THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT MBARARA

MISC.APPLICATION NO.0050 OF 2000

Arising From LCSC NO.24 OF 1997

1. LUGAZI PROGRESSIVE SCHOOL)
2. IMMACULATE MUTUTA)……APPLICANT/DEFENDANT

VS

SSERUNJOGI AND 4 OTHERS……
RESPONDENT/PLAINTIFF

BEFORE: THE HON. MR. JUSTICE V. F. MUSOKE—KIBUUKA

RULING

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Two preliminary objections were raised by learned counsel, Mr. Zehurikize, when this application was called for hearing. He was appearing for the respondents.

The application was filed in this court seeking a revisional order setting aside a judgment and orders against the applicants. The judgment was passed by the LC 1 court of Lugazi in Mbarara Municipality in Civil Suit No. 24 of 1997 of that court. The order was given by the Chief Magistrate at Mbarara allowing the LC 1 Court of Lugazi to proceed and execute its judgment mentioned above.

Upon prior application by her, to Mbarara Municipal Council, Immaculate Mututa, the second applicant, was, on 22/3/93, allocated plots 1, 3, 5, 7 and 9, along Katanywa Road, in Mbarara Municipality. She needed those plots in order to establish Lugazi Progressive School, the first, applicant. Apparently, the land, or at least part of it, had, prior to the allocation, been occupied by the respondents as customary tenants.

After the allocation, the second applicant appears to have been advised by Municipal Council, to compensate the respondents but to no avail. Instead, the second respondent embarked upon developing the land establishing and operating the first applicant. The respondents then sued the applicants in the LC 1 court of Lugazi. The court, after hearing the case, gave judgment in favour of the respondents. The Chief Magistrate of Mbarara subsequently allowed the LC 1 court of Lugazi, in accordance with the provisions of subsection (3) of section 4 of the Resistance Committees (Judicial Powers) Statute, 1988, to go ahead and execute its judgment. This application now seeks a revisional order setting aside both the LC 1 court's judgment and the Chief Magistrate's order allowing the LC1 court to execute the judgment, on the ground that the judgment was a nullity owing to alleged lack of competent jurisdiction in the matter.

The first objection raised by learned counsel, Mr. Zehurikize, is that this application is not competent because the affidavit, deponed in support of it must be struck out owing to the fact that the two Annextures attached to it, and marked as annextures A and B, were not verified by the Commissioner for Oaths. That omission, according to counsel, contravenes rule 8 of the Commissioner for Oaths Rules. Rule 8 of the Commissioner for Oaths Rules, according to learned counsel is mandatory and non-compliance with it would render the affidavit to which annextures are attached defective and must be struck out.

To support his submission, learned counsel relied upon two decisions of this court. One is the decision in Feroz Kassam v. The Commissioner of Land Registration, Misc. Appl. No. 24 of 1996. The other is James Matsiko, Advocate vs. Uganda Railways Corporation, Misc. Appl. No. 826 of 1998. I have had the advantage of reading both those decisions. In both decisions this court held that where annextures to an affidavit have not been verified as required by rule 8 of the Commissioner for Oaths Rules, the application supported by such an affidavit would

have no probative value. As a result, it would be struck out and the motion would be dismissed owing to the fact that it cannot stand without an affidavit in support.

However, I am unable to follow the decision in both cases cited by learned counsel. For the Court of Appeal of Uganda in Uganda Corporation Creamaries Ltd. And Henry Kawalya vs. Reamation Ltd., judicially considered the same point. The Court of Appeal, per Engwau, J. A. stated, "As long as an affidavit is properly sworn before a Commissioner for Oaths, it is competent. It is also my very well considered view that such an affidavit may or may not have exhibits attached to it. In the event of exhibits having been attached to affidavits, then all such exhibits must be sealed by the Commissioner for Oaths and must be marked with serial letters of identification as required by Rule 8." (Emphasis Added)

Elsewhere in the ruling, Engwau J. A. drew a distinction between "exhibits" and "annextures" attached to affidavits commissioned by Commissioner for Oaths. The Court of Appeal was of the view that rule 8, of the Commissioner for Oaths Rules,
applied only to exhibits which have been produced and exhibited to a court during a trial or hearing, in proof of facts. The rule did not apply to annextures to affidavits which are not exhibits. The court stated, at page 4 of the ruling. "In my view, whether or not those annextures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend Rule 8 because they were not exhibits produced and exhibited to a court during a trial or hearing in proof of facts. In any case, the annextures in the present case are not in dispute. Even if those annextures were detached, the affidavits thereof would still be competent td support the Notice of Motion. Rule 8, though mandatory, is procedural and does not go to the root as to competence of affidavits."
I fully agree with the reasoning of the Court of Appeal in this matter. Indeed, I think the words of Sir Charles Newbold, P.1in Probhudas (N) And Co. vs. Standard Bank, (1968) E.A 670, at P. 683, have particular relevance to the instant application. The learned President of the Court of Appeal observed to the effect that courts should not treat every incorrect act as a nullity, with the consequence that every thing founded upon it is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature. I do not think that the effect of a failure by a Commissioner for Oaths to comply with the procedure laid down in rule 8 of the Commissioner for Oaths Rules should result into the invalidation of the affidavit to which the unverified exhibits or annextures are

attached. Rather, the most a court would do would be to reject the exhibits or annextures themselves as they would not be competently presented. The affidavit should then be considered for whatever it is worth without those exhibits of annextures.

I also agree that rule 8 relates to exhibits and the word 'annexture' which cannot be used interchangeably with exhibit should not be read into it. I find all the circumstances and facts of the instant application to be similar to those which pertained in the Uganda Creamaries Ltd. case. Besides, a decision of the Court of Appeal binds this court. I have no option by to follow it.

Accordingly, I agree with Mr. W. Birungi that the first objection lacks merit and must be over-ruled. And it is overruled.

The second objection is that the affidavit in support of the motion be struck out because it was deponed by the second applicant in support of a motion which contains a lie to the effect that the second applicant is the registered proprietor of the disputed land. Learned Counsel for the applicants submitted that the combined effect of paragraphs 2(iii) of the motion and paragraph 2, of the affidavit in support, which according to counsel, must be read together, should be that the affidavit contains a falsehood and should be struck out. Counsel relies upon the authority of Bitaitana vs. Kananura (1977) HCB, 34. This court held in that case that any inconsistencies found in an affidavit however minor, cannot be ignored since a sworn affidavit is not a document to be treated lightly. If it contains an obvious falsehood, then it all naturally becomes suspect. And an application supported by a false affidavit is bound to fail.

I have had occasion to read the ruling in Bitaitana's case. I do not think that it is applicable in the instant application. Counsel for the respondents has pointed to the claim contained in paragraph

2(iii) of the motion which reads:
"(iii) The applicants/Defendants is the registered proprietor of the suit land."

He argued that the affidavit which supports that averment is false. He argues that the applicants have never been and are not registered proprietors of the disputed land.
Although I am aware that an affidavit in support of a motion is, indeed part of the motion, I

do not think that it is legally tenable to argue that the reverse is also true. I do not think that a motion which is supported by an affidavit becomes part of the affidavit in support. For the affidavit contains evidence and is sworn before a Commissioner for Oaths while the motion contains ordinary pleadings. Anything which might be false and contained in the motion cannot, therefore, be said to render the affidavit false because it is not part of it.

Besides, the question of who is the owner or registered proprietor of the land in dispute, in the instant case, is a question of evidence in a substantive suit pending before this court. It would be prejudicial to decided it upon a preliminary objection during which no such evidence is adduced by any of the parties. Then affidavit in reply notwithstanding.

For those reasons, I do not consider the rule in Bitaitana's case (supra) to be either relevant or applicable to the instant application. Consequently the second objection also fails.

Both objections are over-ruled. Costs in the cause. The substantive application is to be heard by this court on Monday, 18th January, 2001 at 9.00 a.m. The Deputy Registrar is to notify both parties of that date and time.

V. F.Musoke Kibuuka
Judge
28/1 2/2000

Order:
The Deputy Registrar to deliver this ruling on a date fixed by him.

V. F.Musoke Kibuuka
Judge