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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

CIVIL REVISION NO. 5 OF 2015

(ARISING FROM KIRA MAGISTRATE’S COURT CIVIL SUIT NO. 25 OF 2013)

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COLLIN KASULE ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. FINA BANK (U) LTD

2. ANDREW ORYADA ::::::::::::::::::::::::::::::::::::::: DEFENDANTS

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BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

When the application came up for hearing, Mr. Amany Joseph, Counsel for the 1st Respondent raised two preliminary objections.

20 The first one is that the affidavit in support of the application is defective for containing hearsay and falsehoods and that it offends **Order19 CPR**. Mr. Amany argued that the deponent does not state the source of knowledge of the facts, yet the Advocate who deposed the affidavit did not handle the matter in the lower court.

Related to the first objection Mr. Amany advanced the argument that the affidavit is
25 highly contentious and as such it cannot be relied on. To fortify this proposition, Mr. Amany cited the case of **Banco Arabe Espanol vs. Bank of Uganda, SCCA No. 08 of 1998**, which was cited in **Simon Tendo Kabenge & Co. Advocates vs. Mineralacessystems (U) Ltd.HCT-MA-565-2011**. In that case an affidavit supporting

application was rejected for being sworn by an Advocate in the law firm representing the
30 respondents for containing contentious matters not within her knowledge.

The second objection is that the affidavit was deponed by Kizito Farouk in his capacity as
an Advocate of the High Court. Mr Amanyia asserted that Kizito Farouk has no valid
Practicing Certificate (PC) for the year 2015. Mr. Amanyia submitted that a search was
conducted with the Chief Registrar who referred them to the Judiciary website, which
35 showed that Kizito Farouk last renewed his PC on the 08/04/2014. Counsel cited the case
of *Prof. Syed Huq vs. Islamic University in Uganda, SCCA No.47 of 1995* in which it
was held, inter alia, that documents filed by Advocates who have no valid PC for the
current year are invalid. Mr. Amanyia asked court to dismiss the application with costs.

In reply, Mr. Godfrey Kibirige, Counsel for the Applicant, submitted that an Advocate
40 who has no PC is not precluded from swearing an affidavit in support of an application as
witness. Counsel argued that there is no law that bars such an Advocate from giving
evidence either by oral testimony or affidavit on account of not possessing a PC. Mr.
Kibirige also noted that the issue that the Advocate has no valid PC came from the Bar
with no evidence to support it and as such it was inadmissible.

45 On the point of the affidavit evidence being hearsay and full of falsehoods, Mr. Kibirige
argued that the alleged falsehoods were never specified by Mr. Amanyia, and hence
Counsel for the Applicant could not respond to them. Mr. Kibirige also asked court to
dismiss the objections with costs.

The submissions in rejoinder primarily reiterated the earlier ones. In need not to
50 reproduce them to avoid repetition, particularly when the issues are pretty clear and
straight forward.

Opinion:

Regarding the objection that an Advocate with no valid PC cannot swear an affidavit as a witness in an application, the position of the law is now settled. **Section 14A (1) (b) (i)**
55 **Advocates (Amendment) Act, No 27 of 2002** is to the effect that where in any proceedings, for any reason, an advocate is lawfully denied audience or authority to represent any party by any court or tribunal; no pleadings or contract or other document made or action taken by the advocate on behalf of any client shall be invalidated any such event, and the case of the client shall not be dismissed by reason of any such event. Given
60 that the **Prof. Syed Huq vs. Islamic University in Uganda case (supra)** was decided in 1995 prior to the said amendment in the law, the position that documents filed by an Advocate with no valid PC are invalid in is no longer good law.

Apart from the above, the particular objection by Mr. Amanyia in this regard, as I understood it did not concern the filing of documents but the swearing of an affidavit by
65 an Advocate with no valid PC. A cursory look at the affidavit in support shows that it was;

*“Drawn& filed by:
M/s G Kibirige & Co. Advocates
Plot 18B George Street, Nakasero
70 P.O.Box 11545, Kampala.”*

Therefore, even if an Advocate with no valid PC were precluded from filing documents, which is not the position of the law any more, that would not preclude the Advocate with no valid PC from swearing an affidavit as a witness.

75 I must emphasise that validity of a PC is not what makes an Advocate. The PC is only his or her licence to practice law, and absence of a valid PC does not preclude an Advocate from swearing of affidavit as a witness in that capacity or invalidate the affidavit sworn.

The Applicant sought in this application for an order of revision with the view to set aside orders issued by His Worship Komakech Magistrate Grade 1 at Kira Magistrate’s Court.

80 The Learned Magistrate ordered for vacant possession/ eviction of the Applicant from the suit premises comprised in Block 223 Plot 171; yet the Magistrate had adjudged his court as having no jurisdiction to handle the suit in respect of the said property. The application is supported by the affidavit sworn by Kizito Farouq who states, inter alia, that he is an Advocate of the High Court of Uganda, and that it is in that capacity that he was swearing
85 the affidavit.

The content of the affidavit is essentially that the trial court entertained a counterclaim and issued orders of eviction and vacant possession when it had already found that it lacked jurisdiction to entertain the claim emanating from the suit property. The other point concerns the locus standi of the 1st counterclaimant bringing a suit when it had
90 revealed that it had already sold property to third party. The deponent finally states that;

“What is stated herein is true to the best of my knowledge.”

Clearly, Mr. Kizito Farouq deponed the above contents in the affidavit in his capacity as an Advocate and to the best of his knowledge of the law given that the depositions relate majorly to matters of law on the jurisdiction of court and locus standi of parties to bring a
95 suit. Regardless of whether Mr. Kizito Farouq has or has no valid PC, these are issues that would ordinarily be within his personal knowledge of the law as an Advocate of the High Court. Issues of the jurisdiction of a court need not to be deponed to the best of

“information” of an Advocate swearing an affidavit because they are ordinarily expected to be within his/her personal legal knowledge as relates to the subject matter. Equally, an Advocate does not need to swear to such contents “to the best of his or her belief” because law is law, whether the Advocate believes it or not. There is, therefore, no hearsay evidence in what is sworn in the affidavit supporting the application, and as such it does not offend provisions of **Order 19 CPR** as submitted by Mr. Amany for the 1st Respondent.

Similarly, I find that there are no contentious issues that would bar the Advocate from swearing the affidavit. What is in issue is whether the trial court was right to entertain a counterclaim emanating from a suit in which the same trial court had adjudged itself to have no jurisdiction over the subject matter. The Supreme Court has settled this position; and it being the position of the law it is presumed to be within the knowledge of any legal practitioner. In **Mohan Musisi vs. Asha Chand SCCA No.14 of 2002**, it was held that if a court has no jurisdiction over part of the case, it has no jurisdiction to try the case. Any Advocate worth the name would be competent to swear an affidavit on such a matter.

On the specific point that the affidavit in support of the application was sworn by an Advocate with no valid PC, no supporting material for that assertion was furnished by the 1st Respondent. Counsel for the 1st Respondent raised the issue only in his submissions and left it at that simply as an allegation. It is trite law that he who alleges must prove.

Section 101 of the Evidence Act clearly provides that;

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”

Section 102 (supra) further provides that;

125 *“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”*

Section 103 (supra) provides that;

130 *“The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”* [Underlined for emphasis].

See also: *Dr.Vincent Karuhanga t/a Friends Polyclinic vs. National Insurance Corporation & Uganda Revenue Authority, HCCS No.617 Of 2002 (2008)ULR 660 at 665*, cited with approval by the Court of Appeal in *Takiya Kaswahili & A’ nor vs. Kajungu Denis, CACA No.85 of 2011*.

135 Mr. Ahanya furnished no proof to support his assertion that Mr. Kizito Farouq has no valid PC. Merely reference to the Judiciary website is not the proof required under the law. The assertions remain purely as evidence from the Bar which is at any rate inadmissible.

140 I wish to note that even without the contested supporting affidavit of Mr. Kizito, an elaborate formal application is not a strict requirement of the law in revision matters.

Section 83 CPA which provides for revision stipulates as follows;

“The High Court may call for the record of any case which has been determined under this Act by any magistrate’s court, and if that court appears to have—

- 145 (a) exercised a jurisdiction not vested in it in law;
 (b) failed to exercise a jurisdiction so vested; or
 (c) acted in the exercise of its jurisdiction illegally or with material
 irregularity or injustice,

the High Court may revise the case and may make such order in it as it thinks fit;.....”

150 *(Underlined for emphasis).*

It is also the acceptable procedure in revision cases that an aggrieved party may write to the High Court Register drawing his/her attention to the irregularity of a subordinate court and request that the matter be brought before a Judge. It is thus apparent that revision can be brought to the attention of the court even by letter. This position is
155 fortified by the case of *Law Development Centre vs. Edward Mugalu (1990 -1991) 1 KALR 103*. The common practice, however, particularly in the High Court, is that it should be by formal application by way of Notice of Motion.

The rationale of flexibility in procedure for bringing revision application is rooted in the principle under *Section 83 (supra)* which deals purely with jurisdiction of a court as can
160 be discerned in paragraphs in (a), (b) and (c) thereof. Jurisdiction is a fundamental issue that goes to the root of any subject matter and the competence of court to try any case. Therefore, procedural formality of bringing the lack of jurisdiction to the attention of the court is of secondary importance. Jurisdiction of a court takes precedence over all matters including the formality (or lack of it) in the procedure of the pleadings.

165 I find that the objections have no merit. I overrule them and dismiss them with costs, and
order that the application for revision proceeds.

170 **BASHAIJA K. ANDREW**
JUDGE
16/12/2015

Mr. Amany Joseph, Counsel for the 1st Respondent present.

Legal Officer of the 1st Respondent present.

175 Mr. Kibirige Godfrey Counsel for the Applicant absent.

Applicant absent .

Mr. Tumwikirize Court Clerk present.

Court: Ruling read in open Court.

180 **BASHAIJA K. ANDREW**
JUDGE
16/12/2015