

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**(FAMILY DIVISION)**

**CIVIL APPEAL NO.004 OF 2022**

**(ARISING OUT LUWERO MISC. APPLICATION NO.130 OF 2020)**

**(ARISING OUT OF DIVORCE CAUSE NO.12 OF 2020)**

**LUTAAYA RAMADHAN ..... APPELLANT**

**VERSUS**

**NATTABI ROSEMARY RAUDAH ..... RESPONDENT**

Before: Justice Ketrach Kitariisibwa Katunguka.

**Ruling.**

**Introduction:**

1. Lutaaya Ramadhan(herein called the appellant) brings this appeal against Nattabi Rosemary Raudah(herein called the respondent); against the whole of the ruling and orders by the trial Magistrate His Worship Munobe Samuel in Miscellaneous Application No.130 of 2020 arising from Divorce Cause No.12 of 2020 Luwero Chief Magistrates Court.

**Background to the appeal:**

2. The respondent/petitioner filed Divorce Cause No.12 of 2020 against the appellant/ respondent in the Chief Magistrates Court of Luweero; before the final determination of the Divorce cause, the appellant who was the respondent therein, filed Miscellaneous Application No.130 of 2020 against the respondent herein before the trial Magistrate for orders that; the petition in Divorce Cause No.12 of 2020 is fundamentally and incurably defective for offending the provisions of section 5 and 6 of the Advocates (Commissioner for Oaths) Act; and rule 6 and 7 of the Advocates (Commissioner for Oaths) Rules; that the petition in Divorce Cause No.12 of 2020 be struck off the record with costs; for being fundamentally and incurably defective and incompetent as it was not sworn before a Commissioner for Oaths; that Divorce Cause No.12 of 2022 be summarily dismissed with costs; costs of the application and the main cause be awarded to the applicant;

3. On the 12<sup>th</sup> day of February 2020, a ruling in M.A No.130 of 2020 was delivered by the trial Magistrate dismissing the application with Orders that: the petition was properly commissioned by a commissioner for oaths; that the supplementary affidavit sworn by Aisu Nicholas was filed without leave and that evidence cannot be relied upon;
4. The appellant being dissatisfied with the ruling of His Worship Samuel Munobe, the Chief Magistrate has appealed to this Court; on 17/5/2022, the appellant lodged a Memorandum of Appeal on the following grounds;
  - i. That the trial Magistrate erred in law when he ruled that the petition in Divorce Cause No.12 of 2020 was verified by a commissioner for oaths which was not the issue before court but rather that the petition was not verified before a commissioner for oaths as required by section 5 and 6 of the Advocates (Commissioner for Oaths) Act and rules 6 and 7 of the Advocates (Commissioner for Oaths) Rules; thereby reaching a wrong conclusion that the petition was properly verified by a commissioner for oaths and thus competent before court;
  - ii. That the trial Magistrate erred in law when he ruled that the supplementary affidavit in support of the M.A No.130/2020 sworn by Aisu Isaac Nicholas was filed without leave of court thereby reaching a wrong conclusion that the same is/was incompetent and of no evidential value;
  - iii. That the trial magistrate erred in law when he delivered the ruling in M.A No.130/2020 in absence of the application/ appellant and his counsel without directing any notice of the same to them thus infringing the appellant's right to a fair hearing under Article 28 of the 1995 Constitution;
5. The Appellant in his memorandum of appeal seeks orders that: the appeal is allowed; the decision of the trial Magistrate in M.A No.130 of 2020 be set aside; the supplementary affidavit sworn by a one Aisu Isaac Nicholas in support of M.A No. 130/2020 was valid and properly on record as it did not require seeking leave to file it; the main petition in Divorce Cause No.12 of 2020 was not signed and verified by the petitioner before a commissioner for oaths as required by section 6 and 7 of the Advocates (Commissioner for Oaths) Act and rules 6 and 7 of the Advocates (Commissioner for Oaths) Rules; that the main petition in Divorce Cause No.12 of 2020 was fraudulently and incurably defective for offending section 5 and 6 of the Advocates (Commissioner for Oaths) Act and Rules 6 and 7 of the Advocates (Commissioner for Oaths); striking off the petition in Divorce Cause No.12 of 2020 with costs for being



fundamentally and incurably defective; delivery of the ruling in M.A No.130 of 2020 by the trial Magistrate without directing any notice to the appellant violated the appellant's right of fair hearing; costs of the appeal and court bellow.

6. The respondent did not file her reply; in spite of service of Memorandum of Appeal through substituted service in Bukedde News Paper of 30<sup>th</sup> November 2022; on court record is a copy of the advertisement; an affidavit of service dated 8/12/2022; the respondent therefore, put herself out of court and has not locus to defend this appeal. (see: *Kanji Devji versus Damor Jinabhai & Co. (19340) 1 E. A.C.A. 87*)

#### **Representation.**

7. The Appellant was represented by Counsel Lutaaya Ramathan of M/s LIN Advocates; he filed written submissions which I have considered.

#### **Duty of the first appellant court.**

8. A first appellate court is required to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, but must bear in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See; *Fr. Narcensio Begumisa & Others V Eric Tibebaga. SCCA No.17/2002; BancoArabe Espaniol V Bank of Uganda. SCCA No.008/1998.*)
9. The first appeal has to be decided on facts as well as on law. In the first appeal parties have the right to be heard on both questions of law as also on facts; this being a first appeal, this court must re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

#### **Consideration of the Grounds of Appeal.**

Ground No. 1:

**That the trial Magistrate erred in law when he ruled that the petition in Divorce Cause No.12 of 2020 was verified by a commissioner for oaths which was not the issue before court but rather that the petition was not verified before a commissioner for oaths as required by section 5 and 6 of the Advocates (Commissioner for Oaths) Act and rules 6 and 7 of the Advocates (Commissioner for Oaths) Rules; thereby reaching a wrong conclusion that the petition was properly verified by a commissioner for oaths and thus competent before court.**



### Submissions by counsel for the Appellant:

10. Citing section 6 of the Oaths Act. Cap.19, section 5 of the Commissioner for Oaths (Advocates) Act, Cap.5 and rule 7 of the Commissioner for Oaths Rules; the appellant's counsel submits that the record of appeal shows that the petitioner/respondent signed the petition on 16/10/2020; the petition was commissioned on 21/10/2020; which implied that the signing or verifying was done by the petitioner in the absence of a commissioner for oaths and the commissioning was done by the commissioner in the absence of the petitioner/respondent;
11. Counsel further states that the trial Magistrate reached a wrong conclusion that the petition was verified by a commissioner for oaths yet the question to be resolved was whether the petition was signed/verified before a commissioner for oaths and evidence on record shows that it was not; therefore, that this was a fundamental error in law for the petition was incompetent for not having been verified before a commissioner for oaths.
12. Counsel cited **Kakooza John Baptist V. Electoral Commission and Another, Election appeal No.11 of 2007 (cited in Mohammed Mohammed Majambere Versus Bakaresa Khalil M.A No.727 of 2011;** court stated that; *"the practice where a deponent of an affidavit signs and forwards the affidavit to a commissioner for oaths without him being present is, in my view, a blatant violation of the law regarding making affidavits and must not be condoned in any way. The deponent of an affidavit must take oath and sign before the commissioner for oaths as required by law. A commissioner who commissions an affidavit without seeing the deponent cannot say that the affidavit was taken or made before him or her; nor can he state truly in the jurat or attestation at what place or time the affidavit was taken or made. Equally the deponent cannot claim to have taken or made the affidavit before a commissioner for oaths.."*

### Analysis of ground 1.

13. I note that counsel for the appellant continues to wrongly cite **Advocates (Commissioner for Oaths) Act** instead of **Commissioner for Oaths(Advocates) Act Cap.5;** and **Commissioner for Oaths Rules;** even when HW Samuel Munobe in his ruling corrected the mistake and stated the correct law; it is trite that as long as there is a dispute unless it is not based on breach of any existing law in the law books of the land; it ought not be disregarded but rather the correct law found and applied; courts have considered the position and held that citing of a wrong law or even the failure to cite any law under which a case is brought, is not fatal, for as long as the substance of

the case is clear on the pleadings and the opposite party is not prejudiced thereby;(see **Gold Beverages (U) Limited v Muhangura & Anor [2020] UGHCCD 126**).

14. I have carefully considered the pleadings and the court record in M.A No.130 of 2020; according to the Notice of Motion therein, the grounds were that; the petition was not sworn before a commissioner for oaths; that the petition in Divorce Cause No.12 of 2020 is fundamentally and incurably defective for offending the provisions of Section 5 and Section 6 of the Commissioner for Oaths (Advocates) Act Cap.5; and rule 6 and 7 Commissioner for Oaths (Advocates) Rules; that the petition in Divorce Cause No. 12 of 2020 be struck off record with costs for being fundamentally defective and incompetent; in her affidavit in reply, the respondent submitted that the Petition in Divorce cause No.12 of 2020 is competent given that it was verified by a commissioner for oaths duly recognized by the law;
15. During hearing of M.A No.130 of 2020; counsel for the applicant submitted before the trial Magistrate that; the petition is fundamentally defective for failure to have been commissioned **before** a commissioner for oaths; in this ground counsel insists that his contention is not whether the petition was verified **by** the commissioner for oaths but whether it was commissioned **before** the commissioner; he prayed that the petition be struck off; in reply counsel for the respondent submitted that the respondent signed the petition on 16/10/2020 and she appeared before the commissioner on the same date; counsel for the respondent submitted that it must have been an error on the part of the commissioner to stamp and put a different date.(emphasis supplied);
16. The trial magistrate in consideration of section 5 of the Commissioners for Oaths Act Cap.5 and section 6 of the Oaths Act. Cap.19 stated that; these are mandatory provisions to state in the Jurat of an oath or affidavit the place and date; and failure to do so would result into striking out the application for being incompetent; the trial Magistrate held that; ***“On perusal of the impugned petition, it is very clear at the jurat that the respondent/petitioner deposed before a commissioner for oaths on the 16<sup>th</sup> day of October 2020. I have no doubt that the commission was a proper one in the circumstances”***.

#### **Determination:**

17. ***Section 5 of Commissioners for Oaths (Advocates) Act Chapter 5*** provides; ***“every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”*** ; section 6 makes it a penalty for unlawfully practising as a Commissioner for Oaths. **Rule**



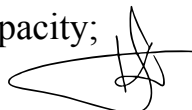
**7 of the rules** provides that: -“*A commissioner before taking an oath must satisfy himself or herself that the person named as the deponent and the person before him or her are the same and that the person is outwardly in a fit state to understand what he or she is doing.*”(underlined for emphasis).

**18.** The facts in **Kakooza John Baptist V. Electoral Commission and Another; and Mohammed Mohammed Majambere Versus Bakaresa Khalil(supra)** (both cited by counsel for the appellant);stem from instances where the deponent does not appear before the Commissioner for Oaths but simply forwards the affidavit, declaration or petition; for instance, in **Mohammed Majambere Versus Bakaresa Khalil M.A No.727 of 2011**, the affidavit in support was just photocopied and the appellant did not appear before the commissioner for oaths who commissioned the affidavit in contravention of section 6 of the Oaths Act, Cap. 19.

**19.** In this appeal; the appellant’s contention is in regard to the different dates when the petition was signed by the petitioner/respondent herein and the date when the petition was commissioned by the commissioner for oaths; counsel for the respondent in MA 130/2020 argued that it was mistake of the Commissioner for oaths to stamp a different date but that the respondent appeared before the commissioner on the date she signed the petition; counsel for the appellant insists that the petition in Divorce Cause No.12 of 2020 is incompetent for not having been verified **before** a commissioner for oaths.

**20.** The intention of section 5 of the act in my view is to ascertain that one’s averments and commitments have been acknowledged by him or her; that there is no doubt that they are hers or his; and that such a person has capacity to make such commitments; it is my considered view that it is when the Commissioner for oaths confirms, signs and stamps that the document becomes valid and attributable to the author; I do not know what law stops a person from making a petition and signs and dates it, then appears before the Commissioner for oaths to confirm that what he or she earlier prepared commits him either by reading through or the document being read for confirmation;

**21.** Court in **Mohammed Majambere Versus Bakaresa Khalil (supra)** stated that; the requirement that a deponent of an affidavit should appear before a commissioner for oaths serves two very important purposes, namely; to identify the person named as the deponent and to assess his/her mental fitness. I believe the fatality would happen if it is proved that the author of the document did not and could never have appeared before the Commissioner for oaths and therefore was not able to fulfil the purpose of commissioning documents;- verifying the identity of the author and the capacity;



22. In absence of any evidence to prove that the petitioner did not appear and could not have appeared and signed before the commissioner for oaths; or that she could not have signed earlier and appeared for commissioning; I would find, in the balance of probability, that the reference to the words ‘before’ or ‘by’ technical semantics; substantive justice would sway me into finding that the petitioner appeared before the commissioner for oaths; in any case she would not have been responsible for the date the Commissioner put on his/her stamp. In **Banco Arabe Espanol v Bank of Uganda [1999] 2 EA 22** court held that the administration of justice requires that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his/her rights."I hold the same view especially where a petition for divorce is concerned and save for strong reasons no one should deny a party from being heard on whether they should stay married or not; I therefore hold that the petition was duly commissioned as it is dated, bears the signature, address and stamp of the commissioner for oaths.

I therefore find no merit in ground one.

*Ground No.2.*

**That the trial Magistrate erred in law when he ruled that the supplementary affidavit in support of the M.A No.130/2020 sworn by Aisu Isaac Nicholas was filed without leave of court thereby reaching a wrong conclusion that the same is/was incompetent and of no evidential value.**

23. In his ruling, the trial Magistrate did not consider the supplementary affidavit sworn by a one Aisu Isaac Nicholas on the basis that the applicant never sought court’s leave to file the same; to which the appellant is aggrieved.

24. For the appellant, it is submitted that the holding of the trial court was a fundamental error and misdirection on law as there was no legal requirement for the applicant/appellant to seek leave of court before filing a supplementary affidavit together with the Notice of Motion and the affidavit in support which were all filed together on the same time and date; counsel submits that leave of court to file a supplementary affidavit in support would only be required if the applicant had filed the application without such additional/supplementary affidavit; counsel prays that this court finds that the supplementary affidavit sworn by Aisu Nicholas was *properly before court*.

25. Court in **Oyiki Sirino Kassiano and Others V. Kampala University UGHCCD Miscellaneous Cause No. 0129 Of 2022** stated that “*The position of the law is that in an application of that nature, all affidavits and pertinent documents should be filed and served on the opposite party before the date*

*fixed for the hearing of the particular application. As such, if a party waits up to after the matter has come up for hearing, and for some reason the matter does not take off, a party seeking to file any supplementary affidavit would need to seek leave of the court and to notify the opposite party. The cut-off point is, therefore, determined by closure of the pleadings in such a matter.”*

26. I have analysed the impugned supplementary affidavit in M.A No.130 of 2020; according to court record, it was filed on 16/11/2020; alongside the notice of motion which was also filed on 16/11/2020; it is undisputed that pleadings hadn't been closed; for the respondent had not yet filed an affidavit in reply; in the context, there was no need for the applicant/appellant to seek court's leave before filing the supplementary affidavit in reply; I want to believe that it is simply called 'supplementary' in reference to its relationship with the affidavit in support of the notice of motion; there was no miscarriage of justice occasioned by the respondent(appellant herein);since she had an opportunity to counter the evidence contained in the supplementary affidavit.

27. I therefore find that the supplementary affidavit sworn by Aisu Isaac Nicholas in support of M.A No. 130/2020 was valid and properly on record and it did not require seeking of leave of court to file it.

Therefore, ground 2 of the appeal succeeds.

*Ground No.3.*

**That the trial magistrate erred in law when he delivered the ruling in M.A No.130/2020 in absence of the application/ appellant and his counsel without directing any notice of the same to them thus infringing the appellant's right to a fair hearing under Article 28 of the 1995 Constitution.**

28. Counsel for the appellant submits that according to the proceedings of the lower court in M.A No.130 of 2020; when hearing closed, the matter was adjourned to the 14/12/2020 at 2:00pm for ruling; on the 14/12/2020, the matter did not take off as the trial Magistrate was indisposed and parties agreed to the 16/12/2020; on the 16/12/2020, the respondent, her counsel and the applicant's counsel were absent, the applicant was present but the ruling was not delivered because the trial Magistrate was indisposed; the matter was adjourned to the 18/12/2020; on the 18/12/2020, the trial Magistrate was indisposed, the matter neither took off nor was it given another date;

29. Counsel submits that in total disregard of the legal requirement to issue or direct a ruling notice to the appellant/applicant, the trial Magistrate proceeded to deliver a ruling dismissing the application in the presence of the respondent and her counsel but in the absence of the applicant and his counsel; that the failure



to issue notices when the ruling was delivered greatly prejudiced the applicant and infringed his constitutional right to a fair hearing, speedy trial and exposed the appellant to a longer trial process of filling a formal application for leave to appeal which would have been saved by oral application for leave to appeal which would have been made immediately after the trial court made a ruling dismissing MA No.130 of 2020.

***Court's consideration of ground 3.***

30. The right to a fair hearing is provided for under **Article 28 (1) of the Constitution of the Republic of Uganda, 1995** which provides that; *"In the determination of civil rights and obligations or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law."*
31. The cardinal principle of natural law that no man shall be condemned unheard is central to our judicial system; **Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639** on the right to be heard states that: *"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."*
32. In **Caroline Turyatemba and others vs Attorney General: Constitutional Petition No. 15 of 2006**; Court held that the concept of a fair hearing involves a hearing by an impartial and disinterested tribunal that affords to the parties before it an opportunity to be heard. This involves giving parties a hearing before it condemns them; the right to fair hearing involves where court follows all procedures correctly and treats all parties equally, so that the trial itself is fair and effective, regardless of the decision and outcome; where a decision is made without hearing the other party that is denial to the right to be heard; but where a matter has been heard and concluded and a decision is given in absence of a party; that in my view is not denying such a party the right to be heard; for a ruling or a judgment is a public document; a communication on the out come of a court process;
33. A right to be heard is premised on where someone still has something to say and a decision is made without their input; I do not believe that the appellant had something to say concerning the ruling; that he would have applied for leave to appeal was moot at the time or that it would have been

heard there and then and granted is also not known; having said that though, the appellant/applicant had the right to be present but he has not demonstrated how his right to be heard was infringed upon; gone are the days when one simply states that his/her rights have been denied without showing how that has negatively impacted them; the appellant had his time to file the application for leave to appeal and a ruling was granted in his favour;

**34.** MA 30 of 2020 was filed on 16/11/2020; the ruling was delivered on 12/2/2021; the application for leave to appeal was filed on 30/03/2021; the orders of court not falling under section 76 of the Civil Procedure Act and O.44 of the Civil Procedure Rules the appellant could not with certainty say that if he had been in court when the ruling was delivered he would have been granted the leave to appeal; the time within which he filed the application for leave to appeal(between 12/2/2021 and 30/3/2021); does not demonstrate that if he had been in court he would have applied earlier;

**35.** I find that the appellant was accorded a right to a fair hearing in M.A No.130 of 2020 before the trial magistrate; failure to issue a notice of ruling did not infringe upon his right to be heard as the ruling of a case emanates from the hearing where the appellant participated.

I find no merit in ground 3 of the appeal.

In the premises, the appeal majorly fails.

Let the Divorce Cause No. 12 of 2020 proceed before the Chief Magistrate.

There is no order as to costs;



Ketrah Kitariisibwa Katunguka

Judge

18/03/2023

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