

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION NO 841 OF 2016
[ARISING FROM CIVIL SUIT NO 312 OF 016]**

**1. MURAD SAMNANI}
2. NASIM MURAD}APPLICANTS**

VERSUS

SALIM JIWANI}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

The applicants who are the defendants in the main suit brought this application by way of chamber summons under Order Eight rules 18 (1); (5) and 20 of the Civil Procedure Rules as well as section 98 of the Civil Procedure Act for orders that the reply to the written statement of defence and the defence to the counterclaim filed on 20th July, 2016 be rejected. Secondly it is for an order that the plaintiff/respondents pleadings be deemed to be closed. Thirdly it is for an order that the counterclaim be deemed to be admitted and for costs of the application to be provided for.

The grounds of the application are that both the reply to the written statement of defence and the defence to the counterclaim were filed out of time and leave of court for extension of time was not sought or granted. Secondly, the Reply to the written statement of defence was not signed. Lastly, it is necessary for the ends of justice that the law and the rules of procedure are adhered to.

The application is supported by the affidavit of MURAD SAMNANI who is the 1st applicant and deposes on his behalf and that of the co-defendant/applicant. He deposes that he was advised by his Counsel John Wakanyira that the reply to the written statement of defence and the defence to the counterclaim were filed without leave of court out of time and ought to be rejected. Secondly, his Counsel informed him that he filed an affidavit of service of the Written Statement of Defence/Counterclaim on 11th July, 2016 deposing that service was done on 6th June, 2016. The reply/defence to them was to be filed within 15 days from the date of service which was not done.

The affidavit in reply of the Respondent opposes the application. Counsel SUSAN KAGGWA, an Advocate with Impala Legal Advocates and Consultants deposed as follows:

The affidavit in support of the application is barred in law, contains material falsehoods and cannot therefore competently support the applicant's application and ought to be struck out. The Applicant's Counsel misguided and ill advised the Applicant that the reply to defence and counterclaim was filed out of time. The first applicant served the written statement of defence on the Respondent counsel on 6th July, 2016 and not on the 6th June, 2016 as he alleges. There is an affidavit of service showing that service of the written statement of defence was done by the 1st Applicant and not a process server. The reply to the written statement of defence and counterclaim was filed on 20th July, 2016 which date was within the statutory fifteen day period from the 16th July, 2016 when the Respondent received the written statement of defence and counterclaim from the First Applicant despite the same having been filed out of time. The Applicants filed the written statement of defence on the 31st May 2016 but served the same on the Respondent on 6th July, 2016. A defence to the counter claim was filed before this honourable court as such it is not correct to say that the claims are admitted. She deposed that there is no requirement under the law that the reply to the counterclaim has to be separately signed, the adopted style and practice requirement is only limited to stating under a separate heading under reply to the counterclaim the parties as described under the plaint. In the alternative but without prejudice if indeed there is any such error it is a mere technicality that does not go to the root of the substantive dispute for which mistake of counsel should not be visited on the Respondent. The Respondent has a good and sound claim against the Applicants as laid out in the Plaint and reply to the written statement of defence and defence to the counterclaim. Furthermore, the Applicants' application is oppressive, a sham, an abuse of court process and intended to delay and defeat the course of Justice by depriving the Respondent of money and property that is lawfully his.

In rejoinder Mr MURAD SAMNANI deposed an affidavit and stated as follows:

He was advised by his Counsel John Wakanyira that the reply to the counterclaim should be rejected on the grounds that it is out of time; incompetent and bad in law because the application was served on the respondent's advocates on 7th October, 2016 as per affidavit of service on court record. He deposed that given the statutory period of 15 days, the respondent's counsel ought to have filed the reply by 22nd October, 2016 but they filed it on 3rd November, 2016 out of time and he neither sought consent from the other party to file out of time nor sought leave of court to file out of time. The respondent's affidavit is incompetent because in deposing to it Counsel descended into the controversy of the parties instead of studying the record and responding to the process in time by filing the reply to the WSD/ counterclaim by 22nd June, 2016 and to respond to the application by 22nd October, 2016. In the affidavit of service of the WSD/counterclaim on the respondent advocate's firm as deposed by the 1st Applicant on 6th June, 2016 states that he signed the visitors' record book; accessed the chambers; served the *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~ *&*\$\$#\$# xtra+ *maximum735securityx 2017 style*

respondent's counsel with the process and left him with the 2 copies and this affidavit has never been set aside. It is noteworthy that there is no other reply to the WSD/ counterclaim on court record save that of the 17th June, 2016. He deposed that the honourable court should not reward the unprofessional conduct of failing to exercise due diligence by reading and going by the court record; to make responses in time and to avoid the manufacture of evidence. The reply should be treated with utmost contempt and be rejected for it is diversionary and a waste of time.

The court was addressed in written submissions.

At the hearing of the application Counsel John Wakanyira represented the Applicant while the Respondent was represented by Counsel Brian Kaggwa.

The gist of the Applicant's submission is that the Written Statement of Defence/ Counterclaim were served on the respondent's counsel at his firm on 6th June, 2016 and an affidavit of service was filed on 11th July, 2016. The respondent ought to have made the reply within 15 days but instead filed it on 20th July, 2016 out of time. Counsel relied on the case of **Patel vs. Madhvani International Ltd (1992) I KALR 92 at 95** that **Order 8 rule 11 (1)** provides for 15 days from the 6th June 2016 when the respondent was served. He submitted that the respondent ought to abide by Order 51 of the Civil Procedure Rules to obtain leave to file out of time or sought the applicant counsel's consent to file out of time. He could have complied with **Order 8 rule 11 (3)** of the CPR on the counterclaim or **Order 8 rule 18(I)** by seeking the leave of court to file out of time. The Applicant's Counsel relied on the decision of **KATTUKU and Others vs. KALIMBAGIZA (1987) HCB 75** that a reply to a counterclaim filed without the leave of court must be rejected. He submitted that the respondent's pleadings are deemed to be closed and the counterclaim admitted. He further submitted that there has been failure to adhere to the time requirement and as to diligence there has been a failure to avoid the hearsay rule that any hearsay is inadmissible because Susan Kaggwa who deposed the affidavit in reply is not Brian Kaggwa and she does not disclose her source of information rendering the affidavit incompetent and should be rejected. Counsel relied on **Regulations 15, 16 and 17 of S.I 267-2** where an advocate is expected not to include any false matter in any affidavit; to inform the court of her discovery that her firm has falsified a document and not to allow court to be misled by the falsehood. He submitted that as a matter of law, the reply ought to have been signed vide under **Order 6 rule 26 Civil Procedure Rules** where the respondent is represented by an advocate and as such there is no reply to the application which application must be allowed with costs.

Counsel for the Applicant reiterated the averments by the Respondent's Counsel in the affidavit in reply and his averments in the affidavit in rejoinder. He prayed that the respondent should not be accorded the relief of filing a reply for he has put himself out of the jurisdiction of the honourable court by filing a mediation summary whereof his counsel purports to represent both the plaintiff and defendant; a matter raised in the applicant's affidavit of service file with court on 7th July, 2016 but to which he has neither responded to nor cleared rendering the respondents

counsel to operate outside the jurisdiction of the court; failing to act on time when served with the WSD/Counterclaim; relying on a false agreement to the plaintiff.

In reply the Respondent's Counsel opposes this Application and relies on the in affidavit in reply of Counsel Susan Kaggwa. He submitted that the Applicants have not furnished court with any plausible grounds to merit consideration of the application by Court. Counsel reiterated the facts of the case and submitted that the Affidavit in Support of the Application is barred in law as it contains material falsehoods and cannot competently support the applicant's application and should be struck out with costs. He submitted that the affidavit in support of the application falsely states that a process server served the Written Statement of Defence on the Respondent's counsel on 6th June, 2016 yet it was the first Applicant (Murad Samnani) who duly served the Respondent's counsel on 6th July, 2016. The reply to the Written Statement of Defence and Counterclaim was filed on 20th July, 2016 within the fifteen day time period of filing. The Applicants filed the Written Statement of Defence on 3rd May, 2016 but only served the defence on the Respondent on 6th July, 2016 way out of time. The Written Statement of Defence and reply to the Counterclaim was filed within the statutory fifteen-day period from the date of receipt of the pleadings and therefore competently filed on court record. A defence to the counter claim validly exists on court record and it is incorrect to state that the claims are admitted when the same are categorically denied by the Respondent in its pleadings.

There is no requirement under the law that the reply to the counter claim has to be separately signed, this is something that has yet again been concocted by the Applicant counsel. In any event, if there is such any error in the filing, which is denied, it is a mere technicality that does not go to the root of the substantive dispute for which mistake of counsel should not be visited on the Respondent. If the orders sought for by the Applicants are granted against the Respondent, great harm will be occasioned to the Respondent. The Respondent has a good and sound claim against the Applicants as laid out in the Plaintiff and Reply to the Written Statement of Defence and Defence to the counterclaim. If this application is accepted, the Respondent will have been condemned unheard contrary to the established principles of substantive justice and equity.

Counsel relied on **Order 9 rule 9 of the CPR** which provides the time limit for service of a defence. He also relied on Order 5 rule 1 which requires service of summons to be made within 21 days from the date of issue; except that the time may be extended on application to court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for extension. He submitted that there is no requirement under the law that the counter claim ought to be separately signed from the reply to the written statement of defence. In the instant case, the reply to the defence and defence to the counterclaim were duly filed within the fifteen days from the date when the Respondent's counsel was served with the defence and counterclaim.

Counsel cited **Article 126 (2) (e) of the 1995 Constitution** that courts should not fail to administer justice due to technicalities within proceedings and submitted that it would amount to a gross injustice and failure to administer substantive justice to disregard the Respondent's legitimately filed pleadings on court record as was also held in **Tororo Cement Co Ltd v Frokina International Ltd SCCA No.2 of 2001**. With regard to mistake of counsel he submitted that the Respondent denies that there is any irregularity in the procedure and process adopted in the filing of its pleadings. However, if court is in any way inclined to fault the said procedure then it should be attributed to mistake of the Respondent's counsel that ought not to be visited on the Respondent. He relied on **Godfrey Magezi and Another v Sudhir Ruparelia Civil Application NO.10 of 2002**, where the honourable Justices of the Supreme Court held that omissions or mistakes or inadvertences of counsel should not be visited on the litigant.

Counsel submitted that the application is deliberately intended to mislead court. The correct and truthful position is that the filing of the WSD/reply was done on time as the applicants served the respondent on 6thJuly, 2016 and not 6thJune, 2016. The date indicated on the reply to the written statement of defence of 17th June, 2017 is a mistake of counsel who intended to write 17th July, 2016. As such mistake by Counsel ought not to be visited on Respondent. The Respondent contends that the Affidavit in support of the application falsely states that the process server served the written statement of defense on the respondent's counsel on 6thJune, 2016 and yet the respondent's counsel was duly served on 6thJuly, 2016. The applicants filed the written statement of defense on 31stMay, 2016 but served it on the respondent on 6thJuly, 2016 for reasons only known to them. He prayed that Court dismiss the application as it is contrary to the best interests of delivering substantive justice and public policy and ought to be dismissed with costs to the Respondent.

In rejoinder the Applicant's Counsel submitted that the Respondent did not exercise due diligence and the affidavit in reply deposed by Susan Kaggwa should be ignored since the affidavit in rejoinder rendered it incompetent. He further submitted that there is no submission in reply in this matter because of the failure to competently defend the affidavit in reply and it should be ignored for failing to be in accord with **S. 103 of the Evidence Act Cap 6 which** places the onus to reply upon the Respondent which onus the Respondent has failed to discharge.

He submitted that the affidavit in support of the application is not founded on any material falsehoods as alleged or at all. The Applicant's Counsel submitted that the submission about being served on the 6thJuly,2016 cannot be sustained in light of the affidavit in rejoinder wherein it is proved beyond doubt that service could only have been on the 6thJune, 2016 and on no other date as such the reply is false. Counsel submitted that if at all the respondents were served out of time; they should have rejected it and not replied. They failed to seek consent from the other party to file late or the leave of the court as such the application is in order and should be allowed without being diverted by emotion. The law provides a mode of correcting mistakes but it is not in a reply to the submissions as such this arrangement must be rejected. The record has evidence
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that they were served by the applicant but they have never challenged his affidavit of service or assailed it at all, moreover this allegation ought to have been made in their affidavit in reply but not in submissions. The cited case in support of the dismissal of the application is actually appropriately applicable to the Respondent's reply and submissions which must be rejected without ado as they are a blatant attempt at sanctifying falsehood which must be rejected. The honorable court should not be swayed by **Art 126 (2) (e) of the Constitution** and depart from its duty of throwing the affidavit in reply and submissions in reply out of court. With regard to mistake of Counsel he submitted that manufacturing evidence is not a mistake and must not be tolerated at all and the cited cases do not at all apply, save for **Makula International vs. His Eminence Cardinal Nsubuga & Another** in support of the rejection of the affidavit in reply. Counsel submitted that it is unprofessional to masquerade by signing off as Counsel for the applicants when they do not have instructions at all from the applicants and for this reason the Respondent's submissions in reply are not only incompetent but also non-existent. The submission in reply has the ill intention of subverting the course of justice and prayed that the Applicant's application be granted with costs.

Ruling

I have carefully considered the applicants application together with the affidavit in support and in the reply as well as in rejoinder. I have gone through the written submissions and the evidence as well as the authorities cited by learned counsels.

The first point of contention is whether the affidavit in support of the application is patently false because the process served of the written statement of defence on the respondents counsel was created to mislead the court. The contention is that the written statement of defence was served by the first applicant and not a process server.

The written statement of defence and counterclaim is said to have been served on 6th June, 2016. I have carefully considered paragraph 4 of the affidavit in support of the chamber summons where the first applicant deposes that he was informed by his counsel and he believed that information to be true and correct that his lawyer filed on court record an affidavit of service of the written statement of defence and counterclaim on 11th July, 2016 wherein the process server deposed that he had effected service of court process of the counterclaim on the plaintiff's counsel on 6th June 2016. It would appear from the paragraph that the process server was a different person from the first applicant. I however reject this conclusion because the paragraph deals with the filing of the affidavit of service on 11th July, 2016 rather than with the person who served the written statement of defence and counterclaim. When one examines the affidavit of service of the written statement of defence and counterclaim it was indeed signed by the first applicant who deposed that he was the one who served the process on the respondents. He deposes that on 6th June, 2016 he received copies of the written statement of defence and counterclaim from the court and upon consulting his counsel he took the opportunity to serve it on the respondents counsel. He also deposed that he registered in the visitor's book and tendered two copies of the written statement of defence and counterclaim on one of the ladies at the

reception. He however never received an acknowledgement and was thrown out of the Chambers. In the premises, I find no falsehood in the affidavit in support of the application at all.

The fact that the respondents counsel received the written statement of defence and counterclaim is confirmed by the reply to the written statement of defence and defence to the counterclaim. The only question in contention is whether the written statement of defence and counterclaim were served on 6th June, 2016 or on 6th July, 2016 which is a question of fact. To establish who is telling the truth, the applicant's averment is supported by the date written on the reply to the written statement of defence and counterclaim wherein Messieurs Impala Legal Advocates & Consultants signed on 17th June, 2016. The respondents counsel attributed this to be a mistake of counsel. The actual problem is that this reply was filed on court record on 20th July, 2016 and therefore the respondent claims that he signed the reply on 17th July, 2016 and not as written on the court record. The applicant's application to strike out the reply to the written statement of defence and counterclaim was received on court record on 25th August, 2016. On the other hand the reply to the written statement of defence was filed on 20th July, 2016. The affidavit of service of the written statement of defence and counterclaim was filed on 11th July 2016, before the reply to the written statement of defence and counterclaim were filed on court record.

I have also considered a letter dated 24th June, 2016 written by the applicant's lawyers and filed on court record on 8th July 2016. In that letter the applicants counsel wrote to the registrar that the written statement of defence and counterclaim were served upon the respondents counsel on 6th June, 2016 according to the affidavit of service. He prayed for judgment against the respondents in accordance with Order 8 rule 14 of the Civil Procedure Rules. The affidavit of service was however filed on 11th July, 2016 and was not on record when the letter was written. The affidavit of service was commissioned on 7th July, 2016 by the Commissioner for oaths. The letter applying for judgment was written subsequently on 8th July, 2016. From all the correspondence, it is the applicants counsel's application together with the affidavit of service which was filed on 11th July, 2016 which prompted the respondent to file a reply to the written statement of defence and counterclaim on 20th July, 2016. I have duly checked the stamp indicating which fees were assessed on the affidavit of service and it is dated 11th of July, 2016. The one on the reply is dated 20th of July, 2016. The most incriminating evidence is that the reply was signed on 17th June, 2016 and not in July. If counsel had been served in July, a contention on which the respondents defence rests, how could they have signed the reply on 17th June, 2016?

After assessing the chronology of events, my conclusion is that the respondent to this application had been served by 6th June, 2016 with a written statement of defence and counterclaim. And on a matter of fact, the reply to the written statement of defence and counterclaim which constitutes the defence to the counterclaim was filed out of time. There is no application for extension of time other than an application, which is this application to strike out the belated reply to the written statement of defence and counterclaim.

I agree with the applicants counsel that in the absence of an application for extension of time within which to file and serve the reply out of time, the applicant's application for judgment on the basis of service of the counterclaim on the plaintiff's counsel on 6th June, 2016 which letter was written on 8th July, 2016 takes precedence. Secondly there is no application to enlarge the

time to file the written reply to the counterclaim out of time or to validate that which has been filed on court record. The respondents counsel has instead insisted that it was served on 6th July, 2016. This is the information contained in the written statement of defence that was attached showing there was acknowledgement on 6th July, 2016. The acknowledgement was made after the respondents counsel had been served. This is because counsels signed a reply on 17th June, 2016. Secondly the applicant clearly indicated that he left both copies of the written statement of defence and counterclaim with the respondent's advocates on 6th June, 2016 when he was thrown out without having been given his copy of the written statement of defence and counterclaim. The fact that the respondent was served with the written statement of defence and counterclaim is confirmed by the reply to the written statement of defence and counterclaim. The affidavit of service was sworn to on 7th July, 2016 before the respondents counsel filed the reply which was lodged on the court record on 20th July 2016. The applicant has proved on the balance of probabilities that it duly served the written statement of defence and counterclaim on the respondents counsel on 6th June 2016 while the conclusion I have on the reply is that it was duly signed on 17th June, 2016 which is about two weeks within the period for the filing of the reply but there was an omission to have it filed or served on the applicants counsel. Subsequently, the acknowledgement on the written statement of defence and counterclaim purporting to have been served on 6th July, 2016 is a clear fabrication and that is my conclusion on the evidence.

The law is prescribed by the rules and rules are handmaidens of justice. I have duly considered the submission that the application is a technicality and substantive justice should be done without regard to technicalities as prescribed by Article 126 (2) (e) of the Constitution of the Republic of Uganda. In this case the respondent has not admitted to have forgotten to file but purported to have been served a month later. The acknowledgement of service attached to the affidavit of Susan Kaggwa and was never given to the first applicant. The applicant was served after the affidavit was filed on the 3rd of November 2016. My conclusion is that the respondents counsel filled a convenient date which is at variance with the date when the reply was signed by the respondents counsel on the 17th of June 2016. I agree with the Applicant's counsel that the court process cannot be used through fabrication of evidence. Either the Respondent's Counsel was served on the 6th of July 2017 out of time for service of a defence and counterclaim which ought to be filed within 15 days as prescribed in the summons and served within a similar period or the respondent was duly served on the 6th of June 2016 within time and the Respondent was out of time. My conclusion is that the respondent was out of time and not in time as averred by the respondent. In the premises article 126 (2) (e) cannot be called in aid of the respondent neither is the negligence of counsel an issue because they say they were in time. What is in issue is who has the truth of both parties.

The respondent's defence to counterclaim should have been filed within 15 days under **Order 8 rules 1, of the Civil Procedure Rules** which is reproduced for ease of reference:

“(1) Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him or her of the counterclaim.”

Secondly the Plaintiff/Respondent is required to reply to the Written Statement of Defence within 15 days of service of the Defence as prescribed by Order **8 rules 18 (1) of the Civil Procedure Rules** which provides that:

“(1) A plaintiff shall be entitled to file a reply within fifteen days after the defence or the last of the defences has been delivered to him or her, unless the time is extended.

(2) No pleading subsequent to the reply shall be filed without leave of the court, and then shall be filed only upon such terms as the court shall think fit.

(3) Where a counterclaim is pleaded, a defence to the counterclaim shall be subject to the rules applicable to defences.”

As such I am of the view that the respondent filed their reply to the written statement of defence and defence to counterclaim out of time since they were served on 6th June, 2016 and only filed a reply on 20th July, 2016 without seeking leave of court. The application ought to be granted.

In the premises the Applicant’s application is granted and orders number (i) (ii) and (iv) of the Chamber Summons are granted. Order (iii) that the counterclaim be deemed to have been admitted will not be made but a declaration issues that there is no defence to the Counterclaim filed in time and the Registrar shall consider the Applicants application for judgment in default of a defence to the Counterclaim. The application succeeds with costs.

Ruling delivered in open court on the 17th of February 2017

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Murad Samnani present

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge 17/02/2017