

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT JINJA
MISC. CAUSE No. 003 OF 2016**

KWESIGA GEORGE=====APPLICANT
(APPLYING THROUGH NEXT FRIEND BAZIBU BETHEL)

VERSUS

1. IGANGA MUNICIPAL COUNCIL
2. JUMA NTALO =====RESPONDENTS

BEFORE HON. JUSTICE MICHAEL ELUBU

RULING

At the commencement of these proceedings, Counsel for the Applicant, Mr. Ngobi Balidawa raised a preliminary point of law regarding the service of the Notice of Motion and the filing of the replies by the respondent.

It is the contention of Counsel that the 2nd Respondent has never filed a reply in spite of service of the application on him. That by an affidavit dated 20/9/2017 the process server TENYWA JOSEPH stated that the 2nd respondent was effectively served.

In absence of a reply by the 2nd Respondent, the Applicant prayed that ex parte judgment be entered against the 2nd Respondent.

The second point is that the 1st Respondent was served on the 17th of May 2016, but only filed their reply on the 15th of June 2016, which is 20 days after service on them.

Counsel argued that owing to *O.5 r2 of The CPR*, a reply ought to have been made within 15 days. In that regard therefore the reply is out of time and ought to be expunged.

Ms. Pheobe Tumwebaze, for the first Respondent objected to this application to expunge the reply of the 1st Respondent.

In the first place, was her contention that the applicant has not come to court with clear hands.

She argued farther that the applicant did not serve the respondent with the Notice of Motion. The affidavit of service does not indicate the name of who was served and yet the law requires that service should be effected on the Town Clerk of an Urban Council.

Finally that the application was filed on the 19/01/2016, and sealed by the Registrar of The High Court on the 25/01/2016. No service was done until May 17/5/2016. That this time period is outside the 15 days within which the law stipulates service, after filing, must be made.

Counsel for the 1st respondent therefore contends that the Notice of Motion had expired and was illegal at that stage. That the illegality cannot be cured because the motion was out of time and had ceased to exist.

The Rejoinder by the applicant is that there is no indication how long the application remained in the custody of this court before it was released to the applicants.

Secondly, as the 1st Respondent concedes to the late reply, then she can have no audience before this court.

The background here is that the applicant filed this application for Judicial Review on the 19th of January 2016. The Registrar sealed his Notice of Motion on the 25/01/2016.

Paragraph 2 of the affidavit of service deposed by TENYWA JOSEPH, which is dated the 17th of May 2016 states that on the 19th of January 2016 he received the copies of the Notice of Motion from the High Court to be served on the parties.

In paragraph 3 he states that he subsequently served on the 17th of May 2016. The 1st Respondent was served on that same 17th of May 2016 while the 2nd Respondent had received a copy of the Notice of Motion on the 10th of May 2016 but that he had refused to acknowledge receipt.

On the 15th of June 2016 the 1st Respondent filed a reply.

Turning now to the merits, by virtue of *S.2 of The Civil Procedure Act* a Motion falls under the definition of Civil Proceedings under the **Civil Procedure Act Cap 71.**

Under Order 5 r. 1 provides under sub rule 2 and 3 as follows,

(2) Service of summons issued under subrule (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 fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension.

(3) Where summons have been issued under this rule, and—

(a) service has not been effected within twenty-one days from the date of issue; and

(b) there is no application for an extension of time under subrule (2) of this rule; or

(c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.

Consequently where summons have been issued then service must be effected within 21 days from date of issue. On application to court within 15 days, the time for service, may, on sufficient reason shown be extended by 21 days.

Under O.5 r.3 if the timelines are not complied with then the suit shall be dismissed without notice.

In this instant case, there was no delay attributable to court as submitted by Counsel for the applicant. The summons were delivered to the applicant on the 26th of January 2016 a day after sealing.

In light of the above service was effected after 4 months and no application to extend time within which to serve was ever made. The law in the rule appears mandatory with the context taken into account and the use of the word "shall" noted.

It would appear therefore that summons here had expired by the time the applicant sought to effect service on the Respondents.

In *Kaur Vs City Auction Mart Ltd (1967) 1 EA 108* the High court found that when O.5 r 1 (5) was offended and Notice of Motion which should have been signed and sealed was not, it held that the notice was a nullity.

By extension where the summons had expired, they could not properly be served as they held no force of law at that stage and were a nullity.

Secondly the process server stated that he served the 1st Respondent by taking the summons to the Registry of the 1st respondent where the Notice of Motion was stamped.

According to Third Schedule of the Local Government Act **Regulation 26 service of** summons on an Urban Council shall be made by sending or delivering the summons to the Town Clerk of the Council.

Therefore the process server must ensure that service is made on the Town Clerk.

In these circumstances, the service was therefore not proper service as it was simply left in the open registry of the 1st respondent. The process server did not even indicate the name of the person he left the summons with.

In view of the above this court finds that the Notice of Motion had expired by the time it was served. Even then, when it was purported to be served, the service was not proper.

In light of that the application is dismissed.

Michael Elubu

MICHAEL ELUBU

JUDGE

6/3/2019

6/7/19

parties advised save for the 2nd party
the respondents liability brief of court
Am-jud of the 1st party
Platha, elem.
CMA: fully delivered in the press
17 11 2019