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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA

(COMMERCIAL DIVISION)

MISCELLANEOUS APPEAL NO. 0031 OF 2022

(ARISING OUT OF MISC. APPLICATION NO. 1023 OF 2022)

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(ARISING OUT OF CIVIL SUIT NO. 0624 OF 2022)

1. CL RISK MANAGEMENT SERVICES

2. CHRISTOPHER LUMALA :::::::::::::::::::::::::::::::::: APPELLANTS

VERSUS

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1. AUGUSTINE KASOZI

2. COLLINE HOTEL LTD :::::::::::::::::::::::::::::::::: RESPONDENTS

BEFORE: HON. LADY JUSTICE HARRIET GRACE MAGALA

*[Appeal from the Decision and Orders of H/W Nakitende Juliet dated 25<sup>th</sup>  
August 2022]*

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### JUDGMENT

#### Background

The Respondents filed Civil Suit No. 0624 of 2022 against the Appellants for cancellation of the advertisement of the sale of the property comprised in Plot 132 Kyaggwe Block I93 land at Mukono and Plot 201



5 Block 232 land at Kireka, Wakiso (suit property), punitive damages, permanent injunction and also sought other orders from court.

The Respondents, using ECCMIS filed Miscellaneous Application No. 1023 of 2022 for a temporary injunction against the appellants. The Respondents served the Appellants with the chamber summons in the  
10 said application. There was a contest as to when service of the court papers was effected. Whether it was 6<sup>th</sup> August 2022 or 8<sup>th</sup> August 2022. The learned trial registrar accepted 8<sup>th</sup> August 2022 as the date of service.

The Appellants claimed that they filed their affidavit in reply on the 23<sup>rd</sup> day of August 2022. On the 25<sup>th</sup> day of August 2022, when the matter  
15 came up for hearing, the learned trial assistant registrar granted an order for the application to proceed *ex parte* on account that the Appellants had been served but had not filed any affidavit in reply to the Chamber Summons. The appellants contend that they had filed an affidavit in reply and thus the *ex parte* order was issued in error. Hence this appeal.

20 The Appellants therefore seek the following orders from Court:

1. That the Ruling and Orders of the Learned Acting Assistant Registrar, Her Worship Nakitende Juliet dated the 25<sup>th</sup> August 2022 be set aside;
2. That Miscellaneous Application No. 1023 of 2022 be set down for  
25 hearing and heard on its merits; and
3. Costs of the Application be provided for.

### **Representation**

5 At the hearing of this Appeal, the Appellants were represented by Mr. Kayanja Osma of M/s United Advocates while the Respondents were represented by Mr. Henry Byansi holding brief for Mr. James Akampumuza of M/s Akampumuza & Co. Advocates

Both counsel for the parties filed their written submissions before this  
10 honorable court. I have had the benefit of reading the said submissions and I have considered them in arriving at this decision.

### **Grounds of Appeal**

The Notice of Motion through which this Appeal was commenced was tacky in the manner in which it was drafted and presented. The Appellants  
15 reproduced the averments in the affidavit in support instead of briefly stating the grounds upon which the appeal is premised. A notice of motion should highlight the grounds on which the motion is based and evidence to support such grounds is contained in the affidavit supporting the notice of motion. Secondly, Court noted that the annextures referred to in the  
20 affidavit in support of the application were not attached to the affidavit in the order they were stated.

However, the above observation notwithstanding, I deducted the following from the notice of motion as the grounds of this appeal:

- a) That the learned Assistant Registrar erred in fact and law in  
25 computing the time required to file the Affidavit in Reply when she included the date of 8/8/22 when the application was served and weekends thereby reaching a wrong decision that caused a miscarriage of justice;



- 5        b) That the learned Assistant Registrar erred in law and fact when she  
found that the appellants/respondents had failed to file and serve  
their affidavit in reply and had thereby excluded themselves from  
the jurisdiction of this honorable court;
- 10       c) That the Learned Assistant Registrar erred when she proceeded to  
grant the impugned Order to proceed *ex parte* without offering the  
Appellants and their lawyers who were all in Court an opportunity  
to be heard during the hearing of the Application thereby causing a  
miscarriage of Justice; and
- 15       d) The learned registrar erred in law when she failed to exercise her  
discretion judiciously thereby occasioning a miscarriage of justice.

The Affidavit in Support of the Appeal was deposed by the 2<sup>nd</sup> Appellant while the Affidavits in reply were deposed by Augustine Kasozi, the 1<sup>st</sup> Respondent and a Director of the 2<sup>nd</sup> Respondent. The 2<sup>nd</sup> Appellant further deposed an affidavit in rejoinder.

20       **Hearing and submissions**

On the 15<sup>th</sup> day of September 2022, when this appeal came up for hearing, the Respondents' lawyers raised a preliminary objection on the competence of this appeal on the basis that it had been overtaken by events. However, the court on the 28<sup>th</sup> of September 2022 allowed this  
25       appeal to be heard on its merits. It guided the parties to make  
submissions on their objections on preliminary points of law as the first  
issues followed by submissions on the substance of the Appeal. In the  
event that the preliminary objections are over ruled and in the interest  
of time, the Parties need not be called back to make their submissions

5 on the substance of the Appeal. To that end, both parties filed their written submissions.

The Respondents raised two preliminary points of law which ought to be addressed first.

A preliminary objection has been defined by the **Black's Law Dictionary**  
10 **9<sup>th</sup> Edition** as an objection if upheld, would render further proceedings before the tribunal impossible or unnecessary. In the case of **Mukisa Biscuit Manufacturing Ltd Versus West End Distributors Ltd (1969) E.A 697** it was observed by Sir Newbold Charles P, that:

*"a preliminary point of law is in nature of what used to be a demurrer.  
15 It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."*

In **Quick Enterprises Ltd Versus Kenya Airways Corporation High Court (Kisumu) Civil Case No. 22 of 1999** it was held that:

20 *"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."*

In **Avtar Singh Bhamra & Another Versus Oriental Commercial Bank, Kisumu High Court Civil Case No.53 of 2004**, the court held that:  
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*"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."*

1. That the application is brought by way of notice of motion and thus a summons, and they were served without a court seal, endorsement or date by the Court

Counsel for the Respondent submitted that the Appellants served onto them the Notice of Motion in this Appeal that did not bare an endorsement, seal and date from the Court thereby rendering it defective. Counsel cited and relied on the case of **Soroti Municipal Council Versus Pal Agencies (U) Ltd MA No. 181 of 2012** where the Hon. Lady Justice Hellen Obura, J (as she then was) held that:

“In Hussein Badda vs Iganga District Land Board & Others, Misc. Application No. 479 of 2011 Zehurikize, J made a very pertinent observation on a point of law which has always been overlooked when dealing with applications for interim orders and temporary injunctions. He stated that an application is valid when it has been signed by the judge or such officer as he or she appoints and it is sealed with the seal of court within the meaning of Order 5 rule 1(5) of the Civil Procedure Rules. He made reference to the case of **Nakito Brothers Ltd. Vs Katumba [1983] HCB 70 page 12** of the ruling where it was stated that “An application is by its nature a summons issued by court requiring the respondent to attend court on the appointed date and time. It becomes valid only when it has been given a date, signed and sealed. It is after the above has been done by court that the application is capable of validity.”  
(Emphasis is mine)

5 It was the submission of the Respondent that the Appellants did not comply with the provisions of **Order 5 rule 1 (5) of the Civil Procedure Rules** which states that:

*“Every summon shall be signed by the judge or such officer as he or she appoints, and shall be sealed with the seal of the court”.*

10 *(Emphasis added)*

He argued that failure to comply with the law rendered the summons a nullity in law and the court should dismiss it.

The appellants never made submissions in reply to this preliminary objection.

15 In the case of **Nyanzi Muhamad Versus Nasolo Annet and others HCMA NO. 14 OF 2021**, Hon. Florence Nakachwa, J observed that the provisions of **Order 5 of the CPR** are mandatory and failure to adhere to the procedure under **Rule 1(5)** is not a mere technicality.

In **Kinyara Sugar Ltd Versus Kyomuhendo Pamela HCMA No. 61 of 2020**,  
20 **Hon. Byaruhanga Jesse Rugyema, J** while observing that a Notice of Motions is a ‘summons,’ noted the importance and essence of court documents, in particular, ‘summons’ to have the signature of the judge and the seal of the court as follows:

*“This requirement is amplified by the fact that the application has to be served upon the opposite party, the Respondent and therefore, the basis of its authenticity, source, is the signature of the Judge or such officer that is appointed for the purpose and seal. It therefore follows that for a document to qualify as a court process and or application, it*

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5 must be signed by a Judge or such officer appointed for the purpose  
and bear a court seal. The other importance of the seal and signature  
of the Judge or any such officer appointed for the purpose, is the  
bestowed power of court which carries with it the consequences of  
10 default by the Respondent. Therefore, absence of a seal offers the  
opposite party/Respondent upon whom the court process and or  
application has been served, liberty to exercise his/her right or option  
to ignore it. Failure to comply with the requirement may thus lead to  
an absurdity.” (Emphasis added)

The requirement of signing court summons by a judicial officer and sealing  
15 them with the court seal is mandatory and should be adhered to at all  
times. This is the only confirmation that the document/summons were  
issued or endorsed by the court.

Under the old court filing system CAS (still applicable in some circuits and  
/or divisions), pleadings would be physically filed/presented before court  
20 at the registry, received and forwarded to the respective judicial officer for  
signing, endorsement and sealing by the court seal. It is only after signing  
and sealing that the documents are available for service onto the  
respective concerned parties.

However, currently at this Division, suits or matters are instituted  
25 electronically through filing on the **Electronic Court Case Management**  
**System (ECCMIS)** that was rolled out in this Court around March 2022.  
The current appeal was filed before this honorable court on the 6<sup>th</sup> day  
of September 2022 on the **Electronic Court Case Management System**  
(ECCMIS). On the 7<sup>th</sup> day of September 2022, this court issued a Notice  
30 of Motion to the Parties. The Notice of Motion was electronically signed



5 on the 7<sup>th</sup> day of September 2022 and was allocated a hearing date of  
15<sup>th</sup> September 2022 at 10:30am. Neither the endorsed Notice of  
Motion nor the Hearing Notice bore a seal. The Hearing Notice bore a  
unique bar code and a logo of the judiciary. However, it did not bear a  
court seal. This court notes that the argument that the summons lacked  
10 a date, endorsement or court seal is based on hard copies served on the  
respondents and attached to the affidavit in reply to this appeal as  
*annextures A and B*. The court record on ECCMIS indicates that on the 7<sup>th</sup>  
day of September 2022, the signed and dated summons were on record  
and available to the Appellants to serve the same onto the Respondents.  
15 The Appellants were therefore made aware of the signed/endorsed copy  
of the Notice of Motion from the case portal under ECCMIS. It is  
important to note that the advent of ECCMIS did not dispense with the  
rules on service of summons under Order 5 of the Civil Procedure Rules  
as amended.  
20 On the 7<sup>th</sup> day of September 2022, the court record had a signed, dated  
and endorsed copy of the summons to the parties. It is not explained by  
the Appellants why they chose to serve the Respondents with pleadings  
that were neither dated nor endorsed by the court. The Court in **Isingoma  
Micheal vs LDC, HCMA No. 234 of 2019** while relying on the cases of **Kaur  
25 vs City Mart [1967] EA 108 and Fredrick James Jjuju & Anor. Vs  
Madhivani Group Ltd. & Anor, HCMA No. 688 of 2016** held that:

30 *“Whereas notice of motion is not signed by a judge or registrar or  
officer appointed for that purpose and sealed by a seal of court, then  
that is a fundamental defect which is incurable and hence the  
application is incompetent and a nullity”.*

5 Since this requirement is mandatory and not a technicality, this preliminary objection is upheld.

**2. The second preliminary objection was that the appeal was incompetent because the Appellants did not challenge the affidavit of service.**

10 Counsel for the Respondents submitted that there was an affidavit of service filed by the respondent which was unchallenged by the Appellants during the proceedings in MA No.1023 of 2022 before the learned deputy registrar. This affidavit was to the effect that the appellants were served on 6/08/2022 via WhatsApp as directed by the  
15 2<sup>nd</sup> Appellant and the affidavit was in compliance with **Order 5 rules 15, 16 and 17 of the CPR**. While relying on the case of ***Domaro Behagana & Another V AG Constitutional Petition No. 53 of 2010***, counsel submitted that such evidence is to be taken as true and in absence of any challenge in cross examination, it is to be taken as the truth. The Appellants did not  
20 make any submission in respect of this objection.

This is not an objection capable of disposing of the suit. It is incompetent and flimsy; and is hereby over ruled.

- 5 In the premises, the finding of the Court in respect of the first preliminary objection disposes of this Appeal. The Appeal is hereby dismissed with costs to the Respondents.

Dated and signed at Kampala this **12<sup>th</sup>** day of **March 2024**.

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**Harriet Grace MAGALA**

**Judge**

Delivered online (ECCMIS) this **27<sup>th</sup>** day of **March** 2024.