

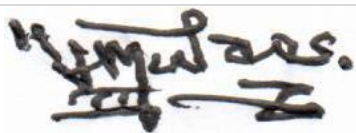


1. That the applicant through his lawyers M/S Waluku, Mooli & Co. Advocates filed Civil Suit No. 28 of 2020 against the 1<sup>st</sup> defendant for fraudulent acquisition of land and prayed for a declaration that he is the lawful owner of the suit land approximately 37 acres; a permanent injunction restraining the defendant from continued trespass; general damages; cancellation of title; interest and costs of the suit.

2. That the applicant later instructed the current advocates and upon perusal of the plaint, it was discovered that in 2016, Uganda People's Defense Forces (UPDF) had established barracks and buried the people who lost their lives in 2016 Rwenzururu Palace crossfire, on the suit land without compensating the applicant. That it was also later established that Uganda Prisons Services has established a prison on the suit land without compensating the applicant.

3. That the addition of the new parties and the amended plaint is aimed at finding a binding a lasting solution between the parties and avoid multiplicity of pleadings. That the amendment was made in good faith and will not cause any injustice to the Respondents. That it is only fair and just that the plaint is amended by adding the Attorney General and the Commissioner Land Registration as a 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendants respectively and to have the plaint amended.

**Reply for the Respondent:**

A handwritten signature in black ink, appearing to read 'M. Waluku' or similar, with a stylized flourish below it.

The application was opposed by the 1<sup>st</sup> respondent through the affidavit of Baluku James, the Senior Management Land Officer for the 1<sup>st</sup> Respondent who contended thus:

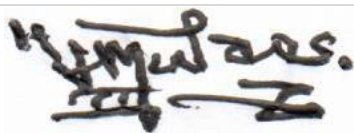
1. That the application and the supporting affidavit contain material falsehoods.

5 That the application is thus incurably defective and same should be struck out with costs. That the affidavit in support of the application was deponed by an advocate from the law firm that represents the Applicant who did not disclose the source of facts deponed to and thus the application is based on hearsay.

10 2. That the affidavit in support of the Application offends the law as counsel is acting as a witness in the same case yet the application touches contentious factual matters not ordinarily within the knowledge of the deponent.

15 3. That the amendment seeks to introduce a new cause of action to wit; that the applicant is a lawful kibanja holder of 37 acres on the suit land an allegation that was not in the original plaint that is sought to be amended. That the proposed amended plaint also seeks to introduce a new claim that the 1<sup>st</sup> defendant's certificate of title be cancelled, a claim that was not in the plaint  
20 sought to be amended. That if the proposed amendment is granted, it shall cause injustice to the 1<sup>st</sup> Respondent.

25 4. That the application was filed in contravention of the law as such the same should not be granted. That in the alternative if court is inclined to grant leave to amend the plaint, then the costs should be borne by the Applicant.



### **Rejoinder for the Applicant:**

In rejoinder, Ms. Masika Sandra averred thus:

1. That the application in issue is competent before court, good in law and not based on falsehoods as claimed and not an abuse of court process. That the deponent disclosed the source of information contained in the affidavit in support of the application under paragraph 4 of the said affidavit.
2. That the proposed amendment does not disclose a new cause of action as the claim for the applicant is a kibanja/customary interest in 37 acres of the suit land and was part of the cause of action against the 1<sup>st</sup> Respondent. That the proposed amended plaint does not disclose a new claim as regards cancellation of the Respondent's title as the same was part of the declaratory orders sought by the applicant in the original suit. That the Application is brought in good faith and it is in the interests of both parties.

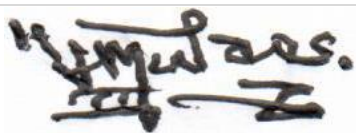
### **Representation and Hearing:**

Mr. Musimenta Stuart of M/s Tropical Law Advocates appeared for the Applicant while Mr. Samuel Kiriaghe of M/s MRK Advocates appeared for the Respondent. Both counsel proceeded by way of written submissions which I have considered in this ruling.

### **Issues:**

I find the following as issues at the heart of this application thus;

- 1. Whether the affidavit in support of the application is defective.**



**2. Whether the applicant should be granted leave to amend the plaint.**

**RESOLUTION:**

**Issue No. 1: Whether the affidavit in support of the application is defective.**

5

**Submissions for the Respondent:**

It was contended that the applicant's supporting affidavit was incompetent for having been deponed by an advocate who is handling the matter and the other in relation to the affidavit in support offending Order 19 of the Civil Procedure Rules.

10

**i. Affidavit being deponed by counsel representing the applicant:**

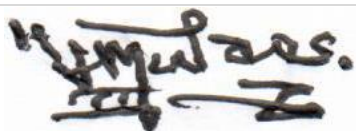
Learned counsel for the 1<sup>st</sup> Respondent contended that the affidavit of Masika Sandra, an advocate in Tropical Law Advocates the very firm representing the applicant is defective for offending Regulation 9 of the Advocates (Professional Conduct) Regulations.

15

Learned counsel cited a number of authorities to support his position to wit; *Banco Arabe Espanol Vs. Bank of Uganda, SCCA No. 008 of 1998* where it was held that *"an affidavit sworn by Counsel for the respondent was defective and should not be allowed in evidence"*.

20

Counsel also cited the case of *David Mutyaba Sgulani & Anor Vs. Eriabu Sebyatika & Anor, High Court Civil Revision No. 005 of 2018* where the affidavit

A handwritten signature in black ink, appearing to read 'Mutyaba S.', is located at the bottom of the page.

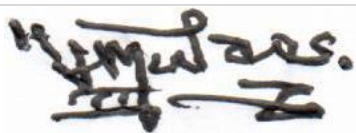
that had been deposed by counsel for the Applicant in a contentious matter involving allegations of property rights and trespass was found to be defective.

Learned counsel also cited the case of *Kasaija Robert Vs. Nasser Iga& Anor*,  
5 *Misc. Cause No. 04 of 2016* where court observed against the acting of counsel as counsel and witness in the same case except in only formal and non contentious matters.

Learned counsel also invited court to section 1 of the advocates Act which defines  
10 contentious business and argued that the matter in issue is contentious and such it is unlawful for the advocate from the firm representing the applicant to deponent the affidavit in support of this application. It was contended that this is an illegality prohibited by law and this court should not condone such illegality.

15 **Submissions for the Applicant:**

In response, Mr. Stuart for the Applicant contended that the affidavit deposed by Mr. Masika Sandra is valid and that regulation 9 of the regulations does not apply. Learned counsel cited the case of *Three Ways shipping services (Group) Ltd Vs. Mtn (U) Ltd*, *Misc. Application No. 584 of 2013* where court while considering a  
20 similar issue held that regulation 9 does not prohibit an advocate from deposing affidavits on matters within their knowledge. That for regulation 9 to apply, the matter must be highly contentious, that is one where an advocate should have discerned that he would be required or be called as a witness. That it was further observed that facts discovered on perusal of the file are facts within the knowledge  
25 of the advocate on which he can depone an affidavit and thus such an affidavit

A handwritten signature in black ink, appearing to read 'M. Stuart', is written over a horizontal line.

cannot be said to have contravened the law. Learned counsel thus contended that regulation 9 does not apply to the affidavit in issue.

### **CONSIDERATION BY COURT:**

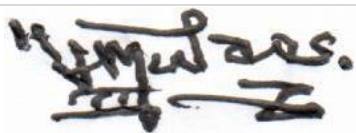
5 Regulation 9 of the **Advocates (Professional Conduct) Regulations S.I 267 – 2** provides as follows –

**“Personal involvement in a client’s case.**

10 *No advocate may appear before any court or tribunal in any matter in which he or she has reason to believe that he or she will be required as a 6 witness to give evidence, whether verbally or by affidavit; and if, while appearing in any matter, it becomes apparent that he or she will be required as a witness to give evidence whether verbally or by affidavit, he or she shall not continue to appear; except that this regulation shall not prevent an advocate from giving evidence whether verbally or by*  
15 *declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.”*

In *Electro Max Uganda Ltd Vs. Oryx Oil Uganda Ltd*, HCMA No. 25 of 2021 *Wamala J* observed citing rule 9 of the Advocates (Professional Conduct) Regulations S.I 267-2 thus:

20 *“It is clear to me that the above regulation is not meant to bar an advocate from giving evidence on behalf of a client. It is meant to bar an advocate from appearing before a court on behalf of a client when the advocate is a witness or a potential witness in a contentious matter. According to the*  
25 *guidance in the decision of Uganda Development Bank vs. Kasirye*



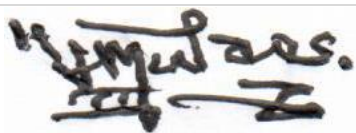
*Byaruhanga & Co. Advocates, SCCA No. 35/1994, an advocate who finds him/herself in such a situation has to choose whether to act as a witness or as Counsel. As such, where an advocate depones to an affidavit in support of an application in a contentious matter, his/her professional duty is not to, at the same time, appear in personal conduct of the matter. Where such an advocate does not act in personal conduct of the matter, there is no contravention of the provision in the cited regulation.”*

In the affidavit before me, the deponent Masika Sandra indicated under paragraph 1 thus: “*That I am a female adult Ugandan of sound mind, an advocate working with the Applicant’s lawyers’ law firm, M/s Tropical Law Advocates and I depone this affidavit in that capacity*”. The deponent indicated the capacity in which she deposed the affidavit. The deponent was not the same lawyer appearing for the applicant. I therefore find that regulation 9 of the **Advocates Professional Conduct) Regulations S.I 267 – 2** does not apply to the affidavit of Masika Sandra in this case. Therefore, I agree with Mr. Stuart that the point of law has no merit and it is overruled.

**ii. Affidavit offending Order 19 rule 3 of the Civil Procedure Rules:**

**Submissions for the Respondent:**

It was argued for the applicant that the affidavit of Masika Sandra offends Order 19 rule 3 of the Civil Procedure Rules. That under paragraph 5 and 6 of her affidavit, she purported to state factual matters which are ordinarily not within her personal knowledge without disclosing the source or how she became aware of the





alleged facts; that her affidavit is thus based on hearsay and thus fatally defective and liable to be struck out with costs to the 1<sup>st</sup> respondent.

### **Submissions for the Applicant:**

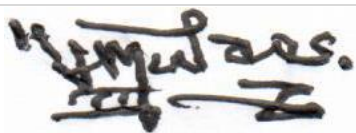
5 In response Mr. Stuart contended that Order 19 rule 3 (1) of the Civil Procedure Rules limits a party to deponing on matters that are within his or her knowledge. He invited me to the case of *Businge & Anor Vs. Gianluigi & Anor*, HCMA No. 203 of 2013 where court in interpreting Order 9 rule 3 observed that an affidavit is deponed by a person who is in knowledge of the facts in issue. That it was further  
10 observed that it is a practice of firms to discuss case files they have been instructed to handle and in such a situation an advocate who is in knowledge of the facts is competent enough to depone an affidavit. It was contended that the application in issue is based on matters of law which can only be deponed to by an advocate or a lawyer and not a party. Learned counsel asked me to find no merit in the point of  
15 law.

### **CONSIDERATION BY COURT:**

Order 19 rule 3(1) of the Civil Procedure Rules provides thus:

**“Matters to which affidavits shall be confined.**

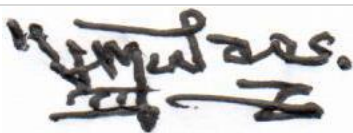
20 *(1) Affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his or her belief may be admitted, provided that the grounds thereof are stated.”*

A handwritten signature in black ink, appearing to read 'K. M. P. S.', is located at the bottom right of the page.

Therefore, matters deponed about should be those within someone's knowledge. This does not in any way exclude advocates. Justice Muhanguzi JSC in *Mbarara Municipal Council Vs. Jetha Brothers Ltd, Supreme Court M.A no. 10 of 2021* stated thus: "...In my view, affidavits can be sworn by anyone to prove a set of  
5 *facts and an advocate is not an exception. An advocate is therefore not prohibited to swear an affidavit where necessary especially on matters that are well within his knowledge.*"

In the application before, the deponent indicated under paragraph 4 that; 'On  
10 *perusal of the file, I realized that very important parties had been left out depending on the orders that had been sought.*' She further stated under paragraph 5 that; 'That it was also discovered that in 2016 the Uganda People Defense Forces (UPDF) had established barracks and buried the people who lost their  
15 *lives in the 2016 Rwenzururu place crossfire on the suit land without compensating the applicant.*' She further stated under paragraph 6 that; 'That it was also discovered that the Uganda Prisons Service had established a prison on the suit land without compensating the applicant.'

The applicant also attached an amended plaint and other annexures to wit; a letter  
20 dated 13<sup>th</sup> September 2016 by Lt Col. Richard Kiwanuka, the Brigadier Commander of Uganda Peoples Defense Forces addressed to Mr. Muhindo Selvesto which made refence to his dated 8<sup>th</sup> September 2016 regarding compensation for his land where UPDF established a detach. There is also a letter by Mr. Katikiro Alex, the Physical Planer of Kasese Addressed to the Chief  
25 Administrative Officer of Kasese where he indicated in paragraph 2 that; 'The



*technical inspection report dated 6/4/2000 (marked A) by the then Staff Surveyor indicated that the land was being utilized for office, dispensary and school buildings and farming by Prison department...'*

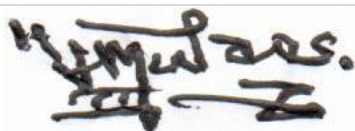
5 Those letters were before the advocate who deponed the affidavit in support of the application. Therefore, the contents of paragraphs 5 and 6 of the affidavit in support of the application, were known to the deponent because he perused the said letters and the same were attached to her affidavit in support of the Notice of Motion. These facts were therefore known to the deponent at the time she deponed the  
10 affidavit in support of the application. Therefore I do not consider these facts to be hearsay to the deponent. I find that these facts were matters within the knowledge of the deponent Masika Sandra. As such I find no merit in the point of law raised and the same is overruled.

15 **Issue No. 2: Whether the applicant should be granted leave to amend the plaint.**

Order 6 Rule 19 of the Civil Procedure Rules governs the amendment of pleadings and it states thus:

20 *“Court may at any stage of the proceedings, allow either party to alter or amend his or her pleadings in such a manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties”*

25

A handwritten signature in black ink, appearing to read 'M. Masika', is written over a horizontal line.

Amendments are paged on the need for courts to determine the real questions in controversy between the parties and to avoid multiplicity of pleadings. Where it appears that the way in which a party has framed his case will not lead to a decision on the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right. (*See Cropper v Smith (1884) 26 Ch. D. 700 (CA)*).

The primary purpose of amendment is to give parties an opportunity to plead specific particulars which will aid court in determining the controversy between them to the logical conclusion. The main intention is to ensure that those other facts which a party did not plead but are relevant to the issue under adjudication by court are pleaded so that all the issues in controversy are fully investigated to minimize multiplicity of proceedings on issues which would be handled in one suit without parties filing different suits.

The grounds upon which court may exercise its discretion to grant leave or not were well laid down by the Supreme Court in *Gaso Transport Services Limited v Martin Adala Obene SCCA 4 of 1994 [1994] VI KALR 5* to include:

1. *The amendment should not work injustice to the other side.*
2. *An injury that can be compensated for by way of costs is not treated as an injustice.*
3. *The multiplicity of proceedings should be avoided as far as possible and all amendments, which avoid such multiplicity, should be allowed.*
4. *An application which is made mala fide should not be granted.*

***5. No amendment should be allowed where it is expressly or impliedly prohibited by any law (Limitation of Action).***

The above grounds were re-echoed by Justice Boniface Wamala in *Okello Wilbert Vs. Obel Ronald, High Court Misc. Application No. 097 of 2020*, where he stated the grounds in the following terms:

***(a) Amendments are allowed by the courts so that the real question in controversy between the parties is determined and justice is administered without undue regard to technicalities.***

***(b) Amendment should not work an injustice to the others side. An injury that can be compensated by an award of damages is not treated as an injustice.***

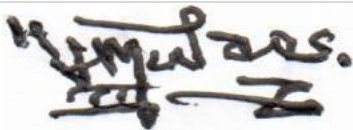
***(c) Multiplicity of pleadings should be avoided as far as possible and all amendments which avoid such multiplicity should be allowed.***

***(d) An application that is made malafide should not be granted.***

***(e) No amendment should be allowed where it is expressly or impliedly prohibited by law.***

***(f) The court shall not exercise its discretion to allow an amendment which has the effect of substituting one distinct cause of action for another.***

In this case, it is contended for the applicant that there is need for amendment to specifically include parties that are necessary to have the applicant's claims fully investigated. It is contended that the Uganda People's Defense Forces (UPDF) and Uganda Prisons had trespassed on the suit land and the applicant claims compensation and other reliefs in the plaint against them. That the proposed



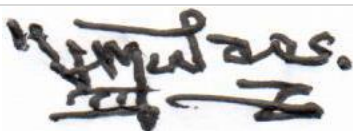
amendment will enable court to determine the real question in controversy between the parties.

I have considered the notice of motion, the supporting affidavit and annexures thereto as well as the affidavit in reply and the submissions of both counsel. I believe and find that the amendment will help clearly bring out the applicant's claim against all the respondents. The amendment will help to avert multiplicity of pleadings since all claims by the applicant against the Respondents shall be handled in a single suit. Further the amendment is not barred by law.

I find that the amendment does not introduce a new cause of action as alleged by the 1<sup>st</sup> Respondent. The cause of action is the same; what the applicant seeks to add are the two respondents as defendants. I believe the application for amendment was not made mala-fide and it will not cause any injustice to the 1<sup>st</sup> Respondent since the 1<sup>st</sup> Respondent in one of its correspondences admit that part of the suit land is occupied by UPDF and Uganda Prisons and the applicant wants to add the Attorney General to account for their occupancy of his land.

The application is hereby granted with the following orders:

- 1. The Applicant shall file and serve an amended plaint within 15 days from the date of delivery of this ruling.**
- 2. The defendants shall file and serve their respective written statements of defense within 15 days from the date of service.**



3. A reply to the written statement of defense if any shall be filed within 10 days from the date of service.

4. The case is accordingly fixed for mention on the 10<sup>th</sup> of July 2023.

5

5. Each party shall bear own costs.

It is so ordered.

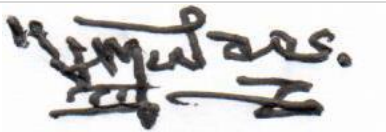
Dated at High Court Fort-portal this 30<sup>th</sup> day of June 2023.

A handwritten signature in black ink, appearing to read 'Vincent Wagana', with a stylized flourish underneath.

10

Vincent Wagana

High Court Judge

A handwritten signature in black ink, appearing to read 'Vincent Wagana', with a stylized flourish underneath.