THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLANEOUS CIVIL APPLICATION No. 0677 OF 2021

(Arising from Civil Suit No. 0873 of 2019)

KAMPALA ASSOCIATED ADVOCATES …… APPLICANT

VERSUS

KATAMBA SSEMAKULA …… RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

a. Background.

Following the conclusion of High Court Civil Suit No. 164 of 2004 between Henry Waibale and others v. The Attorney General, the applicant's bill of costs was taxed and allowed at shs. 3,750,934,000/= The respondent approached the applicant offering to help, at a fee or commission, to recover that payment from the judgment debtor through lobbying and negotiation. The applicant accepted the offer and on 26th September, 2018 a memorandum of understanding was signed between them. Differences having subsequently arisen regarding the performance of that agreement, the respondent instituted a suit against the applicants seeking recovery of shs. 650,000,000/= The respondent's claim is that although on 2nd August, 2019 the applicant received shs. 470,000,000/= and a further shs. 1,800,0000,000/= on 15th October, 2019 consequent to the respondent's performance of his part of the bargain, the applicant has without justifiable cause refused to honour her obligation to pay the respondent for the services rendered.

In their written statement of defence, the applicants state that the respondent failed to discharge his obligations under the memorandum of understanding. The applicant has not received the shs. 1,800,0000,000/= as alleged. Recovery of the amounts paid so far was by the applicant's sole effort and therefore the respondent is not entitled to any payment.

b. The application.

The application is made under section 33 of *The Judicature Act*, section 98 of *The Civil Procedure Act*, Order XIA rule 6 of *The Civil Procedure (Amendment) Rules, 2019*, and Order 52 rule 1 of *The Civil Procedure Rules*. The applicant seeks an order declaring High Court Civil Suit No. 873 of 2019 as abated. The ground is that the respondent not taken out summons for direction since the filing of the suit. The application had been fixed for hearing on 22nd June, 2021 at 9.00 am but it could not be heard on that day due to the "*Revised Contingency Measures by the Judiciary to Prevent and Mitigate the Spread of Covid-19*" that were issued by the Honourable Chief Justice by way of a Circular dated 7th June, 2021 as amended by the subsequent Revised Circular of 21st June, 2021. By virtue of the said guidelines, all court hearings and appearances were suspended for a period of 42 days with effect from 7th June, 2021 save for "urgent matters."

By a letter dated 13th July, 2021counsel for the plaintiff sought to have a date fixed for the hearing of the application. However, since counsel for the applicant filed their written submissions at the time of filing the application and Clause 8 of the "*Revised Contingency Measures by the Judiciary to Prevent and Mitigate the Spread of Covid-19*" contained in the Chief Justice's Circular dated 7th June, 2021 as amended by the subsequent Revised Circular of 21st June, 2021 directs that "Judicial Officers should continue to write judgments and rulings; and deliver them virtually," proceeding to write and deliver a ruling on basis of those submissions, rather than fix a date for oral submissions after the indeterminate period of suspension, would save a lot of time, hence this ruling.

c. Submissions of counsel for the applicant

Representing themselves as parties, the applicants filed written submissions in which they argued that the respondent filed the underlying suit on 21st October, 2019. By virtue of Order XIA rule 1 (2) of *The Civil Procedure (Amendment) Rules, 2019*, which came into force on 25th January, 2019 the respondent was required to take out summons for directions within 28 days of the last reply to rejoinder. The applicants field their written statement of defence on 6th November, 2019. No further pleadings were filed thereafter, yet the respondent has to-date never taken out summons

for directions as required by the rules. Instead the respondent filed two applications on 27th January, 2021 seeking orders of attachment before judgment, which applications were dismissed on 15th February, 2021 and 17th February, 2021 respectively. The respondent has had ample time to comply with the rules but has not. The suit therefore ought to be declared as abated with costs to the applicants.

d. Submissions of counsel for the respondent.

The application was made ex-parte since there is no proof of service on the court record. Consequently the respondent did not file submissions.

e. The decision.

It is not in doubt that the observance of the rules of procedure is fundamental to the course of litigation in so far as they provide the necessary framework for the achievement of justice between the parties. At the same time the courts are aware that too rigid an adherence to the rules in some circumstances may inappropriately and unjustly deprive a party of its rights. It is partly for this reason that article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*, enjoins courts to administer substantive justice without undue regard to technicalities. It is not desirable to place undue emphasis on the test of the rules rather than their objective.

Courts are not expected to construe and apply the rules of procedure with such meticulous care or in a hyper-technical manner so as to result in genuine claims being defeated on trivial grounds. Courts have always been liberal and generous in the application of the rules of procedure since they are hand maidens of justice, rather than ends in themselves. In light of article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*, unless a rule is mandatory, adherence to the strict letter of the rules is justifiable only when there has been a serious departure from a fundamental rule of procedure that has a demonstrable effect on the ability of the court to deliver justice in the case. This is because noncompliance with the rules of procedure is not detrimental to the proceedings if no injustice is cause to the parties (see *Nagawa M. Hajati v. Kajubi Paulo and Katama Alima [1978] HCB 34; Cloud 10 Limited v. Standard Chartered Bank (U) Limited [1987]*

HCB 64; Bahemuka Denis Kimuli v. Sarah Birobonwa Anywar and another [1987] HCB 71; Westmont Land (Asia) BHD v. The Attorney General [1998-2000] HCB 46 and *Kabeterana v. Ntimba [1991] ULSR 170*). Consequently, minor violations or non-compliance with the rules of procedure should be compensable by an award of costs to the adversary.

Establishing a basis for adherence to the strict letter of a rule that is not mandatory has two basic requirements, both of which must be met. First, the rule of procedure from which there has been a departure must be fundamental. Second, there must have been a serious departure from that fundamental rule. Fundamental rules of procedure are those that are essential to the integrity of the trial process and set a minimal standard to be respected in order to observe the right to a fair trial. These minimal standards are often considered to be the rules of natural justice.

Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* guarantees to each person in the determination of their civil rights and obligations, a fair, speedy and public hearing before an independent and impartial court established by law. This guarantee requires that civil trials should be conducted and concluded in the shortest appropriate period of time. The guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place in a "speedy" manner. That time frames specified by the rules are of procedural importance is not in doubt. Indeed "litigants who, having started litigation, elect to allow that litigation to sink into indefinite abeyance, who have had no serious and settled intent to pursue that litigation and who have, in consequence, acted, in respect of that litigation, in knowing disregard of their obligation to the court and to the opposing party, should not be allowed to carry out with litigation conducted in that manner" (see *Solland International Ltd v. Clifford Harris & Co [2015] EWHC 2018*).

Therefore, while there is no definitive list of what rules of procedure are fundamental, rules that set time limits for taking particular steps in the progression of the trial ought generally to be considered fundamental. However, for there to be a serious departure from a fundamental rule of procedure, the violation of the rule must have had or may potentially have a material effect on the court's ability to deliver justice in the case. The departure must be substantial and be such as to deprive a party of the benefit of the protection which the rule was intended to provide. In other

words, observance of the rule must have the potential to result in a substantially different outcome. This will be inevitably be determined on a case by case basis after hearing the parties.

Furthermore, the applicant must have raised the violation of procedure with the court as soon as it arose, unless the applicant was not aware of the violation or it was not reasonably possible for it to have done so. Failure to object promptly will be treated as waiving the right to object at a later stage and the applicant will be precluded from claiming the irregularity constituted a serious departure from a fundamental rule of procedure for the purposes of terminating the proceedings.

The Civil procedure Rules specify quite a number of time bound steps that have to be taken by the litigants if their right to a "fair and speedy" trial is to be achieved. Not all of them though have termination of the proceedings as a consequence of non-adherence. Examples of rules with such a consequence are; Order 17 rule 5 which mandates the court to dismiss the suit if the plaintiff does not within eight weeks from the delivery of any defence, or, where a counterclaim is pleaded, then within ten weeks from the delivery of the counterclaim, set down the suit for hearing; Order 17 rule 6 which mandates the court to dismiss a suit in which no application is made or step taken for a period of two years by either party with a view to proceeding with the suit; Order 17 rule 5 (1) as amended by Order 11A rule 2 of *The Civil Procedure (Amendment) Rules, 2019* where a suit abates "automatically" where no application is made or step taken by either party for a period of six months after the mandatory scheduling conference, with a view to proceeding with the suit; and Order 17 rule 5 (1) as amended by Order 11A rule 6 of *The Civil Procedure (Amendment) Rules, 2019* where a suit "shall abate."

The relevant provisions of Order 11A *The Civil Procedure (Amendment) Rules, 2019* which are pertinent to this application state as follows;

1. Summons for directions.

(2) Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18 (5) of Order VIII of these Rules.

5. Dismissal of suit for want of prosecution.

(1) In any case, not otherwise provided for, in which no application is made or step taken for a period of six months by either party with a view to proceeding

with the suit after the mandatory scheduling conference, the suit shall automatically abate;

(6) If the plaintiff does not take out a summons for directions in accordance with sub-rules (2) or (6), the suit shall abate.

The summons for direction procedure is intended to enable court determine and provide guidance to the parties on what further steps need to be taken in order to effectively prepare for trial. Order 11A rule 2 of *The Civil Procedure (Amendment) Rules, 2019* requires the plaintiff within 28 days after the pleadings are closed, to take out a summons for directions seeking the orders necessary for the conduct of the trial. The parties will then attend court for the necessary directions for just, expeditious and economical disposal of the suit. The purpose of abatement of a suit for failure to comply with the time periods specified is to save the time and expense of a trial when the plaintiff's suit cannot be maintained with reasonable dispatch.

The directions ordinarily relate to mediation of the suit, orders on discovery as may be necessary or desirable having regard to the issues raised in the pleadings, the filing and exchange of trial bundles and witness statements, within a specific period of time, with a view to saving time and expense. The number of witnesses a party may require, and the number of trial days required, are decided at this stage. Where a plaintiff or defendant has failed to give sufficient particulars of his or her claim, defence or counter-claim, the court may make such order for further and better particulars, and as to costs occasioned by such default. Interlocutory applications may be taken at this stage. Once all the directions of the court made at the summons for directions are complied with, the case may be ready for trial. Abatement is the premature ending of a suit before final adjudication. The ultimate goal of the provisions for abatement of a suit is to prevent unnecessary wastage of time and expense. When a suit is abated it may be abated temporarily, or permanently. It may be automatic or at the discretion of court.

Under Order 17 rule 5 (1) as amended, abatement of the suit takes place automatically where no application is made or step taken by either party for a period of six months after the mandatory scheduling conference, with a view to proceeding with the suit. This type of abetment occurs of its own force by inaction and the passage time. No specific order is required to be made.

In contrast, according to Order 11A rule 6 of *The Civil Procedure (Amendment) Rules, 2019* if the plaintiff does not take out a summons for directions in accordance with the Rules, the suit "shall abate." The word "shall" is not always obligatory, imperative or mandatory. Depending on the context, it can also mean "may." It is not merely the use of a particular expression that would render a provision directory or mandatory. It has to be interpreted in the light of the settled principles, and while ensuring that intent of the Rule is not frustrated.

Normally, the word "shall" *prima facie* ought to be considered mandatory but it is the function of the Court to ascertain the real intention of the Rules Committee by a careful examination of the whole scope of the Rules, the purpose they seek to serve and the consequences that would flow from the construction to be placed thereon. For ascertaining the real intention of the Rules Committee, the Court may consider *inter alia*, the nature and design of the Rules, and the consequences which would follow from construing it the one way or the other; the impact of other provisions, whereby, the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the Rules provides for a contingency of the non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the Rules will be defeated or furthered. If the object of the enactment will be defeated by holding the same directory, it will be construed as mandatory, whereas, if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of Rules, the same will be construed as directory.

In determination of the question, whether a provision of law is directory or mandatory, the prime object must be to ascertain the legislative intent from a consideration of the entire statute, its nature, its object and the consequences that would result from construing it in one way or the other, or in connection that with other related statutes, and the determination does not depend on the form of the statute.

Therefore, the word "shall," used in Order 11A rule 6 of *The Civil Procedure (Amendment) Rules, 2019*, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. It is settled law that when a law is passed for

the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or the general public, without very much furthering the object of the law, the same would be construed as directory. Moreover, a provision regulating a matter of procedure will generally be read as directory when disregard of it or the failure to follow it exactly will not materially prejudice a litigant's case or deprive him or her of a substantial right. One of the consequence of the abatement of a suit is that a fresh suit can be brought on the same cause of action, if not barred by limitation. This consequence applies with full force to abatement under both Order 17 rule 5 (1) as amended and Order 11A rule 6. An abated suit is non-existent prior to it being revived.

The question whether a provision of law is mandatory or not, depends upon its language, the context in which it is enacted and its object. Whereas Order 17 rule 5 (1) as amended uses the expression "shall automatically abate," the expression used in Order 11A rule 6 is "shall abate." Employment of the two expressions of great jurisprudential import in the same Statutory Instrument dealing with pre-trial processes must have two different imports. In the former the court has no discretion while in the latter the court exercises discretion. In the latter case, upon consideration for abatement, the court may direct that the suit abates, or may deal with it in all respects as if it were a summons for directions.

The abatement of suits under Order 11A rule 6 when invoked and applied automatically will be counterproductive in light of the fact that under Order 11A rule (7), where a suit has abated the plaintiff may, subject to the law of limitation, file a fresh suit. The court will then be inundated with repeat suits over the same subject matter. Consequently, the suit should be abated by court under Order 11A rule 6 only when it is satisfied that such an order is necessary to save the time and expense of a trial when the plaintiff's suit cannot progress with the dispatch which the circumstances of the suit and the available court resources require.

It was suggested in *Phelps v. Button [2016] EWHC 3185* that in situations of delay, the court ought to consider the following factors. First, the length of the delay; secondly, any excuses put forward

for the delay; thirdly, the degree to which the claimant has failed to observe the rules of court or any court order; fourthly, the prejudice caused to the defendant by the delay; fifthly, the effect of the delay on trial; sixthly, the effect of the delay on other litigants and other proceedings; seventhly, the extent, if any, to which the defendant can be said to have contributed to the delay; eighthly, the conduct of the claimant and the defendant in relation to the action; ninthly, other special factors of relevance in the particular case.

This requires examining the reasons advanced by the person who is accused of undue delay. It also means a close examination of facts, taking into account the reasons, if any, advanced by the person accused of abusing the process for the adoption of a particular course and then deciding whether what occurred is a sufficiently serious misuse of the process of the court to warrant being barred from continuing the case with the consequence that the actual merits of the case are not explored.

In the instant case, rather than take out summons for directions the respondents instead filed two applications on 27th January, 2021 seeking orders of attachment before judgment, which applications were dismissed on 15th February, 2021 and 17th February, 2021 respectively. It is not clear to me how this departure from procedure must have had or may have had a material effect on the court's ability to deliver justice to the parties. It has not been demonstrated that the respondent as a result cannot proceed with the dispatch which the circumstances of the suit and the available court resources require. The applicant has not proved this to be a serious departure from a fundamental rule of procedure to justify a strict application of the rule. It has not been demonstrated that injustice will be caused to the parties if the trial proceeds in spite of the respondent's failure to comply with the procedural requirement in a timely manner. This therefore is a minor lapse that can be corrected and the lapse compensated for by an award of costs for the belated step to the applicants, which also served to penalise the respondent for the delay.

Secondly, for objections regarding violation of the rules of procedure, an applicant an applicant is required to raise them with the court as soon as they arise, unless the applicant was not aware of the violation or it was not reasonably possible for it to have done so. Failure to object promptly will be treated as waiving the right to object at a later stage and the applicant will be precluded from claiming the irregularity constituted a serious departure from a fundamental rule of procedure

for the purposes of annulment. The violation occurred in December, 2019 yet this application was filed over a year and a half later on 5th May, 2021. The application is clearly an afterthought and that fact constitutes additional evidence of the fact that lapse does not constitute a serious departure from the fundamental rule of procedure.

For those reasons the application is dismissed with costs in the cause. A date should now be fixed upon expiry of the period of suspension of "all court hearings and appearances" specified by the "*Revised Contingency Measures by the Judiciary to Prevent and Mitigate the Spread of Covid-19*" that were issued by the Honourable Chief Justice by way of a Circular dated 7th June, 2021 as amended by that of 21st June, 2021 for the parties to be given directions. Summons for direction should accordingly issue for a date available in the court diary. The court clerk is so directed.

Delivered electronically this 15th day of July, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
15th July, 2021.