DENTONS

A commentary on Justice Stephen Mubiru's landmark decision in Barbara Namayega vs. Etot Denis & others; commercial division high court civil suit 939/2019

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A new landscape requiring the shifting of prevention burdens onto those who are in a better position to mitigate impostor fraud.

— Hon Justice Stephen Mubiru

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1. John Musiime assisted by Emmanuel Ankunda acted for the plaintiff in the matter. The unsuccessful defendants have filed a Notice of Appeal.

Introduction

There has been disquiet in sections of the Uganda Law Society over Justice Stephen Mubiru's recent decision in Barbra Namayega vs. Etot Denis and genuine concern on its implications on advocates' duties and potential liability to third parties arising out of their clients' impostor fraud.

While some at the Bar have at once welcomed the decision as being correctly decided, long overdue and in the overall best interest of the profession, others are concerned that it burdens advocates with greater and more costly responsibilities. Further that it exposes them to legal liabilities to third parties and that the means of avoiding such liability are not entirely clear.

In this paper, I expound on the findings of the Court in the case. I examine the basis of some of its findings and comment on its potential implications on the law and practice of advocates acting in land sale transactions and conveyancing. The commentary may also be relevant to the litigation that may follow the impugned transactions.

The facts of the case

Sometime during the month of August 2019, the plaintiff picked interest in the purchase of land comprised in Kibuga Block 23 Plot 612 at Busega, for which purpose she engaged the services of a private law firm to undertake a search of title at the Land Registry. It was confirmed to her, as a result of that search, that the land was registered to a one Nanfuka Kintu Bakia.

The plaintiff then contacted the person who identified herself by that name and who claimed to be the registered proprietor of the land. The phone number had been provided by a broker in the transaction. That impostor advised the plaintiff that her duplicate certificate of title to the land was in the custody of the defendants' law firm, which firm she insisted the transaction had to be concluded in. At that law firm, the plaintiff met the first defendant who at the time was one of the advocates practicing law in the third defendant's law firm, together with the person who had claimed to be Nanfuka Kintu Bakia.

The first defendant proceeded to prepare an agreement of sale of the land wherein the plaintiff signed as the buyer, and the person who had claimed to be Nanfuka Kintu Bakia signed as the seller. The first defendant signed as a witness to the agreement. The first defendant caused the signing of the transfer instrument which he handed over to the plaintiff together with the duplicate certificate of title and a photocopy of the seller's national identity card. The plaintiff paid a sum of 62,000,000 shillings in cash as the agreed purchase price for the land at a city bank in the presence of the first defendant.

Thereafter, the plaintiff took the agreement to her advocates to witness her signature. The following day the seller became evasive and did not hand over vacant possession of the land to the plaintiff contrary to what had been agreed. It later transpired that the duplicate certificate of title was forged and the person who had claimed to be Nanfuka Kintu Bakia was an impersonator.

She thus sued the defendants for a refund of her money, damages, and costs of the suit.

The Decision

In a seminal judgment handed down on 29 January 2024, the Commercial Division of the High Court of Uganda (Justice Stephen Mubiru) found for the plaintiff, holding that although the plaintiff was not the defendants' client, they were liable to her on account of the first defendant having stepped outside of his role as the advocate for the client (the impostor), and instead assumed a role of acting for the benefit of the third party (the plaintiff).

The Court also found them liable on a further basis that, as a matter of public policy, advocates who act on behalf of a seller in a land transaction are treated as warranting the true identity of the seller and are liable to the purchaser of the land when the seller turns out to be an impostor, where the purchaser's loss is attributable to the advocate's failure to take reasonable precautions in verifying the vendor's true identity.

Only the Guilty need to be afraid

The Court noted that to be found liable to a purchaser for impostor fraud, an advocate must have acted with near-criminal culpability by either knowingly or recklessly causing, facilitating, or aiding the impostor fraud.

When it comes to advocates knowingly using their instrumentality and legitimacy to aid their clients to pull off impostor frauds, the decision draws parallels with the criminal law principle of equating accessories before and after the fact, as well as aiders and abettors, to the principal offender[2]. The decision draws further from the principle in the law of torts that principals are liable for torts committed by their agents.

The Judicial creativity in the decision is in extending these above two analogous principles to advocates (the agents in this case) knowingly or recklessly aiding and abetting impostor fraud of their clients (the principals).

The effect of these parallels is not just neat legal theory. The Court found that in such cases, the parallels with liability in criminal law means that an award of punitive damages is justified provided they are not higher than what would have been imposed in a criminal trial[3].

Advocates acting properly, in good faith, and by the long-standing duty of care required of people professing a skill, have nothing to fear. At page 26 of the decision, His Lordship states thus:

"An advocate will not be liable though if he or she exercises good faith and reasonable care, even if the advocate has acted erroneously."

Citing the 1968 East African Court of Appeal decision in **Champion Motor Spares Limited v. Y.V. Phadke and Others[4],** the Court affirms that an advocate cannot be liable for any reasonable error of judgment or ignorance of some obscure point of law.

The decision is categorical in noting that the Courts are reluctant to extend the duty owed by advocates beyond their clients to third parties except in extreme cases where it is proved that the advocate accepted a duty of care towards those third parties. And that is, even if the actions of the advocate cause loss to those third parties.

This was the turning point of the case. On the specific facts of the case, the Court found that the plaintiff entirely relied on the defendants for the assurances of the authenticity of the identity of the impostor fraudster.

Liability is imposed on the traditional basis of both proximity and foreseeability. Proximity, in that the plaintiff must be in such a position as he or she might have been if he or she was, in fact, a client. Foreseeability, in that the advocate must reasonably foresee that the client will rely on his or her representations and that loss will occur to the third party if the advocate acts negligently.

2. Section 19 of the Penal Code Act Cap 120
3. see Rookes v. Barnard and others [1964] A.C. 1129 and Fredrick J. K. Zaabwe v. Orient Bank Ltd and
4. [1966] EACA, 18

Minimizing, better, eliminating impostor fraud is good for private law practice as a business

Commenting on the need for law firms to conduct the Anti Money Laundering Act, 2013 (AMLA) imposed Know Your Client protocols, the decision notes that these requirements are not only a legal obligation but also crucial for maintaining the trust and confidence of clients, regulators, and the broader financial community in the provision of legal services.

Further, that they are essential to ensure that legal processes are not exploited for illicit financial gains and that the profession maintains its integrity. Compliance, it adds, is testament to the commitment of the legal profession to ethical and transparent business practices. By embracing these checks, advocates contribute not only to the protection of their own interests, but also to the broader goal of creating a secure and resilient financial ecosystem.

It is arguable that in addition to cost, a lack of trust and confidence in advocates services is a factor in land transactions being conducted by alternative service providers. In rural areas for example, most land sale agreements are drafted by Local Councils 1 (LC 1)[5].

In the Greater Kampala Metropolitan Area (GKMA), while advocates may draw and complete more land deals than the LC 1s, the latter are more educated and sophisticated than their rural counterparts. They can draft even sophisticated land sale agreements drawing from the widely available templates[6].

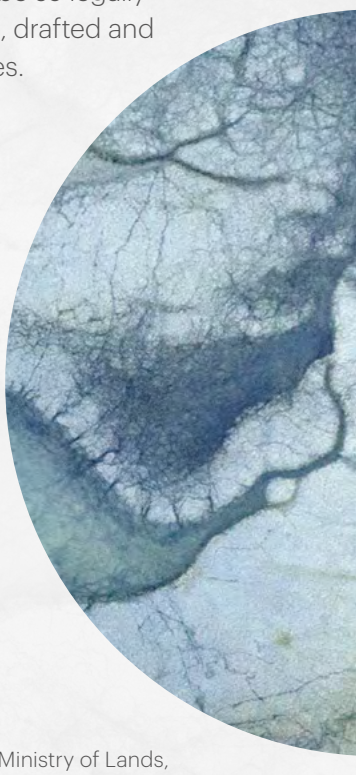
One can imagine that Purchasers are also attracted to the services of these LC 1s because of trustworthiness. The process is completed at the locale of the sold land as compared to inside the chambers of advocates which may be far removed from the land. Many advocates complete land sale agreements for land whose location and existence they have no idea of except for what they can read on a certificate of title.

The LC 1 is a committee of several members living in the locale and with the best assurances of the existence of the land on the ground, knowledge and assurance of its ownership and occupation. There is a form of social accountability that advocates may not have[7].

What parties to a land sale agreement are interested in is not the lawyerly English in which the agreements are written or stamps that Advocates append to them. Their interest it to properly record their transaction and assure themselves of the integrity of the entire transaction, just in case. They will therefore look for service providers who are more likely to ensure this.

It bodes badly for the commercial fortunes of the profession if the public will only pay for advocates' services where they are either compelled by law or have no alternatives.

Obviously, it is recommended that as opposed to the "legal kamyufu[8]", the public is well advised to seek and retain the services of competent advocates in land transactions because even what may look like a simple and straight forward transaction may trigger complex legal due diligence and compliance requirements. For example, transactions involving unnatural persons such as companies, the government, trusts, administrators, executors, or sales following Court order, can be so legally complex that they are best advised, drafted and completed by competent advocates.



5. Refer to the controversy over Local Council Ones charging 10% as transactional fees on land sales.
6. A free template for an agreement for sale of land by private treaty auction is available on the website of the Ministry of Lands, Housing and Urban development; https://mlhud.go.ug/wp-content/uploads/2015/10/MLHUD-sample-Sale-Agreement.pdf
7. See Daily Monitor 12 January 2021; https://www.monitor.co.ug/uganda/news/national/government-orders-lc1-chairpersons-to-stop-charges-on-land-sales-1769972
8. "kamyufu" is Kampala city lingua for an unqualified person especially an electrician.

The Holding that Advocates are not mere clerks in the transaction is vindicated by the Law

The Court found that the role of an advocate in land sales and conveyancing cannot be merely clerical, preparing, reading back, and overseeing the signing of transaction documents and stamping them.

It held that the advocates' role is also to filter against any reasonably avoidable or preventable irregularities in dealings. This finding is well-founded in the law.

The Registration of Titles Act (RTA) for example[9], reserves certain roles and actions for specified persons including, and sometimes, only for advocates. Attestation of instruments within Uganda may only be done by persons listed under the Act, including advocates.

The RTA provides that only advocates with a valid practicing certificate may make an application or tender any document to the Registrar of Titles. In many other respects like the issuance of notices, the advocate is taken as the agent of the registered proprietor.

Examples of other legislations that reserve certain roles for advocates include the Advocates Act[10], the Companies Act[11], the Insolvency Act[12], and the Succession Act[13].

The reason the law reserves these roles for advocates cannot be merely to accord them more monopoly privileges. It is to give the process and its users some quality assurance.

Thus, a registrar of titles dealing with an instrument submitted or attested by an advocate is entitled to have the comfort that such an advocate saw the registered proprietor append their signature, that the signatories are who they claim to be, that the signatures are of a Latin character or where the parties are corporations, that the people purporting to sign on its behalf have the authority to do so.

Otherwise, but for this expected quality assurance that the law supposes advocates to give, I see no reason why the law should reserve these roles for advocates. Anyone on the street should have otherwise been able to perform these roles.

In the recent decision of **CTM Uganda Limited & Others vs. Allmuss Properties Uganda Limited & 3 Others[14],** the Supreme Court held that the Registrar of Companies must carefully execute their statutory duties by satisfying him/herself that the documents presented to her meet the requirements of the Companies Act before accepting or consenting to them. Her role is not a mere formality.

By parity of reasoning, the above finding should be extended to the roles reserved by law for advocates under the RTA and similar laws.

There is another parallel to draw here from litigation. The law expects a litigation advocate to advise his clients against filing a suit where, for example, they do not have the locus to do so, where the intended claim raises no cause of action, or where the intended claims are caught by the statute of limitation.

In answer to his duties to the Court and on public policy considerations, an advocate is duty bound to sieve out such claims. It is long accepted that the duty to Court supersedes the advocate's duty to his client[15].

In England, the law empowers the court to order solicitors personally to pay "wasted costs" incurred by a party because of any improper, unreasonable, or negligent act or omission on the part of the solicitor that the court considers it is unreasonable for their client to pay[16].

In appropriate cases, a client may also recover from their own litigation advocate in a claim of Negligence based on the principles enunciated in the Champions Motor Spares Limited case[17] (supra).

9. Section 135, 147, 195 and RTA
10. See sections 11, 15, 65, 66 and 67 of the Advocates Act
11. See sections 22, 176 and 190 of the Companies Act
12. See section 22 of the insolvency Act.
13. See sections 31, 55 and 247 of the Succession Act
14. SCCA 11/2022, lead judgment of Hon. Justice Stephen Musota
15. See Rondel vs. Worsley [1966] 3 ALLER 657, See also Opiyo Joseph Otiiti vs. Ms. Oyet & Co. Advocates Gulu HCCS 19/2016.
16. Section 51, Senior Courts Act, 1981
17. (See also the Judgment of G.W. Kanyeihamba (JSC) in Frederick J K Zaabwe vs. Orient Bank SCCA 4/2006.

The wide and inclusive definition of a client

On defining who is an advocate's client, the Court in Namayega did not cite or rely on section 1 (b) of the Advocates Act as it did in **Hermon Tesfalidet Ghebrat vs Merlin Advocates and another**[18]. Nonetheless, it paid heed to the fact that the statutory definition is only inclusive, and as such, it recited the various advocate-client relationships such as a specific matter client, an open relationship client, an express retainer, a prospective client, a former client[19], and a client under the implied retainer.

Crucially, however, one notes that having omitted to cite the applicable statutory provision, the Court omitted to take note of the last leg of section 1 (b) of the Advocates Act, which includes: ***"and any person who is or may be liable to pay to an advocate, any costs."***

The Court appears to have accepted the defendants' version that the sale agreement at issue was jointly drafted by the vendor's and the purchaser's advocates. On the record, however, the defendants had admitted having acted for the plaintiff in advising her on all the clauses of the agreement. In the premise, Arguably, section 74 (g) & (h) of the Advocates Act and Regulation 28 of the Advocates (Professional Conduct) regulations compelled the defendants to charge for their services to the plaintiff, the implication being that the Plaintiff would qualify as a client on "the liability to pay any costs to an advocate" basis.

It is also noteworthy that in the Namayega case, while overruling the defendants' preliminary objections that the plaintiff had no locus and therefore no cause of action, the Court (Hon. Dr. Justice Henry Peter Adonyo) had earlier on 5 February 2021, held that the plaintiff was the defendants' client based on section 1 (b).[20] Thus, while the earlier judge found that a client-advocate relationship existed between the parties, the later one found that it did not.

What is novel in the decision is its introduction in Ugandan jurisprudence of the recognition and expounding of the notion of an implied retainer. The Court held that it can imply this relationship by inference and (or) imputation[21] from an objective review of the conduct of the advocate and the person claiming to be their client.

Where the circumstances of the transaction are such that the relationship can potentially fall within this very wide definition of client, advocates would best be advised to take the same precautions as if one existed in fact.

18. Miscellaneous application 196/2020
19. See Sudhir Ruparelia vs. MMAKS Advocates & Others Miscellaneous Application 1063/2017 (Arising out of HCCS 165/2017; Ayebazibwe Ronald vs Barclays Bank ruling in HCCS 165/2012
20. See https://ulii.org/akn/ug/judgment/ugcommc/2021/3/eng@2021-02-05/source.
21. Imputation is what the parties would have intended while inference is what the parties intended.

An advocate's default in following KYC protocols does not create a private right of action but is relevant in determining their liability in a traditional claim in Negligence

Counsel for the defendants in this case, Mr. Emmanuel Kigenyi, is commended for a job well done in defence of his clients. The Court correctly accepted his argument that whereas the Anti Money Laundering Act 2013, (AMLA), the Regulations and Guidelines made thereunder impose Know Your Client (KYC) obligations on Advocates, defaulting thereon does not create a right in a third party to sue even if they suffer loss arising out of the transaction. In his Lordship's wise judgment, the AMLA's objective is to fight money laundering and terrorism financing and not to create such private rights to sue.

Importantly however, the Court held that a Vendor's advocate's failure to conduct KYC protocols on behalf of their client is a relevant consideration in establishing his or her liability in a private claim by a third party under the general law and not under the AMLA.

It would appear however, that the regulator can be successfully sued for failure to enforce the regulations. In **Wendy Angela Payne vs. Uganda Tourism Board and Another**[22] we successfully acted for the plaintiff in a decision where the Court found Uganda Tourism Board liable in damages for breach of its statutory duties to enforce and monitor standards in the tourism industry.

It would also appear from the Court's finding on this point that the words "civil proceedings" as used in the AMLA[23] do not refer to a private lawsuit between a defaulting accountable person and a third-party suffering loss therefrom[24].

One of the touchiest subjects of the Namayega decision at the Bar, is the phenomenon of "walk-in-clients." The decision does not forbid the taking of walk-in clients. However, as this case and that of Chief Magistrate of Buganda Road in **Uganda vs. Kwesiga, Kenneth Bateyo & Others**[25] proves, they pose the greatest risk for crime and money laundering as well as legal and reputational risk to the advocates. They therefore present the greatest need for advocates to carry out enhanced KYC protocols.

Whichever way the advocate-client relationship is initiated, the law requires advocates to know their clients. One can hardly be said to enjoy the fiduciary relationship of client-advocate with a person they barely even know.

In this case, it is concerning that the defendants not only did not open a file for their impostor client, but they also kept no record of the transaction at all. Although the Court did not make the comment, this conduct after the fact can be interpreted as not boding well with the claimed innocence of the defendants. They simply had no record with which even a criminal investigation could work.

Other relevant factors in adjudging whether the advocate is liable include whether there is a statute that governs the conduct of the advocate in issue, in this case, the AMLA compliance with the Act weighs in favour of the advocate having acted properly while not complying speaks to the opposite. Other factors are ability and opportunity of the advocate to control the actions of the client, actual knowledge of the risk of harm, the cost of the means of minimizing or eliminating the risk, and what a reasonable advocate would do in the circumstances.

22. Commercial Division HCCS 680/2019
23. See section 11 of the AMLA.
24. See section 11 of the AMLA.
25. In Uganda vs. Kwesiga, Kenneth Bateyo (Buganda Road Chief Magistrates Court Criminal Case 923/2019), an advocate was convicted of a cocktail of offences including forgery, uttering a false document and obtaining money by false pretenses when he and others duped a buyer in land sales transaction worth Ugx. 330,000,000. The advocate charged a cool Ugx. 50,00,000 representing about 15% of the purchase price for a seller he insisted was a walk-in client.

A watershed moment for Judicial Activism and exploring the juridical basis of the decision

The Judicial activism in the Namayega decision is a masterclass in understanding the evolving and adaptive nature of the common law. In reading the decision, one must bear in mind the fact that the categories in which a person may be found to owe a duty of care to another under the "neighbour principle", in the law of negligence, are not closed. They are established by Courts on a case-by-case basis[26].

The Lacuna and Mischief

The Court finds that pre-current jurisprudence appeared to provide advocates almost unfettered permission to assist their clients in certain forms of lawbreaking activity, including crime and fraud, and that the same is unsustainable[27].

This problem is worsened by the fact that the pre-current jurisprudence fixed all the due-diligence obligations and the risk arising therefrom solely on the purchaser saying nothing of the Registrar of Titles and the advocates involved in the transaction.

The Registrar of Titles[28] who is mandated to provide intending purchasers with search certificates controversially seeks to exclude its liability on the same in the (in)famous words on the paid search reports he provides thus:

"It is for you to satisfy yourself that this land is the property of the person whom you are interested in and no someone else of the same name.

As only personal searches of the register is provided for in the RTA, the above information is given on the understanding that its accuracy is not guaranteed, and that no liability whatsoever can be accepted if loss or damage as a result from any error, omission or misstatement therein.(sic)"

The Court of Appeal (J.M Okello, JCC/JA) in a controversial obiter[29] in Sir John Bageire vs. Ausi Matovu[30] stated:

"Lands are not vegetables that are bought from unknown sellers. Lands are valuable properties and buyers are expected to make thorough investigations not only of the land but of the sellers before purchase,"

The palpable injustice in this instance is in blaming the victim purchaser without any regard to the reliance that such purchaser may have had on the advocates acting in the transaction.

The related problem is that the 1970s statutes[31] that govern the practice of law in Uganda do not expressly impose duties on advocates to act with integrity, to know their clients, to not compromise their independence etc.[32]. It is fair to say that these laws have fallen far behind the present realities of the practice of law. They are generally moribund and long overdue for amendment.

Those being the legal realities and considering that this was a strongly novel case, the Court found that it was proper for it to recognize a new category of duty of care in the general law of Negligence. This is the basis of its holding that knowing or negligent advocates representing fraudulent property vendors and those representing the duped buyers owe the buyer a duty of care and that they are responsible for any resulting losses.

Between the vendor's and the purchaser's advocates, the Court, on the facts of this case, placed the liability exclusively on the impostor seller's advocates because, as previously stated, they owed her a duty of care because they stood in proximity with the plaintiff and could reasonably foresee that she relied on them for the authenticity of the seller.

26. Robinson v. Chief Constable of West Yorkshire Police [2018] UKSC 4; [2018] 2 WLR 595; [2018] AC 736), See also the speech of Lord Macmillan in Donoghue v Stevenson [1932] AC 562 at 619
27. See Ntege Mayambala vs Christopher Mwanje High Court Civil Appeal 72.1991
28. Section 201, RTA
29. See Indefeasibility of Title: An Eroded Concept in Uganda; Peter Mukidi Walubiri
30. CACA 7/1996. See also Prof. Daniel David Ntanda Nsereko vs. Barclays Bank & Ors HCCS 18/2009
31. Advocates Act Cap 267 (1970). The Law Development Centre Act Cap 132 (1970)
32. See the SRA code of conduct for Solicitors, RELs and REFs published by the Solicitors Regulation Authority.

Warranty as to the authenticity of the seller

It is important to delineate the second basis on which the Court found the defendants liable. Namely, that advocates who hold themselves out as acting for the seller, thereby warrant that they act for the "true seller." It then follows that they should be liable for breach of the warranty where their client is not who they claim to be.

The traditional agent's warranty of authority

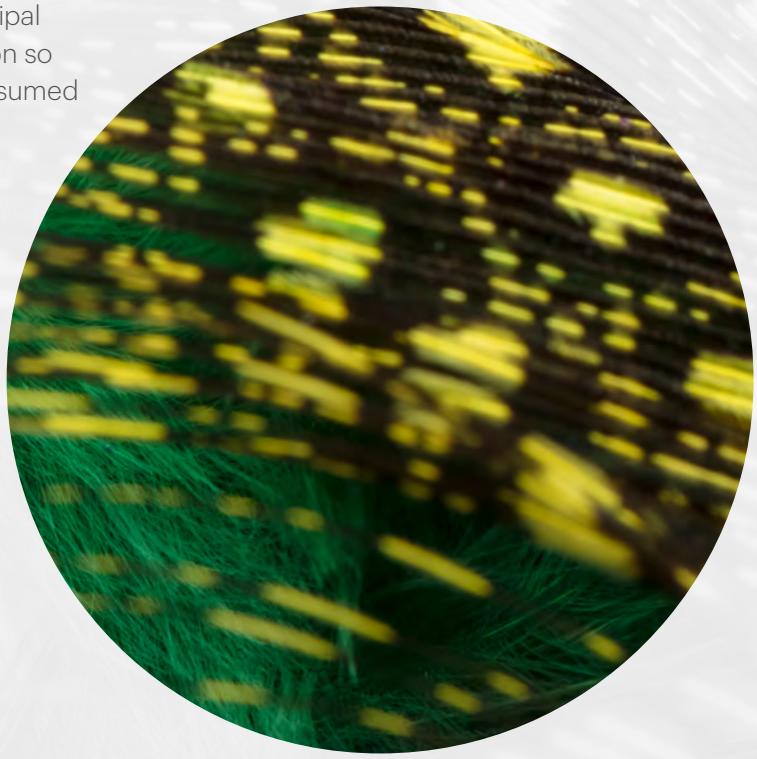
Although the Court did not expressly state or rely on it, the defendants could still have been found liable based on the long-established principle that an agent who holds himself out as acting for a principal thereby gives a warranty that such principal exists and is the "true principal". Thus, a person who purports to act for a non-existent or fictitious principal acts himself.

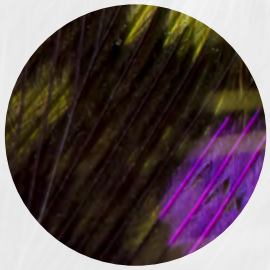
In the case of **British India General Insurance Company Limited vs Mohanlul Solanki alias Dolatrai Mohanlala Mulji**[33] the Court of Appeal of Uganda held that where a person professes to contract on behalf of a principal and the principal is a fictitious or non-existent person, the person so professing to contract may sometimes be presumed to have intended to contract personally and is personally liable on the contract.

It should make no difference that the advocate does not take part in the transaction as a party because Court has upheld the principle against individuals who have purported to sign contracts not in their individual capacity but for and on behalf of companies[34]. Technically, in that scenario, just as an advocate acting in a transaction, the individual would not have been one of the parties to the impugned agreement.

Throughout the Namayega decision, the Court affirms that at common law, the relationship between a client and an advocate is that of principal and agent[35]. It should follow therefore that even as a law of contract/agency rather than the law of negligence principle, the advocate should be held personally liable for acting for a non-existent or fictitious principal[36].

Co-extensively, it can be argued that the advocate would be acting without instructions, for, logically, one cannot be instructed by a fictitious or non-existent person. This violates Regulation 2 (1) of the Advocates (Professional Conduct) Regulations which bars advocates from acting without instructions.





33. Civil Appeal No. 30 of 1997. See also Walugombe Lugobe Company Limited v Jiwa HCCS 349/1967.
34. S.R.S (U) Ltd vs. Aziz Ismail T/A Paventi Tandoori HCCS 20/2011
35. see Ross v. Caunters [1980] Ch 297 at p 322 and White v. Jones [1995] 2 AC 207 at 256B).
36. Collen v Wright (1857) 119 ER 1259,

The above principle is well settled in litigation, but important differences exist

In litigation, an advocate who purports to act for a client that is later proved to be non-existent acts without authority (instructions) and is liable to be condemned to costs personally[37]. In this sense, the Namayega decision can be seen as only extending the liability visited on litigation advocates to transaction advocates.

The difference being that while in the former case, the loss is taken as being the costs of litigation and atoned for as such, in transactions, the loss can only be recovered as damages.

As a matter of jurisdiction, the inherent disciplinary jurisdiction over the indiscipline or misconduct of advocates committed in its presence does not arise in transactions because the transaction happens out of Court[38]. The offending advocate can then only be pursued in a separate cause under the Court's general jurisdiction.

In Namayega, the Court noted that the excesses of a litigating advocate are mitigated by the fact that his actions take place in a courtroom in the presence of the court and opposing advocate. On the other, a transaction advocate advises their client in private and often goes on to actively aid their clients in completing the transactions that he/she advises on. This greater involvement in completing the transaction increases the risk of the advocate being adjudged to have been an aider, abettor, or accomplice of the client should the transaction turn out to be illegal or tortious[39].

The Court held further that the justification for its holding of transactional advocates liable finds basis in extending the already existing analogous statutory duties of advocates to prevent their clients from (ab) using their services and instrumentality for criminal activities, money laundering, or even lying to the court[40]. It declined to call in aid of the defendants, the immunity of advocates, holding that such immunity only applies to advocates acting honestly.

Compared to the risk, compliance is not too burdensome

The court opines that transactional advocates are the classic low-cost avoiders that are often best positioned, at the very least, to make impostor scamming more expensive and difficult. It reasoned that given the significantly increased use of technology for conducting searches through public data records to verify the identity of walk-in-clients, such as automated identity verification checks with the National Identification and Registration Authority (NIRA), know your customer identity checks are much faster and cheaper.

This position finds support in the practice of commercial banks placing the cost of verifying client's identities on the clients themselves. A seller hoping to receive 62,000,000 shillings as in this case, should ordinarily not find it too onerous to spend a few tens of thousands of shillings on verification so that they can receive the much bigger sum.

37. See Bugerere Coffee Growers Ltd versus Sebaduka and another [1970] 1 EA 147; See also Yonge vs. Tonybee [1910] 1 K.B
38. See section 17 of the Advocates Act Cap 267
39. See the controversy in Ayebazibwe Ronald vs Barclays Bank Uganda Ltd (supra) (supra) See also the Judgment of G.W. Kanyeihamba (JSC) in Frederick J K Zaabwe vs. Orient Bank SCCA 4/2006.
40. See section 9 of the AMLA, and regulation 16 of the Advocates (Professional Conduct) regulations SI 267-2

The court appears to have cast the duty on advocates cast too widely in one important particular

The court held that a transaction advocate must conduct deeper due diligence ensuring the client is real, their transaction is real, and the money sitting at the table or elsewhere ready to change hands is real, legitimate, and earned within the confines of all applicable laws.

This is one of the few points on which the decision may be fairly criticized. While the duty as to the authenticity of the identity of the seller and realness of the transaction are within the remit of the advocate, it is clear to me that ensuring that the money involved is real is not within the competency of advocates. The commercial terms and their execution should be only for the parties to the transaction and not the advocates.

Even the AMLA only requires accountable persons to record and flag suspicious transactions. It does not impose on them a duty to ensure that the money to be exchanged is real or that it is legitimately earned. To comply with such a duty might require advocates to constitute themselves into private detectives, the very thing that the Court had held at page 22, advocates are not called to.

Conclusion

The Namayega decision represents a significant and welcome development in Ugandan jurisprudence in view of the significant problem of fraud in land transactions. It recognizes duties on advocates to third parties arising out of acting for their clients. It expands advocates' potential liability arising out of breach of those duties.

It recommends ethical and transparent business practices to advocates which, it is thought, would reap trustworthiness dividends for the profession.

While the full implications are yet to be fully understood, advocates will need carefully to consider their duties and responsibilities under this new precedent. Further discussion and potentially legislative clarification may be necessary to address certain ambiguities given the case was essentially decided on its own facts. This will ensure a balanced approach that protects both the interests of third parties and the ethical functioning of the legal profession.

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