

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja
MISCELLANEOUS APPLICATION NO. 279 OF 2017
(Arising from Civil Suit No. 54 of 2008)

**1. MWENEWU MARY (One of the administrators of the estate of the late
NAMUTIIBWA THEREZA**

2. ROSE NABIRYE APPLICANTS

VERSUS

NTALO SABASIRESPONDENTS

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

Brief introduction and background

The applicants presented this motion through M/s Ngobi, Ndiko Advocates seeking leave to file their notice of appeal out of time and for leave to proceed with filing their appeal against the decision of His Worship Egessa Wilberforce Masaaka in Civil Suit No. 54/2008 delivered on 26/5/2017. The respondent opposed the application through the Legal Aid Project of the Uganda Law Society, Jinja. Both counsel filed written submissions as directed by Court.

The brief grounds of the application are that upon advise of unnamed court officials, they opted to prosecute Civil Suit No. 54/2008 (hereinafter referred to as the main suit) unrepresented. That after judgment was delivered, they did obtain legal representation from M/s Zinsanze & Co., Advocates through whom they applied for the typed and certified copy of the judgment. That although duly instructed, that firm of lawyers failed to lodge the appeal on time, and it is upon the advise of their current

legal counsel that they seek to lodge the intended appeal out of time, and thus this application.

Rose Nabirye the second applicant deposed the affidavit in support of the application in which she generally supported the main grounds in the motion. She added that her former lawyers applied for a copy of the certified judgment on 29/5/2017, which she received on 14/6/2017. She conceded that her former lawyers did not serve the respondent with the letter applying for the certified judgment, but none the less, their failure on that account and to file the appeal on time, should not be visited on her. She contended further that she is not guilty of dilatory conduct and her intended appeal has merit.

The respondent opposed the application and in his affidavit in reply contended that Ms. Nabirye's affidavit is riddled with falsehoods, and the application has no substantive grounds to merit its success. In his view, it is a mere waste of courts time. In rejoinder, Ms. Nabirye deposed that no substantive grounds were raised to oppose the application, and the respondent did not show that he was likely to suffer any form of injustice if the Court allowed the applicants' memorandum of appeal out of time.

My decision:

Applicants' counsel commenced their submissions with an objection. They contend that the respondent filed his affidavit in reply one and a half years late and even then, made no particular response to Nabirye's affidavit. They prayed that the affidavit in reply be struck out, and as a result, Nabirye's affidavit be accepted as uncontested. There was no specific response to those objections. In my view, there would be merit

in the objection if service on record confirms that the respondent was served in good time and failed to respond. I would accordingly need to peruse the motion, and its affidavit of service.

Kitemu Martin stated to be attached to the firm of Ngobi Ndiko Advocates, filed an affidavit of service on 22/1/2017. He deposed that the motion was issued for service on 25/9/2017, he received it on 20/11/2017, and effected service on 25/11/2017. Going by that evidence, I fear that he purported to effect service of the motion, outside the time allowed by Order 5 Civil Procedure Rules (CPR). It is provided in Order 5 rr 2 CPR, that summons shall be effected within 21 days from the date of issue. Where for sufficient reason, service is not effected within that time, an extension must be sought by formal application, within 15 days immediately after the 21 days expire.

I can deduce from the record that the days for service expired on 16/10/2017 and no application for extension of the time for service was sought. It is now a settled principle in the High Court that the provisions of service under Order 5 CPR are mandatory. The Court has no jurisdiction to entertain a matter in which summons were served outside the statutory time and no extension was sought. It is provided under O. 5 rr 3(c) CPR that a suit for which summons are served out of time, should be summarily dismissed without notice, and that would be the case even where no objection is raised by the opposing party. It is now well settled that the provisions of Order 5rr 1-3 CPR equally apply to hearing notices, motions and other interlocutory applications. See for example **Kanyabwera Vs Tumwebaze (2006)EA 86** readily followed several times e.g. in **Orient Bank Ltd Vrs Avis Enterprises HCCA No. 2/2013**, **Lubega Juju &Anor Vs Madhvani Group Ltd (M/A No. 688/2015)**, **Michael M. Mulagussi Vrs Peter Katabalo M/A No. 6/2016**, and many more.

This is a very old matter for which a decision was made in favour of Sabasi the respondent way back on 26/5/2017. The applicants did not appeal within the

stipulated 30 days and conceded not to have served the respondent with their letter to apply for the certified record. Even when the record was availed, they failed to lodge the appeal on time. It may well be that they were let down by their successive lawyers but the law is strict on the law of service and the respondent should not be deprived of the fruits of his judgment under such circumstances.

I choose to apply the law strictly and thus dismiss this application for late service. Since no objection was raised for the respondent in that regard, they shall not take advantage of costs.

The application is accordingly dismissed without any order as to costs.

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EVA K. LUSWATA

JUDGE

17/2/2021