

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0001 OF 2014

5 **EJAB FAMILY INVESTMENTS AND }
TRADING COMPANY LIMITED } PLAINTIFF**

VERSUS

10 **CENTENARY RURAL DEVELOPMENT BANK LIMITED DEFENDANT**

Before: Hon Justice Stephen Mubiru.

RULING

15 When the suit came up for hearing on 4th May 2017, counsel for the defendant, Mr. Waniala Allan raised a preliminary objection contending that the suit be dismissed for being incompetent by reason of the fact that the defendant has never been served with summons to file a defence to-date, and that therefore the suit offends the provisions of order 5 (1) (2) and (3) of *The Civil procedure rules* in so far as the defendant has never been served with the summons and plaint within the required 21 days from the date of filing and neither is there any application of
20 extension. He prayed that the suit be dismissed because it is incompetent.

In response, Ms. Nalugya Ramula holding brief for Mr. Nsubuga Charles Counsel for the plaintiff submitted that counsel in personal conduct of the suit insisted that he served personally and can prove it if given time. In the alternative, that since counsel for the defendant has been attending court, failure to serve the summons to file a defence should be considered a mere
25 technicality and therefore disregarded. She cited *Boyes v. Gathuri [1969] EA 385* where Justice Spry stated that mere adoption of a wrong procedure is not fatal. Also that in *Proline Soccer v. Lawrence Mulindwa and Four others, H. C. Misc. Application 0459 2009*, article 126 (2) (e) the same principle was applied in a case where there had not been service.

In reply, Mr. Waniala submitted that the authorities cited are clearly distinguishable in that the
30 decisions related to procedure other than non-compliance with the requirement of service. In the *Proline case* the defence had been filed. In this case there is no defence. He reiterated his prayers.

Having perused the record, considered the preliminary objection, listened to the submissions of both counsel and addressed my mind to the law, I struck out the plaint with costs to the defendant and undertook to explain the detailed reasons for that order in this ruling. Amendments to *The Civil Procedure Rules* were introduced on 24th July 1998 (see *The Civil*
5 *Procedure (Amendment) Rules, 1998; S.I. 26 of 1998*) as part of measures taken to allow more expedient justice for those with legitimate claims. Order 5 rules 1 (2) of *The Civil Procedure Rules* provides as follows;

Service of summons issued under sub-rule (1) of this rule shall be effected within
10 twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-
one days, showing sufficient reasons for the extension. (emphasis added).

The use of the word “shall” prima facie makes that requirement mandatory. This provision automatically invalidates summonses to file a defence which may have been issued and are not
15 served within twenty one days of issuance. It is meant to eliminate suits which are filed for the sake of achieving collateral objectives other than the genuine determination of justiciable disputes and as a means of expeditiously disposing of frivolous or speculative suits. It is thus settled law that the provisions of Order 5 of *The Civil Procedure Rules* are mandatory and should be complied with (see *Kanyabwera v. Tumwebaze [2005] 2 EA 86 at 93*).

20 A plaintiff, who fails to serve within the stipulated twenty one days from the date of issuance of the summons upon him or her for service, will not *ipso facto* lose the right to do so beyond that period, except where the Court permits him or her to do so for reasons which it must state in writing. Extension of the time within which to serve the summons must be sought “within fifteen
25 days after the expiration of the twenty-one days.” Under Order 5 rule 32 of *The Civil Procedure Rules*, the application must be made by summons in chambers. The requirement of a formal application “showing sufficient reasons for the extension” imposes a duty on Court to apply its mind to the reasons advanced by the plaintiff for his or her failure to serve within the twenty one
30 days and to record the reasons for extending the time. In other words, there is no mechanical extension of time for serving summons to file a defence. The Court must be satisfied by evidence on record and state the precise reasons for its permitting the plaintiff to do so beyond the stipulated period. An application for extending the validity of summons which have not been

served must be made, by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

5 The power of the Court to extend the time for service of summons to file a defence is however restricted, on a plain reading of the rule, to applications made within fifteen days reckoned from the date of expiry of the twenty one days within which service of the summons should have been effected. The words used by the Rules Committee for conveying its intention are unambiguous and the only plain, literal and logical interpretation that can be given to the provision read as a whole is that the Court cannot extend time in respect of applications made beyond the fifteen
10 days. In the instant case, the summonses were issued to counsel for the respondent for service on 27th January 2014. Consequently they should have been served on the applicants latest 17th February 2014, failure of which the extension ought to have been sought formally latest 4th March 2017, yet no such application for extension of time was ever made.

15 It is argued by counsel for the respondent that the court should in the interests of justice disregard this irregularity. That submission is apparently inspired by the general principle that the rules of procedure are “intended to serve as the hand-maidens of justice, not to defeat it” (see *Iron and Steel Wares Limited v. C.W. Martyr and Company (1956) 23 E.A.C.A. 175 at 177*). In a deserving case, the court may rightfully exercise its discretion to overlook the failure to comply
20 with rules of procedure, upon such conditions as it may deem fit intended to guard against the abuse of its process. *Article 126 (2) (e) of The Constitution, 1995, enjoins courts to administer substantive justice without undue regard to technicalities*. For that reason each case is to be decided on its facts. In *Byaruhanga and Company Advocates v. Uganda Development Bank, S.C.C.A No. 2 of 2007, (unreported)* it was left to the discretion of the judge to decide whether in
25 the circumstances of a particular case and the dictates of justice, a strict application of the laws of procedure, should be avoided. The Supreme Court decided in that case that;

30 *A litigant who relies on the provisions of article 126 (2) (e) 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.*

However, in the instant case, the court is mindful of the mischief sought to be cured by the requirement for strict compliance with the periods of time stipulated in Order 5 of *The Civil Procedure Rules*. The entire scheme of that Order aims at only one thing; to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him or her expeditiously without undue delay. This is consistent with the requirement of Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* to the effect that in the determination of civil rights and obligations, a person shall be entitled to a fair, speedy and public hearing. This is achieved by effecting personal service failure of which substituted service may be allowed in such situations as the rules permit.

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If the defendant appears before the Court after the filing of the suit against him or her, and he or she is informed about the nature of the claim and the date fixed for reply thereto, it must be deemed that the defendant has waived the right to have a summons served on him if such a defendant goes ahead to file a defence to the suit before he or she is formally served in accordance with the rules of service of summons. Such a waiver can be determined from the record and also from the subsequent conduct of that party. The same position will arise when a party *suo motu* appears before the Court prior to actual service of summons either by himself or through counsel. In such a case, it would rather be too technical a view to take that service of summons in the ordinary course should still to be insisted upon and to hold that further proceedings in the suit would take place only thereafter. This is neither the purpose nor the way to look at the various provisions of *The Civil Procedure Rules*. It is not possible for me to countenance a situation in which the defendant though present in the Court after filing a written statement of defence, is still allowed to insist that unless proper service of summons be made upon him or her, he or she should be deemed to be unaware of the proceeding. Where therefore defendants on their own motion file defences to the suit, it becomes superfluous to still insist that summons should be served upon them.

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That notwithstanding, it is not sufficient for a plaintiff to institute suit against a party and not take steps to effect service of summons. A defendant must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The Summons must be served in the manner provided for in the rules to enable the defendants to

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submit to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of the court over them is not invoked and therefore they may in exercise of their rights choose never to appear or respond to the suit and nothing can happen to them. Consequently, the suit will never proceed against them and neither can the plaintiffs obtain interlocutory judgment against them nor set it down for hearing against the defendants since no interlocutory judgment can be entered in a suit except in default of filing a defence. Therefore until a defendant is served with summons to file a defence, there is no basis for him or her to answer to the suit.

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The question is whether failure to adhere to such clear and elaborate procedural requirements of Order 5 of *The Civil Procedure Rules* is a mere procedural technicality that can be sacrificed at the altar of substantive justice. In my considered view, a summons to file a defence is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, there is no other way he or she will submit to the jurisdiction of the court. Non-compliance with this rule therefore cannot be mere procedural technicality. A court has no jurisdiction to deal with a filed complaint until a summons to file a defence has been served and a return of service filed, which step alone will activate further proceedings in the suit. Until summons have been issued and served, the suit is redundant.

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Article 126 (2) (e) of The Constitution of the Republic of Uganda, 1995, is not a panacea for all ills and in appropriate cases the court will still strike out pleadings such as this considering that one of the aims and overriding objective of the amendment of Order 5 of *The Civil Procedure Rules* was to enhance expeditious disposal of suits and curtail the abuse of court process for ulterior motives. If this proposition is correct, as I think it is, it would follow that a suit would be liable for striking out at any stage upon expiry of the stipulated periods before the summons duly issued is served. The timelines in the rules are intended to make the process of judicial adjudication and determination swift, fair, just, certain and even-handed. Indeed, public policy demands that cases be heard and determined expeditiously since delay defeats equity, and denies the parties legitimate expectations (see *Fitzpatrick v. Batger & Co. Ltd* [1967] 2 All ER 657).

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It is for those reasons that non-compliance with the requirements of renewal of summons to file a defence is considered a fundamental defect rather than a mere technicality and it cannot be cured by inherent powers since issuance and service of summons to file a defence goes to the jurisdiction of the court (see *Mobile Kitale Station v. Mobil Kenya Limited & Another* [2004] 1 KLR 1; *Orient Bank Limited v. Avi Enterprises Ltd.*, H.C. Civil Appeal No. 002 of 2013; *Western Uganda Cotton Company Limited v. Dr. George Asaba and three others*, H.C. Civil suit No. 353 of 2009 and *Asiimwe Francis v. Tumwongyeirwe Aflod*, H.C. Misc. Application No.103 of 2011).

In this case, the summons to file a defence expired on 17th February 2014, without any action having been taken by the plaintiff and its counsel to extend their validity. Examination of the court record revealed that there was no affidavit of service on record. Courts have time and again emphasized the need to file an affidavit of service after effecting service (see *Tindarwesire v Kabale Municipal Council* [1980] H.C.B. 33; *Edison Kanyabwera v Pastori Tumwebaze SCCA No. 2 of 2004 (unreported)*; *Kanji Naran v. Velji Ramji* (1954) 21 E.A.C.A. 20). Failure to file one in these proceedings has not been adequately explained and no reliance whatsoever could be placed on a statement from the bar that service was effected by counsel with personal conduct of the case, in the absence of an affidavit of service. The court further found it curious that three years after the alleged service and failure of the defendant to file a defence, counsel for the plaintiff has never applied for a default judgment. This omission is more consistent with the fact that service has never been affected rather than the contrary. I found it to be a fact corroborative of failure to serve summons to file a defence. Since the defendant had not engaged in conduct constituting waiver of its right to be duly served and submit to the jurisdiction of this court, the suit against it lapsed the moment the summons became stale for non-compliance with the requirements of Order 5 r 1 (2) of *The Civil Procedure Rules*. It is for those reasons that the plaintiff was struck out with costs to the defendant.

Delivered at Arua this 5th day of May 2017.

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Stephen Mubiru
Judge
05th May 2017