

KEVIN OTIM ::::::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

ESKOM UGANDA LIMITED ::::::::::::::::::::::RESPONDENT

**BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA
NTAMBI**

RULING

Background

The Plaintiff now herein the Respondent in this Application brought a summary suit Civil Suit No. 2 of 2023 against the Defendant now herein the Applicant for recovery of a liquidated sum of Ugshs. 74,620,191.93/=, interest at the commercial rate of 24% p.a from the date of resignation and costs of the suit.

The Applicant, herein, who is the Defendant in the summary suit subsequently filed an application on 3rd March, 2023 for leave to appear and defend the said suit.

During the court hearing session on 12th February, 2024, Counsel for the Respondent prayed to object to the application. His contention was that the application was served on the Respondent after the requisite 21 days.

Representation

The Applicant was represented by Counsel Ferdinand Musimenta of Jambo & Co. Advocates while the Respondent was represented by Counsel Nicholas Mwasame of Shonubi, Musoke & Co. Advocates.

Submissions

Court directed the parties to file written submissions in respect of the preliminary objection.

Counsel for the Respondent submitted that this application was filed on the 27th February 2023 and was endorsed by court on the 3rd March 2023. He further submitted that despite filing this Application, it was never served by the Applicant



on the Respondent until 25th of May 2023, almost 3 months after the same had been issued. Counsel made reference to the law on service of summons under Order 5 rule 1(2) of the Civil Procedure Rules which stipulates that summons must be served within 21 days from the date of issue of the summons, except that time maybe extended upon application to court, which must be made within 15 days after the expiration of the 21 days. Counsel cited and relied on the case of **Nankabirwa Eva Walusimbi Vs Mariam Namugenyi Sozi C.S No. 160 of 2017** which relied on the case of **Ejab Family Investments and Trading Company Ltd Vs Centenary Rural Development Bank Limited H.C.C.S No. 001 of 2014** where it was noted that the use of the word “shall” in Order 5 rule 1(2) prima facie made it a mandatory requirement to effect summons within 21 days.

He also submitted that the applicant still reserved to apply to court to extend the summons within 15 days from their expiry but did not. He relied on the case of **Rashid Abdul Karim Vs Suleiman Adrisi M.A No. 9 of 2017**.

He also submitted that service of expired summons ousts the jurisdiction of this Honourable Court. He cited the cases of **Orient Bank Limited Vs Avi Enterprises Limited Civil Appeal No. 2 of 2013** and **Alex Mulyabintu Vs Case Western Reserve University & another Civil Appeal No. 190 of 2013** in which Justice Madrama (as he then was) stated that the provision of Order 5(1)(3) of the Civil Procedure Rules are clear that where summons has not been served within 21 days and no application for extension of time has been made, the application is dismissed / the suit shall be dismissed without notice.

He further cited the case of **Bitamisi Namuddu Vs Rwabuganda Godfrey S.C.C.A No. 16 of 2014** where it was stated that Order 5 rule 1(2) and (3) are written in plain, clear and unambiguous words. Order 5 rule 1(3) clearly states that where summons is issued and service not effected within 21 days from the date of issue and no application for extension of time is made, the suit shall be dismissed without notice. The provision does not give the court discretion to decide whether to dismiss or not to dismiss the suit. The court’s action is dictated by law and it is mandatory. It was also his submission that the rationale for dismissal of such a suit is that failure to adhere to the statutory timelines creates an illegality and that the position of the law is that courts cannot sanction illegalities once brought to their attention.

He then prayed that the application is dismissed with costs and that judgment be entered in the summary plaint.



In reply Counsel for the Applicant agreed with the legal standpoint of view in respect of Order 5 rule (1) and (2) of the Civil Procedure Rules as the correct position. He then submitted that the provision was inapplicable to the instant application and that Counsel for the Respondent presented no proof of service prior to raising the preliminary objection. He acknowledged that they had a duty to follow up with court and fix the application which they did and that the Respondent was served by court.

He also submitted that the Respondent's claim remains unproven as to the manner in which the application was served or to whom this service is attributed. He cited the case of **Busingye & others Vs Williams Katotsiire (2001-2005) HCB 108** where it was held that the law is that where a defendant denies having been served, the onus is on him/her to prove to the satisfaction of court that service was ineffective.

It was also his submission that the Respondent had not denied service but had claimed that service was done out of time and did not provide proof of service of the application out of time. He also submitted that the purpose of service of summons was to make the Respondent aware of the case against such claim and that since the Respondent filed a substantive response to the application- in his view the purpose of service of the application was served. It was also his submission that Counsel for Respondent's claims were at the Bar and relied on the case of **Mayanja Joshua Kajubi Vs Wasswa Amon Bwogi & another HCMA NO. 44 of 2016**. He then concluded by praying that the preliminary objection is denied and overruled and that the matter be set down for hearing of the application on its merits.

Issue

Whether this application is incompetent before this court and should be struck out?

I have carefully considered the submissions from both parties.

Order 5 rule 1(2) of the Civil Procedure Rules provides that,

“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 the court, made within 15 days after the expiration of the twenty-one days, showing sufficient reasons for the extension.”



This provision automatically invalidates summonses 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 of the Civil Procedure Rules are mandatory and should be complied with.

I have perused the court record and it is clear that this application was endorsed by court on the 3rd March 2023. I have also noted that it is on court record that Counsel for the Respondent signed for and received the application on the 25th May 2023. This implies that the same was never served onto the Respondent until he received it from court.

From the submission of the Counsel for the Applicant, I take notice that he agrees with Counsel for the Respondent's reliance on Order 5 rule 1(2) of the Civil Procedure Rules as the correct position of the law.

It was uncontested that the application was lodged by court on 3rd March 2023 and I consider it safe to conclude that the requisite 21 days within which the Applicant was to serve the applicant onto the Respondent started running from 3rd March 2023. The Application should have been served by 5th April 2023 onto the Respondent.

By 5th April 2023, there was no affidavit to show that the application had been served onto the Respondent as required under Order 5 rule 17 of the Civil Procedure Rules so as to give proof of service.

From the reading of Order 5 and trite law, the rule is mandatory and therefore failure to serve without an application to extend time coupled with absence of an affidavit of service from the Applicant on the court record amounts to the conclusion that there was no service.

I note that counsel for the applicant in his submissions emphasized that the Respondent had failed to prove that he was served outside the time provided. To this submission, I am cognizant of the fact that on court record, counsel for the Respondent signed for and received the application on 25th May 2023 and by then, the summons had already expired.

I also note that counsel for the applicant submits that since the Respondent became aware of the application and has since filed a substantive response to the application, it was his submission that the purpose of service of the application was served. I want to clarify that by the time counsel for the Respondent received the application and in the absence of an application to extend time of service of the application onto



the Respondent by the Applicant, the summons had since expired and so there was a non-existent application.

Since the provisions under Order 5 rule 1 are of mandatory application, it results into a penalty as a result of default in accordance to Order 5 rule 1(3)(a)(b) of the Civil Procedure Rules which is dismissal of the suit or application. **See Gladys Senkubuge & another Vs Kibirango Joyce M.A No. 1704 of 2019.**

I find that the Applicant defaulted to serve the application onto the Respondent within the requisite 21 days and despite the fact that the Respondent received the application, it was still out of time.

The application is hereby dismissed under Order 5 rule 1(3) (a) (b) of the Civil Procedure Rules.

The costs of this application are to be borne by the Applicant.

I so order.



FARIDAH SHAMILAH BUKIRWA

JUDGE

29th February, 2024.

Delivered by email.