THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORTPORTAL

MISCELLANEOUS APPLICATION NO.023 OF 2022

(ARISING FROM CIVIL SUIT NO. 42 OF 2017)

ANNE KAHUNDE MANYINDO:::::::::::::::::::::::::::::::: APPLICANT

VERSUS

TOM ATUHAIRE MUGISA::::::::::::::::::::::::::::::::::RESPONDENT

BEFORE: HON.MR. JUSTICE VINCENT EMMY MUGABO

RULING

Introduction

This application was filed by way of Notice of Motion under section 98 of the Civil Procedure Act, Order I Rules 3 and 13, and Order 52 Rule 1 of the Civil Procedure Rules seeking the following orders:

(a) That the applicant be added as a party to Civil Suit No. 42 of 2017

(b) Costs of this application be provided for.

The grounds for this application are set out in the affidavit in support of the application deponed by Anne Kahunde Manyindo, the applicant herein, the gist of which is that:

a) The respondent secretly procured a freehold land title to the suit property situate at Kitumba Kabegira, East Division, Fort Portal

City without consultation of and proper notification of the applicant and other occupants of the suit land who have been enjoying a quiet possession of the same.

b) The respondent filed Civil Suit No. 42 of 2017 in this court seeking vacant possession of the suit land against Rev. Richard Mutazindwa based on a title deed whose boundaries are coterminous with the demarcations of the applicant's land.
c) The applicant is directly interested as the owner of land in the area and wishes to protect his interests by being added as a defendant in Civil Suit No. 42 of 2017.

The respondent opposed the application by way of an affidavit in reply on the following grounds:

a) That the applicant is not known to the respondent and that in Civil Suit No. 42 of 2017, the respondent herein sued the defendant for trespass on part of the suit land.
b) That the applicant is not a known occupant of the suit land.
c) That the applicant has not adduced cogent evidence that he is either in occupation or has an interest in the suit land.
d) That this application is incurably defective and ought to be dismissed with costs.

Background

The respondent filed Civil Suit No. 42 of 2017 against Rev. Richard Mutazindwa, seeking a declaration that the defendant is a trespasser on the land comprised in LRV HQT 576 Folio 25 Block 15 Plot 5 at

Burahya, Kabarole. The respondent also sought a permanent injunction restraining the defendant from trespassing on the land, general, punitive, and temporary damages. In his written statement of defence, the defendant refuted all allegations of trespass, asserting that he was merely developing his plot of land acquired from the Late Daniel Kakeete. Additionally, the defendant counterclaimed for the cancellation of the respondent's leasehold certificate of title, alleging fraud in its acquisition. He further sought a declaration that the respondent herein is a trespasser, and a permanent injunction restraining the respondent and or his agents from trespassing on the suit land.

In this application, the applicant herein seeks to be added as a party to Civil Suit No. 42 of 2017 on the basis he has an interest in the suit land.

Legal Representation.

At the hearing, the applicant was represented by Timothy Atuhaire of *M/S Atuhaire & Co Advocates* while *M/s Factum Associated Advocates* represented the respondent. Only Counsel for the respondent filed written submissions which I have considered in this ruling.

Issues for determination

In this application, the issue for determination is whether the application raises sufficient grounds for the applicant to be added as a party to Civil Suit No. 042 of 2017.

Submissions by Counsel for the Respondent

Counsel for the respondent raised a preliminary objection to the application. Counsel argued that the application was incurably incompetent to the extent that the Notice of Motion served upon the respondent has no court seal which offends order 5 Rule 1(5) of the Civil Procedure Rules.

Counsel referred this court to the case of ***Kinyara Sugar Ltd Vs. Kyomuhendo Pamela HCMA No.61 of 2020*** where the court held that a Notice of Motion that is not signed by an authorized court official and sealed within the meaning of Order 5 Rule 1(5) of the Civil Procedure Rules is fundamentally defective and incurable.

Counsel for the respondent further submitted that the Notice of Motion was served out of time as stipulated under law without leave of court. Counsel submitted that the Notice of Motion was signed on the 29th of March 2022 and served on the respondent on the 27th of October 2023 after one year and 7 months without formally seeking an extension of time within which to serve the same.

Counsel cited Order 5 Rule 1(2) of the Civil Procedure Rules which requires service of summons to be affected within 21 days from the date of issue by court. Counsel argued that compliance with Civil Procedure Rules is a mandatory requirement which cannot be dispensed with.

Counsel referred this court to the authorities in the case of ***Nankabirwa Eva Walusimbi Vs. Mariam Namugenyi Sozi HCCS***

No. 130 of 2016, and ***Nakiyemba v Ssemugenyi & 4 Ors HCCS No. 397 of 2016*** where it was held that in cases where court summons is not served within 21 days from the date of issue, a party in default must seek leave of court for an extension of time within which to serve.

I will first deal with the preliminary objections raised by counsel for the applicant before delving into the merits of this application. Civil Procedure rules require courts to first deal with preliminary points of law before entertaining the merit of the main suit or applications.

Order 6 Rule 28 of the Civil Procedure Rules provides thus:

> ***"Any part shall be entitled to raise his or pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing, except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down foe hearing and disposed of at any time before hearing."***

The preliminary point of law raised by counsel for the respondent is two-fold; serving a Notice of Motion which had no seal of court and outside the 21 days, as provided for in the Civil Procedure Rules.

On the issue of failure to seal the application with court seal, counsel for the respondent submitted that this offends Order 5 Rule 1(5) of the Civil Procedure Rules.

Order 5 Rule 1(5) of the Civil Procedure Rule provides thus:

> **"Every *such summons shall be signed by the judge or such officer as he or she appoints and shall be sealed with the seal of Court."***

This rule is couched in mandatory terms and makes it obligatory for a seal of the court to appear on court documents, such as a Notice of Motion, for their authenticity.

In ***Fredrick James Jjunju & Anor Vs. Madhivani Group Ltd & Anor HCMA No. 688 of 2015,*** the court held thus:

> ***"Where a 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."***

In ***Kaur Vs. City Auction Mart Ltd [1967] E.A 108,*** an application to lift a caveat was commenced by Notice motion which had not been endorsed or issued by a Judge. Additionally, the "summons" was neither signed nor sealed. It was held that this did not comply with the Civil Procedure Rules. In dismissing the application, the court noted that according to the law, a document, such as a summons, must bear the court's seal. This requirement exists for evident reasons; ensuring that the document is issued under the proper authority and from the appropriate office.

In *Kinyara Sugar Limited Vs. Kyomuhendo Pamela (supra),* it was held that a court official document issued from the High Court, initiating proceedings to be worth the name, must be endorsed by an officer of the court and be sealed accordingly.

The absence of a court seal on a document, such as a notice of motion, can largely be attributed to the negligence of Counsel given that litigants trust their advocates, expecting them to be knowledgeable about procedural aspects of the law.

A court seal is a crucial element on an official court document, and the failure to include it renders the document unofficial and fatal.

On the issue of service of the Notice of Motion after 21 days without seeking leave of court for an extension of time within which to serve, counsel for the respondent submitted that this offends Order 5 Rule 1(2) of the Civil Procedure Rules.

Order 5 Rule 1 (2) of the Civil Procedure Rules provides thus:

> **"*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 an application to the court, made within fifteen days after the expiration the twenty-one days showing sufficient reasons for the extension*".**

The timelines that apply to the service of summons in an ordinary plaint also apply to the service of applications. The provision in Order

5 Rule 1(2) of the Civil Procedure Rules automatically invalidates summons which may have been issued and are not served within twenty-one days from the date of issuance. It is settled law that the provisions of Order 5 Rule 1(2) of the Civil Procedure Rules are mandatory and should be complied with.

An applicant who fails to serve summons in the application within the stipulated 21 days from the date of issuance of the summons upon him or her for service is required to make a formal application within 15 days after the expiration of the 21 days for an extension of the time within which to serve the summons on the opposite party under Order 5 rule 32 of the Civil Procedure Rules. The application must be made by summons in chambers.

The court must be satisfied by evidence on the said application and should clearly state the reason for permitting the applicant to effect service beyond the stipulated period.

In the instant case, the summons was issued on the 29th of March 2022, and it should have been served to the respondent within 21 days from the date of issuance. However, the Respondent was only served on the 27th of October 2023.

There was no application for an extension of time within which to effect service on the respondent. Therefore, the service of the pleadings on 27th October 2023 was out of time.

I take note of the fact that in deserving cases, the court may rightly exercise its discretion to overlook the failure to comply with the rules

of procedure, upon such conditions as it may deem fit to guard against the abuse of its process. However, each case is to be decided on its own facts depending on the prevailing circumstances.

In the case of ***Byaruhanga and Co. Advocates Vs Uganda Development Bank, S.C.C.A No. 2 of 2007***, the Supreme Court held that:

> "***A litigant who relies on the provisions of Article 126(2)(e) of the Constitution must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2)(e) is not a magical wand in the hands of defaulting litigants."***

Considering the circumstances of the instant application, it is not sufficient for the applicant to file an application against a party and neglect to take steps to properly effect service of summons as required by law.

I find that the applicant's failure to adhere to such clear and elaborate procedural requirements of Order 5 of the Civil Procedure Rules, on the validity of the application and service of the summons outside the stipulated time period, is not a mere procedural technicality that can be sacrificed at the altar of substantive justice.

The applicant's counsel has an obligation to follow the application and ensure that proper documents with annexures, if any, are served

on the respondent. Therefore, serving an unsealed application on the respondent was illegal.

Pursuant to the foregoing, I find merit in the preliminary objections and uphold them. This application is therefore dismissed with costs to the respondent.

On the issue of costs, I note that the applicant filed this application through an advocate, Timothy Atuhaire, of *M/S Atuhaire & Co. Advocates.* An advocate acting on behalf of his client should ensure that the application is properly sealed and served in time. In case of failure to serve in time, the advocate should seek an extension of time to serve the summons. These are steps upon which an advocate is instructed to represent a client. Even when timelines were set for filing written submissions, learned counsel for the applicant did not file the required submissions.

In the premises, I believe this is a proper case where an advocate who is in personal conduct of this application should meet the costs of the application. The award of costs, however, is generally not considered to be a penalty, but a method used to reimburse the other party for the expenses of litigation.

Costs awarded against counsel personally are intended to have a punitive or deterrent element because the conduct in issue was found deserving of punishment or rebuke (***See Myers Vs Elman (1940) AC 282,319; and Harley Vs McDonald (2001) 2 AC 678, 703, paragraph 49).***

In Simba Properties Investment Co. Ltd And 5 Others Vs. Vantage Mezzanine Fund II Partnership And 6 Others HCCA No. 0002 of 2023, Hon Justice Stephen Mubiru held thus:

> ***"Reprehensible conduct represents a marked and unacceptable departure from the standard of reasonable conduct expected of an advocate. As a disciplinary sanction, an award of costs to be paid personally by an advocate serves to protect the public and the Courts, foster public confidence in the Bar; in the integrity, professional skill and trustworthiness of advocates, preserve the integrity of the profession, remedy an injured party's or the legal system's injury, and to deter other advocates. The spectre of being made liable to pay actual costs personally should be such as to make every advocate think twice before putting forth a vexatious, frivolous or speculative claim or defence, or engaging in any sort of misconduct related to litigation.***

An advocate has a duty of competent representation and diligent advocacy ***(see Regulations 2(2) and 12 of the Advocates (Professional Conduct) Regulations).*** Reasonable diligence is understood to mean acting with commitment and dedication to furthering the interests of the client and proceeding with zeal in advocacy on the client's behalf. To meet this duty, an advocate must employ his legal knowledge, skill, thoroughness, and preparation for

presentation. It can be summed up that an advocate owes a duty of care to his or her client. On taking instructions, the advocate impliedly agrees to carry out that service with reasonable care and skill ***(see Namayega Barbra Vs. Etot Denis & 2 Others HCCS No. 939 of 2019)***

Therefore, an advocate with instructions should be able to follow the laid-out procedures in the Civil Procedure Rules. Additionally, an advocate is required to meet the schedules set by the court. Filing and abandoning case files in court by an experienced advocate, and a senior member of the bar cannot be overlooked.

Advocate Timothy Atuhaire did not take steps under the Civil Procedure Rules to ensure that this application is heard and determined on its merits. Therefore, it would be unfair, in the circumstances, to order the innocent litigant to pay the costs of the application.

Accordingly, advocate Timothy Atuhaire will meet the costs of the application personally.

It is so ordered.

Dated at Fort Portal this 31st day of January 2024

Vincent Emmy Mugabo

Judge