) In addition to any punishment prescribed under any provision of this Act, the client of an advocate to whom subsection (1) or (2) relates, is entitled to a refund by the advocate concerned of any fees paid to that advocate by the client and also to compensation in respect of any costs or loss incurred by the client as a result of the conduct of the advocate." [Emphasis added]

20

25

Justice Muzamiru Kibeedi JA in *Hon. Lokeris Samson* (above) observed that the applicability of Section 14A of the Advocates (Amendment) Act, 2002 in a bid to rectify the alleged defect. He had this to say;

30 ***"... The operative words from the above section are "pleading or contract or other document made or action taken by the advocate on behalf of any client".***

5 *My understanding of the import of the above phrase is that the section covers documents made and actions taken where an advocate-client relationship exists or has existed. The term "advocate" is defined by Section 1 of the Advocates Act to mean "any person whose name is duly*
10 *entered upon the Roll of Advocates.*

On the other hand, the term "client" is defined by the same section in the following terms:

"client" includes "any person who, as principal or on behalf of another, or as a
15 *trustee or personal representative, or in any other capacity or as trustee or personal representative, or in any other capacity, has powers express or implied to retain or employ and retains or employs, or is about to retain or employ an advocate and any*
20 *person who may be liable to pay an advocate any costs"*

The question that arises is whether the commissioning of the Principal Affidavit is one of the actions made in the circumstances where an advocate - client relationship
25 *exists.*

I think not. My view is further reinforced by Section 4 of the Commissioners for Oaths Act which expressly bars a Commissioner for Oaths from commissioning documents
30 *"in any proceeding or matter in which he or she is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate or in which he or she is interested". The section is couched thus:*

5 **4. Powers of a Commissioner for oaths:**

1) ***A commissioner for oaths may, by virtue of his or her commission, in any part of Uganda, administer any oath or take any affidavit for the purpose of any court or matter in Uganda, including matters ecclesiastical, matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognisance in or for the purpose of any civil proceeding in the High Court or any magistrate's court; except that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he or she is the advocate for any of the parties to the proceeding or concerned in the matter or clerk to any such advocate or in which he or she is interested. In the premises aforesaid and for completely different reasons, I would not fault the trial court for refusing to invoke Section 14A of the Advocates Act to remedy the alleged defects in the commissioning of the Principal Affidavit.***

10
15
20

(Emphasis added)

Aligning the above decision to the instant matter, I would confirm that since this court is bound by the above Court of Appeal decision, then Section 14A of the Advocates Act, 2002 as amended would not be applicable in the circumstances herein.

25

This position is also supported by another Court of Appeal decision in ***Ochwa David vs Ogwari Polycarp & EC Election Petition Appeal No. 16 of 2021***, wherein it was held that;

30

“... where “a petitioner's election petition was struck out by the High Court for being incompetent and incurably defective for reason that the affidavits supporting the

5 *petition were not commissioned by a commissioner for*
oaths without a valid practicing certificate. This court
declared that in circumstances such as those brought
about by an errant Advocate, the trial Judge erred when
he denied the applicant time to rectify the affidavit in
10 *support of the petition in compliance with section 14A of*
the Advocate's Act. The court also found that a petition
can stand alone and can be heard without the
accompanying affidavit and that where there is an
affidavit in support, it is brought in witness of and not as
15 *an integral part of the petition. Where the affidavit in*
support is defective, it can be struck off without affecting
the petition. We find no cause to depart from the above
reasoning.”

20 With respect to this preliminary objection and taking into account the
above two cited decisions of the Court of Appeal, I would conclude and
find that as far as an affidavit commissioned by a commissioner without a
practicing certificate renewal is concerned the defect in the
commissioning of such an affidavit can be cured by applying the
provisions of Section 14(A) of the Advocates Act, 2002 as amended by not
25 dismissing a plea and or giving a party time to rectify the defect of the not
well commissioned accompanying affidavit as the case may be since the
recurring theme in both holdings is that a commission made by a
commissioner for oaths does not expire with the lapse of a practicing
certificate and that where such an affidavit accompanies a plea arises from
30 the fault of counsel, then a party should not be condemned unheard as a
result of such inadequacy by counsel.

5 Drawing from the above holdings, I would find that the applicants' affidavit in support of the application which was commissioned by an advocate whose practicing certificate was not renewed at the time he commissioned the affidavit is curable by virtue of Section 14(A) of the Advocates Act as amended since section 14A 1 (b)(ii) protects innocent
10 litigants against errant advocates/commissioner for oaths for as was held in ***Male Wilson Vs Kayondo Fred and another Election Petition Appeal No. 27 of 2021;***

15 ***“In the application of section 14 A of the Advocates Act, a court should not when attention is drawn to it, proceed with defective pleadings but rather, time should be granted to the innocent litigant to rectify the error and correct, replace and file fresh affidavits.”***

20 Accordingly, this court would similarly find that the instant application should be allowed to proceed by virtue section 14A (l) (b) (ii) of the Advocates Act by the applicant filing fresh affidavit (s) in its support which are in compliance with the law.

25 Such an affidavit must be filed within fifteen days from the date of this ruling.

b. Having resolved the preliminary objection as above, then the resolution of this application shall await the filing of affidavit(s) in its support. Accordingly, I have not considered the same at this stage.

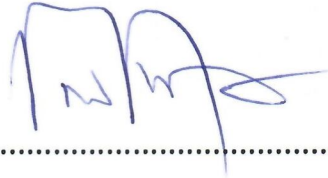
30 5. Orders:

- Arising from my conclusions above, the applicants are granted time to file such affidavit (s) in support of this application which duly and

5 properly commissioned by an advocate with a practising license
within fifteen days from the date of this ruling.

- The costs at this stage of the application arising from the preliminary objection would inescapably abide the outcome of the application.

10 I so order.



.....
Hon. Justice Dr Henry Peter Adonyo

15

Judge

10th February 2023