THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL DIVISION]

MISC. APPLICATION NO 333 OF 2010

(Arising from Civil suit No. 105 of 2009]

STOP AND SEE [U] LTD]…….. APPLICANT/DEFENDANT

VERSUS

TROPICAL AFRICA BANK LTD] ……... RESPONDENT/PLAINTIFF

BEFORE HON. JUSTICE CHRISTOPHER MADRAMA

RULING

The plaintiff filed a suit on the 30th of March, 2009 claiming among other things for recovery of United States dollars 36,000 being rental refund arising out of breach of contract, general damages, interests and costs of the suit. The defendant's written statement of defence was filed on the court record on the 20th of April, 2009. Thereafter, the defendant/applicant filed Miscellaneous Application No. 333 of 2010 on the 28th of May, 2010. The application is for a temporary injunction to restrain the Respondent/plaintiff from further locking of the Applicant's/Defendant's suit premises until the final determination of High Court Civil Suit No. 105 of 2009 and in the alternative the Applicant be allowed to re enter the suit premises. According to the affidavit of Natukunda Andrew sworn on the 18th of June, 2010 annexure B thereof the application was served on the Respondents/Plaintiffs lawyers on the 17th of June, 2010. The Respondents filed an affidavit in reply on the 10th of November, 2010. The affidavit was sworn on the 8th of November, 2010 by one Fred Muwema. When the matter came for hearing of the application for a temporary injunction, counsel for the Applicant raised a

preliminary objection to the affidavit in reply of the Respondent and requested the court to strike it off with costs. Counsel Moses Tugume appeared for the Applicant while Counsel Kiggundu Mugerwa appeared for the Respondent.

Counsel for the Applicant's objection was firstly that Affidavit was sworn by an advocate of the firm representing the Respondents. That the affidavit touches on controversial facts. In particular the Applicants Counsel referred to paragraphs 3 and 4. He contended that the Respondents affidavit in reply was filed out of time in contravention of order 12 rule 3 sub rule 2 of the Civil Procedure Rules which rule requires that all replies to interlocutory applications be made within 15 days from date of service. The application was served on the Respondent on the 17th of June 2010. The reply thereto was filed on the 10th of November 2010 which is about 5 months later. On inquiry by court as to why Counsel for the Applicant filed a rejoinder to the Respondent's affidavit in reply, he submitted that the rejoinder was to enable him to raise the objections. He prayed that the affidavit is struck out with costs.

Counsel Mugerwa opposed the preliminary objection and contended that, there is no law that bars an Advocate from swearing an affidavit in reply for as long as it is not the same advocate going to prosecute the matter. Paragraph 1 of the said affidavit clearly avers that the deponent is swearing the affidavit in his capacity as an advocate practicing with the law firm which has instructions to prosecute this matter. As far as paragraphs 3 and 4 of the affidavit are concerned, they are not contentious because they are based on correspondences from the Respondent and the Applicant which correspondences speak for themselves. Counsel for the Respondent submitted that the impugned affidavit does not contravene the Advocates Act and Applicant would not suffer any prejudice by reason of Mr. Muwema deposing to this affidavit.

On the issue of the time limit for filing an affidavit in reply, Counsel for the Respondent submitted that it is a cardinal principle of law that rules are hand maidens of justice. The objection does not go to the root of the substantive dispute. That being the case, the Applicant is not bound to suffer any injustice or prejudice for failure to file within the time lines set out in the Civil Procedure Rules. He submitted that this matter came before court several times and the last time it was mentioned, counsel for the Applicant applied for an adjournment to file a reply. This was on the 17th of November 2010 and the hearing adjourned to the 8th of December 2010. Any objections to the affidavit in reply should have been raised then. Having failed to raise it, coupled

with applying for an adjournment with a view to filing an affidavit in rejoinder, Counsel is estopped from making this objection. Counsel for the Respondent further submitted that the affidavit in rejoinder was filed a day before this matter came for hearing and served on the Respondent a day before which is more than 15 days out of time and that the Applicants Counsel is equally guilty of failure to observe order 12 (3) (2) of the Civil Procedure Rules.

Counsel Mugerwa further submitted that under article 126 (b) this court is enjoined to deliver justice without undue regard to technicalities. The time lines referred to were mere technicalities which do not go to the root of the dispute. He asked the court to overrule the applicant's objection.

In rejoinder Counsel Moses Tugume submitted that the rule which forbid advocates to swear affidavits in contentious matters extends to all advocates in the firm handling the matter. He undertook to furnish court with an authority to this effect. He further submitted that the issue of who is in possession and as to whether the Applicant took possession and when is a contentious matter. Concerning Annexure "B" to the affidavit in reply, it does not address the issue of taking possession of the premises. The affidavit in rejoinder is not affected by order 12 rules 3 (2) of the Civil Procedure Rules. That rule relates to the application and reply thereto and does not address affidavits in rejoinder. The affidavit in rejoinder was in any case filed with leave of court. Counsel submitted that he had informed court that he would reply by the 26th of November 2010 and the Respondent conceded. Counting from the 26th to the 7th of December are 11 days and not 15. He concluded that the objections raised are not technicalities but are on illegalities.

Article 126 (2) (e) of the Constitution was not meant to erase the Civil Procedure Rules. It is not a substitute for any of the rules. Counsel for the Respondent had an option to apply for enlargement of time under order 51 rules 7 to file a reply out of time but he did not do that. He reiterated his prayers for the affidavit to be struck off the record.

I have carefully considered the submissions of both counsel of the parties. The question of timelines for the filing of interlocutory applications has not yet been exhaustively considered. The question of whether the affidavit in reply was filed within the prescribed time shall be resolved first this is because an answer to the issue will determine whether the second issue on the validity or competence of the affidavit should be considered or not. Counsel for the applicant

relied on order 12 rules 3 of the Civil Procedure Rules. Order 12 rule 3 deals with the timelines for filing of interlocutory applications, service thereof and the handling of interlocutory applications. It provides as follows:

> **3. Interlocutory applications.**
>
> (1) All remaining interlocutory applications shall be filed within twenty-one days from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within fifteen days after the completion of the scheduling conference; that date shall be referred to as the cutoff date.
>
> (2) Service of an interlocutory application to the opposite party shall be made within fifteen days from the filing of the application, and a reply to the application by the opposite party shall be filed within fifteen days from the date of service of the application and be served on the applicant within fifteen days from the date of filing of the reply.
>
> (3) An interlocutory application shall be fixed for hearing within twenty-one days from the date of service of the reply on the applicant.
>
> (4) All interlocutory applications shall be heard and finalized within forty-five days from the date fixed for the hearing of the application unless the court, for sufficient reason, extends the time.

The rule should not be read in isolation. Sub rule 2 follows from sub rule 1 of rule 3 order 12 of the Civil Procedure Rules and deals with all remaining interlocutory applications from the date of completion of the alternative dispute resolution, or where there has been no alternative dispute resolution from the completion of the scheduling conference. This case was referred for mediation on the 27th of May 2009. On the 27th of April, 2010 the matter came for scheduling before the Hon. Justice Stella Arach judge of the High Court as she then was whereupon she referred the parties to the mandatory court assisted mediation.

The strict interpretation of the rule would imply that time has to be reckoned from the matters stated in rule 3 sub rule 1. This means that time runs from the date of completion of the alternative dispute resolution or to run from the completion of the scheduling conference. In this case there has neither been a completion of the alternative dispute resolution which is the mandatory mediation nor has there been a scheduling conference. Rule 3 sub rule 1 is the foundation of sub rule 2 which learned counsel for the applicant relied upon. This is the problem of interpretation. On the one hand if you rely on sub rule 1 to interpret sub rule 2 you must come to the conclusion that the application must be filed after the occurrence of the matters stated therein. What if the application is filed irrespective of whether the matters stated in sub rule 1 have occurred? Sub rule 1 gives 21 days within which such interlocutory applications have to be filed from the occurrence of the matters stated therein. This application was filed before the occurrence or consummation or completion of alternative dispute resolution or the scheduling conference. Consequently, one may say that the application does not fall within rules 3 of order 12 of the civil procedure rules.

On the other hand, one can contend that order 12 rule 3 sub rule 2 is of general application and does not only apply to applications made within 21 days of the completion of alternative dispute resolution, or scheduling conference. Therefore if any application is filed before the completion of alternative dispute resolution or scheduling conference, sub rule 2 which prescribes 15 days for the filing of the reply would apply. The current application was filed about a year after the filing of the suit. It was filed outside the timelines prescribed by order xii. The Civil Procedure Rules generally prescribes at most three months for the pleadings to be completed and the case to be scheduled or sent for alternative dispute resolution.

Time lines:

Generally time is reckoned from the time of filing of a plaint and the issuance of summons by the court. A summons should be served on a defendant within 21 days from issuance.

Where there is no objection to jurisdiction under order 9 rule 3 of the Civil Procedure Rules, order 8 rule 1 (2) requires a defendant to file his or her defence within 15 days from the date of issue of summons. The defendant may file a counterclaim with his or her defence and this affects the timelines for the filing of pleadings.

Where no counterclaim is filed together with the defence to the plaint, order 8 rule 18 (1) of the CPR provides that a plaintiff is entitled to file a reply to the defence within fifteen days after the defence or last of the defenses has been delivered to him or her, unless time is extended. Thereafter, no pleading subsequent to the reply of the plaintiff to the defence shall be filed without leave of court. This means that from the time the summons are served on the defendant, there are a maximum of 15 days for filing a defence. The defence is to be served or filed within 15 days. (This gives 30 days from service of plaint on defence.) Thereafter, the plaintiff shall file a reply. The time scales are as follows:

- From issuance of summons 21 days to serve the defendant
- From service of summons on the defendant there are 15 days to file a written statement of defence.
- The plaintiff shall be served with the defence within 15 days of filing thereof. After the plaintiffs reply, the pleadings are deemed closed unless leave of court is sought.
- From the filing of a written statement of defence and delivery thereof to the plaintiff, the plaintiff shall be entitled to file a reply thereto within 15 days from that time.
- This gives us a maximum total of 81 days to close the pleadings.

Where a counterclaim has been filed the time lines are the same as the rules applicable to the filing of defence under Order 8 rule 18 (3). Therefore a defence or reply to the counter claim has to be filed within 15 days from the service of the defence and counterclaim. Specifically order 8 rule 11 (1) provides that: "(1) Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him or her of the counterclaim."

The rule also caters for cases where the counterclaimant names some other person other than or in addition to the plaintiff. Where a defendant to a counterclaim is not the plaintiff, such a defendant shall be entitled to a summons and will file a defence to the counterclaim within 15 days. A counterclaim has to be served on the defendant within fifteen days after its filing under order 8 rules 11 (2). No other reply shall subject to the reply or rejoinder to the defence or

counterclaim be filed without leave of court. An application for leave shall be filed within 15 days from the date of the last service. (Order 8 rule 11 (3).

Last but not least under order 8 rule 18 (4) where the last rejoinder or reply has been made or where there is a default in making it and no leave to file out of time, a pleading has been made, the pleadings shall be deemed to be closed. Furthermore the pleadings are deemed closed after seven days from the filing of the last reply or from the time ordered by court for the filing of a further reply. We can thereof reckon approximately 90 days from the time of summons for the pleadings to be closed.

Where pleadings have been closed or are deemed to have been closed the case may proceed as provided for under order 9 of the Civil Procedure Rules … However order 9 comes into operation 15 days from the time specified which runs from the service of the plaint on the defence in cause of default for filing a defence.

Where the last of the defenses have been filed, and there are no default or ex parte proceedings under order 9 the suit may be set down for hearing subject to order 12 which deals with scheduling or pretrial matters.

“11. Setting down suit for hearing.

(1) At any time after the defence or, in a suit in which there is more than one defendant, the last of the defenses has been filed; the plaintiff may, upon giving notice to the defendant or defendants, as the case may be, set down the suit for hearing. (Is this rule not redundant? The court may now fix the case for scheduling as part of case the management scheme)
(2) Where the time allowed for filing a defence or, in a suit in which there is more than one defendant, the time allowed for filing the last of the defenses has expired and the defendant or defendants, as the case may be, has or have failed to file his or her or their defenses, the plaintiff may set down the suit for hearing ex parte.”

Under order 10 (1) the defendant or plaintiff may apply to court within twenty one days from the date of the last reply or rejoinder for leave to deliver interrogatories and discoveries in writing for the examination of the opposite parties. Interrogatories shall be answered by affidavit within ten days. Any application to strike out interrogatories on the ground of being scandalous or irrelevant, or not exhibited bona fide for the purpose of the suit or lack of materiality to the suit may be made within seven days after service of the interrogatories. Under rule 11 of order 10, where a person omits to answer or answers insufficiently, the party interrogating may apply to court to make him answer or for a further answer by affidavit or by viva voce examination.

A party may also apply for discovery and inspection of documents. A party may give notice to another to produce for inspection any documents referred to in his or her pleadings. The party on whom notice is given shall deliver within 10 days give notice specifying the time and place for the inspection excepting those that the party objects to produce.

Assuming all these preliminary matters are complied with, the time taken cannot exceed six (6) months! Thereafter we assume order 12 comes into operation. It is however my finding that order 12 rule 3 sub rule 2 is meant to give the timelines for all interlocutory applications that are envisaged after the completion of the scheduling conference or alternative dispute resolution. There are other kinds of interlocutory applications which are catered for in the preceding rules to rule 3 of order 12 that I have outlined above. I do not need to outline exhaustively the kinds of interlocutory applications envisaged in rule one and two of order 12. I may say that they deal with inter alia applications that do with interrogatories, discovery and alternative dispute resolution. The rest of interlocutory applications are covered by order 12 rules 3. The logical conclusion is that this application falls outside the provisions of order 12 itself. (It should be noted however that an application can be filed anytime depending on the circumstances of the case and of the parties) Secondly, the rules are meant to give the parties timelines within which to file and complete their pleadings. These pleadings follow the same pattern as that of a plaint and a written statement of defence. It follows that the same time lines would apply to interlocutory applications. A reply or defence to an application has to be filed within 15 days. Failure to file within 15 days would put a defence or affidavit in reply out of the time prescribed by the rules. Once the party is out of time, he or she needs to seek the leave of court to file the

defence or affidavit in reply outside the prescribed time. The practice of legal practitioners is to file an affidavit in reply at pleasure. This has to be discouraged. Order 12 rule 3 should guide advocates on the time lines for pleadings in interlocutory applications.

In this case the Applicant's chamber summons was filed on the 28th of May 2010 and court fees were paid the same day. But the notes indicate that the Registrar issued the chamber summons under the seal of the court on the 15th of June 2010. **It one complies with order 12 rule 3 (2) the application has to be served within 15 days from the date of filing**. That means that strict interpretation of the rule would mean that even the chambers summons were served on the 17th of June 2010 outside of 15 days from the time of *filing* of the application. However it is noted that the fault in this case, is that of the court. The Registrar only signed the document on the 15th of June 2010 about 18 days after filing. I must say that the Honorable Registrar should have time to issue all summonses and notices which have been filed on the day they are filed. The rule presupposes that summonses and notices are issued on the day they are filed. This must be the practice to be adopted otherwise the rules may be rendered inoperative. It would enable the application of the rules without injustice to the parties. As it were the applicant cannot be faulted for having served on the 17th of June 2010 more than 15 days from the date of filing on the 15th of May 2010. Service was made on the Respondent within 2 days from when they received the chamber summons for service on the Respondent.

I have not decided the question of whether an interlocutory application which is filed about a year after the filing of the suit and therefore outside the timelines prescribed by order 12 of the Civil Procedure Rules would be incompetent. There may be situations at any time when the suit is still pending in court warranting the filing and handling of interlocutory applications for the appropriate remedies. I refrain from making further comments on this. Consequently it is my finding that affidavit in reply was filed out of time by about 5 months as submitted by the Applicants Counsel.

Next I must decide the question of estoppels or waiver. Is the applicant barred by the doctrine of estoppels from objecting to the affidavit in reply? Counsel for the respondent submitted that having replied to it, and having had a previous occasion to attack the affidavit in reply, the applicant is estopped from raising the question of the reply having been filed out of time. I find this argument troubling, because the provisions for filing an affidavit in reply within 15 days are

statutory. Can estoppels be raised where there are express statutory provisions? According to Halsbury's Laws of England 4th Edition reissue (1987 – 1997) volume 17 (1) page 290 paragraph 591 Estoppels cannot be set up to override or contravene the substantive law. The House of Lords in **Maritime Electric Co Ltd v General Dairies Ltd [1937] 1 All ER 748 at 753 express this view:**

> "In the view of their Lordships, the answer to this question, in the case of such a statute as is now under consideration, must be in the negative. The sections of the Public Utilities Act which are here in question are sections enacted for the benefit of a section of the public, that is, on grounds of public policy, in a general sense. In such a case—and their Lordships do not propose to express any opinion as to statutes which are not within this category—where, as here, the statute imposes a duty of a positive kind, not avoidable by the performance of any formality for the doing of the very act which the plaintiff seeks to do, it is not open to the defendant to set up an estoppels to prevent it. This conclusion must follow from the circumstance that an estoppels is only a rule of evidence which, in certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail, in such a case, to release the plaintiff from an obligation to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part. It is immaterial whether the obligation is onerous or otherwise to the party suing. The duty of each party is to obey the law. To hold, as the Supreme Court has done, that in such a case, estoppels is not precluded, since, if it is admitted, the statute is not evaded, appears to their Lordships, with respect, to approach the problem from the wrong direction; the court should first of all determine the nature of the obligation imposed by the statute, and then consider whether the admission of an estoppels would nullify the statutory provision. ..."

The Respondent raises estoppels by conduct normally stated as estoppels either by silence, omission or acquiescence. His contention is that the applicant ought to have raised the objection earlier. According to **Phipson on Evidence Fifteenth Edition** page 100, where the conduct consists of omission, before an estoppels can be set up, there must be a duty to the person misled by the conduct. It cannot be said that the Applicants Counsel had a duty to the Respondent to raise the objection earlier. The Applicant filed the application and it was upon the Respondent to

reply. The Respondent was not misled to do anything. Moreover the objection was raised at the earliest opportunity when the matter came for hearing. In any case rules of procedure are not technicalities.

Article 126 (2) (e) of the Constitution enjoins Courts to deliver substantive justice without undue regard to technicalities. The question of what amounts to "undue regard to technicalities" is to be interpreted by court. The rules and timelines for filing defences are not technicalities. They regulate the conduct of the courts business and ensure not only fairness but an orderly manner of disposal of cases. The Supreme Court had occasion to interpret article 126 (2) (e) of the Constitution in the case of **UTEX INDUSTRIES VS ATTORNEY GENERAL S.C.C.A. NO. 52 OF 1995.** In that case, there was no certificate indicating the time that had been taken to prepare the record. The respondent had not applied for leave to extend time since the appeal had been filed after the stipulated 60 days. The Supreme Court on article 126 (2) of the Constitution held that "*the article seems to be a reflection of the saying that rules of procedure are handmaidens of justice- meaning that they should be applied with due regard to the circumstances of each case. We cannot see how in this case article 126 (2) (e) or the Mabosi case can assist the respondent who sat on his rights since 18/8/1995 without seeking leave to appeal out of time* The Supreme Court followed the said decision in the case of **Kasirye Byaruhanga & Co. Advocates vs. U.D.B. S.C.C.A. NO. 2 of 1997**. The court said: *We adopt the same reasoning here and say that a litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.*

In this case the Applicant's Counsel has not even applied for leave to enlarge the time within which to file the reply. I agree that in the absence of an application to enlarge time, the affidavit in reply is incompetent having been filed out of time.

The general rule is that where the defendant does not file a defence or file it within time, the court will proceed in default of the defence. In the case of **Attorney General versus Sengendo [1972] 1 EA 356** (CAK) The Attorney General did not filed a defence within 30 days and when the case came for hearing the Advocate for the AG was requested to apply for extension of time to file his written statement of defence but he declined. At the hearing the Attorney general's

representative wanted to cross examine the plaintiffs witnesses but the court declined to grant him leave to participate in the proceedings holding that it had no discretion to grant leave. The trial judge relied on the principle that a defendant who fails to file a defence puts himself out of court and cannot be heard. On appeal to the Court of Appeal at Kampala, it was held that the trial judge had discretion whether to permit the AGs representative to participate in the proceedings. At page 360

> "On the matter coming for hearing the trial judge refused to allow the advocate appearing for the Attorney-General to cross-examine the witness or take part in the trial. He relied on the judgment of this Court in Kanji Devji v. Jinabhai (1934), 1 E.A.C.A. 87. O. 9, r. 10, is silent on the procedure to be followed when the appellant fails to file a defence. The procedure is different when a defendant has failed to enter an appearance, in that case the action is set down for hearing ex parte, no notice is served on the defendant but provision is made by r. 18 of that Order that if a defendant does appear and desires to take part in proceedings then the court is given a wide discretion and has power to allow the defendant to take part in the proceedings even though this would no doubt be on terms to see that the appellant does not suffer through the defendant's default. The court must clearly have discretion to act under r. 10. The whole basis of our civil procedure laws is to see that justice is done between the parties, and the courts will be slow to prevent a defendant from making his defence even though he is in default, if the plaintiff can be reasonably compensated for any loss he suffers in costs. I agree with Mustafa, J.A. that the judge has discretion, when the suit is set down for hearing under r. 10 to allow a defendant to apply to make good his default and might even, in his discretion, have allowed the defendant to cross-examine the witnesses if in fact he was only cross-examining on the question of damages. However, it does not appear from the record in this case that the defendant ever admitted liability for the injuries received: he first appears to do so in his memorandum of appeal to this Court. I do not think that the Devji case takes away the discretion of a trial judge to allow the defendants to be heard under r. 10.

It is clear that the correct course for the counsel would have been to apply for leave to file the reply out of time. Even though no defence has been filed, I have deemed it fit to permit the

grant leave. The trial judge relied on the principle that a defendant who fails to file a defence puts himself out of court and cannot be heard. On appeal to the Court of Appeal at Kampala, it was held that the trial judge had discretion whether to permit the AGs representative to participate in the proceedings. At page 360

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It is clear that the correct course for the counsel would have been to apply for leave to file the reply out of time. Even though no defence has been filed, I have deemed it fit to permit the Respondents counsel to participate in the proceedings. In interlocutory applications default judgments cannot be entered. The final result is that the Respondents affidavit in reply is struck out with costs for having been filed about 5 Months out of time. Counsel for the Respondent may however address court on the merits of the Applicants application.

Christopher Madrama

Thursday, December 09, 2010

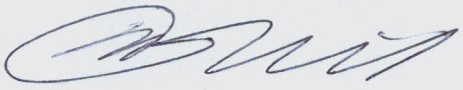
Ruling delivered in the Presence of:

Moses Tugume for Applicant

Mugerwa Kiggundu for Respondent

Applicants MD Haruna Sembatya in court

Patricia Akanyo Court Clerk.



Christopher Madrama

Judge

Thursday December 09 2010