THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-MA-0916 OF 2004
(Arising from HCT-00-CC-CS-0877-2004)

CENTURY ENTERPRISES LTD ::::::::::: APPLICANT/DEFENDANT

VERSUS

GREENLAND BANK (IN LIQUIDATION)
:::::::::::::::::
RESPONDENT/PLAINTIFF

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

Upon this case coming up for hearing, counsel for the Applicant, Mr. Samuel Mugisa, raised a short and precise preliminary point of law. He argued that the application was filed under 0.33 rr 3 and 4 of the Civil Procedure Rules and that as such, the Applicant was obliged to serve the Respondent with the notice and the supporting affidavit within the time stipulated under 0.5 r 1. That the Notice of Motion issued on 8/12/2004 and served on 3/2/2005 was out of time. He invited Court to have it struck out and order that Judgment be entered for the Plaintiff as prayed in the plaint.

Mr. Moses Kuguminkiriza for the Applicant does not share that view. According to him, service was indeed effected after 21 days. However, under 0.33, no time limit is imposed for service of documents on the other party. The rule, so argues counsel, does not state the period within which service must be effected. In his view, once a matter is brought under 0.33, the time frames stipulated under 0.5 r 1 do not apply.

I have very carefully addressed my mind to the arguments of both counsel.

Briefly, the Respondent herein filed HCCS No. 877/2004 to recover a sum of Shs.12,778,645-, interest and costs of the suit. It is claimed that the Defendant in that case operated an account with the Plaintiff bank (now in liquidation). That in February 1998, the Defendant was granted an overdraft facility of Shs.5m and in March 1998 another one of Shs.3m. That at the time of the closure of the bank in 1999, the outstanding balance on the Defendant's A/C was Shs.5,862,959-. Hence the claim of Shs.12,778,645- which includes interest up to the date of filing. Under 0.33 r 4, all that the Defendant has to show is that there is a triable issue of fact or law. The Defendant can do so by filing an application for leave to appear and defend the suit. The application takes the form of a Notice of Motion. There is no stated procedure under that order for service of such application on the opposite party. However, under 0.45 r 2, all such orders, Notices and

documents (emphasis mine) shall be served in the manner provided for the service of summons. It is noteworthy that the word used in the order is 'shall'. In the absence of any other rule to the contrary, this takes us to 0.5 which governs issue and service of summons.

From the above, Mr. Kuguminkiriza's argument that service of process under 0.33 is not governed by 0.5 r 1 cannot be sustained. The contentions herein are, first, that the application for leave to appear and defend was not served on the Applicant within 21 days from the date of issue as required by the rules, and, secondly, that there was no application to extend time within which to effect service of the summons. From my analysis above, the two contentions above cannot be faulted. The time frames stipulated in 0.5 r 1 were certainly the mischief, or the unsatisfactory state of affairs, which the amendment to the Rules in 1998 was meant to remedy. It was targeted at people who after getting summons for service on the opposite party just went to sleep there by contributing to unnecessary build up of case back log. Clearly, therefore, the law is on the Respondent's side. It was imperative that in order to comply with the rules, an application had to be made to Court within 15 days from the expiry of the 21 days, showing sufficient reasons, to extend the time within which to serve the notice of motion. So much for the law.

Mr. Mugisa asked Court to order the application struck out, as there was non-compliance with the mandatory provisions of the rules of procedure. Mr. Kuguminkiriza did not make any prayer in mitigation, believing as he certainly did that the law was on his side. The rules of procedure enjoin this Court to administer law and equity concurrently. I'm cutely aware that Article 126 of the Constitution enjoins Courts to administer substantive justice without undue regard to procedural technicalities. This law, however, did not intend to do away with the rules of Civil Procedure. It was not meant to be a magic wand in the hands of defaulting litigants. It should not be used to side step rules of procedure: Utex Industries Ltd –Vs- Attorney General SCCA No. 52/95.

This may explain, perhaps, why Mr. Kuguminkiriza did not rely on it. In Nassanga –Vs- Nanyonga [1977] HCB 318, however, the Court held, and I agree, that the Civil Procedure Rules are a guide to the orderly disposal of suits and a means of achieving justice between the parties. The same should not be used to deny a party desirous of contesting.

I have made a glimpse into the impugned application. The Applicant states therein that it is not indebted to the Respondent as claimed as the Respondent recovered all its money by way of sale of the security, i.e. Motor vehicle No.435 UAK. The Respondent denies sale of that vehicle.

In view of the correspondence between the parties after the institution of the suit whereby the Respondent's claim is totally denied, and considering the manner in which the bank was taken over which may have affected custody of documents, the Respondent cannot have reasonable grounds for believing that the Applicant has no defence at all to the suit.

While therefore there is merit in the Respondent's point of law regarding service of the notice of motion, I would hesitate to allow this procedural lapse to over shadow the substantive concerns of the Applicant. In the spirit of Article 126 (2) (e) of the constitution, I'm inclined to disregard the irregularity. I have come to this conclusion because in a case such as this, while there is, on the one hand, the necessity for the rules to be followed, there is, on the other hand, the need for the Courts to control their proceedings and not to be unreasonably inhibited by the rules of procedure. The idea is that the administration of justice should normally require that the substance of all disputes be investigated and decided on their merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights: Banco Arabe Espanol –Vs- Bank of Uganda SCCA No. 8/1998.

This, of course, does not mean that rules of procedure should be ignored with impunity. Far from that. Each case must, of course, be decided on the basis of its own circumstances.

In the instant case, while the lack of adherence to the rules has been noted with the seriousness it deserves, the circumstances of the case require that the same be overlooked for the sake of administering the greater interests of justice. In the result, the point of law is accepted in part. I invoke the powers of this Court under Article 126 of the Constitution, section 4 of the Judicature (Amendment) Act, 2002 and S.98 of the Civil Procedure Act which enables the Court to make such orders as may be necessary for the ends of justice, to grant the Applicant/Defendant leave to defend the suit as prayed. The statement of defence shall be filed within seven (7) days from the date of this order.

As regards costs, although they follow the event, in view of my observations above regarding Applicant's non adherence to the rules, the Respondent shall have the costs of this application in any event.

It is so ordered.

Yorokamu Bamwine

J U D G E

10/05/2005