

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT JINJA**  
**CIVIL APPEAL NO. 68 OF 2023**  
**ARISING FROM MISC. APPLICATION NO. 318 OF 2022**  
**ARISING FROM CIVIL SUIT NO. 76 OF 2023**

**THE REGISTERED TRUSTEES OF  
THE JINJA MUSLIM CLUB :::::::::::::: :APPELLANTS**

**VERSUS**

- 1. UGANDA MUSLIM SUPREME COUNCIL**
- 2. ISMAIL ADI BASOGA**
- 3. ASUMANI TIMUNTU**
- 4. JINJA CITY COUNCIL**
- 5. COMMISSIONER LAND REGISTRATION**
- 6. MOHAMMED HUSSEIN BOWA :::::::::::::: : RESPONDENTS**

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

**Background**

On 7<sup>th</sup> November, 2023, during the court hearing session, counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents raised a preliminary objection. His contention was that Civil Appeal No. 68 of 2023 was filed onto the Respondents out of time.

**Representation**

Counsel Habakurama Elias represented the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents while Counsel Bernard Mugeni represented the Appellant. The 5<sup>th</sup> Respondent had no representation.

**Submissions**

The parties addressed court orally.



### Oral Submissions by Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents.

Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents submitted that the Appellants filed Civil Appeal No. 68 of 2023 on 21<sup>st</sup> July, 2023. That the same was also endorsed by court on 21<sup>st</sup> July 2023 but that the appeal was only served upon the Respondents' counsel on 30<sup>th</sup> August, 2023. It was his submission that it was served out of time in contravention of the provisions of Order 5 rule 2 of the Civil Procedure Rules (CPR). He also submitted that no leave was sought by the Appellants to extend service and so the requisite 21 days would have expired on 11<sup>th</sup> August 2023 and yet the appeal was served on the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents on 30<sup>th</sup> August 2023.

He submitted that there was a wealth of authorities in this court and superior courts that Notices of Motion, Chamber Summons, hearing notices e.t.c are all governed by Order 5 rule 2 of the CPR and must be served in strict conformity with that order. As that was the position in **Gwabugada Geoffrey Vs Bitamisi Namuddu C.O.C.A 23/2009** which position was fortified by the Supreme Court in **Edison Kanyabwe Vs Patoli Tumwebaze S.C.C.A 6/2004**.

He then prayed that the Appeal should be struck out without delving into the merits of the Appeal and that the omission to serve out of time is not a mere technicality. He concluded that as a result, the appeal is incompetent and should be struck out with costs to the Respondent.

### Counsel for the Appellant

In reply, counsel for the Appellant submitted that Order 5 rule 2 of Civil Procedure Rules referred to by the Respondents' counsel deals with summons & counsel had stretched it to Notice of Motions. He submitted that there is no specific law that relates to Notices of Motion and that **Gwabugada Geoffrey Vs Bitamisi Namuddu (supra)** only extended the order to hearing notices and not to Notices of Motion.

He submitted that since no law provides for Notices of Motion, this qualifies as a technicality curable under Article. 126 (2) (e) of the Constitution and relied on the case of **Attorney General Vs Maj. Gen. David Tinyefunza S.C.C.A No 1/1997 & Ismail Serugo Vs Kampala City Council & Another S.C.C.A 2/98**. He also cited the case of **Dr. Kizza Besigye Vs H.E Yoweri Museveni Election Petition No. 1/2001** in which case an argument arose as to whether the petitioner had not followed the provisions of the law. C.J Odoki held that court should administer substantive justice without undue regard to technicalities. It was his





prayer that court looks at the grounds named in the appeal which grounds have merit as substantive justice requires so. He also prayed that court should overrule the objection and the appeal should be allowed to proceed on its merits.

**Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents.**

In Rejoinder, Counsel for the Respondents emphasized that Order 5 rule 3 of the Civil Procedure Rules is general on the mode of service on all summons commenced in a civil nature. It was also his submission that this is not a mere technicality and touches on the merit of the appeal as the Appellants had the option to seek extension of time within which to serve the Appeal which option they elected not to exercise. He submitted that the Appellants did not even explain their inability to serve the Notice of Motion in 21 days. He also argued that Article 126 (2) (e) of Constitution was not made to do away with rules of procedure and if it was so, that could be the same case with the Court of Appeal (Judicature) Directions and Supreme Court Rules directions. He concluded that the preliminary objection had merit and was backed by law and that therefore, the appeal is incompetent and should be struck out with costs to the Respondents.

I shall resolve this preliminary objection by formulation of this issue;

**Whether this appeal is defective before this court and should be struck out?**

**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.”

It is trite law that the timelines that apply to service of summons in an ordinary plaint also apply to service of applications. **See Nyanzi Muhammad Vs Nassolo Harriet & 2 others H.C.M.A No. 14 of 2021.**

This being an appeal brought by way of Notice of Motion, I find that it is governed by **Order 5 rule 1(2) of the Civil Procedure Rules**. I consider that the provision of **Order 5 rule 1(2) of the Civil Procedure Rules** is mandatory in nature and this automatically invalidates summonses which may have been issued and not served within 21 days from the date of issuance.





An applicant/appellant who fails to serve summons in applications within the stipulated twenty-one 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 extension of 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 satisfied by evidence in the said application and clearly state the reasons for permitting the applicant to effect service beyond the stipulated period.

I have perused the court record of this application. It is clear that the application was endorsed on 21<sup>st</sup> July, 2023 and ought to have been served onto the Respondent within 21 days otherwise an extension of time within which to effect service ought to have been sought formally by the Applicant.

On court record, I take note of two affidavits of service on the 4<sup>th</sup> and 5<sup>th</sup> Respondents which were both filed in court on 7<sup>th</sup> of November, 2023. Upon further perusal of the court record, I also do not find any other affidavits of service upon the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 6<sup>th</sup> Respondents.

During oral submissions, counsel for the Appellant submitted that the appeal was served upon the Respondents' counsel on the 30<sup>th</sup> August 2023 which was clearly out of time. I also note and upon reading the affidavits of service on court record that the 4<sup>th</sup> and 5<sup>th</sup> Respondents were served out of time.

I do not find any compelling and persuasive reason as to why the Appellant could not effect service within the requisite 21 days or rather seek court's leave to extend time of service.

Counsel for the Appellant submitted that the instant facts herein qualify as a technicality curable under Article. 126 (2) (e) of the Constitution and relied on the case of **Attorney General Vs Maj. Gen. David Tinyefunza S.C.C.A No 1/1997 & Ismail Serugo Vs Kampala city council & Another S.C.C.A 2/98**. He also cited **Dr. Kizza Besigye Vs H.E Y. Museveni Election Petition No. 1/2001**, in which case an argument arose as to whether the petitioner had not followed the provisions of the law. C.J Odoki held that court should administer substantive justice without undue regard to technicalities.

I am also mindful that in deserving cases, the court may rightfully exercise its discretion to overlook the failure to comply with 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.



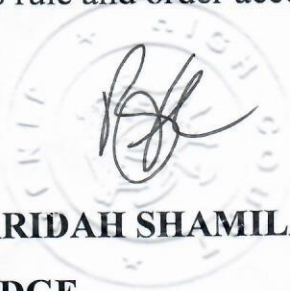
In the instant case, I find that the appeal was clearly served out of the requisite timeline of 21 days and the Appellants did not exercise their right to apply to the court for leave to extend time of service. I also find that the Appellant was too reluctant on its side and so cannot come up to plead Article 126(2)(e) of the Constitution simply to negate being held accountable. **In Byaruhanga & Co. Advocates Vs Uganda Development Bank S.C.C.S No. 2/2007**, 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 that Order 5 rule 1(2) of the Civil Procedure Rules is mandatory in nature, I am guided by the law to apply it strictly. I find that the appeal is defective as it was clearly served outside the legal timelines and consequently I find that this court does not have the jurisdiction to entertain it.

Pursuant to my findings, I find merit in the preliminary objection and uphold it. The appeal is hereby dismissed with costs to the Respondents.

I so rule and order accordingly.



**FARIDAH SHAMILAH BUKIRWA NTAMBI**  
**JUDGE**

**Ruling delivered on 1<sup>st</sup> March, 2024.**