

- 1. That a default judgment be entered against the defendants in Civil Suit No. 281 of 2010.**
- 2. That High Court Civil Suit No. 281 of 2010 proceeds as if the defendants had filed a defence.**
- 3. Costs of this suit be provided for.**
- 4. Any other appropriate reliefs this Honourable court deems fit.**

The application's main ground is that the defendants deliberately neglected to file and serve their written statement of defence within 15 days from the date of receipt of service of the summons and plaint as directed in the summons.

The application is supported by the affidavit of the applicant. The main averments in the supporting affidavit are that although the defendants were dully served they have never filed and served their written statement of defence. That for this reason the defendants put themselves outside the jurisdiction of this court. That they have neither applied to court for extension of time within which to file and serve their defence.

The defendants filed an affidavit in reply sworn by one Elizabeth Sabuni. It is averred in this affidavit in reply that the defendants were served on 1/12/2010 and filed their defence on 15/12/2012 which was within time. It was their contention that the application has no merit.

When the application came up for hearing Dr. Akampumuza prayed to proceed *ex parte* as the respondents were dully served but had failed to turn up for hearing of this application. Court allowed his request to proceed with the application *ex parte*.

The gist of Dr. Akampumuza's submission is that by virtue of order 8 rule 19 and order 9 rule 3 filing of defence is complete only if after filing the defence a duplicate copy thereof is served on

the plaintiff. That this must be done within the time allowed to file the defence. Counsel contended that although the defendants filed their defence, it has never been served on the plaintiff as required by law. That for that reason there was no defence properly filed.

In support of his argument counsel cited the following authorities:

- (1) *Mwesigwa Geoffrey Philip Vs Standard Chartered Bank of Uganda, Miscellaneous Application No. 82/2011 arising from HCCS No. 30/2010.*
- (2) *Mark Graves Vs Balton (U) Ltd Miscellaneous Application No. 158/2008 arising from HCCS No. 818/2007.*
- (3) *Nile Breweries Limited Vs Bruno Ozunga T/A Nebbi Boss Stores HCCS No. 580 of 2006.*
- (4) *Miscellaneous Application No. 593 & 595 of 1999. (Arising from CS No. 476/1999), Attorney General & UCB Vs Westmont Land (Asia) BHD & 2 others.*

I have considered submissions by counsel and perused the authorities cited to me and the Rules referred to.

Order 8 rule 19 of the Civil Procedure Rules provides ...

“Subject to rule 8 of this Order, a defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the defence or other pleading at the address for service of the opposite party.”

The relevant part of order 9 rule 3 (1) which was drawn to my attention states:

“(1) A defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any such irregularity as is mentioned in rule 2 of this Order or on any other ground shall give notice of intention to

defend the proceedings and shall, within the time limited for service of a defence, apply to the court for

Apart from what I will comment on order 8 rules 8 and 11(2) of the Civil Procedure Rules, I have not come across any provision in our Civil Procedure Rules which requires the defendant to file his or her defence and serve it on the plaintiff all within the time allowed to file the defence.

Order 8 rule 19 set out above does not state that the defendant after filing his or her defence must serve it on the plaintiff within the very period allowed to file the defence.

I am unable to read time limit for service of the defence to the plaintiff in this Rule as asserted by Dr. Akampumuza. The Rule simply provides for the filing of the defence and any pleadings subsequent to filing of the defence.

It also provides for delivering of a duplicate copy of the defence or other pleadings to the opposite party. No time limit is set for delivering of these pleadings.

The opposite party is not necessarily the plaintiff. The opposite party can as well be the defendant in the case of any pleadings filed subsequent to the filing of his or her defence. For instance in case the plaintiff files a reply to counterclaim or to the written statement of defence, the defendant would be the opposite party.

The time within which to deliver the defence or any other pleadings subsequent to the filing of the defence at the address for service of the opposite party is not stated in this rule, and there is no reason why it should be imported or implied.

The provisions of order 8 rule 19 are subject to rule 8 of the same order which I will come to later. I would like to first deal with the filing of the defence.

The relevant procedure with regard to the mode of filing a defence is to be found in order 9 rule 1 which states:-

“(1) A defendant on or before the day fixed in the summons for him or her to file a defence shall file the defence by delivering to the proper officer a defence in writing dated on the day of its filing, and containing the name of the defendant’s advocate, or stating that the defendant defends in person and also the defendant’s address for service. In such case he or she shall at the same time deliver to the officer a copy of the defence, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return it to the person filing the defence, and the copy of the defence so sealed shall be a certificate that the defence was filed on the day indicated by the seal.”(Underlining added).

The time within which the defence is dully filed is provided for under rule 1 of order 8 which states:

“(1) The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his or her defence.

(2) Where a defendant has been served with a summons in the form provided by rule 1 (1)(a) of Order V of these Rules, he or she shall, unless some other further order is made by the court, file his or her defence within fifteen days after service of the summons.”

Once the defendant has complied with the time limit prescribed by rule 1 of order 8 and files his or her defence in accordance with order 9 rule 1, the filing of such defence is complete and properly before court.

Order 8 rule 19 relied on by counsel merely adds more details on the filing of the defence and further provides for the filing of any pleadings subsequent to the filing of the defence. It also directs for delivering of those pleadings at the address of the opposite party. But as already indicated above this rule does not set time limit within which those pleadings should be delivered at the address of the opposite party.

In its discretion court can limit time within which service of the defence should be effected on the plaintiff.

In view of what I have endeavored to explain above, I am unable to find that filing of a defence is complete only when it has been served on the plaintiff within the time allowed to the defendant to file his or her defence. I find that once the defendant complies with the provisions of order 8 rule 1 and order 9 rule 1 of the Civil Procedure Rules, the filing of the defence is completed.

Order 8 rule 19 on which counsel's submission is hinged, as I said earlier, is subject to the provisions of order 8 rule 8 which states-

“8. Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with any other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting forth the names of all the persons who, if the counterclaim were to be

enforced by cross-action, would be defendants to the cross-action and shall deliver to the court his or her defence for service on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence.” (Underlining added).

This rule deals with the filing of a defence which contains a counterclaim. The defendant has to deliver to court his or her defence for service on the plaintiff and on such other parties to the action. The filing of the defence and counterclaim must be done within the time allowed to file the defence.

In other words the last phrase of this rule which reads “***within the period within which he or she is required to file his or her defence***” refers to delivering of the pleadings to the court for service on the plaintiff, but it does not mean that service on the plaintiff has to be done within the time required to file the defence.

My understanding of this rule is that the time limit referred to in this rule is in relation to the filing of the defence together with a counterclaim.

The only time limit prescribed by the rules for service of defence is where such defence contains a counterclaim provided under the said rule 8. The rule providing time limit for service of such defence is rule 9 of order 8 which states:

“9. Where any such person as mentioned in rule 8 of this Order is not a party to the suit, he or she shall be summoned to appear by being served with a copy of the defence, which shall be served in accordance with the rules for regulating service of a summons.” (Underlining added).

The relevant rules regulating service of summons is to be found in order 5 rule 1 and in particular sub-rule 2 which provides:

“Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension.”

In the instant case, the parties to the counterclaim are the same parties to the suit, and as such the provisions of order 8 rule 9 and order 5 rule 1 (2) would not apply.

But under order 8 rule 11 once a person named in a defence as a party to a counterclaim is served with a counterclaim he or she has to file a reply within 15 days after service.

Further he or she is obliged to serve the reply upon the defendant within 15 days after its filing. This is the only instance where time to serve a defence (in form of reply) is prescribed by law.

Apart from the above it appears to me that there is no provision in our Civil Procedure Rules limiting or prescribing time within which a defence should served on the plaintiff or a counterclaim should be served to a person who is a party to the suit.

However, although the rules do not prescribe the time within which a defence should be served on the plaintiff, they nevertheless continue mentioning service of the defence.

In my view service of such pleadings should be done within reasonable time from the date of filing the defence.

On the other hand the officer of court who receives and seals the defence under order 9 rule 1 can further direct time within which the defence and or counterclaim should be served on the plaintiff.

In the instant case, it is contended that up to now the defence and counterclaim have ever been served on the plaintiff. Can the defendants be blamed for failure to serve their pleadings within reasonable time?

In the circumstances of this case the answer to the above question is in the negative. The defence and counterclaim were filed on 15/12/2010. Two days later the plaintiff filed this application seeking for an order to proceed as if the defendant had filed a defence on ground that the defendant had neglected to file and serve the written statement of defence to him.

This approach derailed the whole process as the attention was diverted to fighting this application.

A diligent plaintiff could have picked a copy of the defence on 16/12/2010 when he filed an affidavit of service or on 17/12/2010 when this application was filed. In case there was no copy on record the plaintiff's counsel could easily have demanded one from the defendant's counsel.

Instead of doing the above the plaintiff was in a hurry to get an order to proceed ex parte on the belief that there was no valid defence on the ground that no defence had been served on him within the 15 days allowed to the defendants to file their defence.

This hurried application was based on misinterpretation of the Rules of this court. It was diversionary and only served to delay the progress of the case.

Under the diversionary circumstances, the defendants cannot be condemned for unreasonable delay in serving the defence on the plaintiff.

All in all I find no merit in this application which is hereby dismissed.

Since the defendants did not appear in defence of the application I will make no order as to costs.

The hearing of the case shall proceed interparties.

VINCENT T. ZEHURIKIZE

JUDGE

3/7/2012