

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0158 -2008
(Arising from HCT-00-CC-CS-0818-2007)

MARK GRAVES APPLICANT

VERSUS

BALTON (U) LTD RESPONDENT

BEFORE HON. MR. JUSTICE LAMECK N. MUKASA

RULING:

This is an application by Chamber Summons brought under Order 9 rule 3 (l) (f), (g) and (h) of the Civil Procedure Rules and Section 33 of the Judicature Act.

When the application came up for hearing Mr. Paul Rutisya counsel for the Respondent, raised two preliminary points of law. First, he argued that the Applicant had not yet filed a defence. He contended that to bring an application under Order 9 rule 3 of the Civil Procedure Rules the Applicant must first file a defence and

then file the application. He submitted, therefore that the Applicant has no locus to bring this application.

In his reply Mr. Baingana, counsel for the Applicant, argued that sub-rules 5 and 6 of rule 3 of order 9 CPR made the filing of a defence optional where a defendant makes an application under sub-rule 1 of the rule.

The application is brought under Order 9 rule 3(I) (f), (g) and (h) CPR which states:-

*“A defendant who wishes to dispute the jurisdiction of the Court in the proceedings by reason of any such irregularity as is mentioned in rule 2 of this order or any other ground shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the court for

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The issue is whether an application under the above rule can be filed by a defendant without first filing a Written Statement of defence. The Respondent contends that where the defendant

has not filed a defence he has no locus to file an application under the rule.

The rule requires an applicant who wishes to dispute the jurisdiction of Court to:-

- (i) give notice of his/her intention to defend the proceedings,
- (ii) apply within the time limited for service of a defence.

A defendant who has been served with summons is required to file a defence within the time and manner as provided by Order 8 rules 1 and 19 and Order 9 rule 1 of the Civil Procedure rules. The filing of such a defence, rule 2 provides, is not a waiver by the defendant of any irregularity in the summons or service of the summons or in any order giving leave to serve the summons out of the jurisdiction or extending the validity of the summons for the purpose of service. The filing of a defence is clear and sufficient notice to the plaintiff that the defendant is not only intending but is defending the proceedings against him. It is trite that any irregularity in the pleadings or proceedings can be raised as a preliminary objection at any stage of the proceedings either by

formal application or informally by oral application. Logically the requirement for notice of intention to defence cannot arise where a defence has already been filed. My considered view is that for a defendant to apply under rule 3 of Order 9 CPR he does not require to have filed a defence first provided he gives notice of his intention to defend the proceeding prior to the filing of the application and does so within the time limited for service of a defence.

The filing of a defence prior to filing an application under rule 3, is optional. Where a defence is filed, such filing will not be a waiver to filing of the application (rule 2). Further the filing of a defence where the defendant has filed an application under rule 3 is not treated as a submission to the jurisdiction unless court makes no order on the application or dismisses it (rule 5). And where the defendant who has filed a defence, does not make the application such defence will be treated as a submission by the defendant to the jurisdiction of the court in the proceedings unless the defence is withdrawn with leave of court under rule 1 (3) of Order 25 CPR.

Whether a defence is filed or not, to file an application under Order 9 rule 3 CPR the Applicant must:-

1. be disputing jurisdiction of the court.
2. prior to filing the application, give notice of intention to defend the proceedings, and
3. file the application within the time limited for service of a defence.

It is not conditional that the Applicant must have filed a defence prior to filing the application though he/she may opt to file a defence. In the premises the Respondent's first objection is overruled.

The Respondent's second point of objection was that the application was after the lapse of the time for service of a defence. Counsel for the Respondent referred to the court record and pointed out that the summons were served on the Applicant by substituted service. That was by advertisement in the New Vision Newspaper of 14th March 2008. The summons required the defendant/Applicant to "file the Written Statement of defence within fifteen (15) days from the date of publication of this notice" – i.e. 14th March 2008. Counsel argued that the defence should have been filed by or before 31st March 2008. This application was filed on 1st April 2008

The rule provides:

“--- within the time limited for service of a defence ---“

Order 8 rule 1 (2) provides:-

“(2) Where a defendant has been served with summons in the form provided by rule 1(I) (a) of Order V of these Rules, he or she shall, unless some other or further order is made by the Court, file his or her defence within fifteen days after service of the summons.”

Order 8 rule 19 states:

“Subject to rule 8 of this order a defendant shall file his or her defence and either party shall file any pleading subsequent to filing of the defence by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the defence or other pleadings at the address for service of the opposite party.”

Therefore filing of a defence is completed by delivering a defence to court for placing upon the court record and delivering a duplicate thereof at the address for service of the plaintiff (order 8 rule 19). This was supposed to be done within 15 days from the date of publication of the advertisement (Order 8 rule 1(2)) CPR).

When this application was filed on 1st April 2008, it was outside the time limited for service of a defence. However, Mr. Baingana argued that Order 9 rule 5 of the Civil Procedure Rules, where any defendant fails to file a defence on or before the day fixed in the summons and the plaintiff is desirous of proceeding upon default of filing the defence under of the rules of the Order, requires the plaintiff to file an affidavit of service of the summons upon the record. Counsel argued that no affidavit service had yet been filed on the court record. He therefore submitted that the period within which to file a defence had not yet started to run.

Order 8 rule 3 (I) CPR required the Applicant to make the application “within the time limited for service of a defence.”

In the instant case within 15 days form the date of publication of the notice and the evidence on record shows that it was published in the New Vision Newspaper of 14th March 2008. The provisions of rule 3(I) address “service of a defence” and not return of

service. An affidavit of service provided for by Order 9 rule 5 is a requirement as to evidence of service. Further evidence of service of the summons can be gathered from the Applicant's own affidavit. In paragraph 2 the Applicant refers to Mr; Jimmy Muyanja as his advocate and in paragraph 3 he avers that on 15 March 2008 the said Mr Muyanga informed him of the advert. Order 5 Rule 18 (2) provided that substituted service under an order of Court shall be as effectual as if it has been made on the defendant personally

In the premise I find that the application was filed out of the time limited for service of the defence. *In Uganda Revenue Authority Vs Uganda Consolidated Properties Ltd (1997 – 2001) UCL 149* Justice Twinomujuni JA stated:-

“Time limit's set by statutes are matters of substantive law and not mere technicalities and must be strictly complied with.”

This application was caught up by the time limits within the provisions of Rule 3 (I) of Order 9 CPR

The second point of objection is upheld.

Before I take leave of this matter I wonder whether this was an application envisaged to be brought under Order 9 Rule 3 of the Civil Procedure Rules.

Applications under the rule must be by a defendant who disputes the jurisdiction of the Court by reasons of any such irregularities as mentioned in rule 2 of the order or on any other ground. First the Applicant must be disputing jurisdiction. The irregularities mentioned in Rule 2 should be in:

- (i) the summons;
- (ii) the service of the summons;
- (iii) any order giving leave to service the summons outside the jurisdiction.
- (iv) any Order extending the validity of the summons for the purpose of the service.

All the above irregularities affect the jurisdiction of Court. So reference to “or any other ground “in Rule 3 must be reference to other grounds which affect the jurisdiction of court. The grounds upon which this application is grounded do not affect the jurisdiction of court.

The grounds for this application as per the Notice of Motion are that:-

1. The Respondent has knowingly refused to disclose critical facts to the Honourable Trial Court thereby rendering its suit an abuse of the court process.
2. The Respondent's Advocate in breach of his professional code of conduct and as an officer of court has knowingly refused to disclose essential facts which are well within his knowledge, thereby wasting the scarce resources of the judiciary by abusing the court process.
3. The suit be dismissed with costs because it is just and equitable.

The above grounds are basically the Respondent's and/ or its Advocate's refusal to disclose critical or essential facts. I have also perused the Applicant's affidavit in support. The following are the grounds I could gather from it.:-

1. There is no contractual relationship between the Respondent and the Applicant in his personal capacity
2. The suit does not disclose a cause of action against the Applicant.
3. The Respondent's claim in the suit is the same claim in another suit Balton (U) Ltd Vs Mark Graves t/a Bellflowers HCCS No. 654 of 2006 between the same parties and still pending before this Honourable Court.

The above are not grounds by which the Applicant disputes the jurisdiction of the Court. I therefore find that the application is outside the scope of Order 9 rule 3 of the Civil Procedure Rules.

All in all the application is dismissed with costs to the Respondent

Hon Mr. Justice Lameck N. Mukasa

JUDGE

22nd August 2008

