

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**  
**(LAND DIVISION)**  
**CIVIL SUIT NO. 30 OF 2016**

**HAJJI SULAIMAN KIZITO.....PLAINTIFF**

**VERSES**

- 1. KAMPALA FINANCIAL SERVICES LTD**
- 2. JULIUS MUHURIZI**
- 3. MODIA INVESTMENTS (U) LTD**
- 4. SARAH KASASA.....DEFENDANTS**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

When Civil Suit No. 30 of 2016 came up for scheduling, Counsel Kizza for the Plaintiff and Counsel Gerald Nuwagira for the 4<sup>th</sup> Defendant raised a preliminary objection that Counsel Tibaijuka witnessed the mortgage deed and attested it. That under Regulation 9 of the Advocates Conduct Regulations, it provides that;-

*“no Advocate may appear in any matter where he will be required to give evidence verbally or by affidavit”*

That he should withdraw so that they get another lawyer since he is a likely witness.

Counsel for the 4<sup>th</sup> Defendant while associating himself with the above submission added that the 4<sup>th</sup> Defendant’s defence mentions their colleague substantially as part of defence and that he is their witness. He prayed that their prayers be granted so that the Defendants’ case is not prejudiced.

Court granted leave to Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant to file written submissions in response and a rejoinder thereto, which I have fully considered in this ruling.

At page, 2 paragraph 9 Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendant submits that, not only does the Plaintiff concede that the mortgage in question was authorized by someone else other than Mr. Tibaijuka, but he also concedes that Mr. Tibaijuka has never been his Counsel. That mere witnessing the mortgage deed without having prepared it and without ever having been the Plaintiff's Counsel is not a sufficient ground for disqualifying Mr. Tibaijuka from acting as Counsel in the present suit. He submitted that, instances where an Advocate is disqualified from acting as Counsel in a particular suit are usually those in which the Advocate has previously acted for both parties during negotiations and preparing the resultant agreement. That the rationale for disqualifying the Advocate in such cases is that in the course of acting for the objecting party, the Advocate established a fiduciary relationship with them and obtained confidential information which he cannot now be allowed to use to their detriment.

That the 4<sup>th</sup> Defendant's list of witnesses attached to her written statement of defence lists only the 4<sup>th</sup> Defendant as the witness and others with leave of Court. That she did not list Mr. Tibaijuka as her witness and that no leave has been sought or granted to include him as a witness. He made a prayer that the Plaintiff and the 4<sup>th</sup> Defendant have failed to make out a case for the disqualification of Mr. Tibaijuka from acting as Counsel for the Plaintiff in the instant case and prayed that the objection raised be overruled with costs.

In rejoinder, Counsel submits that the issue before Court is the mortgage deed which he witnessed as an Advocate and was deeply involved in the transaction which has not been denied, secondly, that the 4<sup>th</sup> Defendant mentions Mr. Tibaijuka as her witness. That the 4<sup>th</sup> Defendant mentions how she dealt with Mr. Tibaijuka in her pleadings and that it is not surprising that she mentioned him in the scheduling notes.

Regulation 9 of the Advocates (Professional Conduct) Regulations SI 267 – 2 provides: *“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 informal or non-contentious matter of fact in any matter in which he or she acts or appears”.*

It is not in dispute that Counsel Tibaijuka representing the 1<sup>st</sup> and 2<sup>nd</sup> Defendant in this matter witnessed the mortgage deed, it is not in dispute that the 4<sup>th</sup> Defendant mentions Counsel Tibaijuka in her pleadings that is;- paragraph 4 (c-e) of the 4<sup>th</sup> Defendant's to effect that,-

- c. *that the 4<sup>th</sup> Defendant sent Ushs. Shs 32,000,000/- only (thirty two million shillings) to the lawyer (Tibaijuka Charles) but he declined to receive the money and said he would first consult the 2<sup>nd</sup> Defendant.*
- d. *that subsequently, the 4<sup>th</sup> Defendant personally carried the money to the chambers of Counsel Tibaijuka Charles, who received put it in his drawer but before he could give a receipt to the 4<sup>th</sup> Defendant, he consulted the 2<sup>nd</sup> Defendant in the presence of the 4<sup>th</sup> Defendant.*
- e. *that Counsel Tibaijuka then returned the money stating that the 2<sup>nd</sup> Defendant told not to receive the money as the suit land had already been sold.*

It was Counsel for the Plaintiff's submission in rejoinder that Counsel Tibaijuka will be required to give evidence on the document (mortgage deed), the issue of taking the money to Counsel Tibaijuka by the 4<sup>th</sup> Defendant, and circumstances surrounding his refusal to accept the same.

It should be noted that Regulation 9 prevents an Advocate to represent a party in a case where he/she has knowledge that amounts to evidence that may be adduced during trial and Regulation 9 does not deal with conflict of interest as this is dealt with in Regulation 4 and 10 of the Advocates regulations (supra).

In **V. G. Keshwala versus Shunobi Musoke M.A No. 501 of 2013** it was noted that;-

*“The only question to be determined is whether the representation by the respondent firm of Advocates of the Defendant is prejudicial to the applicant. To answer this question, there is a question of fact to be determined as to whether the applicant is a former client before considering whether the representation would be contrary to the law or ethics”.*

Upon perusal of the pleadings before Court, it cannot be seen any-where on record that the said lawyer/Advocate has ever represented the Plaintiff or the 4<sup>th</sup> Defendant in personal conduct of

matters apart from witnessing the mortgage deed, there is no confidential information the Plaintiff and 4<sup>th</sup> Defendant would have shared with Counsel Tibaijuka.

In *Uganda Development Bank versus Kasirye, Byaruhanga & Co. Advocates, SCCA No. 35/1994*, it was held that;

*“There is no reason to believe that the respondent’s Counsel is required to appear as a witness as a matter of fact, that his knowledge of the transaction is immaterial”.*

It was noted further that;

*“The general result of the regulation is that an Advocate appearing in a case can give evidence himself in formal or non-contentious matters of fact, but otherwise he may have to choose to be either an Advocate or a witness. The sole criteria are whether before appearing, the Advocate has reason to believe that he would be a witness in the case or having appeared and finding himself a witness, he ought not to continue to appear”.*

*Wambuzi CJ* noted in that case 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 case, that the regulation simply provides that Counsel must choose to be a witness in a case or to be Counsel but not both. I note that Counsel Tibaijuka choose to be an Advocate and not a witness.

In *Henry Kaziro Lwandasa versus Kyas Global Co.Ltd M.A No. 865/14*, it was held that;

*“The question remains as to what is meant about being required to appear as a witness. In the Rule of pleadings, under the Civil Procedure Rules, order 6 rule 2 provides that every pleading shall be accompanied by a list of witnesses, in simple terms, this means that a person required as a witness is listed as a witness. The rule to list potential witnesses in every pleading is mandatory. In the absence of any of the parties requiring the Advocate to be a witness or applying for leave of Court to do so, then unless the Court requires the Advocate to appear as a witness, it cannot be concluded that the Advocate will be required by any of the parties to the suit to appear”.*

It has been argued by Counsel for the Plaintiff that failure to include the said Advocate to the list of witnesses to the 4<sup>th</sup> Defendant’s written statement of defence is not fatal since he included him in the scheduling memorandum and mentioned him in the WSD (paragraph 5, c-e). That he is a potential witness and has to be disqualified from the case.

Basing on the above cited case of *Henry Kaziro Lwandasa versus Kyas Global Co. Ltd* (*supra*), am in agreement with the trial Judge's ruling that a party has to list witnesses they will adduce during trial and failure of which they have to seek leave of Court as provided for under O6 r2. Counsel stating that the Counsel Tibajuka was included in the scheduling memorandum of the 4<sup>th</sup> Defendant is not tenable in law as a scheduling memorandum is a mere proposal by a party which is always subjected to agreement or disagreement by all the parties to the suit.

I therefore, find no merit in the preliminary objection raised by Counsel, it is hereby overruled.

I so order.

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Henry I. Kawesa

**JUDGE**

14/03/2019

14/03/2019:

Simon Kiiza for the Plaintiff.

Representative of 1<sup>st</sup> Defendant and Representative of 4<sup>th</sup> Defendant absent.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

**JUDGE**

14/03/2019

The case is therefore formerly fixed for conferencing on 26<sup>th</sup> August 2019 at 11.00 an.

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Henry I. Kawesa

**JUDGE**

14/03/2019