

**MISCELLANEOUS APPLICATION NO. 114 OF 2018 ARISING FROM  
CIVIL SUIT NO.032 OF 2017**

**SUN HUAWEN:::::::::::::::::::::::::::::::::::: RESPONDENT**

## Back ground and brief facts

Sun Huaweiwen sued Muwanga Daniel in HCCS No. 32/2017 on a summary suit for the recovery of Shs. 175,000,000/= and costs. Muwanga then filed M/A 85/17 for leave to appear and defend the main suit. That application was on 11/4/18 dismissed for want of prosecution and judgment entered in favour of Sun Huaweiwen in the main suit. Muwanga then filed the current application for orders that the *exparte* judgment in the main suit be set aside and M/A 85/2017 be reinstated and heard interparty.

At the hearing of 17/4/2019, Mangeni Ivan G. for the respondent objected to the application. He argued that a Notice of motion is a suit in relation to purposes of service and that it was served out of time and therefore in line with O.5 CPR, should be dismissed with costs. Mudhumbusi Daniel for the applicant disagreed. He argued that an application which is by motion is not an ordinary suit, the type falling under O.4 CPR, but one envisaged under O.9 rr 27 and O.36 rr 11 CPR. It is therefore not subject to the rule in O.5 CPR. He argued in the alternative that

the applicant entrusted the duties of service of the application upon his advocate Muzuusa Stephen and if there was any error, mistake or delay, this was an error that should not be visited on Muwanga. He argued further that Sun Huawen who had never appeared in court had suffered no prejudice and that this would be a good case to fall under the provisions of Article 126(2) of the Constitution, where technicalities should not defeat justice.

### **My Decision**

The term ‘suit’ is defined under section 2(x) to mean “*civil proceedings commenced in any manner prescribed*”. This would include motions much as it would include ordinary suits. There appeared to be no contention on that law, the point of departure put forward by counsel Mudhumbusi, being that suits are commenced under Order 4 CPR and that their mode of service is provided for under Order 5 CPR. I respectfully disagree, and the following are my reasons.

Section 2 CPA can be regarded as the law that generally provides for the mode of institution of any type of suits. It made no provision on how and when a suit can be served after its filing. In my view, Order 4 CPR is meant to make provision for institution of ordinary suits by plaint. Likewise, Order 52 CPR makes provision for institution of suits by motion and their contents.

Order 5 CPR which naturally follows Order 4 CPR gives details on the issue and service of summons under different circumstances. Order 51 CPR did not make a similar provision for service of motions. Suffice to say, Order 5 CPR did not exclude service of motions, which as I have said, fall within the general category of suits. I note that there was an attempt to make provision for the service of interlocutory applications under Order 12 CPR. According to Order 12 rr 2 CPR,

an interlocutory application shall be served within 15 days of its being filed. However, applications envisaged by that order appear to be the type that are originated from a main suit and filed immediately after the scheduling conference or alternative dispute resolution proceedings have been closed. I doubt that it would cover the current circumstances.

The issue of whether applications like motions should be served in the manner prescribed by Order 5 CPR has been the subject of much contention and inevitably resulted into contrasting decisions especially at the High Court. This therefore would require reference to decisions of the higher courts on the matter.

In his decision of **Fredrick James Jjunju & Anor Vrs Madhivani Group Ltd & Anor M/A 688/2015**, Justice Bashaijja followed the decision in **Kanyuabwera Vs Tumweba (2005) 2 EA 86** in which Justice Oder JSC (R.I.P) held that “...*what the rule stipulates about service of summons, in my opinion, applies equally to service of hearing notices*”. By inference, Justice Bashaijja concluded that the procedure of service provided under Order 5 CPR also applies to service of hearing notices and applications. I agree with that conclusion especially when I have found that Order 51 CPR made no provision of service of summons, and the current application would not fall under interlocutory applications under Order 12 CPR.

That said, the provisions of Order 5 rr 1(2) CPR are clear. It provides as follows: “*Service of summons issued under sub-rule (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 court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension*”.

The record indicates that the application was filed on 18/4/18 and sealed for service the same day. Service upon the respondent was not done until 29/1/2019, nearly nine months later. That service was confirmed by an affidavit of one Mukasa Dalious filed in Court on 11/2/19. There was no application to extend the time for service after it was filed, in any case, even the 15 days had long expired. Counsel's suggestion that this is matter that can be regarded as a mere technicality is not viable because the rules are clear on the procedure of service. Even if I were to exercise my discretion, such inordinate delay to serve court process would not invite the protection of the Constitution. Again, the argument that late service was the mistake of the advocate and not Muwanga as a client, are weak since he chose to instruct lawyers who under Order 3 rr.2 CPR became his statutory agent in the suit. Service of court process including motions, is central to the responsibilities of any counsel under instruction.

For the above reasons, I would up hold the objection. The notice of motion was served well out of time. The motion as a suit, then becomes a suit that is bad in law. It is dismissed with costs to the respondent.

I now turn my attention to Mr. Muwanga's motor vehicle registration No. UAZ 645N Toyota Wish that was on 4/3/2019, parked at the premises of this Court. It is not in contention that its presence in Court is not the result of an order forexecution, but an agreement by Mr. Muwanga himself, probably to fend off imminent execution against his person.

I order that the vehicle should be released to Mr. Muwanga with immediate effect. Since the judgment in the main suit subsists, Sun Huawen may recommence execution proceedings, if no agreement is reached with Mr. Muwanga

I so Order

Signed

**EVA K. LUSWATA**

**JUDGE**

**DATED: 7/5/2019**