



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

5 MISCELLANEOUS APPLICATION No. 406 OF 2020

[Arising from Civil Suit No. 178 of 2018]

1. SHEENA IMRAN AHMED

2. NABILA IVY===== APPLICANTS

VERSUS

10 **1. EDMOND MUSOKE**

2. PROSCOVIA NAKIMBUGWE KIZITO ===== RESPONDENTS

[Administrators of the Estate of the Late Francis Mboози]

BEFORE JUSTICE RICHARD WEJULI WABWIRE

RULING

15 The Applicants filed this application under Sections 96 and 98 CPA and Orders 51 r 6 and 52 r1 CPR seeking leave to file their written statement of Defence out of time and for costs of the application to be provided for.

The Application is supported by the Affidavit of Nabila Ivy,
20 in which the grounds thereof are stated but briefly are that;

- a) The Respondents did not serve the Applicants with summons and the plaint
- b) The Applicants learnt about the courts proceedings late, through the plaintiffs lawyers
- c) That since December 2019, when the 2nd and 3rd defendants' Written statement of defence was expunged from the record, their counsel, a one Silver Owaraga, had health complications until now and he failed to file the application for extension of time on time. That the defendants have a good defence to the suit

The Applicants' major contention is that Summons in the head suit were never served on them.

The Respondents contested the Application in an Affidavit in Reply deponed by Edmond Musoke, in which he, among other things he deponed to, averred that it was false to state that the Applicants were never served.

The background to this Application is that at a previous hearing of the main suit, the Respondents /Plaintiffs raised a preliminary objection that the 2nd and 3rd Defendants, who are the Applicants herein, had filed their written statement of defense out of time. The preliminary objection was upheld and the defense was expunged from the Record.

The Applicants then brought this Application seeking for leave to file out of time.

The Respondents raised a preliminary point of law which I will first determine before I proceed to the merits of the
50 Application.

They contend that the Applicants cited section 96 of the Civil Procedure Act, Cap 71 which, in their understanding, is not applicable in the instant case.

Section 96 CPA provides that;

55 *“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired.”* .

60 He submitted that the provision only deals with instances where a period is specifically fixed or granted by a court to do an act, but that in the present case, no period was ever fixed by court for the Applicants to file their written statement of defence. That the period for filing the written
65 statement of defense is fixed by the Civil Procedure Rules, SI 71-1.

He prayed that the provision cited by the Applicants be disregarded.

In reply, Counsel for the Applicants contended that the
70 preliminary objection was of no legal consequence in as
far as the provision envisages situations where time is
either fixed by statute or granted by court.

He further contended that since the discretion to enlarge
time lies with court, it should be exercised to allow the
75 Applicant prayer for expansion of time.

In any case, the Applicants having stated that the
Applicants proceeded under Section 98 CPA and Order 51
rule 1 should put the Respondents apprehensions to rest.

Be that as it may, I have addressed my mind to the law
80 and previous decisions in this jurisdiction regarding this
issue.

The general rule is that where an application omits to cite
any law at all or cites the wrong law, but the jurisdiction
to grant the order sought exists, then the irregularity or
85 omission can be ignored and the correct law inserted, per
Justice Bamwine, as he then was, in **Francis Wazarwahi
Bwengye v Haki w. Bonera, HCT-00-CV-CA-0033-2009.**

The learned Judge also cited the case of **Tarlol Singh
Saggu vs Roadmaster cycles (U) Ltd CACA No. 46/2000**
90 in which , citing with approval the decision of the former
East African Court of Appeal in **Nanjibhai Prabohusdas**

& Co. Ltd vs Standard Bank Ltd [1968] EA 670 it was held that:

95 *“The court should not treat any incorrect act as a nullity with the consequence that everything founded thereon is itself a nullity unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”*

100 The Courts discretionary mandate under Section 96 CPA is unfettered.

What the provision does is to set the ground for Courts’ mandate under order 51 rule 6 CPR which provides for enlargement of time.

105 In light of the foregoing, I find no merit in the preliminary objection raised and it is herewith dismissed.

110 However, before I move to the next stage, to consider the Application on its merits and the submissions by respective Counsel, I will address a point of law which seems to have eluded the parties and their respective Counsel.

I have considered the pleadings and submissions by the parties. Most importantly however I have carefully perused

115 my Ruling in Civil Suit 178 of 2019, when the Applicants
defence was expunged.

In that Ruling, I observed that;

120 “S.96 of CPA gives Court the discretion to enlarge
time where the appointed time has expired. The
court usually exercises this discretion upon the
party requiring the extension applying for the
same. In the instant case, no such application
was made and no reason given for court to extend
time for filing a defence out of time”.

125 The record in CS 178 of 2019 shows that whereas the suit
was filed on 22nd June 2017, the defendants filed their
respective defenses on 30th August 2017.

The defendants did not move Court to extend or validate
their defense which was filed out of time and so their
130 defense was expunged from the Record.

What the Applicants now seek, which is to have time
enlarged so that they are allowed to file their Written
Statement of Statement, is what they should have done in
the first instance, before the defense was expunged from
135 the record.

The Application is, with due respect to both Counsel and
the Applicant, misconceived. This is so, for the reasons

that whereas in CS 178 of 2019, extension of time would
have cured the irregularity, when this possible remedy
140 was not sought by the Applicants/Defendants, the WSD
was expunged from the record.

In the circumstances therefore, the WSD cannot be simply
reinstated by extension of time within which it is filed.

The right thing to do would have been for the Applicants
145 to seek to have the order that expunged the Defense
reviewed and vacated, and then seek Court's leave to
enlarge time or validate the defense filed out of time.

Where a belatedly filed defense has been expunged from
the record, the defendant cannot simply seek to have it re-
150 filed out of time without first seeking to have the order
which struck it off the record vacated.

The grand norm of justice is that the substance of disputes
should be heard and decided on merits over form, and it
is also a well-established principle of administration of
155 justice that a litigant should not be penalized for the
faults, mistakes or dilatory conduct of Counsel when the
litigant has been vigilant.

While the circumstances that led to dismissal of the
defense in the first instance can be broadly attributed to
160 the dilatory conduct and possible mistakes of the

Applicants'/Defendants' Counsel at that time then,
presently, even if the defendant is interested in having the
Application heard and determined on the merits, the
expunged defense must now first find its way back on to
165 the Record and then possibly have extension of time for
belated filing granted or validated under Order 51 r 6 CPR.

Miscellaneous Application No. 406 of 2020 is
misconceived and it cannot be redeemed by exercise of
Court's discretion to enlarge time or by attribution of the
170 shortcomings experienced to mistakes or dilatory conduct
of Counsel or even honoring the prioritization of
dispensing substantive justice over technicalities and
form.

This Court cannot therefore delve into considering the
175 merits of the application for extension of time to file a
defense which it has long struck off the record, before its
order is vacated.

In the event, the Application fails.

I make no order as to costs.

180 Delivered at Kampala this 4th day of September 2020.

Richard Wejuli Wabwire

JUDGE

Present in Court:

185

1.

2.

3.

4.