

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 471 OF 2015**

HUSSAIN HASANALI JIVANI}.....PLAINTIFF

VERSUS

- 1. MERALI JIVRA TAJDIN}
2. JIVRAJ AL KARIM}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from an objection to witness statements filed 39 days late by the Plaintiffs. Counsel Earnest Sembatya appeared for the Plaintiff and Counsel Bernard Oundo appeared jointly with Counsel Wilbur Kayiwa for the Defendants. The suit was coming for hearing when Counsel Bernard Oundo objected to the Plaintiffs witness statements on the ground that the witness statement was filed late and out of the timelines directed by the court. He prayed that they should be struck out.

The grounds of the objection are that in March 2017 the Court directed both parties to the suit to file witness statements on 11th April 2017 and serve them on the same day on opposite Counsel. The Plaintiff did not comply and filed witness statements 39 days after the time set by court and served it on the Defendant's Counsel a day before the hearing on 5th June, 2017. The Defendant's Counsel relied on rule 5 (2) of the Constitution (Commercial Court) (Practice) Directions and rule 6 (4) and submitted that they provide that the court will set realistic timelines for the hearing and once established the timelines shall be adhered to. Extension of time can be granted in special circumstances. He submitted that this court considered this issue in **Seruwagi Mohammed vs. Yuasa Investments Civil Suit No. 334 of 2013**. In that case this Court held that rule 7 of the Constitution (Commercial Court) (Practice) Directions serves the same purpose as rule 3.9 of the UK Civil Procedure Rules. At page 10 of the judgment, the court held that the principles discussed in the case of **Mitchell vs. Newsgroup Newspaper Ltd [2013] EWCA Civ 1526** were the three principles to be considered in granting leave. The first principle is to identify and assess the seriousness and significance of the failure to comply with any rule, direction or court order. He contended that failure for 39 days to file and serve witness statements and thereafter to serve them a day before trial affects efficient progress of the litigation even if no particular prejudice was occasioned. He contended that such prolonged failure is serious or

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significant failure. In assessing whether the failure is trivial, the Defendants Counsel contended that failure for over two months to serve the statement is not trivial because it affects the progress of the litigation.

The second principle is that the court should consider why the failure or default occurred. The Defendant's Counsel submitted that no reason has been given for the default and therefore the Plaintiff merely decided not to comply.

The third principle is that the court must consider all the circumstances of the case so as to enable it to deal justly with the application. The circumstances of the case which relate to principle number 1 and 2 show there had been no application for extension of time. Witness statements were served 39 days late. If the witness statement is admitted then costs should be awarded and the Defendant should be allowed to file supplementary statements and time to do so.

In reply Counsel Earnest Sembatya contended that the objection was a continuation of the Defendant's efforts to unjustly enrich himself. Witness statements are not provided for under Ugandan rules of procedure or laws and what is catered for is an oral statement. In the event witness statements are not filed a party who is available can testify orally. The Plaintiff's Counsel contended that there is a clear distinction between witness statements and affidavits. The essence of use of witness statements is expedition of the hearing rather than keeping witnesses out of court. In the case of **Seruwagi Mohammad vs. Yuasa** (Supra) witness statement were construed as covered by the Civil Procedure Rules. At page 13 of the ruling and at the end the court ruled that procedural rules were handmaidens of justice and declined to strike out the witness statement.

After further a short adjournment to peruse the available authorities on the matter, the Plaintiffs Counsel submitted that the principle to assess the seriousness of failure to comply with timelines put differently is the question of whether the Defendants would be prejudiced. He contended that the witness statement which had been filed out of time does not in any material way differ from the Plaintiff's case as pleaded. It does not differ in any material way on the issues agreed to in the Joint Scheduling Memorandum executed by both Counsel. In fact in his objection the Defendant's Counsel did not point out any prejudice they would be occasioned by late filing. A perusal of the plaint and scheduling memorandum would disclose that no new matter is included in the witness statements. He wondered whether the Defendants would be prejudiced in anyway. If they are prejudiced, is that prejudice capable of being remedied? The Plaintiff's case has not been heard and the Defendant has not been heard. The Defendants can make good the prejudice suffered and in any case no prejudice was shown. Can it be said that the breach is serious or significant? Should it be used as a basis for keeping a party from testifying? No. On the second principle as to why the default occurred, Counsel submitted that the default was that of Counsel and default of Counsel should not be visited on the litigant. The default is in not filing the

statement on time. The witness statement had been signed by the witness on the 31st of May 2017.

The third principle is for the court to evaluate all the circumstances of the case. The Plaintiff's Counsel prayed that the court considers that the Plaintiff paid money to the Defendants about three years ago as part payment for an apartment. The Plaintiff rescinded the agreement and has not been refunded the 14,000 US\$. If the witness statement is struck out, there are two possibilities. The Plaintiff's suit may be dismissed. The second is that the witness can be permitted to give oral evidence. It would be absurd for the Defendants to be permitted to unjustly enrich themselves by the act of a court of justice. Would it be just for a witness statement to be struck out for being filed out of time? As held in **Seruwagi vs. Yuasa** (supra), procedural rules are handmaidens of justice. He relied on article 126 (2) (e) of the Constitution for the submission that Courts should administer justice without undue regard to technicalities. He wondered whether the Defendants are devoid of any remedy under rule 7 of the **Constitution (Commercial Court) (Practice) Directions** which provides the sanctions such as costs. He submitted that costs were an adequate sanction for late filing and prayed that the objection is overruled and the witness statement admitted out of time.

In rejoinder the Defendants Counsel submitted that the first point relates to witness statements not being part of our laws. However in rejoinder and in the case of **Spear Motors vs. AG and 2 others HCCS NO. 692 of 2007** the commercial court had the opportunity to consider this argument. Hon. Justice Irene Mulyagonja held that witness statements have been used in the commercial court from as far back as 2004 and the practice has developed as to how they are to be employed. She added that the genesis of the use is to be found in rule 5 of the **Constitution (Commercial Court) (Practice) Directions** which provides that ordinary rules of procedure of the High Court will apply to commercial actions subject to clarifications set out in the practice directions. This practice was endorsed by this court under Administrative Circular Number 1 of 2012 which was issued by the Head of the Court. The submission that witness statements are not provided for in Ugandan law is misconceived.

On issue two that procedural rules are handmaidens of justice and Article 126 of the Constitution (hereinafter Art 126) the Defendant's Counsel relied on the cases of **Kasirye Byaruhanga & Co. Advocates vs. UDB SCCA No. 2 of 1997**, where it was held that that Art 126 of the Constitution is not a magic wand in the hand of defaulting litigants. A litigant who wants to rely on Art 126 (2) (e) must satisfy the court that in the circumstances of his or her case, it is desirable not to pay regard to the relevant technicality. He contended that the Plaintiff ignored court directives and filed late. There was no prompt application for extension of time and therefore it was a clear case in which the Plaintiff should not rely on Art 126.

On the question of prejudice, in **Mitchell vs. Newsgroup** (supra) the court stated that failure to serve witness statements for two months affects the efficient progress of the litigation. The authorities emphasise that the applicant does not need to show prejudice.

On principle number 3 on evaluation of circumstances, the witness statement introduces an additional trial bundle which was not part of the scheduling conference. Court should look at the promptness of filing the application. A period between two days and seven days delay is reasonable.

In Andrew Mitchell vs. Newsgroup paragraph 59 it was held that tougher and more robust rule compliance ensures that justice can be done in the majority of cases. This requires an acknowledgement that achievement of justice means something else now. The overriding objective falls in line with the **Constitution (Commercial Court) (Practice) Directions** rule 2 (2) on expedition of proceedings. If timelines are not adhered to, the commercial court will not be acting in the furtherance of this objectives under rule 2 (2) of the **Constitution (Commercial Court) (Practice) Directions**.

The option that the default is of Counsel is discussed in **Clearway Drainage Systems Ltd vs. Mile Smith ltd [2016] EWCA Civ 1258**. One of the inevitable consequences was that the advocates can be held to be liable.

Ruling

The brief background to this ruling is that on 20th December, 2016, the main suit was fixed for hearing without prejudice to efforts to have the suit determined through ADR. It was fixed for hearing on 6th June 2017 at 9 AM. The court directed that witness statements were to be filed and exchanged with the opposite Counsel by both Counsel of the parties on 11th April, 2017. Without prejudice to ADR the suit was adjourned for hearing on 6th June, 2017.

When the suit came for hearing on 6th June, 2017 after alternative dispute resolution effort had failed to resolve the suit, the Defendants Counsel objected to the witness statements filed by the Plaintiff on the ground that they were filed outside the timelines directed by the court and he prayed that they be struck out. His contention was that witness statements were supposed to be filed and exchanged on 11th of April 2017. The Plaintiff's Counsel did not comply with the court direction and filed witness statements of the Plaintiff 39 days out of time and had served them on the Defendant the previous day of 5th June, 2017. He submitted that extension of time lines set by a commercial court judge had to be made in special circumstances. He relied on the judgment of this court in **Seruwagi Mohammed versus Yuasa Investments Civil Suit No. 334 of 2013**. He further relied on English authorities set out in the submissions above. The contention is that failure to comply with court directions and to file witness statements 39 days and to serve it a day before the trial affects efficient progress of litigation. In the alternative he prayed that if the

witness statement is admitted then costs should be awarded to the Defendant and the Defendant should be allowed to file a supplementary statement and given time to do so.

The Plaintiff's Counsel opposed the preliminary objection to the witness statements. He initially submitted that witness statements were filed to expedite hearing rather than to leave witnesses out of court. Secondly, witness statements were not provided for under the Civil Procedure Rules. He further maintained that procedural rules are handmaidens of justice and as held in the case of **Seruwagi Mohammed vs. Yuasa Investments Ltd (Supra)**. He mainly submitted that the Defendants would not be prejudiced. The witness statement filed out of time did not in any material way differ from the Plaintiff's case as pleaded and on the issues agreed upon in the joint scheduling memorandum. The Defendant's Counsel did not show what prejudice would be occasioned.

I have carefully considered the submissions of Counsel as disclosed in the written submissions that have been reproduced above. This court has dealt with a similar situation in the case of **Seruwagi Mohammed vs. Yuasa Investments Ltd Civil Suit Number 324 of 2013**. In that case an objection was taken to the witness statement of the Defendant's witness on the ground that it was filed out of the timelines set by the court. Clearly the case of Seruwagi Mohammed (supra) is distinguishable on the ground that in that case, the Plaintiff had filed witness statements when the Defendant filed witness statements and the period of delay was about 8 days. The court noted that it was unethical for the Defendants Counsel to read the written testimony of the Plaintiff's witnesses to the Defendant's witnesses before taking down the Defendants witness statement. It was noted in that ruling that Counsel takes the written testimony of the witness in Chambers and is duty bound not coach the witnesses or even help the witness with their testimony but to record the testimony from the witnesses as if he were leading them in the court. The prejudice was in the fact that the Defendants Counsel had the benefit of reading the testimonies of the Plaintiff's witnesses and sometimes of even having cross examined them before examining his own witnesses in Chambers and having their witness statements filed. The court noted that it gave undue advantage to the Defendant's witnesses which may well be to respond to the Plaintiffs witnesses. The defence would be better prepared because they would be answering any matter raised or generated in the Plaintiff's witness statements and in cross examination. Yet witness statements were to be exchanged after the scheduling conference where all points of agreement and disagreement had been disclosed and agreed upon. Witness statements would be exchanged within the period given by the court to avoid the rebuttals and counter rebuttals.

The second aspect considered by the court was a failure to abide by the directions of the court under rule 6 (4) of the **Constitution (Commercial Court) (Practice) Direction** which provides inter alia that the court may set realistic timelines for the hearing and once established, those time limits will be expected to be adhered to and extension will be granted in special circumstances. This rule is read together with rule 7 of the **Constitution (Commercial Court) Decision of Hon. Mr. Justice Christopher Madrama Izama** *maximum735securityx 2017 style*

(Practice) Directions which vests discretionary power in a commercial court judge to refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim in whole or in part. In that context the court considered some English authorities.

With reference to UK rules of procedure on witness statements reference was made to the case of **Devon & Cornwall Autistic Community Trust (a company limited by guarantee) trading as Spectrum vs. Cornwall Council [2015] EWHC 403 (QB)** before Honorable Mr. Justice Green of the High Court, Queen's Bench Division. There was an application made by the claimant to serve evidence out of time and vacate the trial date which had been fixed. It was held following **Mitchell versus News Group Newspapers Ltd [2013] EWCA Civ 1526** that an application for permission to rely on evidence was an application for relief from the sanction pursuant to the Civil Procedure Rules 3.9 which is reproduced for ease of reference:

"3.9 – (1) On an application for relief from any sanctions imposed for a failure to comply with any rule, practice direction or court order, the court would consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need;

(a) for litigation to be conducted efficiently and at the proportionate costs; and

(b) to enforce compliance with the rules, practice directions and orders."

While I noted that the above rule was similar in terms of providing for sanctions for non compliance with court directions as under Rule 7 of the Constitution (Commercial Court) (Practice) Directions, the wording of the rule is very different. Secondly it is a general rule for noncompliance with any rules, practice directions and orders while rule 7 deals with failure to comply in a timely manner with any order made by a commercial judge. Timelines set may be extended in special circumstances.

The Court of Appeal in **Denton vs. TH White Ltd [2014] EWCA, Civ 906** held that where a party fails to comply with the timelines ordered by the court some principles would be applied in considering whether to grant an extension of time. The first principle is to identify and assess the seriousness and significance of the failure to comply with any rule, practice, direction or court order (as embodied in the cited rule). If the breach is neither serious nor significant, the court is unlikely to need to spend time on the second and third stages of the principles. The second stage is to consider why the default occurred. Lastly, the third stage is to evaluate all the circumstances of the case so as to enable the court to deal justly with the application (These principles are set up in the rules).

Whereas there is no specific rule providing that an application shall be made under The Constitution (Commercial Court) (Practice) Directions, rule 7 thereof envisages an application

for extension of time and possibly to be saved from the consequences of non-compliance specified in that rule.

In **Seruwagi vs. Yuasa** (supra) I held that in Uganda applications for extension of time are made under Order 51 rules 6 of the Civil Procedure Rules. The question remains on the first principle that court directives are to be complied with and extension granted in special circumstances whether filing and service of a witness statement late is a matter to be considered under rule 7 of the Constitution (Commercial Court) (Practice) Directions at this stage.

The rule provides as follows:

“7. Noncompliance of parties.

Failure by a party to comply in a timely manner with any order made by the commercial judge in a commercial action shall entitle the judge, at his or her own instance, to refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim, in whole or in part, or to award costs as the judge thinks fit.”

While the English authorities are persuasive on the issue of failure to comply in a timely manner with any order made by a commercial judge, the Ugandan statutory provision quoted above is explicit enough. The first rule is rule 6 (4) of the **Constitution (Commercial Court) (Practice) Directions** which permits the court to set realistic time limits for the hearing as was done in this case. The time limits are to be adhered to and extension only granted in special circumstances. A party who does not comply with time limits set by court should apply for extension of time under Order 51 rule 6 of the Civil Procedure Rules. This rule is read together with rule 7 of the **Constitution (Commercial Court) (Practice) Directions**. Rule 7 gives the commercial court judge upon the failure of the party to comply in a timely manner with any order made by the judge, discretionary power at his or her own instance to refuse to extend any period of compliance with an order of the court or to dismiss the action or counterclaim. In this case the judge has powers to dismiss the suit for non compliance of the Plaintiff.

In this case hearing has not yet commenced and may well be commenced at a future time. In the **Seruwagi Muhammad vs. Yuasa Investments Ltd** it was held that it would be unethical to prepare witness statements having in mind the testimonies of the Plaintiff’s witnesses and that the evidence may be given trifling weight. The question of whether evidence should be given trifling weight follows the decision of the East African Court of Appeal in **Andiazi vs. Republic [1967] EA 813 (CA)** and the judgment of the Supreme Court in **Semande vs. Uganda [1999] 1 EA 321**. In those cases it was held that a witness who listens to testimonies of other witnesses before testifying is bound to have his or her evidence given trifling weight. Of course evidence can be assessed on merits and in this suit the facts are primarily agreed facts and what is in controversy may be legal or some facts yet to be adduced in evidence. It follows that the question of what weight to be given to the Plaintiff's evidence can only be considered in the evaluation of

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the evidence after testimonies of witnesses and not at this stage of the proceedings. Failure to file in time at this stage and in the circumstances of this suit should not be a basis for barring the Plaintiff from testifying. The only question for me to consider is whether to dismiss the suit for delay of 39 days or apply other sanctions.

It is my holding that it is in the interest of justice, that the Plaintiff should be heard and the Plaintiff has leave to file witness statements out of time. Witness statements already filed are validated by extension of time under Order 51 rule 6 of the Civil Procedure Rules with costs of the objection and extension of time to the Defendants.

Thirdly, because this suit has not proceeded as scheduled by the court, the file is sent back to the registrar for reallocation to another judge as I have been transferred to another division of the High Court.

Ruling delivered in open court on 27th of June 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Counsel Earnest Sembatya for the Plaintiff

Plaintiff is in court

Counsel Mwanja Brian for the Defendants

The second Defendant is in court

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

27th June 2017