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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMPALA

(CORAM: MANYINDO D.C.J., KATO, J. & BERKO, J.)

CIVIL APPEAL NO.27 OF 1996

B E T W E E N

BAKUNDA DARLINGTON ..... APPELLANT

A N D

DR. KINYATTA STANLEY ..... 1ST RESPONDENT

FRANK NTAHO ..... 2ND RESPONDENT

(Arising from Election Petition No.18  
of 1996, earlier filed as No.1 of 1996  
at Kabale High Court)

JUDGMENT OF THE COURT:

This is an appeal by the appellant Darlington Bakunda. The appeal is against the decision of Lugayizi J. The respondents are Dr. Kinyata, B.J. Stanley and Frank Ntaho. Returning Officer Rukungiri District. Brief facts leading to this appeal as may be gathered from the records of the court below are as follows:- The appellant was a Parliamentary candidate for the constituency of Kinkizi East in the district of Rukungiri in the elections which were held on the 27/06/96. He contested with the first respondent Dr. Kinyata who



won the elections. The appellant petitioned the High Court for an order that the elections be set aside and new elections held in that constituency. When the petition came up for hearing the appellant's counsel applied to the court to permit him to amend the affidavit accompanying the petition because in his (counsel's) view the affidavit was not sufficient. The court heard the application and dismissed it on the ground that it was incompetent as the affidavit which was to be amended had been sworn before an advocate who had no practising certificate. The court then struck out the petition for incompetence as it was not accompanied by an affidavit as required by law. The appellant was ordered to pay the two respondents the costs of that application. The appellant being dissatisfied with that decision, appealed to this court against the ruling.

In his memorandum of appeal the appellant gave two grounds of appeal which are as follows:-

1. That the learned Judge erred in law in finding that the failure by a Commissioner for Oath to renew a certificate enabling him to practice as an advocate of the High Court rendered the petitioner's affidavit sworn before him annulity and consequently his decision to strike out the petitioner's petition was wrong.
2. That the learned Judge failed to exercise his discretion judiciously in ordering the costs of the petition to be borne by the appellant despite clear evidence of the fact that the errant Commissioner of Oaths in question was not the advocate for the Petitioner nor had he revealed to the petitioner, his advocate or any other person the fact of his failure to renew his practising certificate.

At the hearing of the appeal the learned counsel for the appellant Mr. Byenkya decided to abandon the second ground of appeal on the ground that he had included it in his



memorandum of appeal while suffering from the impression that the order made by the trial Judge for costs was intended to cover the costs of the petition and the application but after some reflection he discovered that the costs were only in respect of the application but not the petition. In view of that discovery he saw no point to argue the second ground of appeal. He accordingly abandoned it and proceeded to argue the first ground of appeal only.

The learned counsel Mr. Byenkya at the very beginning of his submission made it clear to the court that he was not appealing against the refusal by the Judge to grant him leave to amend the affidavit but his appeal was based purely on a point of law which was whether the affidavit presented to the court did not amount to an affidavit in law as was decided by the trial court.

Judging from the arguments of the three advocates who appeared for the appellant and the two respondents, two points came out as central points. The first point is <sup>(1)</sup> whether an advocate who has been appointed as commissioner for oaths under the provisions of Section 2 of Commissioner for Oaths (Advocates) Act can continue to serve as commissioner for oaths after his practising certificate has expired. The second point which came out was <sup>(2)</sup> what is the effect of an oath or affidavit taken before a commissioner for oaths who is an advocate and whose practising certificate had expired at the time he administered the oath. It is on these two points that most of the arguments centred. We shall deal with these two points separately starting with the first point first.

The provisions of Section 2 of the Commissioner for Oaths (Advocates) Act which was the main issue in this matter reads as follows:-

"2. (1) The Chief Justice may, from time to time, by commission signed by him appoint persons being practising advocates who have practised as such for not less than two years in Uganda immediately prior to making any application

for appointment and who are certified to be fit and proper persons by two other practising advocates to be commissioners for oaths, and may revoke any such appointment.

Provided that the power to revoke a commission shall not be exercised till the commissioner in question has been given an opportunity of being heard against any such order of revocation.

(2) Each commission signed as aforesaid by which any commissioner for oaths shall be appointed shall bear a revenue stamp of the value of one thousand five hundred shillings to be paid for by the commissioner for oaths therein named; but no other charge or fee shall be made or be payable in respect of such appointment or in respect of anything requisite to be done to perfect the same.

(3) After the said commission shall have been duly signed and stamped as hereinbefore provided, the appointment of the person therein named as a commissioner for oaths shall be forthwith published in the Gazette.

(4) Each commission shall forthwith terminate on the holder thereof ceasing to practise as an advocate.

Mr. Byankya the learned counsel for the appellant was of a firm view that an advocate who has been commissioned by the Chief Justice to serve as a commissioner for oaths may continue to act as a commissioner for oaths even after his practising certificate has expired. He also argued that the word "cease" appearing in sub-section 4 of section 2 of the Act only applied when an advocate has completely stopped serving as an advocate but not when he has temporarily suspended his activities as an advocate while waiting for his



practising certificate to be renewed.

Mr. Mwesigwa Rukutana the learned counsel for the first respondent disagreed with him (Mr. Byenkya) on this particular point. It was Mr. Mwesigwa Rukutana's argument that an advocate does not qualify to be appointed as a commissioner for oaths unless he is in possession of a valid practising certificate and once his practising certificate has expired his authority to serve as commissioner for oaths also ends. It was his view that the commission to administer oaths by an advocate goes together with his practising certificate; he quoted as his authority: Emilly Williams Guide to the Practice of Supreme Court page 10.

Looking at the provisions of sub-section one of section 2 of the Commissioner for Oaths (Advocates) Act (Cap 53), it cannot be said that the section was intended to give an advocate an authority to administer oaths even when he had stopped practising as an advocate due to expiration of his practising certificate. With due respect we do not agree with Mr. Byenkya's contention that the practising certificate is not part of the authority for an advocate to continue serving as commissioner for oaths. The Act itself states in clear terms that the commission must be issued to a person who is a practising advocate which means a commission can only be in existence when the particular advocate to whom it was granted is in possession of a valid practising certificate as required by section 10 of the Advocates Act.

We accept Mr. Mwesigwa's argument that the commission granted to an advocate under the Act goes with a practising certificate. Once an advocate has ceased to practice the commission also goes. We are, however, aware of the fact that there are people who under the Act are permitted to serve as commissioners for oaths even though they are not advocates. Under section 4 of the Act such people are Magistrates, Registrars of the High Court, Deputy Registrars and district registrars who are ex officio Commissioners for Oaths.



It would be absurd to say that these people would continue to have such powers even if they have ceased holding such offices, the same applies to the advocates. We think that Mr.

\* Byenkya's argument that it is only the Chief Justice who can revoke the commission once granted to an advocate cannot be sustained in view of the provisions of sub-section 4 of section 2 of the Act. In our opinion this sub-section creates yet another way the commission may be terminated, it can be terminated by the advocate ceasing to practice as an advocate.

X It was argued on behalf of the respondents that an advocate who does not renew his certificate by the 1st March, ceases to practice in view of the provisions of sub-section 4 of section 2 of the Act. We are in complete agreement with that line of reasoning. To hold otherwise would defeat the purpose which that sub-section was intended to serve.

It may be observed here that Mr. Byenkya the learned counsel for the appellant was not sincere to the court nor was he serious in his argument that an advocate who lacks a practising certificate can still continue to administer the oath in view of the contents of paragraph (d) of the Affidavit of the appellant sworn in support of the application to amend his original affidavit. Paragraph (d) of the appellant's affidavit dated 03.09.96 sworn before John F. Kaanyemba reads as follows:-

"(d) That I am informed by my advocate M/s. Byenkya, Kahika Co. Advocates that they have recently discovered that the aforementioned commissioner for oaths does not appear on the list of the advocates who have renewed their practising certificates for the current year and as such he was not entitled to commission my aforesaid affidavit."

This part of affidavit reveals beyond doubt that when Mr. Byenkya appeared before this court to argue this particular point of law he was fully aware that a person whose practising certificate has not been renewed is not entitled to act as a Commissioner for Oaths. This

affidavit was definitely drawn by Mr. Byenkya's firm of advocates and Mr. Byenkya himself personally argued the application for which this affidavit was sworn so it would be unreasonable to imagine that he was ignorant of the existence of this statement. It is unfortunate that counsel should come to court to argue a matter which he knows fully well to be wrong in law.

Be that as it may, it can finally be stated here that an advocate whose practising certificate has expired cannot legally continue to administer the oath to anybody since his practising certificate is the basis upon which the Commissioner for Oaths operates as per provisions of sub-sections 2 and 4 of section 2 of the Commissioner for Oaths (Advocates) Act.

Turning to the second point, it was the case for the appellant that the affidavit sworn before this advocate who had no practising certificate was a valid affidavit. Mr. Byenkya contended that although the decision in the case of: Olowora vs Uganda Central Co-operative Union Ltd. Civil Appeal No.25 of 1992 decided that documents signed or filed by an advocate who has no practising certificate during the period of grace are valid, the decision did not go further to say that any act done outside the period of grace is invalid. On the other hand Mr. Mwesigwa insisted that any act done by an advocate after the first day of March when he has no practising certificate is invalid by virtue of section 14 of the Advocates Act. On this point he quoted the case of: Kabogere Coffee Factory vs Haji Twahibu Kigongo Supreme Court Civil Application No.10 of 1993 (unreported) in support of his argument. We agree with Mr. Byenkya that in Olowora's case the court only said that documents filed within the period of grace are valid but did not go further to say what would happen to the acts of an advocate beyond that date, that point was left open, but the lacuna was filled by the latest case of: Kabogere Coffee Factory vs Haji Twahibu Kigongo



(supra) where it was specifically stated that documents filed after the expiration of the days of grace were invalid. The position of law as stated in the two cases of: Olowa and Kabogere (supra) should be taken to represent the position of the law on the point. Mr. Mwesigwa argued that any affidavit sworn by a person before a person who has no practising certificate is invalid and of no legal effect. On that point he relied on the authority of: Chitalev & K.N. Rao: The Code of Civil Procedure Vol. 3 (1908) pages 1-2 where it was stated as follows:-

"An affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer oaths. The swearing or solemn affirmation of an affidavit is essential for its validity as an affidavit. An affidavit not sworn before a proper officer but simply attested by such an officer does not amount to an affidavit of the signatory."

The Judge was quite correct when he stated in his ruling that the appellant's affidavit in support of his petition was not an affidavit at all, it was invalid and had no legal effect. As pointed out by Mr. Mwesigwa in his forceful argument, this court cannot condone an illegality. In the case of: Makula International vs Cardinal Nsubuga (1982) HCB 11 it was held that no court can sanction or condone an illegality which has been pointed out to that court. It is remarkable that Mr. Byaruka contended before us that the appellant's affidavit was valid when he himself had applied to the High Court to have the same affidavit amended because he thought it was not valid.

We would summarise the law on this point as follows:- An advocate who is commissioned by the Chief Justice under section 2(1) of the Commissioner for Oaths (Advocates) Act ceases to be a commissioner for Oaths the moment his practising certificate

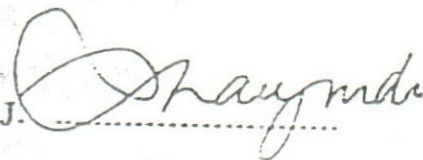


expires and that an advocate who practises without a practising certificate commits an offence under section 14 of Advocates Act. Accordingly all the acts which he performs in his capacity as an advocate or Commissioner for Oaths after the period of grace has expired are invalid. It may be stated here that any person who administers an oath when he has no authority to do so commits an offence under section 85 of the Penal Code Act.

In these circumstances, the appeal fails and it is accordingly dismissed with costs and the costs of the application in the High Court.

Dated at Kampala this 20<sup>th</sup> day  
of November 1996.

The Hon. Mr. Justice S.T. Manyindo, D.C.J.



The Hon. Mr. Justice C.M. Kato



Hon. Mr. Justice J.P. Berko

