THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - MA - 570 - 2011

(Arising out of Civil Suit No. 257 of 2011)

M/S SIMON TENDO KABENGE ADVOCATES & ANOR ::::::: APPLICANTS

VERSUS

MINERAL ACCESS SYSTEMS LTD :::::::::::::::::::::::::::: RESPONDENT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

R U L I N G:

The Applicant Simon Tendo Kabenge trading as M/S Simon Tendo Kabenge Advocates seeks this court, to strike out the Respondents Written Statement of Defence and Counterclaim in High Court Civil Suit No. 275 of 2011 and to enter judgment in default in his favour.

The application is grounded on the following;

That on the 7th September the Applicant being the Plaintiff in High Court Civil Suit 275 of 2011, served the Defendant/Respondent with summons to file a defence. By the 21st September 2011, the Respondent had not filed its defence.

The Respondent filed affidavits in opposition deponed by Eva Nalwanga an advocate with M/S Kasirye, Byaruhanga & Co. Advocates who was in conduct of the case and another by Glendon Archer, a Director of the Respondent Company.

At the hearing of the application, counsel for the Respondent submitted that they were not relying on Eva Nalwanga's affidavit, and so discarded it.

The Respondent thus lay reliance on the affidavit of Dr. Glendon Archer, who unfortunately from paragraph 5 upto 8 simply reproduced what his advocate told him and para 9 and 10 almost cut and paste of what was in the Eva Nalwanga's affidavit that was discarded.

Dr. Grendon Archer deponed that he was informed by his advocates that 22 September 2011 was the day on which the time for filing the defence expired. That since the defence was filed on the 21 September 2011 it was well within time.

Counsel for the Applicant further submitted that the Respondent did not pay fees for the documents he filed and that even after the court ordered payment of fees it was neither done within the 14 days that the court ordered nor at all.

Mr. Ruhisya for the Respondent submitted that the defence was filed within the prescribed time fo 15 days in complete compliance with Order 8 rule 1(ii) of the CPA. He said the Respondent was served on the 21 September 2011 and the Written Statement of Defence filed on the 21 September 2011. Removing the date of service, meant that time for filing a defence expired on the 22 September 2011.

I shall first look at the filing of the defence.

Counsel for the Respondent submitted that they filed the defence on 21 September 2011. It is not in doubt that the defence was received at the court registry the 21 September 2011. It is also an agreed position by both parties that service upon the Respondent was effected on the 7 September 2011. When then would the 15 days begin running?

Section 34 of the Interpretation Act provides in (a)

> *"A period of days from the happening of the event or the doing of anything shall be exclusive of the day in which the event happens or the act or thing is done"*

Order 51 rule 8 provides

> *"In any case in which any particular number of days not expressed to be clear days in prescribed under these rules or by any order or direction of the court, the days shall be reckoned exclusively of the first day and inclusively of the last day."*

From the foregoing provision, it is clear that the court disregard the day in which the event took place because it is not a complete day Radcliffe V Bartholomew [1892]IQB 161.

In the present case service having been effected on the 7 September 2011, the day of service would not be included in computation of the 15 days within which the defence should have been filed. Begging the computation on the 8 September 2011 meant that the time expired on the 22 September 2011. In the premises acts done on the 21 September 2011 were within the time as prescribed.

Counsel for the Applicant contended that filing was not complete before service.

It is true, that the person who files the pleadings carries the obligation to serve. Can one say, because the Applicant did not serve the Respondent, he had therefore not filed.

Order 9 rule 1 provides

> "A Defendant on or before the day fixed in the summons for him or her to file a defence shall file the defence by delivering to the proper officer a

> defence in writing dated on the day of its filing, containing the name of the Defendant's advocate, or stating that the defendant defends in person and also the defendant address for service. In such a case he or she shall as the same time deliver to the officer a copy of the defence, which the officer shall seal with the official seal, showing the date on
>
> which it was sealed, and then return it to the person filing the defence, and the copy of the defence so sealed shall be a certificate that the defence was filed on the day indicated by the seal.

The rule is so clear, that was amounted to filing was the reception of the Written Statement of Defence, the sealing and dating it. Service on the opposite party is an obligation that arisen after filing. Needless to say, payment of fees is a mandatory requirement under exempted.

Turning to the issue of non payment of fees, the Applicant filed a suit No. 275 of 2011 against the Respondent/defendant on the 21 September 2011 the Respondent filed a Written Statement of Defence and counterclaim.

The Written Statement of Defence that is in the file bore a receipt originally dated 21 September 2011 for 1500 with a receipt No.
-10855 and two other figures which were later disfigured with 74. It is clear that there was an attempt to change the value on the stamp for 1500 to 514,900, changing the last two figures of the serial number by inserting 74 over those that had originally been there and even changing the date of issue.

I have combed the suit file and the other payments that I found were one on 9 August 2011 of 269,300= in respect of the plaint No. URA0138559 and another URA 08333120 dated 4 October 2011. This means the disfigured one on the Written Statement of Defence was meant to be for it.

These matters were brought to the attention of the court. The learned Judge found that the receipt formerly of 1500/= had been reused to represent the fees for the Counterclaim.

He wrote;

> *"In this matter reusing a receipt on different court documents is truly unacceptable given even that the fee in question is a paltry Shs. 1500"*

He then gave the Defendant a chance to repair the wrong in the following words;

> *"I shall however, not allow that to stand in the way of addressing a substantive dispute and order that the Respondents pay all relevant fees the head suit and all applications with evidence to court before the hearing of the main suit.*

In his ruling, its clear that he did not believe that fees had been paid for the counterclaim. Looking at the changes and alteration of the value paid, originally 1,500/= for a claim of USD 139,400- I fully agree with the learned Judges finding that fees had not been paid.

Counsel for the Respondent in his reply to the objection did not show as had been directed by court that the fees had now been paid. It follows that the Respondent did not make those payments as required.

Furthermore, it did not only fail to pay fees on its counterclaim but also defied a court order.

Suits are not properly before court until the required court fees are paid. Non payment fees leads to the striking out of the pleadings, **UNTA Exports Limited V Customs** [1970] EA 648

Furthermore, the Judges' order to pay fees before the next hearing was a peremptory order at times referred to as *"unless orders"* whose disobedience could only be described

as contumacious conduct. **Tolbey V Morris** [1979] I WLR 592. Court cannot standby and condon such acts. Since the Respondent did not in anyway show that it never intended to flout the court's order, and the fact that court cannot condon non payment of fees, the only thing left is to strike out the pleadings against which the learned Judges orders were made.

In that regard, the Written Statement of Defence and counterclaim are struck out.

Judgment is entered in default thereof and matter be fixed for proof of claim.

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David K. Wangutusi
JUDGE

Date: 27 - 08 - 2013