

Counsel explained that the written statement of defence has never been served on the plaintiff. He contended that such failure is in breach of the provisions of order 8 rule 19 of the Civil Procedure Rules which provides that the defendant shall file his or her defence by delivering it to the court for it to be placed on the record and delivering a duplicate of the defence or other pleading at the address for service of the opposite party.

According to counsel filing of a defence is not complete until a duplicate of the defence has been served on the opposite party (the plaintiff).

Since this had not been done, counsel prayed that the matter proceeds as if the defendant had not filed a defence and that the un served defence on record be struck out, and the plaintiff proceeds with the suit.

Dr. Akampumuza cited *Mwesigwa Geoffrey Philip Vs Standard Chartered Bank of Uganda Miscellaneous Application No. 200 of 2011 (arising from C.S. No. 30/2010)* decided by my brother Judge, Hon. Justice Christopher Madrama and *Nile Breweries Ltd Vs Bruno Ozunga T/A Nebbi Boss Stores HCS No. 580/2006* before his Lordship Hon. Justice Lameck Mukasa. He also cited *Miscellaneous Application No. 595 of 1999: Attorney General of Uganda & Uganda Commercial Bank Ltd Vs Westmont Land (Asia) & 2 others* and *Mark Grawes Vs Balton (U) Ltd Miscellaneous Application No. 158 of 2008 arising from HCCS No. 818/2007*.

As H.E. Ambassador Professor Dr. Oboth Okumu, counsel for the defendants could not make an immediate reply the matter was adjourned to another date of 21/11/2011. On this date counsel was not ready to make his reply for the reasons noted on the record of the case. This court directed him to file written submissions on not more than three pages by 15/12/2011.

On that date counsel filed his reply on nine page document in which he dedicated six pages castigating me and attacking my integrity as a Judge. In the remaining three pages he attacked courts generally and Dr. Akampumuza as an Advocate.

At the end of it all counsel merely prayed that the proper and just order to make is for court to hand over a copy of the defence to Dr. Akampumuza and that I should note the desperate and dishonest argument for the applicant to advance injustice.

I must admit that, on the issue (Preliminary objection) raised by Dr. Akampumuza, H.E. Ambassador Professor Fr. Oboth Okumu made no reply expected of counsel with such titles.

However, I find that there is sufficient material on record to dispose of this matter.

Order 8 rule 19 of the Civil Procedure Rules relied on by counsel for the plaintiff provides:

“19. Filing of defence

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 to the opposite party.”

In my view this rule provides for two scenarios namely the filing of the defence, and the filing of any pleading subsequent to the filing of the defence. This is done by placing them on record and also by delivering a duplicate of such documents to the opposite party.

But the rule does not prescribe time within which to file the defence or pleadings subsequent to the filing of the defence. Similarly this rule does not prescribe time within which to serve the opposite party with the defence or with any pleading filed subsequent to the filing of the defence. It simply states that filing is done by placing the documents on record and delivering duplicate thereof to the opposite party. This rule does not provide time limit in which to file the same pleadings.

The time within which a defence is to be filed is provided for under rule 1 of order 8 which states:

“1. Written Statement

- 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 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 the fifteen days after service of the summons.”***

The other rule which prescribes time within which a defence is to be filed is rule 8 of the same order 8. This rule also deals with the filing of the counter claim. It states:

“8. Title of counter claim.

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

The last part of the underlined clause appears to have caused some misunderstanding to the effect that service of the defence and the counterclaim to the plaintiff is to be effected within the time allowed to file the defence.

But a careful reading of this clause and rule will show that the time being talked about is for filing of the defence and counter claim but not for service of those pleadings to the plaintiff.

The act to be done ***within the period within which he or she is required to file his or her defence*** is the delivering to the court of the defence together with the counter claim for service on the plaintiff and such other parties to the action.

In other words a defendant who sets up a counter claim, among other things, he or she must deliver such defence which includes a counter claim to the court for service to all the parties to the action which includes the plaintiff. He or she has to deliver such pleadings to the court within the period within which he or she is required to file his or her defence.

It means that a defendant filing a defence together with a counter claim does not enjoy longer time than a party filing a defence simpliciter. He has to file the defence and the counter claim within the time allowed to file a defence.

Giving this rule any other interpretation would simply lead to absurdity.

Such a scenario was observed by Hon. Justice Madrama in ***Protection Security Services Vs Eastern Builders & Engineers Ltd Miscellaneous Application No. 566 of 2011 (arising from HCCS No. 101 of 2011)*** where the Learned Judge found that the defendant has to file written statement of defence within 15 days from the date of service of summons on him or her and that to hold that service of the defence should be made within the same period would reduce the number of days prescribed for filing of the defence.

If the defence was to be filed on the last day allowed to file the same, there would be no sufficient time to effect service of the written statement of defence to the plaintiff.

I agree with the above observation. There is no way the Rules Committee could give a specific period to the defendant within which to file his or her defence and then indirectly reduce that period by directing that within the same period he or she must serve the written statement of defence to the plaintiff.

The only logical conclusion is that both Rules 8 and 19 of order 8 do provide for the filing of the defence but do not prescribe time within which to effect service of those pleadings to the plaintiff.

It is only where the counter defendant is not a party to the suit that he or she must be served with a copy of the defence in accordance with the rules for regulating service of summons by virtue of rule 9 of order 8, which provides:

“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.”

In other words the defendant must serve a copy of the defence to such a party within 21 days from the date of filing the defence, by virtue of order 5 rule 1 (2) of the Civil Procedure Rules.

From our rules this appears to be the only instance where time within which to serve the defence is limited.

From what I have endeavored to discuss above, I find that Dr. Akampumuza’s proposition that filing of a defence is complete only when it is filed and served on the plaintiff within the time allowed to file the defence is not only unsustainable but also impracticable.

Filing of the defence is complete and the defence is properly before court once it is filed within the time prescribed in the summons. It cannot be tied up within service of the defence to the plaintiff.

How a defence should be filed is provided for under Order 9 rule 1 and in particular sub 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.”

In my view this provision is conclusive on the issue raised by Dr. Akampumuza. It is a clear provision with regard to filing a defence. One does not need to look elsewhere to determine what amounts to filing of a defence.

It does not include service of a defence to the plaintiff. Filing of the defence in accordance to this rule and order 5 rule 1 (2) of the Civil Procedure Rules is sufficient.

Dr. Akampumuza argued that the requirement that the defence should be served to the plaintiff within the same period allowed to the defendant to file his or her defence is not just a mere technicality but that such requirement goes to the very heart of the right to a fair hearing under article 28 (1) of the Constitution which dictates that in adjudication of Civil and Criminal matters there shall be a speedy impartial and fair trial.

He argued that you cannot have a speedy trial where parties file documents and just abandon them on record as in this case.

I am not persuaded by this argument. A diligent plaintiff cannot be frustrated by the defendants' failure to serve a copy of the defence to him or her. He or she would be on the look out to find out whether a defence has been filed in obedience of the summons.

If he or she finds that no defence has been filed within the prescribed time, what should be done is provided for in the rules. He or she, for instance, can apply for a default judgment.

If on the other hand the plaintiff finds that there is a defence on record there is nothing to stop him or her to pick a copy or request for the same from the opposite party and at the same time fix the case for hearing.

I do observe that the rules talk of service of the defence to the opposite party though without specifying time within which that should be done.

But one thing must be born in mind that a party which has submitted to the jurisdiction of court in order to contest the claim against him cannot be shut out.

It is a fundamental rule of natural justice that all parties to the dispute be accorded an opportunity to be heard and the matter disposed of on merits.

In fact shutting out a defendant who duly filed the defence in time would itself violate the right to a fair hearing under the said article 28 (1).

There is nothing that would stop court from directing the defendant to serve a copy of the defence to the plaintiff where it becomes necessary. This can be done at any time after filing of the defence and if need be time within which to effect service can be limited by the court.

In fact in the instant case the plaintiff was all along aware that the defendants had filed their written statement of defence which was filed on 13/7/2011, after some six days, when an affidavit of service was filed. The defence was already on record. The delay to set down the suit for hearing cannot be attributed to the defendants.

The delay in hearing the substantive suit can only be blamed on the plaintiff who indulged in a multiplicity of Interlocutory applications. There are three of them.

All in all I find that our rules do not provide for time within which a defence shall be served on the plaintiff except in the situation I have pointed out above.

For the reasons I have advanced I find no merit in the preliminary objection and it is rejected. The defence is properly before court. The hearing of the case is to proceed on merit.

The costs occasioned by these pleadings shall be paid to the defendants in any event.

VINCENT T. ZEHURIKIZE

JUDGE

4/7/2012