THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION

HCT – 00 – CC – MA - 364 - 2012
(ARISING FROM CIVIL SUIT 327 OF 2010

1. **GOOD MAN AGENCIES LTD**
2. **NICHOLAS WERE …………...………………... APPLICANTS/ DEFENDANTS**

VERSUS

HIGHLAND AGRICULTURE EXPORT LTD ……….. RESPONDENT/ PLAINTIFF

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

R u l i n g

This application is by chamber summons under Order 9 r 2, 3 (1) (a) (g) and (2) and Order 52 r 1(3) of the Civil procedure Rules for dismissal of the summons in HCCS No. 327 of 2010 on grounds of ineffective service and low costs. The application is supported by the affidavit of Nicholas Were the second applicant and the Managing Director of the first applicant.

The grounds for this application are that the respondent/plaintiff did not serve summons within the time prescribed for service of summons. Furthermore, that in the absence of proof of service of summons, then the court has no jurisdiction to hear the main suit.

In the affidavit in support of the application, Mr. Nicholas Were deponed that the respondent filed HCCS No. 327 of 2010 on 13th September 2010, summons were issued on 14th September 2010, but the same were not served and 21 days have expired since the date of issue. Furthermore, that no application for extension of time within which to serve summons has been made and therefore, the main suit should be dismissed. Mr. Were deponed that in the absence of service of summons in a regular manner, the court has no jurisdiction to hear the matter.

In reply, Mr. Arvind Patel the Managing Director of the respondent deponed that on 15th September 2010, he was contacted by Mr. Godfrey Sebuuma a law clerk attached to M/S Kaggwa & Kaggwa Advocates his lawyers, who informed him that the summons were ready for service upon the applicants. Furthermore, that because he did not know the places of abode and the business premises of the applicants, he called the 2nd applicant on Telephone No. 0772440916 and requested him to attend a meeting at the chambers of his lawyers M/S Kaggwa & Kaggwa Advocates on Plot 3, Pilkington Road, NIC Building Annex, Suite A05 and also alerted the process server to be present on that day. Mr. Arvind deponed that on 16th September 2010, Mr. Were came to the said chambers at 3.00pm and found him and the process server. Furthermore, that summons and the plaint in HCCS No. 327 of 2010 were received by Mr. Were on his own behalf, and on behalf of the 1st applicant, to which he is the Managing Director. Mr. Arvind deponed that the applicants later filed a defence but he discovered that the process server had forgotten to file an affidavit of service and therefore, the lapse by the process server should not be visited on the respondent.

At the hearing of the application, the applicant was represented by Mr. Semuyaba, while the respondent was represented by Mr. Kaggwa. The parties filed written submissions.

The question for determination by the court in this application is whether summons was served on the applicants. In his submissions, counsel for the applicant submitted that the summons was issued on 14th September 2010 and twenty one days within which to serve expired on the 5th October 2010 before they were duly served upon both applicants.

Counsel for the applicant further submitted that there was no application for extension of time within which to serve summons and therefore, the proper remedy is to dismiss the suit in accordance with Order 5 rule 1 (3) of the Civil Procedure Rules. Counsel relied on the case of **THREE WAYS SHIPPING (GROUP) LTD V. KEN GROUP (MA 406 of 2011)** for this submission.

Counsel further submitted that Order 9 rule 2 and 3 (1) (a) and (g) of the Civil Procedure Rules allow a defendant to apply for striking out of summons in the absence of service of summons in a regular manner, and that in the absence of proper service of summons, the court has no jurisdiction to hear the suit. Counsel for the applicant further submitted that Order 5 r 16 of the Civil Procedure

Rules provides that an affidavit of service should be filed after service has been made, but in this case, no affidavit of service was filed.

He submitted that the irregularity in service of summons is a matter of substance and not form and can not be treated as a mere technicality. Counsel referred to the authority of **ODUNGA'S DIGEST OF CIVIL PROCEDURE, (Pg 58)** for this submission.

Counsel for the applicant submitted that Order 9 rule 2 of the Civil Procedure Rules allows a party to challenge any irregularity in the summons, and that the filing of a defence by the defendant shall not be treated as a waiver by him or her of any irregularity of 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 purposes of service. Counsel for the applicant submitted that this rule should be read in conjunction with Order 5 rules I (2) of the Civil Procedure Rules which provides that summons shall be served within 21 days from the date of issue.

On the other hand, counsel for the respondent submitted that the applicants were served with the summons and the plaint on 15th September 2010 and thereafter they filled a defence to the suit.

Counsel for the respondent however conceded that there is no affidavit of service on record owing to a lapse on the part of their Clerk to file one, but the respondent's Managing Director, Mr. Arvind Patel confirms in his affidavit in reply that on 16th September 2010, he held a meeting with Mr. Nicholas Were, at which summons and the plaint were served upon the applicants by the process server in his presence. Counsel for the respondent submitted that it is inconceivable that Mr. Nicholas Were who is not a court official suddenly walked into the court registry without any suspicion and discovered that a plaint had been filed and then instructed his Lawyers to file a defence.

Counsel for the respondent prayed that the court believe that the applicant was served with summons as deponed in the affidavit in reply, because the applicant did not deny that his telephone number is 0772-440916 and that this number was used by the respondent's Managing Director for purposes of arranging the meeting at which the summons were served. Counsel for the respondent

further submitted that this denial by the applicants is in bad faith and an attempt to defeat justice, since the respondent did not object to the late filing of the defence for the greater reason that the dispute be investigated by the Court on its merits.

Counsel for the respondent submitted that this application was filed on 2nd July 2012 after service of a hearing notice for the main suit had been made upon the applicants on 22nd May 2012 and there is an affidavit of service on court record. Furthermore, that this application was made after one year and 9 months since the applicants filed their defence.

Counsel for the respondent also submitted that two mediation sessions were conducted in 2011 but the applicant was uncooperative. Furthermore, that the respondent's counsel prepared a Joint Scheduling Memorandum and forwarded it to the applicants' counsel but the latter refused to comment or even sign the same. Counsel for the respondent submitted that putting the above facts into consideration, the applicants are before this court of equity, seeking a remedy of dismissal of the suit and yet they have abused, with impunity the Court's own process by refusing to attend court annexed mediation or sign the Joint Scheduling Memorandum, yet the respondent has complied with the Practice Directions of the Court and is seeking to be heard on the merits.

Counsel for the respondent submitted that the issues in this application were resolved in the case of **HWANG SUNG FISH FACTORY & R.K. JAIN V CHRISTOPHER SEMUGENYA (MA 688 of 2010 arising from HCCS 387 of 2010)**, in which this court found that the trial process had started, in that Court annexed mediation had taken place and therefore it would be too late and too technical to raise issues of service. The court in that case further found that **Section 98** of the Civil Procedure Act and **Section 33** of the Judicature Act, provide that the court is expected to resolve disputes in such a way as to prevent an abuse of court process and see that Justice is done and all issues resolved. Furthermore, that **Article 126** of the Constitution also states that Substantive Law should be followed without undue regard to technicalities.

Counsel for the respondent prayed that in the event that the court accepts the applicants’ version of the nature in which service was done, then Court should be guarded by the greater interests of justice as this application was filed late after Court proceeded. Counsel for the respondent further

submitted that the authority of **THREE WAYS SHIPPING (GROUP) LTD - VS KEN GROUP OF COMPANIES LTD** relied on by the applicants was decided per incuriam, is not binding on this court and is distinguishable from the instant case because in this case, the applicant, who has the burden to prove non service, has not convinced court about how he knew that a suit against them had been filed.

Counsel for the respondent submitted that this application seeking for an order of dismissal of the main suit for lack of jurisdiction on account of want of proper service of summons, would in essence, have the effect of ousting the jurisdiction of the High Court which is both constitutional and statutory. Counsel for the respondent submitted that the High court has unlimited jurisdiction and not even an Act of Parliament can oust the jurisdiction of the High Court. Counsel relied on the case of **TRANSTRAC LTD V DAMCO LOGISTICS (U) LTD (M.A No. 394 of 2010** arising from HCCS No. 161 of 2010) for this submission.

I have carefully considered the submissions of the parties and the authorities referred to me for which I am grateful.

Proof of service of summons is by affidavit of service. According to Order 5 r 16 of the Civil Procedure Rules,

> *"Affidavit of service.*
>
> *The serving officer* ***shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service*** *stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."(Emphasis mine)*

There are a number of decided authorities on the subject of service of summons. The filing of an affidavit of service as proof of service is a mandatory requirement under the provisions of Order 5 r 16 of the Civil Procedure Rules and is designed to ensure that there was actual service and that it

was carried out properly. Hence it would be dangerous for courts to accept the fact that there was service of summons when summons were not signed by the defendant. (See Allen J, in **OSUNA OTWANI v. BUKENYA SALONGO [1976] HCB 62).**

In the later case of **CENTURY ENTERPRISES LTD v. GREENLAND BANK (IN LIQUIDATION) (MA No. 0916 OF 2004 Arising from HCT-00-CC-CS-0877-2004)** Bamwine J, found that

> *"The rules of procedure enjoin this Court to administer law and equity concurrently. I'm cutely aware that Article 126 of the Constitution enjoins Courts to administer substantive justice without undue regard to procedural technicalities. This law, however, did not intend to do away with the rules of Civil Procedure. It was not meant to be a magic wand in the hands of defaulting litigants. It should not be used to side step rules of procedure**: UTEX INDUSTRIES LTD V ATTORNEY GENERAL SCCA NO. 52/95… In Nassanga V Nanyonga [1977] HCB 318,** however, the Court held, and I agree, that the Civil Procedure Rules are a guide to the orderly disposal of suits and a means of achieving justice between the parties. The same should not be used to deny a party desirous of contesting. While therefore there is merit in the Respondent's point of law regarding service of the notice of motion, I would hesitate to allow this procedural lapse to over shadow the substantive concerns of the Applicant. In the spirit of **Article 126 (2) (e)** of the constitution, I'm inclined to disregard the irregularity. I have come to this conclusion because in a case such as this, while there is, on the one hand, the necessity for the rules to be followed, there is, on the other hand, the need for the Courts to control their proceedings and not to be unreasonably inhibited by the rules of procedure. The idea is that the administration of justice should normally require that the substance of all disputes be investigated and decided on their merits, and that errors and lapses should not necessarily debar a litigant from the pursuit of his rights: **BANCO ARABE ESPANOL –VS- BANK OF UGANDA SCCA NO. 8/1998.** This, of course, does not mean that rules of procedure should be ignored with*

impunity. Far from that. Each case must, of course, be decided on the basis of its own circumstances."

In the decision of this Court in the case of **HWANG SUNG FISH FACTORY & R.K. JAIN V CHRISTOPHER SEMUGENYA (MA 688 of 2010 arising from HCCS 387 of 2010),** I held that,

"Many arguments have been raised as to the service. To my mind the practice as to service is will settled. Serve and then file an affidavit of service in a timely manner, so that the case is managed accordingly. The affidavit of service was filed four months later, what is court to make of that? A defence (WSD) has been filed, but counsel for the Applicant states that O.9 r.2 states that a defence does not act as a waiver. Counsel for the Respondent states that prejudice has been occasioned in this case. The record shows that after all this occurred; court annexed mediation took place on the 16/12/2010, 12/01/2011 and 22/02/2011. It was when mediation failed that the file was sent to trial and hence the question of service is resurrected. I have considered all this and it appears that the trial process has started in that court annexed mediation took place. It would be in my view too late and too technical to raise issues of service at this stage. Court is under Section 98 of the Civil Procedure Act (CPA) and Section 33 of the Judicature Act expected to resolve disputes in such a way as to prevent an abuse of court process; see that justice is done and all issues resolved. Article 126 of the Constitution also states that substantive law should be followed without due regard to technicalities. Both parties did not follow the rules, and both parties have started the court process. It is in my view unjust and too late to reverse it."

In this case, the applicants assert that they were not served with summons. That is the irregularity that the applicants rely on. The affidavit in reply suggests that the applicant was served in the chambers of counsel for the respondent on the 16th September 2010. It is a fact that the written statement of defence was then filed on the 13th October 2010. However applicant in his affidavit in rejoinder does not deny the assertion that he was served save that no affidavit of service was put on Court record. I am inclined to believe therefore that the applicant was served and that is why a

defence was filed in response but that the only irregularity was no affidavit of service was put on Court record. That in my view would not defeat the interests of substantive justice. There is equally no prejudice to my mind to the applicant who as I have found was on notice to defend the suit. If service had (for example) been made on a wrong party then that would have been another matter.

I according dismiss the application and put the costs in the cause

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Geoffrey Kiryabwire
JUDGE

Date: 13/03/13

13/03/13

9:31 a.m.

Ruling read and signed in open court in the presence of;

- Semuyaba for the Applicants

In Court

- None of the parties
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date: 13/03/2013