THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL COURT]
CIVIL SUIT NO. 353 OF 2009

WESTERN UGANDA COTTON CO. LTD::::::::DEFENDANT/COUNTERCLAIMANT

VERSUS

1. DR GEORGE ASABA}
2. M/S GEOCOTTCO (U) LTD}
3. COTTCO (U) LTD}
4. COTTON INTERNATIONAL} ::::::::::::::RESPONDENT/COUNTERDEFENDANTS

This is a ruling in a preliminary objection raised by Mr. Paul Kuteesa counsel for the plaintiff that the counterclaim filed against the plaintiff and other counter defendants was not duly served in accordance with the law and therefore should be dismissed with costs.

Counsel pointed out that from the records, the written statement of defence and counterclaim was filed on 17/12/2009 and it was never served on the counter defendants. He stated that he accessed a copy by himself from the court records and filed a response on 24/05/2010 having learnt about it during the mediation process when counsel for the defendant referred to it.

He submitted that the provisions of the law, specifically Order 8 rule 8 of the Civil Procedure Rules (CPR) requires that where a defendant sets up a counterclaim he has to serve it within the period he/she is required to file his/her defence. That the ordinary period for filing a defence is fifteen days as provided by Order 8 rule 1(2) of the CPR. He argued and I agree with him, that the provisions of Order 8 rules 8, 9 and 19 read together with the provisions of Order 5 clearly impose a duty on the defendant/counterclaimant to serve the counterclaim. He submitted that the counterclaim should have been served within 15 days from 17/12/2009.

He referred to Order 9 Rule 2 of the CPR and submitted that the filing of the reply to the written statement of defence and defence to the counterclaim by the plaintiff did not constitute a waiver of the right to challenge the competence of the

counterclaim filed in the suit. He prayed that the counterclaim be dismissed with costs as against the 1st counter defendant/plaintiff for failure to serve the counterclaim within the time prescribed by Order 8 rules 1 (2) and 8 of the CPR.

He contended that as against the other three counter defendants, the counterclaimant /defendant was required under Order 8 rule 9 to serve them in accordance with the rules for service of summons since they are not party to the main suit. He submitted that Order 5 rule 1(2) provides that summons should be served within 21 days from the date of issue of summons which was not done in this case. He submitted that the court record showed that upon receipt of a letter from the defendant's counsel requesting for summons to be issued for service on the other three counter defendants, the Registrar issued the same way back in May, 2010 but the defendant had not bothered to collect and serve.

He further submitted that a counterclaim that is not served is incompetent and should be struck off. For this assertion, he relied on the decisions of ***Wambuzi Ag.CJ*** (as he then was) in ***Nampera Trading Co v Yusuf Ssemwanje & Anor [1973]ULR 99*** and ***Lameck Mukasa, J in Nile Breweries Ltd v Bruno Ozunga t/a Nebbi Boss Stores H.C.C.S 0580 of 2006*** (unreported). He submitted that even if the rules of court were directory as counsel for the defendant would have court believe they do not excuse a party from due compliance.

He pointed out that this suit had already been scheduled and was pending hearing of evidence for which a date had been fixed and the 2nd, 3rd and 4th defendants to counterclaim did not participate in the scheduling. He wondered how such an action would continue against them.

He further submitted that Order 5 rule 1(3) is to the effect that where summons have not been served the suit shall be dismissed and prayed that the counterclaim be dismissed as against the other 3 counter defendants.

Mr. Joseph Mwenyi for the defendant requested and was allowed to file a written response to the submission which he did. He submitted that the law on service had recently been settled by the Supreme Court in the case of ***Mukasa Anthony Harris v Dr. Bayiga Micheal Phillip Lulume EPA No. 18 of 2007;*** where the Supreme

Court held that the primary purpose of court is to investigate substance of the dispute and as such the rules relating to service are not mandatory but directory. Further that where there is a default, the proper course by court is to grant extension of time as that is the intention of Article 126(2) (e). He stated that this was also the position in ***Sitenda Sebalu v Hon Sam K. Njuba EPA No. 6 of 2009***.

He contended that Order 8 rule 8 provides for the time of filing a defence and counterclaim but does not provide for the time of service of defence/counterclaim. He submitted that it was therefore quoted out of context. He further submitted that Order 8 rule 1(1) also provides the time for filing a defence which is 15 days from the date of receipt of summons. Counsel contended that although Order 5 rule 1 (2) uses the word shall, it had been interpreted in the case of ***Mukasa Anthony Harris*** (supra) to be directory and not mandatory.

As regards the other three new parties/ defendants to counterclaim, counsel submitted that counsel for the plaintiff/1st defendant to counterclaim had no instructions to represent them and therefore had no locus to raise a preliminary objection on their behalf.

He contended that the defendant/counterclaimant vide a letter dated 14th May 2010 applied to court for extension of time for the summons to be served on the defendants to counterclaim and copied its request to counsel for the plaintiff. A copy of the letter was alleged to have been attached and marked annex **"A"** but this court did not see it. Counsel contended that the Preliminary Objection had come after they notified court that they needed fresh summons and court had not responded whether it was granting the request or denying it.

Counsel submitted that the plaintiff having filed a reply to the counterclaim, no prejudice had been suffered or had been demonstrated to have been suffered. He submitted that in light of the fact that a separate suit might still be filed against the respondent because the period of limitation had not expired, it would be necessary for avoidance of multiplicity of suits to validate service of the counterclaim. He prayed that in the interest of justice, court on its own motion should validate the said service in exercise of its inherent power under sections 96 and 98 of the Civil Procedure Act.

He prayed that the preliminary objection be dismissed with costs.

I have heard the submissions of both counsels and looked at the relevant laws and the authorities relied upon. I first of all wish to highlight the relevant part of Order 8 r 8 that relates to service which provides as follows:-

> ***"……****and shall deliver to the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence"*.

In that regard, ***Odgers on Pleadings and Practice, 20th Edition*** at pages 222 & 223 also states that;

> *"The defendant can also plead a counterclaim against the plaintiff along with some other person, not already party to the action, described as a "defendant to counterclaim"……Whenever such a counterclaim is pleaded, the defendant must place at the head of his defence an additional title, stating the names of all persons whom he has thus made defendants to his counterclaim and* ***serve the counterclaim upon them****". (Emphasis added).*

The time a defendant is required to file his or her defence as prescribed by Order 8 r 1 (2) is within fifteen days after service of the summons. Under Order 8 r 19, it is the duty of the defendant/counterclaimant to serve the written statement of defence together with the counterclaim like in this case on the defendant(s) by delivering a duplicate of the defence or other pleading at the address for service of the opposite party.

For purposes of determining this preliminary objection I will consider it in two parts. Firstly, I will consider service on the plaintiff and secondly service on the other three defendants to the counterclaim who are not parties to the original suit.

As regards service on the plaintiff, I agree with counsel for the plaintiff's submission that this is governed by Order 8 rules 8 and 19 of the CPR and it was

the obligation of the defendant to serve the same within the time stipulated by the rules. It was conceded by counsel for the defendant in his submission that the written statement of defence and the counterclaim was not served on the plaintiff. Counsel submitted that the law on service had recently been settled by the Supreme Court and prayed that in the interest of justice this court should exercise its discretion under sections 96 and 98 of the CPA to validate service of summons. He relied on the case of ***Mukasa Anthony Harris*** (supra) to buttress this point. The issue for this court to determine is whether failure to serve the counterclaim on the plaintiff was fatal so as to warrant striking off the counterclaim as against the plaintiff.

The object of service of a summons in whatever way it may be effected as stated in ***Mulla, The Code of Civil Procedure, Volume 2, 17th Edition at page 231*** *is that the defendant may be informed of the institution of the suit in due time before the date fixed for the hearing.*

I believe the same object as stated by ***Mulla*** (supra) is applicable to the instant case which is in respect of service of the counterclaim. This is because the plaintiff or any other person named in a defence as a party to the counterclaim has a right to file a reply to it within fifteen days from the date of service as stipulated by Order 8 rule 11 of the CPR. It would therefore be inconceivable and irregular for a defence and counterclaim to be filed and not served.

However, counsel for the plaintiff submitted that he picked a copy of the same from court when he learnt about the counterclaim during mediation and subsequently filed a reply thereto. He relied on Order 9 rule 2 of the CPR and argued that his action did not amount to a waiver of the right to challenge failure to serve the summons hence his preliminary objection. He also relied on the authorities of ***Nampera Trading Co.*** (supra) and ***Nile Breweries Ltd*** (supra) to contend that a counterclaim that is not served is incompetent and should be struck off.

With due respect, I am of the view that the two authorities are distinguishable from the instant case. I believe the ***Nampera Trading Co.*** case (supra) is more relevant for the second part of this objection which concerns the other three defendants to

the counterclaim. I will therefore consider it at that stage. I also think that the facts of the instant case is slightly different from the one in ***Nile Breweries Ltd*** case (supra) in that while in that case the amended written statement of defence was never served just like in this one, the plaintiff's counsel in this case out of his vigilance picked a copy of the written statement of defence together with the counterclaim from the court file and even made a reply thereto.

In ***Mukasa Anthony Harris*** (supra), where the appellant was suspected to have helped himself with a copy of the petition, the Supreme Court observed that the omission to serve the notice was an irregularity which did not vitiate the proceedings. Further that the appellant had not pointed out any prejudice or injustice which he suffered because of the alleged omission by the respondent to serve the notice. Consequently, the court was of the opinion that, that was a case where Article 126 (2) (e) of the Constitution was applicable.

In the instant case, counsel for the plaintiff throughout his submission did not point out to this court any prejudice or injustice that was occasioned to his client by the defendant's omission to serve. Although the issue of service in this case was raised at an early stage unlike in ***Mukasa Anthony Harris*** (supra), I believe that since no prejudice or injustice has been occasioned to the plaintiff, the omission to serve can be treat as an irregularity which for purposes of Article 126 (2) (e) of the Constitution can be safely ignored to ensure that substantive justice is done.

I am also persuaded by the holding in the Kenyan case of ***Pragji Bhagwanji and Company Ltd V Michael Krags and Others, Civil Suit No. 338 of 1995***, to the effect that;

> *"The service of a process becomes effective when a party who is targeted by that service becomes aware of the existence of that matter, which he has to respond to".*

I believe the object of service in this case was achieved by counsel for the plaintiff's action. For the above reasons, the preliminary objection as relates to service on the plaintiff is overruled.

As regards service on the other three defendants to counterclaim who are not parties to the original suit the situation is quite different. As rightly argued by counsel for the plaintiff, service on those defendants is governed by the provisions of Order 8 r 9 which provides that:-

> *"Where any such person as mentioned in rule 8 of this Order is not a party to the suit, he or she shall be summoned to appear by being served with a copy to the defence, which shall be served in accordance with the rules for regulating service of a summons".*

Rules for regulating service of a summons is found under Order 5 of the CPR where rule 1 (2) thereof provides that service of summons issued under sub-rule (1) shall be effected within twenty one days from the date of issue. This rule allows extension of time upon an application to the court made within fifteen days after the expiry of the twenty one days. The procedure for this application is by summons in chambers as provided in rule 32 of Order 5.

Counsel for the plaintiff rightly pointed out that the defendant never served the other three defendants to counterclaim because their service should have been effected in accordance with Order 5 r 1 (2) of the CPR. Court record shows that the defendant's counsel wrote to the Registrar of this court on 14th May 2010 informing her that they had inadvertently omitted to take out summons on the counterclaim as it introduced new plaintiffs to the suit and the time had lapsed. They requested for the Registrar's indulgence to issue summons to the said respondents to enable the firm serve the counterclaim on them. Upon receipt of this letter on the 24th May 2010, the Registrar issued summons the following day on 25th May 2010. There are four copies of the summons on the court file to date and as admitted by counsel for the defendant in his submission, none of the defendants to counterclaim has been served.

This therefore means that the other three defendants to counterclaim are not aware of the counterclaim against them and as such have not participated in the proceedings of this case thus far. The scheduling of this matter has already been done and it is due for hearing after disposal of this preliminary objection.

Counsel for the defendant in his submission downplayed this matter by submitting that the law on service had recently been settled by the Supreme Court in ***Mukasa Anthony Harris*** (supra).

With all due respect to counsel for the defendant, I think he did not address his mind to the context in which His Lordship Tsekooko JSC analyzed the law that was under consideration and arrived at the conclusion he made. I do not think the Supreme Court intended to do away with the mandatory requirement of Order 5 concerning service since it was not even the law under consideration by the Court. The law that was being considered was ***section 62 of the Parliamentary Elections Act, 2005*** and ***rule 6 (1) of the Parliamentary Election (Election Petitions) Rules*** which, as clearly stated by His Lordship Tsekooko JSC, did not provide for sanctions for omission to serve hence his conclusion that it was directory and not mandatory.

That conclusion in my opinion was still in line with what the Supreme Court had earlier stated in the case of ***EAGEN v EAGEN S.C.C.A. No. 2 of 2002*** that where the legislature prescribes something in mandatory language the relevant provision is imperative and obligatory. Non-compliance would affect the validity of the act done in disobedience of them.

Order 5 r 1 (2) is couched in a mandatory language and Order 5 r 1 (3) clearly provides for sanction where summons are not served within twenty one days and there has been no application for extension of time. The sanction is dismissal of the suit without notice. This makes Order 5 r 1 (2) mandatory because failure to comply with it has consequences. Counsel's prayer that this court exercises its power under sections 96 and 98 of the CPA to validate the service is misconceived in view of this finding.

I also find counsel's recourse to Article 126(2) (e) of the Constitution in the circumstances of this case an over stretch and an abuse of this well intended provision. In this regard I find very instructive the reasoning of the Supreme Court in ***UTEX Industries v Attorney General S.C.C.A. No. 52 of 1995*** which was adopted in ***Kasirye Byaruhanga & Co. Advocates v UDB S.C.C.A. No. 2 of 1997*** to the effect 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 particular technicality. Article 126 (2) (e) is not a magic wand in the hands of defaulting litigants".*

Counsel for the defendant submitted that their application for extension of time within which to serve the defendants to counterclaim with the summons was still pending determination by the Registrar. Of course this is not true given what the records show as indicated above.

Counsel further submitted that counsel for the plaintiff/1st defendant to counterclaim had no instructions to represent the rest of the defendants to counterclaim and therefore had no locus to raise a preliminary objection on their behalf. With due respect to counsel, I believe counsel for the plaintiff as an officer of court is under a duty to inform court of any anomaly in the proceedings before court and I thank him for doing so. In my opinion, he does not need instructions to do so. In any case, as stated above, this court is obliged to dismiss a suit without notice where service is not effected within twenty one days.

As indicated earlier, the authority of ***Nampera Trading Co.*** is more relevant here in view of the fact that it relates to defendants to counterclaim who were not parties to the original suit who were not served and therefore were neither present in court nor represented. Court in that case held that the amended written statement of defence which raised a counterclaim and introduced new parties who were not before the court was incompetent in the circumstances of the case and consequently, there was no defence to the action.

In the instant case, counsel for the plaintiff's focus was on service of the counterclaim and it is what he asked this court to dismiss. I will therefore take it that he did not have any issue with the defence and as such I will not make any finding regarding the same.

In conclusion, I find that the defendant did not comply with the mandatory provisions of Order 5 r 1 (2) and in the circumstances I uphold the preliminary

objection as regards service on the 2nd, 3rd and 4th defendants to counterclaim and dismiss the counterclaim against them.

In the result, the preliminary objection raised by counsel is overruled in so far as service of the counterclaim on the plaintiff is concerned and upheld as far as service of the same on the 2nd, 3rd and 4th defendants to counterclaim is concerned. Consequently, the counterclaim against the 2nd, 3rd and 4th defendants to counterclaim is accordingly dismissed.

However, I have looked at the nature of the counterclaim and how it was structured and I am of the opinion that it may not be possible for the defendant to maintain the same against the plaintiff in its current form. In exercise of the discretion given to this court by section 98 of the CPA and in order to avoid multiplicity of suits as per section 33 of the Judicature Act, leave is hereby granted to the defendant to either amend the counterclaim (if it is possible) or withdraw the same, whichever it finds more appropriate in the circumstance.

I make no order as to costs of the preliminary objection.

I so order.

Dated this 8th day of September 2011.

Hellen Obura
JUDGE

Ruling delivered in open court in the presence of Mr. Paul Kuteesa for the Plaintiff and Dr. George Asaba, the plaintiff.

The defendant and its counsel were absent.

JUDGE
08/09/2011