

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0142 -2008
(Arising from HCT-00-CC-CS-0166-2002)

ROBERT OPIO & ANOTHER APPLICANTS

VERSUS

EDWARD KABUGO SENTONGO RESPONDENT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Robert Opio and the Registrar of Titles, the 2nd and 3rd Defendants in Civil Suit No. 166 of 2002, seeking an extension of time within which to file an Amended Defence to an Amended Plaintiff. The application is brought by Notice of Motion under Order 51 rule 6, Order 52 rule 1 of the Civil Procedure Rules and Sections 96 and 98 of the Civil Procedure Act.

The application is supported by two affidavits, one deposed to by Sarah Basagwa Kulata, the Ag. Commissioner for Land Registration in the Ministry of Lands, Housing and Urban Development. The other is deposed to by Robert Opio, the 1st Applicant and a Senior Registrar of Titles for Kampala City Council.

Order 51 rule 6 of the Civil Procedure Rules grants court the discretion to extend time within which to take any action or proceedings. It states:-

“Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by order of the Court, the Court shall have power to enlarge the time upon such terms, if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order.”

Section 96 of the Civil Procedure Act states:-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion, from time to time, enlarge the period, even though the period originally fixed or granted may have expired.”

While prosecuting the application Ms Fredah Kabatesi, a State Attorney argued that the reasons contained in the two affidavits, filed in support of the application, provided sufficient reasons as to why the Amended Written Statement of Defence was not filed in time. Counsel cited the case of Charles Harry Twagira Vs Attorney General and 2 others SCC Application No 15 of 2006 where Justice Kanyeihamba JSC agreed with the holding

of Justice Tsekoko JSC in the Mansukhal Ramji Karia & Crane Finance Co Ltd Vs Attorney General & 2 others SCC Application No. 1 of 2003 where he stated:-

“The matter is left to the discretion of the Court. This means in my view that various factors can constitute sufficient reason. In my view, a ground that prevents injustice to an applicant can constitute sufficient reason. Counsel's mistake can cause injustice. Article 126 (2) (c) requires courts to administer substantive justice without undue regard to technicalities. Without being dogmatic, I think that Article 126 (2) (c) should be a useful tool in considering applications as this one.”

The Plaintiff/Respondent's claim in the main suit is that at all material times, he was and still is the registered proprietor of the land and house situate at Kyadondo Block 208 Plot 1408 Kawempe. That the 1st Applicant/2nd Defendant is a registrar of titles and the officer in charge of Kampala Mailo Office Land Registration Department Ministry of Water, Land and Environment working under the control of the 2nd Applicant/3rd Defendant. The 2nd Applicant is in charge and control of the office of Titles in the said Ministry. That the 1st Applicant fraudulently and in non-compliance with the provisions of the Registration of Titles Act removed a caveat lodged on the property by one Jenifer Kabugo, wife to the Respondent, registered a mortgage in favour of the 1st Defendant and had intention to register a transfer into the names of a third party. Which act the Respondent contends caused him loss and damage for which he holds the Applicants and the 1st Defendant jointly and severally liable.

The Respondent filed an affidavit in reply where in paragraph 3 he avers that the department of land registration and survey where Sarah Basagwa Kulata works was served on 17th August 2007 but has since not filed a defence to the amended plaint. In paragraph 6 he avers that since the time the 1st Applicant, Robert Opio, was served with the Amended Plaint has been appearing in court but had never explained to court as to why he did not file a defence to the Amended Plaint.

In his affidavit Robert Opio states that he is employed in the Government of the Republic of Uganda as a Senior Registrar of Titles for Kampala City Council. That at the material times he was officer in charge of Kampala Mailo Office and a subordinate officer to the Ag. Commissioner Land Registration. Since the end of the year 2004 he was relocated from the Ministry of Lands, Housing and Urban Development under, what he terms, very harsh circumstances whereby he was literally declared persona non-granta, which, he says, meant that he could not be seen near the registry nor could he access any of the records in respect of land matters, including the file and certificate of title comprising of the suit property. He contends that as a result of the above reasons, when the amended plaint was served on him in August 2007, he could not have access to the relevant file in order to prepare an appropriate defence. That it was only from the beginning of the year 2008 the circumstances changed enabling him to have access, requisite and make consultations but and be in position to prepare the defence attached dated 19th March 2008.

In her affidavit the Ag. Commissioner for Land Registration avers that she is the officer in charge and control of the Department of Land Registration. As the responsible officer, her attention has been only recently drawn to the suit by the 1st Applicant, Opio Robert. She contends that she is the responsible officer upon whom service of the Amended Plaintiff ought to have been made. She denies having been served and states that she only learned from the said Opio Robert, the Senior Registrar of titles for Kampala District of the alleged service of an Amended Plaintiff on the Department on or about 16th August 2007. She contends that due to the failure to serve the responsible officer, it has not been practicable for the Department to effectively prepare itself and to file the necessary defence within the prescribed time.

On the above evidence Counsel of the Applicants submitted that there were sufficient reasons for the Applicants' failure to file the amended statements of defence in time. Counsel also relied on the case of Attorney General Vs AKPM Lutaya SCC Application No. 12 of 2007, where the reason for delay was that there was a lack of co-ordination in the Civil Registry of the Attorney Generals Chamber following the resignation of a Senior State Attorney who had the personal conduct of the case file. Justice Bart Katurebe JSC found that there was a lack of coordination in the Civil Registry of the Attorney General's Chambers and held that the mistakes and lapses and or failures by the Director of Civil Litigation, his lawyers and staff constituted sufficient cause as to why the necessary steps were not taken in time. His Lordship allowed the application for extension of time.

Mr Medard Lubega, counsel for the Respondent, opposed the application. He argued that the application was tailored with lies and deceitful conduct on the part of the Applicants. With regard to the 1st Applicant Counsel argued that he had neither been dismissed nor interdicted but only transferred from the Land Department to Kampala City Council. He had been only relocated or transferred. Counsel maintained that in the circumstances he had access to the relevant files.

It is an agreed fact that Opio Robert had moved from the Registration of Land Department of the ministry to Kampala City Council. His evidence on oath is that the circumstances of his transfer were very harsh and was literally treated a persona non grata with no access to the department. The only evidence to contradict that statement is that of the Respondent who in paragraph 5 of his affidavit states that Opio Robert has always had access to the Land Registry. Mr. Edward Kabugo Sentongo is not an officer or member of staff in the land Registry and as such he is not in position positively to assert, as he attempts to do, that Opio had free access to the Registry. It is not always true that an officer who has been transferred from an office has free access to that office and or documents therein. There is no evidence given to contradict Opio Robert's evidence on the circumstances surrounding his transfer. I therefore find no reason to doubt his averments as to his accessibility to the information relevant for the preparation of an appropriate defence.

With regard to the 2nd Applicant counsel argued that the office of the Commissioner Land Registration was aware of the Amended Plaintiff since there was service of the Amended Plaintiff on the Commissioner Land

Registration one Mr Karibwende on 17th August 2007. Further Ms Kulata must have been aware of the Amended Complaint since on 11th February 2008 a Hearing Notice had been served on a lady Commissioner for land whom learned counsel concluded must have been Ms Kulata. He relied on the two affidavits of service, annexures “A1” and “A2” to the affidavit in reply.

In Annexure A2, the process server avers that he was forwarded to the Commissioner of Land Mr. Kalibwende whom he served the Amended Complaint. This was on 17th August 2007. While in Annexure A1 the process server states that on 11th February 2008 he served Hearing Notice on the Commissioner of Land whom he this time does not name but refer to as “Her” . The implication is that there has since been changes in office of the Commissioner. The evidence available is that Ms Sarah Basagwa Kulata is currently the Ag. Commissioner Land Registration. However there is no evidence to show that she was the lady Commissioner on whom the Hearing Notice was served on 11th February 2008. Her evidence is that she had only been recently made aware of the existence of the suit and the Amended Complaint by the 1st Applicant. It is not disputed that Mr. Karibwende on whom the Amended Complaint had been served had ceased to be the Commissioner Land Registration. No evidence has been adduced to show that Sarah Basagwa Kulata, the Ag. Commissioner was the one who immediately replaced Mr. Karibwende. This court is not prepared to infer that since Sarah Basagwa Kulata is a lady, she must be the one served with Hearing Notice on 11th February 2008. In the premises I find that the 2nd Applicant has given sufficient reasons for failure to file an Amended Written Statement of defence in time.

Both Applicants in their respective affidavits, state that it is just and equitable that the application for extension of time within which to file the defence is allowed. The need to file an Amended Written Statement of defence arose following the Respondent having filed an Amended Plaintiff on 16th August 2007. Otherwise both Applicants had already filed a jointly Written Statement of Defence on 26th April 2002. The Applicant has attached to this application their intended Amended Written Statement of Defence. I have carefully perused the Applicant's Written Statement of Defence on record and their intended Amended Written Statement of Defence and I have found that the intended Amended Written Statement of Defence does not introduce anything new. It does not in any way introduce a new defence. The defence is substantial the same, save that the Intended Amended Written Statement of Defence is more elaborative. Even if the Application was to be rejected what is stated therein could still be brought out in evidence and the Applicants would still be within their pleadings.

Therefore considering all the circumstances of this case this Court finds it appropriate to exercise its discretion and allow the application by both Applicants to extend the time within which to file their Amended Written Statement of Defence. The application is granted. Since the reasons for the Applicants' failure to file the Amended Written Statement of Defence cannot be attributed to the Respondent, the Respondent is awarded cost occasioned to him by this application.

Hon Mr. Lameck N. Mukasa
Judge

22nd August 2008