

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION

MISC. APPLICATION NO. 0220 OF 2024

(arising from Civil Suit No. 1003 Of 2023).

1. BARUNGI RICHARD
2. MUHANGI GEORGE :::::::::::::::::::::::::::APPLICANTS/COUNTER-DEFENDANTS

VERSES

1. KAWESA SAM
2. KAWESA ERNEST :::::::::::::::::::::::::::RESPONDENTS/COUNTER-CLAIMANTS

BEFORE: HON LADY JUSTICE NABAKOOZA FLAVIA . K

RULING

1. This Application was brought by Chamber Summons under **Section 33 of the Judicature Act; Section 7 and 98 of the Civil Procedure Act and Order 6 Rule 29 and 30 of the Civil Procedure Rules**. It seeks orders that:
 - a. The Respondents' counterclaim in High Court Civil Suit No. 1003 of 2023 does not disclose a cause of action against the Applicants.
 - b. The Respondents' counterclaim in High Court Civil Suit No. 1003 of 2023 be struck out with costs for being res judicata.
 - c. The Respondents' counterclaim in High Court Civil Suit No. 1003 of 2023 is frivolous, vexatious, bad in law, is wastage of court's time and amounts to an abuse of court process.
 - d. Costs of this Application be borne by the Respondents.
2. The grounds of the application as stated in the application are expounded in the affidavit deposed to by the 1st Applicant. He avers that the applicants were co-defendants in HCCS No.1003 of 2023 (main suit); that the Respondents filed a defence and a counterclaim against the Applicants and the Commissioner for Lands Registration which suit was dismissed on 31/10/2023 for being time barred but the counter-claim survived. That the proprietary interest in land comprised in Kyadondo Block 215 Plot 939 were

heard and determined in HCCS No.105/2006. That allowing the Respondents to proceed with the counter-claim while the issues raised therein are res-judicata and without a cause of action shall amount to an abuse of court process.

3. The Respondents opposed the application and filed their affidavits in reply wherein they deposed that they are the surviving Administrators of the estate of the Late Erenesiti Kawesa. The counter-claim is a separate suit and is not time barred as the fraudulent transfers were done in July 2023 after court had decreed in Civil Suit No. 105/2006. That Civil Suit No. 105 of 2006 was between different parties that is, Nakitto Sarah (Administrator of the estate of the late Kawesa) against Nakiwala Safina, Buyongo Kim and Nambatya Maastullah (administrators of the estate of the late Ahmed Sembatya), while the present suit is between the Respondents and the Applicants together with the Commissioner Land Registration. That the Judgement in HCCS No 105/2006 was vacated and waived in Civil Appeal No. 297/203 which decreed that the suit land belongs to the estate of the late Alima and Ahmed and not the Applicants. Further, that the counter-claim discloses a cause of action for fraud against the Applicants and the Commissioner for Land Registration; and it is not frivolous and vexatious as it is intended to administer justice, cancel the fraudulent transactions and end the un-just enrichment of the Applicants.

4. Representation: Counsel Muhangi George represented himself (2nd Applicant) and the 1st Applicant while the Respondents were represented by Counsel Wasswa Fahad.

Preliminary Objection

5. Counsel Wasswa Fahad objected to the representation of the 1st Applicant by the 2nd Applicant. He submitted that Counsel is in conflict since he was also representing himself as a party to the application.

6. In reply Counsel Muhangi George submitted that there was no law barring him from representing himself and the 1st Applicant. There is no conflict of interest in the matter nor will the Respondents be prejudiced by this representation. That Counsel did not quote any law to prove his representation a nullity or that it would be a conflict of interest if he was representing the Respondents and himself.

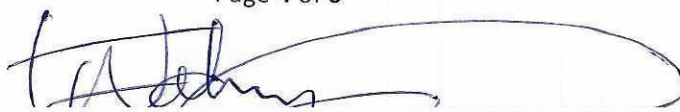
7. In rejoinder, Counsel for the Respondents referred court to Regulation 9 of the **Advocates (Professional Conduct Regulations)**, SI 267 which provides that:

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 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 declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears.

8. Further, that the 2nd Applicant gave the 1st Applicant (**Barungi Richard**) authority to depone an affidavit in support of the application. That having given such authority, it is clear that the 2nd Applicant will give evidence of some point as he did through Barungi Richard by virtue of the consent and will also give evidence in the main suit by way of witness statements. That the out-come of this application will benefit him. He prayed that the 2nd Applicant should not represent the 1st Applicant but only represent himself.
9. In reply with leave of court, Counsel for the Applicants submitted that the Respondents cited the aforesaid Regulation but read half of it by stating that 'no advocate may appear' and left out "except that this Regulation shall not prevent an advocate from giving evidence either verbally or declaration or affidavit on a formal or non-contentious matter or fact in any matter in which he or she acts or appears." It was Counsel's submission that the provisions of the Regulation bar him from appearing as a witness of the Respondents and that is where there is a conflict. That in this case, he is a party and the 1st Applicant is also a party thus he is not barred from representing the 1st Applicant. Further, that the only witness in this application whom they intend to cross examine is the 1st Applicant and for him, (Muhangi George) does not appear in the record as a witness to disqualify him from representing the 1st applicant. If the respondent had applied to cross-examine counsel George Muhangi (2nd Applicant) then he would be a

witness. He does not have any affidavit on record where they intend to cross-examine him and the reference to the main suit would be of advantage of both parties where he will be required to give evidence in form of witness statements unlike in this application. That if he is made a witness in the main suit, then counsel's objection will be properly raised in the main suit. Counsel prayed that the objection is over-ruled and counsel cross-examines the 1st Applicant.

10. I have carefully considered Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267-2 from which the preliminary objection is premised. Its provisions have already been reproduced above. In **M/s Quality Uganda Ltd Vs Uganda Performing Rights Society & 4 Ors HCCS No. 444/ 2019**, Justice Wamala Boniface noted that Regulation 9 deals with incompatibility of the role of an advocate and witness in the same case, and not conflict of interest. Conflict of interest is dealt with in other regulations such as Regulation 4 and 10 of the Advocates (Professional Conduct) Regulations SI 267-2. A similar observation was made in the case of **Henry Kaziro Lwandasa Vs Kyas Global Trading Co. Ltd(supra)**.
11. It is apparent that in the submissions, Counsel for the Respondents pointed out that counsel Muhangi is conflicted when he represents himself and the 1st Applicant. As noted already, Regulations 4 and 10 above apply to conflict of interest.
12. As my learned brother Mubiru J., stated in **Hermon Tesfald Ghebrat Vs Marlin Advocates & Anor HCMA No. 196/ 2020**, conflict of interest is "*any situation in which an individual or corporation is in position to exploit a professional or official capacity in some way for their personal or professional benefit*". Further, courts have evolved a test to be applied to determine whether a conflict of interest exists so as to preclude an Advocate from conducting the case before the court. Justice Mubiru also pointed out that for a conflict of interest to arise, there must be a fiduciary relationship such as one that exists between an Advocate and a Client (**Hermon Tesfald Ghebrat Vs Marlin Advocates & Anor**). Similarly, in **Ayebazibwe Vs Barclays Bank (U) Ltd (Cs No. 162/2012) Madrama J** (as he then was) held that, an Advocate is prohibited from representing a party litigating against a former client on the subject a former client has ever instructed Counsel in question.



13. Therefore, for a party to raise conflict of interest as a ground to disqualify an opposite Counsel, he or she has to prove that they had a previous engagement and that any evidence of such a Counsel has may be used against him/her. The Counsel against whom the objection lays must have had an established fiduciary relationship with the party raising the objection and also obtained confidential information from him or her.
14. It is quite obvious that provisions and the elucidated principles on conflict of interest are inapplicable to the instant case since the 1st Applicant's Counsel has never had any fiduciary relationship with the Respondents. Having ruled out on the provisions of **Regulations 4 and 10 of the Advocates (Professional Conduct) Regulations**, supra, I shall now turn those under **Regulation 9**.
15. It was observed by the Supreme Court in **Uganda Development Bank Vs Kasirye, Byaruhanga & Co. Advocates SCCA No. 35/1994** that, *"there are exceptions to Regulation 9, in case of an advocate acting as a witness and counsel in formal and non-contentious matters"*.
16. The word "contentious" in as far as judicial proceedings are concerned is defined by the Black's Law Dictionary to mean *"a judicial proceeding not merely ex parte in its character, but comprising attack and defense as between opposing parties"* (**Henry C., B. (1968). "Black's Law Dictionary", 4th Edn. Rev., West Publishing Co., page 1325**).
17. In this case, the matter before court is not ex parte; and what is asserted in the application and affidavit in reply involves an attack and defense by the parties. For that cause, I find that the matter is contentious and that the exception under **Regulation 9 of the Advocates (Professional Conduct) Regulations** does not apply to it.


In M.P Electronics Ltd & Anor vs. DFCU & Others HCMA No.510 of 2023, Justice Stephen Mubiru rightly observed that **Regulation 9 of The Advocates (Professional Conduct) Regulations** *"prohibits counsel from serving as advocates in the same cases in which they may be required to testify - The rule thus operates to disqualify an advocate only when the advocate*



involved 'will be required as a witness to give evidence whether verbally or by affidavit'".

18. In this case, it is clear that the 2nd applicant is Counsel and as well as a witness having given the 1st applicant authority to depose an affidavit on his behalf. There is no reason why he did so yet he is within the jurisdiction of court and is not a corporation but at the same time wants to be Counsel in the same matter. Considering the above observations, the 2nd applicant cannot be a witness and a Counsel for the 1st applicant at the same time. This court finds that his representation of the 1st applicant violates **Regulations 9 of the Advocates (Professional Conduct) Regulations.**
19. Consequently, the preliminary objection is hereby sustained. The 1st applicant is directed to find another Advocate so that the application proceeds for hearing on its merits.

Signed, dated and delivered at Kampala this 23rd day of 05 2024.


Nabakooza Flavia. K
Judge