

THE REPUBLIC OF UGANDA
IN THE HIGH COURT F UGANDA AT KAMPALA
[LAND DIVISION]
CIVIL REVISION NO.005 OF 2018
(ARISING FROM MAKINDYE CHIEF MAGISTRATES COURT CIVIL
SUIT NO.54 OF 2015)

1. DAVID MUTYABA SEGULANI

2. MARY SEGULAN NANSUBUGA:.....APPLICANTS

VERSUS

1. ERIABU SEBYATIKA

2. VINCENT MAGARA:.....RESPONDENTS

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant brought this application under Section 83 and 98 of the Civil Procedure Act and O.52 r1 of the Civil Procedure Rules for order that;

- i) This Court exercises its powers of revision to set aside the ruling in this matter issued by the learned trial Magistrate the Civil Suit No.54 of 2015 dismissing the Applicants' preliminary objection to the suit and;

ii) Costs

The application is supported by the affidavit of Umar Lukwago who deponed that by reason of the errors set forth, the decision of the trial Court be set aside under the revisionary powers of the high Court.

The Applicants filed submissions in support of the application.

In response, the respondents filed an affidavit in reply deponed by the 1st respondent; Eriab Sebyatika, denying all matters set forth by the Applicant and also questioning the competency of the application; and the supporting affidavit.

In further rejoinder, the Applicant swore another affidavit reaffirming the matters in issue.

The Applicant in submissions raised 6 issues for determination. However, the Respondents in their submissions set forth two responses, sub headings under;

- (a) Competency of the affidavit in support and;
- (b) Competency of the application (merit) which I will deal with first before resolving the listed issues.

In his subjection, Counsel for the respondent pointed out that affidavit I support was affirmed by Umar Lukwago, who stated in paragraph I that he is Counsel for the Applicant. He argued that he is incompetent to swear the affidavit because he is not on record as

Counsel for the Applicant, which contravenes O.19 r3 of the Civil Procedure Rules; since he is not party to the case.

Secondly, even if he was Counsel, then still, his affidavit violates the Advocates (Professional Conduct) Regulations which bar an Advocate from swearing an affidavit for a client in a matter he appears in as Counsel.

Both objections above were not rebutted in submissions in rejoinder, but were responded to by the Applicant's affidavit in rejoinder by Umar Lukwago, in which he confirms that he was one of the Counsel having the conduct of the case, and *'have been one of the legal representatives of the Applicants at all material times and therefore have the capacity to affirm this affidavit'*

This admission puts this affidavit in the category described in ***Banco Arabe Espanol versus Bank of Uganda; SCCA No.08/98*** where the Supreme Court held that;

"an affidavit sworn by Counsel for the respondent was defective and should not be allowed in evidence"

The gist of this position is premised in the provisions of Regulation 9 of the Advocates (Professional Conduct) Regulations, and Rule 7 of the Commissioner for Oath Rules.

The Regulation imports the legal position that Counsel cannot be a witness in the same case he is representing.

This Court held in Kasaija Robert versus Nasser Iga and Abdu Ngobi; (HCT-04-CS-004/2014) Mbale that;

“the position above as espoused in R V Secretary for state for India (1941) 2 ALL ER.546 that cause should not act as Counsel and witness in the same case; the position was put in further clearer perspective by Yunus Ismail t/a Bombo City Store versus Alex Kamukamu & Ors; t/a O.K Bazari (1992)3 KALR 113 (SCU) which went further to state that;

“this regulation shall not prevent an Advocate from giving evidence verbally or by declaration or affidavit on formal or non-contentious matter in which he acts or appears”.

The affidavit in rejoinder of Umar Lukwago is not departing to format non contentious matters as revealed in paragraph 7 - 8; & 9 which refers to matters *locus standi*, property rights, jurisdiction and trespass.

This affidavit is therefore fatally defective as argued by Counsel for the respondents. It violates the Advocates (Professional Conduct Regulations) is accordingly struck out.

b) On the merits of the application, the Applicants prays for revision. Section 83 of the Civil Procedure Act which the Applicants is premised provides that;

the High Court may call for the record of any case which has been determined under this Act by any Magistrate's Court if that Court appears to have;

- a. Exercised a jurisdiction not vested in it in law,*
- b. Failed to exercise a jurisdiction so vested or;*
- c. Acted with illegality, irregularity or injustice.*

Counsel's argument is that there was no final determination of any matter for the Court to be called upon to revise the same.

I do agree.

Revision is a remedy resorted to correct errors, omissions or mistakes, illegalities committed in the exercise of jurisdiction by a trial Court in determining a matter.

Looking at the matter before me, the lower Court is still hearing the case. There was no determination of anything including the preliminary objection which was raised. The learned trial 1 magistrate is on record and address the concerns during defence hearing.

It is therefore premature to raise a revision on a matter which Court has opted to consider at the final end of the trial. In any case, revision can only accrue where there has been finality of determination.

According to Black's **Law Dictionary 9th Edn. Pg514**, determination is defined as '*a final decision by a Court or administrative agency*'.

Going by that definition, it is clear that no final determination of Civil Suit No. 54 of 2015 has been pronounced to warrant a revision. I also reiterate the concern of my brother *Hon. Justice Batema N.D.A* in ***Bwambale Byasaki versus Shaka Augustine; MA No.0064 of 2014***, regarding a similar matter thus;

"no reasonable Court would entertain an application for revision orders against every procedure error or step wrongly or irregularly taken by a trial Court before the matter is finally determined by the Magistrate's Court".

As rightly argued by Counsel for the respondents, there is no merit in this application as no final decision that has been made by the learned trial magistrate in Civil Suit No.65 of 2015 to warrant an application for revision.

On the two grounds raised by Counsel for the respondents, I find no merit in all the grounds raised in this application as the application is defective and incompetent.

It is accordingly dismissed with costs to the Respondents.

I so order.

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Henry I. Kawesa

JUDGE
09/04/2020.