

The Republic of Uganda

In The High Court of Uganda

Holden At Soroti

Miscellaneous Application No. 31 Of 2020

(Arising from Civil Suit No. 014 Of 2017)

Attorney General..... Applicant

Versus

1. Okello James Enos

2. Opolot Edward..... Respondent

Before Hon. Justice Dr. Henry Peter Adonyo:

Ruling

Background

The applicant filed Misc. Application 31 2020 arising from civil suit no. 014 of 2017 against the Respondents seeking for the following orders;

- a. Review and set aside the order of court in civil suit no. 14 of 2017 of Justice Batema N.D.A.
- b. Costs of this application be provided for.



On the 08/04/2021 Court granted the applicant a last opportunity to file and serve its affidavits in rejoinder on or before 15/04/2021 and to produce the deponent in support to the application on 22/04/2021 at 9:00 am for cross examination by counsel for the respondent who had sought leave of court to cross examine the deponent who, however, turned up late on the 22/04/2021 when applicant's counsel had already made an application to proceed ex - parte. When court was just about to make a decision, the respondent's counsel appeared in court and sought court's indulgence to be allowed to participate in the proceedings which prayer was not opposed by the applicant. Given that status, the respondents' were allowed to participate in the proceedings accordingly with the opportunity to cross examine the Applicant's deponent.

Representation:

The applicant was represented by Ms Nakanaba Babra and the respondents were represented by Mr. Amodoi Samuel Moses and Mr. Ogire Gabriel.

Submissions:

Counsel for the respondents' raised a preliminary point of law orally which in his view would dispose of the whole application by drawing the court's attention to paragraph 3 of the affidavit in reply deposed by Mr. Opolot Edward which read as;



'the deponent thereto had no power of Attorney/authority from the hospital from the Hospital Board or hospital Director which affidavit offends the provisions of the Commissioner for Oaths (Advocates) Act Cap 5. The 2nd page of the affidavit in support has the stamp of the Chief Magistrate dated 28/02/2020 but does not bear the names of the commissioner, names of the magistrate and the grade'.

Under S.11 of the oaths Act judicial officers and others indicated can administer any lawful oaths.

In the affidavit before court the magistrate's names and grade are not provided for which is an illegality that was condemned by the Supreme Court in Presidential Election Petition of *Kiiza Besigye Vs. Y. K. Museveni Election Petition No.1 of 2001* in which an affidavit commissioned before a Deputy Registrar was challenged as it did not have the names and grade of the judicial officer. However, that anomaly was cured before the hearing upon the judicial officer confirming that indeed the affidavit was administered before him which in the instant case is not the case as there is no affidavit filed by counsel for applicant confirmation the magistrate before whom the deponent appeared. This failure by counsel for the applicant to do so renders the affidavit invalid in terms of the decision in *Kizza Besigye (above)* as it is an indication that there is a possibility that deponent did not appear before any judicial officer.

According to counsel for the respondents that renders the affidavit an illegality and thus be struck out with costs with the Notice of Motion remaining

without a supporting affidavit and thus it should be dismissed since the illegality pointed to court overrides all the questions of law.

Additionally, counsel pointed out that the copy of an affidavit in rejoinder served indicates that the deponent of the affidavit had authority to do so but which is not true making it offend the provision of Order 3 as there is no confirmation that the indeed there was such authority from the hospital board of the directors.

Given this position counsel urged court to make a finding that the deponent of the affidavit be held responsible personally in costs if court is inclined to strike out the affidavit.

In response Counsel for the applicant reiterated that on the first issue of the commissioning magistrate, the burden of proof in civil matters as per S. 101 of the Evidence Act is on the person who asserts that fact and wants court to make a decision in that respect and thus since it is the respondents who are alleging that the affidavit in support of the application, then they must prove so but the law does not provide the nitty gritty of what to be contained in an affidavit although it stipulates the persons who can witness an affidavit and a magistrate.

In this case the affidavit in support has a signature and a stamp of the Chief Magistrate's Court which has not been denied by the Chief Magistrate of Soroti and the same is evidence that the affidavit was duly commissioned by a competent person and if the respondent disputes the signature and the stamp, the burden otherwise is upon them to prove that the affidavit is not commissioned by a competent person. But they have not brought any affidavit from the Chief

Magistrate court disputing the same and considering the need for an affidavit under 0.19 of the CPR, the affidavit to challenge the same should have been made by a person with knowledge of the matter but alas this is also not so leaving the respondents to have no capacity to challenge the signature or stamp of the commissioner since he does not work in the Chief Magistrate's court with result that the whole submission should be rejected as mere assumptions not backed by evidence.

On the second element of the objection, that is authority to depose the affidavit in support, counsel submitted that the deponent had the authority to do so as the applicant is the Attorney General and has not disputed the affidavit sworn on its own behalf. Secondly, an affidavit is evidence and the suitable person to depose it is the person familiar with the facts with Order 19 CPR providing that an affidavit should be confined to the knowledge of the deponent which is the case here since the sources of his information is disclosed as required by law.

Again under 0.19 r 1 CPR the law provides for the affidavit of any witness and so this being a witness of the applicant, then affidavit is permissible under the law. Given the fact that under paragraph 3 of the affidavit in rejoinder there is clarification on the capacity to do so with paragraph 3 (iii) showing that the deponent is the Senior Hospital Administrator.

Counsel for the applicant also referred to Article 126(2) (e) of the Constitution which requires that substantive justice be administered without undue regard to technicalities and pray that the court takes this into account and accept the

affidavit in rejoinder and affidavit in support in addition to taking it that whichever magistrate commissioned it was competent to do so under the law and since it was not the deponent's decision not to include the names of the commissioner for oaths in the jury then the objection should be overruled and the application allowed to be heard on its own merit.

Counsel for the respondent in rejoinder reiterated earlier submissions that the affidavit is entirely defective and submitted that Counsel for the applicant was referring to the stamp of the court but pointed out that it was not the court which commissions but a commissioner for oaths and since Oath Act gives judicial officers the power to commission an oath then such officer should be indicated as Soroti Chief Magisterial area has several judicial officers as was done by Gidudu in the Kizza Besigye's case (above) as the Oath Act goes hand in hand with the Stamp Act.

But that since the applicant failed to adduce evidence to satisfy court that the affidavit in support of this application then the same should be found incurably defective and should be struck out with costs as the case in *Mohammed Majyambere Vs Bhakresa Khalil M.A 727 of 2011* when Hellen Obura did so with an application which had a defective affidavit in support and the application itself collapsed.

Counsel further pointed out the reliance on Article 126(2) (e) of the Constitution is not magical to cure a defect since the matter herein goes to the root of the substantive matter and is not procedural.

In regards to the authority to depone, counsel adopted earlier submissions but hasten to add that the deponent is under the command and control of the Hospital Director and Board who have to give blessing to any of his actions such that they can be held vicariously liable.

The preliminary objection raised requires Court to resolve the issue whether the affidavit in support offends sections 4 and 5 of the Commissioner for Oaths (Advocates) Act Cap 5.

Counsel for the respondent submitted that the affidavit in support offends **Section 4 of the Commissioner for Oaths (Advocates) Act Cap 5** which provides for the powers of the commissioner and section 5 thereof provides for the Particulars to be stated in a *jurat* or attestation clause in the following words. “*Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.* (Emphasis mine)

I have had the benefit of internalizing the submissions of both counsel and the affidavits in support, in reply and rejoinder perused and observed that the affidavit deponee by Ojwang James has the stamp of the chief Magistrates Court without the name, grade of the judicial officer.

Section 5 of the Commissioner for Oaths (Advocates) Act cited above is to the effect that “*every commissioner for oaths before whom any oath of affidavit is*

taken or made shall state in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.”

Rule 9 of the schedule provides that the form of the jurat is set out in the Third Schedule to the rules as follows.,

“sworn and declared before me this day of....20.....at.....

Commissioner for Oaths”.

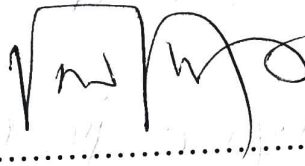
In the case of **Kizza Besigye (supra)** at page 24 the lack of proper form was cured by another affidavit confirming who had commissioned the questioned affidavit which is not the case here thus distinguishing the present case from that one given that in that case a supplementary affidavit confirming the commissioning of the earlier affidavit was done thus curing the questioned anomaly.

In the present case counsel for the applicant should have sought court’s leave to file a supplementary affidavit in order to cure such anomaly but did not. Therefore, in line with the holding in **Kizza Besigye’s** case above given that the commissioned affidavit in support of this application dated 28th February 2020 only reads the Chief Magistrate’s court but does not indicate the name of the judicial officer who commissioned the document., I would in line with the holding in ***Makula International Ltd Versus His Eminence Cardinal Nsubuga 1982 HCB 11*** find that the said affidavit does not comply with the law and thus

is an illegality which once brought to the attention of court overrides all questions of pleading including admissions.

The affidavit deposed by Ojwang James is thus incurably defective leaving the notice of motion to stand on its own without supporting evidence. This application would thus be struck out with costs to the respondents.

I so order.



Henry Peter Adonyo

Judge

2nd July 2021

Order:

This ruling is forwarded to the Registrar of this court to have it delivered online to parties in line with the Hon Chief Justice's directions on COVID-19 SOP's.

I so order.



Judge

2nd July 2021

23/7/22

Court: Ruling delivered
to Advocates via email.

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23/7/22 AR.