

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)**

HCMA NO 0954 OF 2015

ARISING FROM HCCS NO 574 OF 2015

KYAMBOGO UNIVERSITY}.....APPLICANT/DEFENDANT

VS

THE HEIGHTS LTD}.....RESPONDENT/PLAINTIFF

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The Applicants filed this Application under Order 9 rule 12 and Order 50 rule 6 of the Civil Procedure Rules SI 71-1 for an order setting aside the interlocutory judgment entered against the applicant in HCCS No. 574 of 2015, for extension of time within which to file and serve the written statement of defence and for costs of the suit to be provided for.

The grounds of the Application are that the Respondent who filed an action against the applicant served a person who is not authorized to receive summons/documents on behalf of the Respondent and that the person forwarded the summons to the proper authorities when time for filing and serving the written statement of defence had already lapsed. When the applicant instructed counsel upon discovering that a suit had been filed, counsel filed an application for extension of time to file and serve the Written Statement of Defence vide HCCA 841 of 2015 but was informed that an interlocutory judgment had been entered. The applicant has a good and bona fide defence to the Respondent's suit and it is just and equitable that the Application is granted and time within which to file the Written Statement of Defence extended.

The application is supported by the Affidavit of Patrick .W. Madaya, the acting University Secretary of the Applicant C/o Messrs Bashasha & Co. Advocates sworn at Kampala on 16th November, 2015.

The affidavit sets out the facts of the application as written hereunder. On 8th October, 2015 the deponent discovered that summons in HCCS NO. 574 of 2015 had been served on the clerical secretary on the 4th of September 2015. The clerical secretary is not a person authorized to receive summons or official documents on behalf of the university. The clerical secretary did not within time bring the summons and pleadings in the suit to the attention of the persons authorized to receive summons on behalf of the University. The served pleadings were forwarded to the Applicant's lawyers Messrs Bashasha & Co. Advocates who duly applied for extension of time to file a Written Statement of Defence but later discovered that an interlocutory judgment had been entered against the Applicant. The Applicant does not owe any money to the Respondent and has a good and bona fide defence to defend the suit.

The Respondent's affidavit in reply is sworn by Birungi Christine of Messrs Frank Tumusiime & Co. Advocates. She is an advocate of the High Court and deposes in reply that on 3rd September 2015, she received two copies of summons together with the plaint from Namara Joshua, Counsel having personal conduct of the suit for service upon the Defendant. On the 4th of September, 2015 at around 9.00 am she proceeded to the Applicant's premises where she read the marks on the door and identified the office of the University Secretary. She entered and introduced herself and the purpose of her visit to a lady who she later identified as Raila Asiru who asked her to hold on as she sought guidance from the University's Legal office. Upon her return she acknowledged receipt on her copy by stamping on both summons and plaint where she also wrote her name. The omissions or negligence for not transmitting the summons and plaint to the relevant authority was an internal problem which cannot be visited on innocent litigants.

At the hearing, the applicant was represented by Counsel Habomugisha Innocent while the Respondent's was represented on diverse dates by Counsel Namara Joshua though he was absent when the court directed the parties to file written submissions. The court was duly addressed in written submissions by both Counsels.

The agreed issues are:

1. **Whether there was proper and or effective service of summons to file a defence on the Applicant.**
2. **What remedies are available to the parties?**

Whether there was proper and or effective service of summons to file a defence on the Applicant.

In his address to the court, learned Counsel for the Applicant set out the facts as detailed in the affidavit of Patrick Madaya summarised above and the grounds of the application as set out in the notice of Notice of Motion and summarised above.

Learned counsel for the Applicant submitted that Order 5 of the Civil Procedure Rules lays out the rules of service and rule 10 thereof stipulates that wherever practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient.

He submitted that the essence of this rule was laid out by the Supreme Court of Uganda in the case of **Geoffrey Gatete & Another Vs William Kyobe, Civil Appeal No. 7 of 2005** where Justice Mulega, held that there can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him or her so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the defendant in person.

Learned Counsel for the Applicant further submitted that the Respondent purports to rely on service to a Clerical Secretary of the Applicant as well as a stamp as evidence of effective service. In addition learned Counsel submitted that the standard test to achieve effective service has not been met and that there was no effective service of summons by the Respondents.

In reply, the Respondent's Counsel submitted on the brief facts from the Respondent's point of view that the Respondent duly served summons in the said suit onto the Applicant through the office of the University Secretary on 4th September, 2015. That service was acknowledged by an employee of the Applicant Raila Asiru working in the office of the University Secretary who is

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responsible for receiving documents addressed to the University Secretary and who in this case received the summons and plaint upon consulting the Applicant's Legal Officer.

He further submitted that failure to submit the summons and plaint to the relevant officer cannot be attributed to the Plaintiff and cannot be a sufficient cause since the respondent is not a human being and cannot be served in person.

The Respondent also invited the Court to consider Order 5, Rule 10 of the Civil Procedure Rules, SI 71-1 and the case of **Geoffrey Gatete and Another vs. William Kyobe** and submitted that the Applicant was served the summons and plaint on 4th September 2015 which were received by the acting University Secretary Raila Asiru after consulting with the University Legal Officer who stamped on a copy of the summons with the University Secretary's office receiving stamp.

He further relied on the case of **Makerere University vs. Zescom Technologies Limited Misc. Application No. 432 of 2013** and submitted that in an application proceeding by evidence supplied by an affidavit, where there is no opposing affidavit, the application stands unchallenged.

Counsel for the Respondent submitted that the Applicant did not file an Affidavit in rejoinder to controvert the Respondent's facts as contained in the affidavit in Reply which is in effect unchallenged and therefore true. He further submitted that this authority is not binding but rather persuasive. The Applicant was duly served with summons and the interlocutory judgment should be maintained and the suit set down for formal proof.

In rejoinder learned Counsel for the Applicant, submitted that the Respondent failed to appreciate that even in serving officers and agents responsible for the scheduled corporation, the rules of service must be adhered to, to the extent that service is deemed effective.

Counsel for the Respondent also submitted that the relevant agent/officer of the Applicant that the law recognizes the authorised person to be served with court summons as the University Secretary whose office is established by law under Section 33 of the Universities and Other Tertiary Institutions Act 2001.

He further submitted that a clerical secretary cannot act on behalf of the University Secretary for purposes of receipt of summons on behalf of the University. He prayed that the court finds in the premises that the Applicant was not effectively served by the Respondent.

What remedies are available for the parties?

Counsel for the Applicant relied on Order 51 rule 6 of the Civil Procedure Rules S1 71-1 and submitted that it gives the court wide discretion to extend or enlarge any time fixed under the Rules. He also relied on the case of **Makerere University vs. Zescom Technologies Limited Misc. Application No. 432 of 2013** which followed the holding in **Mbogo vs. Shah [1968] EA and Patel vs. E.A. Cargo Handling Services (1974) E.A** where Duffus P at page 76 held that: “the main concern of the court is to do justice to the parties and court will not impose conditions on itself to fetter the wide discretion given to it by the rules”. Failure to file a written statement of defence was not the fault of the Applicant. Furthermore the interlocutory judgment only denies the applicant justice and curtails their right to be heard. The Applicant is ready to adduce evidence to show that all payments due to the Respondent for services rendered were made and therefore there was no breach of contract on their part and there are triable issues in this suit.

In reply, Counsel for the Respondent relied on S.98 of the Civil Procedure Act, Cap. 71 and S.33 of the Judicature Act, Cap.13 which gives Court inherent powers to make such orders as may be necessary for the ends of justice. He submitted that the applicant was duly served and the application should not be granted and that costs be granted to the Respondent. Concerning the Applicant’s indebtedness the Applicant did not attach any evidence of having paid the sum of Uganda shillings 81,919,435/= and the Applicant’s application to set aside the interlocutory judgment in the main suit and leave to extend time within which to file and serve the Written Statement of Defence ought to be dismissed with costs and the main suit be fixed for formal proof.

Ruling

I have duly considered the Application together with the affidavit evidence, the submissions of counsel and the law cited. The Applicant seeks to set aside the interlocutory judgement entered

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against it HCCS 574 of 2015 and extension of time within which to file and serve the written statement of defence.

The facts are that summons to file a written statement of defence together with a copy of the plaint attached was received by the office of the University Secretary on 4 September 2015 and stamp of the office of the University Secretary acknowledging service is stamped on the copy of the summons on the same day. Next to the stamp of the office of the University Secretary, is the signature of Raila Asiru showing that she received the summons. The gist of the application is that Mr Patrick Madaya, the acting University Sec of Kyambogo University deposed that on 8 October 2015 he discovered that summons in HCCS 574 of 2015 were delivered to the clerical secretary, a person not authorised to receive summons or official documents. Moreover the said clerical secretary did not bring the summons and pleadings in the suit to his attention, the attention of the Vice Chancellor or even the University legal Department for action until 8 October 2015. Upon receiving the documents he immediately forwarded the pleadings in the main suit to the lawyers of the University for purposes of filing a written statement of defence. For that reason they were unable to file the written statement of defence in time due to improper service of summons. The University lawyers filed an application for extension of time to file and serve the written statement of defence but later discovered that an interlocutory judgement had been entered against the Applicant.

The respondent through the affidavit in reply of Christine Birungi, an advocate of the High Court deposed that she served the summons on 4 September 2015 on the said person who wrote her name as Raila Asiru. As far as she is concerned it was sufficient for purposes of effective service, to serve the office of the University Secretary and not the person of the University Secretary. On that basis pleadings were effectively served on the office of the University by her on 4 September 2015. She further maintained the clerical secretary received the summons and consulted someone in the Legal department of the Applicant before she acknowledged service. The alleged person consulted is unknown and what is established is that summons was received by the Clerical Secretary one Raila Asiru.

As far as the facts are concerned there is no controversy about what happened to the extent of summons being received and acknowledged by Raila Asiru. The issue is whether an authorised person had been duly served. For the applicant it was submitted that service had to be made on the defendant in person and that the service had to have the desired effect of giving notice to the defendant of the filing of the suit against it. The applicant relied on the case of **Geoffrey Gatete and another versus William Kyobe Supreme Court Civil Appeal Number 7 of 2005**.

On the other hand the Respondents defence is that the applicant was duly served through the office of the University Secretary. This service was through the employee of the Applicant Raila Asiru. Counsel further submitted that the applicant did not file an affidavit in rejoinder to controvert the Respondent's facts.

On the other hand the applicant in rejoinder reiterated that the office of the University Secretary is established by law under section 33 of the Universities and Other Tertiary Institutions Act 2001 and a Clerical Secretary cannot assume the legal position of the University Secretary.

As far as facts are concerned the Respondent's Counsel has no basis to submit that an authorised person from the Applicant's Legal Department had been shown the court summons. Asiru Raila or any other person who could have seen what happened has not been called. Moreover the copy of summons acknowledged is the hard evidence of who was served. Summons has to be acknowledged by the person served under Order 5 rule 14 of the Civil Procedure Rules. The person served is required to endorse on a copy of the serving officer. In the premises there was no prejudice to the Applicant for not filing an affidavit in rejoinder.

Section 23 (1) of the Universities and Other Tertiary Institutions Act, 2001 provides that a public university established under section 22 thereof shall be a body corporate with perpetual succession and a common seal and may sue and be sued in its corporate name. Secondly it provides that the seal of the public university shall be authenticated by the signatures of the Vice Chancellor and the University Secretary. Section 33 of the Act which establishes the office of the University Secretary does not specifically designate the University Secretary as the person authorised to receive court summons. It provides that the University Secretary is responsible for

the general administration of the University and has the custody of the University seal. He or she is also the Secretary of the University Council and is answerable to the Vice Chancellor.

Under Order 29 rule 2 of the Civil Procedure Rules service on a statutory Corporation is provided for in the following terms:

"Subject to any statutory provision regulating service of process, where the suit is against a Corporation, the summons may be served –

- (a) on a secretary, or on any director or other principal officer of the Corporation; or
- (b) by leaving it or sending it by post address to the Corporation at the registered office, or if there is no registered office, then at the place where the Corporation carries on business."

The rule makes it permissible to serve summons on a secretary, any director or other principal officer of the Corporation. A principal officer is neither a secretary nor a director. The provision is clear that it has to be either a secretary or a director or other principal officer. It follows that the word "Secretary" used here is akin to Corporation Secretary or Company Secretary. By using the disjunctive "or" under Order 29 rule 2 (a) of the Civil Procedure Rules, the categories mentioned there under of a secretary, or on any director or other principal officer of the Corporation are alternatives to one other. If it is not served on a secretary, it may be served on any director of the Company/Corporation. If it is not served on a secretary or any director, then summons may be served on any other principal officer. The second leg of the rule is that summons may be served by sending it by post addressed to the Corporation at the registered office but this is not the mode of service adopted in this suit and need not be considered.

The question of who a principal officer is was considered by Pennycuik J in the case of **Re Vic Groves & Co Ltd [1964] 2 All ER 839** where he defined the term 'principal Officer' under rule 30 of the Companies (Winding up) Rules 1949 which provided as follows:

"Every petition shall be verified by an affidavit referring thereto. Such affidavit shall be made by the petitioner, or by one of the petitioners, if more than one, or, in case the petition is presented by a corporation, by *some director, secretary, or other principal officer* thereof, and shall be sworn after and filed within four days after the petition is presented, and such affidavit shall be prima facie evidence of the statements in the petition." (Emphasis added)

Pennycuick J held at page 840 that:

“Now Mr Mothio is neither a director of nor a secretary of Shell-Mex and BP Ltd. His position is that of divisional manager. I have been told that there are, in all, thirty-two divisional managers. By s 455 of the Companies Act, 1948, the expression “officer”, in relation to a body corporate, includes a manager, so it seems clear that Mr Mothio is an officer of the petitioner company; but on the material before me it seems impossible to say that he is a principal officer of the company. That expression is not necessarily limited to directors. Various other officials of corporations have from time to time been accepted as principal officers. For example, I imagine, a general manager would be, but I do not find it possible to say that all these thirty-two gentlemen are principal officers of the company.”

The court considered the expression "officer" in relation to a body corporate to include a manager but found it difficult to hold that the relevant officer considered in the judgment was a principal officer. In **Remco Ltd v Mistry Jadva Parbat and Co Ltd and others [2002] 1 EA 233**, Justice Ringera of the Kenyan High Court Commercial Division held that service on the receptionist of the company was not proper service. In the case of **Kampala City Council versus Apollo Hotel Corporation [1985] HCB at page 77**, it was argued that the Applicant had not been served with summons and was not aware of any pending suit and therefore could not enter appearance. In the application to set aside the decree Justice Odoki (judge of the High Court as he then was) held that summons have to be served on the secretary to the board, or the chairman of the board or any director or other principal officer in that category of responsibility. Such persons were in a position to take legal action on behalf of the Corporation. Therefore not any other officer of the Corporation may be served with process. He held that the person served as manager of the Corporation was not a principal officer of the Corporation competent to accept service of process.

In the case of **Augustine Okurut vs. Gerald Lwasa and Produce Marketing Board [1988 – 1990] HCB at 164** service of court process on the secretary to the managing director of the

second Defendant was held to be outside the scope of Order 29 rule 2 of the Civil Procedure Rules.

Last but not least counsel relied on the case of **Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe SCCA No 7 of 2005** where it was held that service of summons means service of summons that produces the desired or intended effect which is to make the Defendant aware of this suit. The rule however depending on the wording of rule 11 would be important for this analysis. It provides in part that court has to be: satisfied that the service of the summons was not effective ...” The judgment of the court was delivered by Mulenga JSC with concurrence of the rest of the panel of Supreme Court Judges. At page 8 second paragraph to page 9:

“the courts below took the expression “deemed good service” referred to in order 30 rule 3 and the expression “effective service” referred to in order 36 rule 11 to mean the same thing and actually use them interchangeably. In my view, the two expressions are significantly different.

The Oxford advanced learner’s dictionary defines the word “effective” to mean “having the desired effect; producing the intended result”. In that context, effective service of summons means service of summons that produces the desired or intended result. Conversely, in ineffective service of summons means service that does not produce such result. There can be no doubt that the desired and intended result of serving summons on the defendant in the civil suit is to make the defendant aware of the suit brought against him so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the defendant in person. Rules of procedure, however, provide for such diverse modes for serving summons that the possibility of service failing to produce the intended result cannot be ruled out in every case.

For example, in appropriate circumstances service may be lawfully made on the defendant’s agent. If the agent omits to make the defendant aware of the summons, the intended result cannot be achieved. Similarly, the court may order substituted service by way of publishing the summons in the press. While the publication will constitute lawful service, it will not produce the desired result if he does not come to the defendants notice.

In my considered view, these examples of service envisaged in order 36 rule 11 as “service (that) was not effective.” Although the service on the agent and substituted service would be “deemed good service” on the defendant entitling the plaintiff to a decree under order 36 rule 3, if it is shown that the service did not lead to the defendant becoming aware of the summons, the service is “not effective” within the meaning of order 36 rule 11. (See Pirbhai Lalji vs. Hassanali (1962) EA 306).

...

In my view, the expression “service that is deemed to be good service” is so broad that it includes service that would not produce the intended result, which therefore is not effective.”

The court dealt with the issue as to whether service was effective or deemed good service. Order 29 rule 2 deals with whether the person who received service is an authorised person and the above authority does not deal with this.

In the premises service was effected on a person who is not authorised and to make matters worse the summons and copy of plaint was not brought to the attention of an authorised person in time. In the premises there was no good service on the Applicant and the interlocutory judgment entered by the Registrar on the 2nd of October 2015 is hereby set aside.

The Applicant has leave to file a written statement of defence within 14 days from the date of this order.

In applications for extension of time under Order 51 rule 6 of the Civil Procedure Rules costs are borne by the Applicant unless otherwise ordered by the Court. In circumstances where service was not effective there is no basis for extension of time to file and serve the defence out of time and therefore the costs of the Application are costs in the cause.

Ruling delivered in open court on the 24th of March 2016.

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Grace Atuhairwe Counsel for the Applicant

Applicants Officials not in court

Kiconco Katabazi Patrick Counsel for the Respondent

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

24 March 2016