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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
MISCELLANEOUS APPLICATION No. 0733 OF 2022
(ARISING FROM CIVIL SUIT No. 0156 OF 2022)

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DAR AL- HANDASAH CONSULTANTS (SHAIR AND PARTNERS) APPLICANT

VERSUS

MKM COMESA COMPANY LIMITED RESPONDENT

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BEFORE: HON. LADY JUSTICE SUSAN ABINYO

RULING

Introduction:

This application was brought by Notice of Motion under the provisions of section 33 of the Judicature Act, Cap 13, and section 98 of the Civil Procedure Act, Cap 71, and Order XIA Rule 1 (2) & (6) of the Civil Procedure (Amendment) Rules, 2019 and Order 52 Rule 1 of the Civil Procedure Rules, S.I 71-1, seeking orders that:

1. The Civil Suit No. 156 of 2022 has abated for failure to take out summons under Order XIA Rule 1(6) of the Civil Procedure(Amendment) Rules 2019.
2. Costs be provided for.

Facts:

The application is supported by an affidavit of Winnie Atwine, an Advocate of the High Court, and external Counsel for the Applicant, deponed in paragraphs 1-9, and summarized as follows: -

That on the 21st day of March, 2022, the Respondent filed a plaint against the Applicant before this Hon. Court for breach of contract, and that on 1st April, 2022, the Applicant filed a written statement of defence, and subsequently served it on the Respondent on the 13th day of April, 2022.

5 That the requirement to extract summons for directions is mandatory under the law and non-compliance renders the suit abated. That there is no evidence on Court record at the time of this application to show that the Respondent has taken out summons for directions as prescribed by law.

That it is fair, just and in the interest of justice that this application is granted.

10 The Respondent filed an affidavit in reply, deponed in paragraphs 1- 19, by Kibyami Lwanga Charles an Advocate of the High Court, who is conversant with the facts surrounding this case, and summarized as follows: -

That the Respondent herein submitted their reply to the written statement of Defence on 26th April, 2022 through the ECCMIS system, and it was only validated,
15 and or admitted on the 19th day of August, 2022, an issue which was out of control of the Respondent, and that as a result, the Respondent could not take out the summons for directions, when the last pleading was still “pending validation” as seen on the ECCMIS system, and that during that time, the then Deputy Registrar in charge of the matter was Her Worship Nabakooza Flavia.

20 That the Respondent still being interested in its case, and despite the Respondent’s pleading not being validated, took out summons for directions, and filed on the 16th day of June, 2022. That later the suit was transferred to Her Worship Hatanga Juliet Harty, and the Respondent followed up on the matter, and was able to take out summons for directions on the 4th day of July, 2022, which was
25 endorsed by this Honorable Court, and timelines given to the parties to file a joint scheduling memorandum, trial bundles, and witness statements.

That the Respondent went ahead and filed their scheduling memorandum, trial bundle, and witness statement, and served upon the Respondent, who deliberately chose to ignore, despite the Court’s directives. That in the
30 circumstances, the said application is frivolous, vexatious, and an abuse of Court process, since this honorable Court already issued summons for directions and gave directives to the parties.

That at all times the suit never abated, since the Plaintiff’s (Respondent herein) last pleading was validated on the 19th of August, 2022, and that the summons for
35 directions was issued by this honorable Court therefore, the suit could not abate. That it is in the interest of justice that this application is dismissed with costs.

5 The Applicant filed an affidavit in rejoinder, deponed in paragraphs 1- 18, by Joel
Osekeny an Advocate and external Counsel for the Applicant, briefly that this
application is not frivolous, vexatious or an abuse of Court process because
summons for directions has never been taken out, and that even when this
10 honorable Court agrees that they were taken out, this was irregularly done, and
that it was done beyond the stipulated time without leave of Court.

That in the absence of a hearing for summons for directions, no summons could
be issued by this honorable Court, and as such, the filing of the scheduling
memorandum, witness statements, and trial bundle on the timelines issued by this
Honorable Court was irregular.

15 Representation:

The Applicant was represented by Counsel Daniel Lubogo of M/S AB & David
Advocates while the Respondent was represented by Counsel Edward Kayemba
of M/S Kaggwa & Kaggwa Advocates.

Issues for determination

20 Counsel for the Applicant did not frame the issues for Court's determination
however, in accordance with Order 15 Rule 3 of the Civil Procedure Rules, SI 71-
1, the issues are framed as below;

1. Whether Civil Suit No. 0156 of 2022 abated?
2. What are the available remedies?

25 Issue No.1: Whether Civil Suit No. 0156 of 2022 abated?

It was submitted for the Applicant that the grounds of the application are stated
in paragraphs 1-9 of the affidavit in support of the application deposed by Joel
Osekeny.

30 Counsel contended that the time this application was filed, the Respondent had
failed to extract summons for directions within the 28 days as provided under
Order XIA Rule 1(2), and (6) of the Civil Procedure(Amendment) Rules 2019, on
the requirement of issuance of summons for directions, and that the evidence
from the ECCMIS is that the suit abated.

5 Counsel for the Respondent invited Court to look at paragraphs 5-19 of the Respondent's affidavit in reply, and Annexures attached therein, to argue that the Respondent filed its written statement of defence on 13th April, 2022, and was within the time frame of the law, as seen in Annexure" A".

10 Counsel submitted that in the system, this was validated on 19th August, 2022, and as per the guidelines of this honorable Court, a document is filed upon validation by the Court, and that the process of validating was not within the Respondent's control. That the Respondent took out summons for directions on 16th. June, 2022, as seen in Annexure "B", which was endorsed by this Honourable Court, and timelines was given to the parties to file a Joint Scheduling Memorandum, and
15 trial bundles as seen in Annexure "D".

Counsel further submitted that at no time did this suit abate, since the Respondent's last pleading was only validated on 19th August, 2022. Counsel relied on the case of *Ali Owor & Anor Vs The Registered Trustees of Tororo Diocese, HCMA No. 148 of 2022*, to submit that the circumstances of the case should be
20 considered before the Court can conclude that the suit abated.

In rejoinder, Counsel for the Applicant submitted that Order 8 Rule 5 of the Civil Procedure Rules provides that pleadings are closed when the court gives time lines. The Applicant was served with the defence on 13th, April 2022, and they should have filed a reply by 18th April, 2022.

25 Counsel contended that any subsequent filings after that date would require leave of Court, and that the Respondent clearly filed their reply on 26th. April after time had lapsed without leave of Court, and that the reply was never served upon the Applicant as required under the law.

30 Counsel argued that the reply was validated on 19th. August, 2022, and that there is an irregularity, since the filing of the reply to the written statement of defence was made after the summons for directions. That a close look at the Court record, clearly shows that the Respondent's had on several occasions kept on engaging various Registrars of this Court, and that they should have taken out summons for directions by 16th. May, 2023.

35 Counsel further argued that the evidence on record clearly shows a non-compliance to the Rules of this Court, but also a glaring irregularity by the Respondent, and that it is not true that the Applicant's Counsel refused to receive

5 the pleadings because they had already indicated to them that this application had been filed.

Decision

Order XIA Rule 1(2) of the Civil Procedure (Amendment) Rules, 2019 provides that:

10 "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."

In the instant case, the plaint was filed on 21st March, 2022, and the written statement of defence was filed on 1st April, 2022 but validated on 13th April 2022. The reply to the defence was filed on 26th April, 2022, and validated on 19th August, 2022 by the Registrar.

It is noteworthy that the validation of the reply to the written statement of defence by the Registrar on 19th August, 2022, was done after 116 days had lapsed from the date of 26th April, 2022, when the said reply was filed.

15 It is my understanding that a document is deemed to have been filed by a party, when the document is validated by the Registrar of the Court, and the validation of documents is a process that is not within the control of a party to the suit.

I am cognizant of the fact that this case does not fall within the exceptions for taking out summons for directions, and this explains the reasonable steps that was taken by the Respondent to extract summons for directions on 16th June, 2022, before the last reply was validated on 19th August, 2022 by the Registrar.

20 I am fully persuaded by the decision in **Seruwu Jude Vs Swangz Avenue Ltd, HC Civil Appeal No. 0039 of 2021**, cited with approval in the case of *Ali Owor & Anor Vs The Registered Trustees of Tororo Diocese*(supra), relied upon by Counsel for the Respondent, on the proposition that the Court has to exercise its discretion judiciously, and look at all the circumstances of the case before it can conclude that the suit abated.

Accordingly, this Court finds that failure by the Respondent to take out summons within the prescribed time frame was due to extraneous circumstances beyond his control.

35 For reasons stated above, this issue is therefore, answered in the negative.

5 Issue No.2: What are the available remedies?

This Court having found issue (1) above in the negative, further finds that this application lacks merit.

This application is dismissed with costs to the Respondent.

Delivered electronically this 13th day of October, 2023.

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SUSAN ABINYO
JUDGE
13/10/2023

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