

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
FAMILY DIVISION
CIVIL SUIT NO. 31 OF 2013

1. SERWADDA EDWARD MAYANJA
2. KATEREGGA JOHN
3. NASSUNA GORETTE
4. BOSCO MAYANJA.....PLAINTIFFS

VERSUS

1. NOREEN NAKIYAMU
2. RITA NALWADDA MAYANJA.....DEFENDANTS

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE
RULING

This is a ruling on a preliminary objection raised by learned Counsel Mugerwa for the defendant's counsel to the effect that learned Counsel Andrew Wetaka represented the plaintiffs before the plaint was amended and he made one of the plaintiffs a defendant in the amended plaint. He contended that if counsel Wetaka in his amended plaint makes one of the plaintiffs a defendant, he should excuse himself from the matter because he would be prejudicing the client under regulations 4, 7 and 10 of the Advocates (Professional Conduct) Regulations; that Counsel's actions amount to professional misconduct. He prayed that Counsel Wetaka opts out of the case for it to proceed.

The objection was opposed by learned Counsel Andrew Wetaka who submitted that the 2nd defendant was not one of the plaintiffs given that she stays abroad; that her name was included by mistake during preparation of pleadings; and that the suit is for revocation of letters of administration and the two defendants are undeniably the joint administrators. He contended that it would be irregular to file a suit for revocation of letters of administration against one

administrator yet they know there are two administrators; that one of the grounds is that they acted fraudulently which was the reason they amended the plaint. He contended that Counsel Mugerwa had not proved any prejudice to be suffered by the 2nd defendant; that he was not even a witness in the case; that however Counsel Mugerwa also represented the Mayanja family and the notice of withdrawal shows there are a number of them on record. He prayed court to disregard Counsel Mugerwa's preliminary objection, and further stated that Counsel Mugerwa was also prejudicing the defendant's case and should step down.

Counsel Mugerwa submitted in rejoinder that the 2nd defendant is a former client of Counsel Wetaka of KGN and that it was not by mistake that her name was added; that the said Counsel can use the information he has against the said defendant. He submitted that they were not aware of any proceedings or any application seeking to serve any party by substituted service or any application. He reiterated his prayers and prayed for the 2nd defendant to be given time to file her defence.

I have carefully perused the court record and addressed the submissions of both Counsel, including the relevant authorities on this matter.

The question for determination is whether the 2nd defendant was ever a client of Counsel Wetaka such that the said counsel's subsequently making her a defendant in a matter where she was plaintiff would prejudice her as defendant.

The Advocates (Professional Conduct) Regulations, SI 267 – 2, in rule 4, provide that an advocate shall not accept instructions from any person in respect of a contentious or non contentious matter if the matter involves a former client and the advocate as a result of acting for the former client is aware of any facts which may be prejudicial to the client in that matter.

Rule 7 of the same regulations provides that an advocate shall not disclose or divulge any information obtained or acquired as a result of his or her acting on behalf of a client except where this becomes necessary in the conduct of the affairs of that client, or otherwise required by law.

Rule 10 of the same regulations provides that an advocate shall not use his or her fiduciary relationship with his or her clients to his or her own personal advantage and shall disclose to

those clients any personal interest that he or she may have in transactions being conducted on behalf of those clients.

The record indicates that the original plaint in this matter was filed on 11/03/2013. Ritah Nalwadda the subject of the objection in the instant suit was the 12th plaintiff suing as a co administrator of the estate of Michael Serwadda Mayanja. Noreen Nakiyamu Mayanja, the other co administrator of the estate of Michael Serwadda Mayanja, was the defendant in the suit. Paragraphs 1, 3, and 5 of the plaint state that the defendant Noreen Nakiyamu Mayanja at all times frustrated the 12th plaintiff's co – administration of the estate, mentioning scenarios when the defendant allegedly forged the said 12th plaintiff's signatures. The plaint was drawn and filed by KGN Advocates with whom Counsel Wetaka works. The record shows that the said Counsel Wetaka appeared before Justice Lugayizi (now retired) in this matter on 19/11/2013 and 03/02/2014 where he is on record stating that he was appearing for the plaintiffs, which at that time included the 12th plaintiff who is now 2nd defendant in the amended plaint. The submissions of Counsel Wetaka that the current 2nd defendant's inclusion in the plaint is a mistake is therefore not correct in the given circumstances.

The record also reveals the 2nd defendant to have withdrawn Civil Suit No 31/2013 which withdrawal was filed in this court on 14/01/2015. In the withdrawal the 2nd defendant, then writing as 12th plaintiff, stated that she had never given instructions to the suit in her names and that she had no conflict of interest with her co administrator. This confirms that the 2nd defendant did not give KGN Advocates instructions to file a suit on her behalf. The allegations by Counsel Mugerwa that he had a receipt where the 2nd defendant paid KGN Advocates (where Counsel Wetaka works) three million Uganda Shillings (3,000,000/=) was not substantiated by any evidence as counsel Mugerwa did not submit the receipt in question. This infers that no information could have been disclosed by the said defendant to counsel Wetaka who works for KGN Advocates. In that regard, the allegation that Counsel Wetaka has information that may prejudice the 2nd defendant cannot stand.

It also means that when Counsel Wetaka made misrepresentations to court on 19/11/2013 and 03/02/2014 when he stated that he appeared for the plaintiffs, clearly at least one of the plaintiffs, the 12th plaintiff, had not given him instructions to represent her. This is within the perspective of rule 2(1) of the Advocates (Professional Conduct) Regulations which state that no advocate shall

act for any person unless he or she has received instructions from that person or her duly authorised agent. In **Kabale Housing Estate Tenant's Association Ltd V Kabale Municipal Local Government SCCA No 15/2013** counsel handled a company matter where he had no instructions to do so. The Supreme Court held that the application having been filed by counsel without instructions was incompetent in law.

I would in the premises, and for reasons given above, find that though Counsel Wetaka held out to to be counsel for all the plaintiffs in the initial Civil Suit No 31/2013, the 12th plaintiff who is now 2nd defendant has never been his client. The said counsel's representing the plaintiffs in the amended plaint where the initial 12th plaintiff is now 2nd defendant will therefore not prejudice the 2nd defendant's interests since she has never been the said counsel's client.

The submissions or allegations by Counsel Wetaka that Counsel Mugerwa also at one time represented the Mayanja family and his subsequent request to have Counsel Mugerwa should step down from the case were not substantiated by any evidence.

All in all the preliminary objection raised by the 1st defendant's counsel is overruled with costs.

Dated at Kampala this 28th day of June 2016.

Percy Night Tuhaise

Judge.