

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]**

CIVIL SUIT NO. 0178 OF 2009

HUSSEIN MOHAMMED:.....PLAINTIFF

VERSUS

- 1. MAYANJA BASHIR**
- 2. KALYEOGA APALLINARIS**
- 3. KITHENDE**
- 4. KAMPALA FINANCIAL SERVICES LTD**
- 5. CATHERINE ODONG**
- 6. COMMISSIONER LAND REGISTRATION :.....DEFENDANTS**

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

On the 10th day of November 2017 when this matter was called for further hearing, Counsel Isaac Walukagga appearing for the Plaintiff made an application to Court that he intends to call Counsel Tibaijuka (Counsel for the 2nd Defendant) as a witness in respect of documents which he had authored, regarding removal of a caveat from the property which is referred to under document titled '*Application for removal of caveat Instrument No. 370363 of 25.8.2006*' and drawn and filed by M/s. Tibaijuka & Co. Advocates dated 13th July 2007, and a sale agreement document referred to as '*sale agreement*' made on 10th July 2007 between Kalyoboga Appolinaris Kithende and Kampala Financial Services Ltd and drawn by M/s. Tibaijuka & Co. Advocates dated 10th July 2007, together with another document referred to as '*Registration of Titles Act; LRV 147 Folio 10 Plot 4 Mengo*', Transferred by Kalyoboga A. Kithende to Kampala Financial Services Ltd, in the presence of M/s Tibaijuka Atenyi (Advocate).

It was contended by Counsel Walukagga that by virtue of Counsel Tibaijuka's involvement in the drawing and drafting of the aforesaid documents, he ought to excuse himself from representing the Defendants and should step down.

In reply, Counsel Tibaijuka said that basing on the decided cases of *Uganda Development Bank versus Kasirye Byaruhanga & Co.; SCCA No. 35/94, Hon. Mukasa Fred Mbidde & Michael Mabukke versus LDC CA No. 51/2013 and Dynasty Africa Ltd. versus Moses Mugabi & Ors – Com. HCCS No. 246/2007.*

He was not ready to step down and he gave his reasons basing on the above decisions as being the following;

1. That the Plaintiff's list of witnesses named 3 witnesses and he is not among those listed. He argued that the ratio in the above cases is that if an Advocate is not listed as a witness, then attempts to have him step down are futile. Counsel Tibaijuka argued that the Plaintiffs' Counsel 'only intends' to call him as a witness, yet the prospection is not sufficient ground for Counsel to excuse himself from a case basing on the said authorities.
2. Counsel said he could not be compelled to testify as a witness for the Plaintiff as that would amount to misconduct.
3. He argued that any breach of Regulation 9 is not an offence.
4. Counsel argued that the documents he is alleged to have authored can be introduced in evidence by any other witness and his witnesses will be available for cross examination.

Counsel prayed that the application is misconceived and ought to be dismissed with costs against Counsel personally.

In rejoinder, Counsel Walukagga re-emphasised that according to Regulation 9 of the Advocates Regulations, no Advocate should appear in a matter where he is likely to be called as a witness or when it becomes apparent that he will be a witness. Counsel further argued that the matters above became apparent when he made the application. He distinguished the cited cases and maintained his prayer that Counsel be ordered to disengage from the conduct of the matter.

Having listened to the above arguments, this Court finds as herebelow;

Under Regulation 9 of the Advocates (Professional Conduct) Regulations states that

“No Advocate may appear before any Court or tribunal in any matter in which he has reasons to believe that he will be required as a witness to give evidence, whether verbally or by affidavit and while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by affidavit, he shall not continue to appear, provided that this regulation shall not prevent an advocate from giving evidence whether verbally or by affidavit on formal non-contentious matters or facts in any matter in which he acts or appears”.

This provision has been subjected to a number of interpretations as discussed in the cases provided. In the Supreme Court decision of **Uganda Development Bank versus Kasirye Byaruhanga & Co. Advocates; SCCA No. 35/1994**, the judgement of Wambuzi CJ held that;

*“It is generally accepted that the main intention of this regulation is that an Advocate should not act as Counsel and witness in the same case. The Court so remarked in **Yunusu Ismail versus Alex Kamukama & Ors, Civil Appeal No. 7 of 1987** (unreported). The intention of the provisions is to make an exception in formal and non contentious matters. In other words, an Advocate may not give evidence as a witness verbally by declaration or affidavit in a case in which he appears as an advocate except in formal or non contentious matters. The expression ‘reason to believe that he will be required; as a witness to give evidence presupposes that an advocate who acts or appears in a case should know whether or not he would be required as witness. If so, then he must not appear before a Court as an Advocate in the case”.*

The question therefore to answer is whether Counsel Tibaijuka as at the time this application was made, had any reason to believe that he would be required as a witness to give evidence in this matter.

In the **Uganda Development Bank versus Kasirye Byaruhanga** (*supra*) in the judgment by **Platt JSC**, this question is expounded. The Judge in his judgement, stated that the proper criteria is to examine ‘*whether the Advocate, before appearing had a reason(s) to believe that he will be a witness in the case or having appeared and finding himself a witness in the case or having appeared and finding himself a witness, he ought not to continue to appear*’. ‘The Judge further guided that there is no problem with the type of proceedings, formal or non (contentious proceedings, it was intended that the Advocate would not have any reason to believe that he will be a witness, or having found that he is a witness, will not find any compatibility between his role as an Advocate and witness...’

The Judges above guided that an Advocate must make a choice. The choice is made easier where evidence is not by an affidavit because, should the Advocate find it imperative to be a witness, he can choose to call evidence through other witnesses other than himself OR step down as an Advocate in the matter so that he gives evidence.

This scenario was expounded at length by my brother **J. Madrama** in the case of **Lwandasa versus Kyasa Global Trading Co. Ltd (Misc. App. No. 865/2014 of the Commercial Division.**

This case was grounded on similar facts where Counsel had drawn the documents in controversy, and was requested to step down so that the opposite Counsel could treat him as a witness. The Court found that for reasons similar to the reasoning espoused above, the Advocate could not be ordered so to do under Regulation 9 for as long as he had not been listed as a witness by either party, and the application was grounded on a future intention to call him as a witness.

The above case answers the controversy before me. The fact that Counsel Tibaijuka's name is not listed as one of the witnesses either for the Plaintiff or the Defence, leaves the intention to call him as a future speculative event outside the scope of Regulation 9 above.

Secondly Regulation 9 gives Counsel the option to make a choice between being a witness or to abstain from being a witness and continue being Counsel in a matter where Counsel did not swear any affidavit as a witness.

It is apparently clear from this case that though Counsel Tibaijuka authored the documents referred to, it has not been shown in any way that he intends to testify on them.

Regarding the fact that the Applicant wants to call him as his witness, it does not satisfy the covered criteria envisaged under Regulation 9. This is because it is a matter which should have been conversed at the stage of pleadings, whereby his name ought to have been listed as a witness. The law having been settled by the cases referred to any Counsel who finds himself in the scenario of Counsel Tibaijuka, is given an option to personally decide whether

he wants to continue as Counsel or as a witness. In this case, Counsel has in submissions opted to remain as Counsel, and submitted that his witnesses are available to answer by cross examination any question relating to the said documents.

I therefore make reference to the case of *Uganda Dev Bank versus Kasingye Byaruhanga & Co. (supra)*, *Lwandasa versus Kyasa Global Trading & Co (supra)*, *Ayebazibwe Raymond's versus Barclays & 3 Ors; HC CS No. 165/12, Yunusu Ismail T/a Bamboo City Stores versus Alex Kamukama ad Ors T/a Buzari (1992) 3 KALR 113 (SEU) 119 and RV Secretary of state for India (194) 2 ALL ER 546* to state that in all such cases, it is trite that an advocate should not act as a Counsel and witness in the same case.

However, Regulation 9 gives distinctions between formal and non contentious matters and that an Advocate should make an informed decision whether to continue representing a party as an Advocate, or step down and give evidence as witness. He/she cannot do both at the same time in the case, where the Advocate is required as witness, then O.6 r2 of the Civil Procedure should be followed by listing him as a witness by the party who intends to call him as such. This was not done in this case. Counsel Tibaijuka was not listed as a witness. He has also opted to remain as Counsel.

In the result, this application fails. Counsel will continue to represent the 2nd Defendant. Costs abide the main cause.

I so order.

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Henry I. Kawesa

JUDGE

14/12/2017