THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASINDI

MISCELLANEOUS APPLICATION NO. 51 OF 2018

ARISING OUT OF MISCELLANEOUS CAUSE NO. 09 OF 2017

JOSEPH INITIATIVE LTD ::APPLICANT

VERSUS

AKUGIZIBWE JOSELYNE::RESPONDENT

RULING BY JUSTICE GADENYA PAUL WOLIMBWA

This application is brought under Section 98 of the Civil Procedure Act, Order 51 Rule 6, Order 52 Rules 1 & 3 of the Civil Procedure Rules S. 1 71-1 seeking for the orders that:-

1. The Honourable court do extend the time in which to file and serve the Affidavit in Reply to the Respondent in respect of Miscellaneous Cause No. 09 of 2017
2. That costs of the application be provided for.

The grounds of the application as briefly stated in the Notice of Motion and in the affidavit in support of the application are:-

1. That the applicant received a hearing notice from the Respondent on the 30th day of May, 2018 for hearing of the matter fixed on the 31st May, 2018 upon which they instructed the lawyers to handle the matter and filed a notice of instructions on the 31st day of May, 2018.
2. That the applicant was never served with the said pleading of judicial review and has sufficient cause for failing to file an affidavit in reply to the application for judicial review.
3. That he has a good defence to the application for judicial review and the application has been brought without inordinate delay.
4. That it is only fair and equitable and in the interest of justice that the application be allowed.

The respondent opposed this application on the following grounds:-

1. The applicant was duly served with the application and was not prevented by any lawful cause for not filing an affidavit in reply in time.

2. That the applicant is guilty of dilatory conduct and is responsible for instructing their current counsel late
3. That the present application has no merit and is intended to delay disposal of the main cause
4. That she opposes the application to extend time to file a reply to the main cause by the applicant.

The Applicant in rejoinder through an affidavit in rejoinder was filed by Ruth Nabejja, the Human Resource and Administration Manager of the Applicant Company deponed that she misplaced the court documents which she received on the 18th July 2017 and also forgot to inform the advocates about the case in court. She also deponed that the respondent will not be prejudiced in any way if the application is granted.

Representation

M/s Katende, Ssempebwa & Co. Advocates represented the applicant while M/s Kasangaki & Co. Advocates represented the Respondents.

The lone issue for determination in this application whether the Applicant has established sufficient cause to be allowed to file an affidavit in reply out of time?

Counsel for the applicant submitted that they were bringing this application to be allowed time to file an affidavit of reply in MC 15 of 2018, outside the prescribed time. He submitted that Order 51 rule 6 of the Civil Procedure Rules empowers a court to extend time under the rules where the rules have imposed limitations on time. For ease of reference, Order 51 rule 6 of the Civil Procedure Rules provides that:

> **"Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by order of the court, the court shall have power to enlarge the time upon such terms, as if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order".**

Counsel for the Applicant submitted that the Applicant never filed the affidavit in reply because the Human Resource Officer, who received the application for judicial review, being legally illiterate did not pass on the court process to the company's lawyers/ advocates. He said that the Applicant only came to know about the application for judicial review, when they were served with the hearing notice for the application. He submitted that as soon as the applicant learnt of the application and the defaults of the Human Resource Manager, they promptly filed this application for leave to file an affidavit in reply outside the time prescribed by the rules.

Turning to the merits and law in support of the motion, counsel for the applicant submitted the court has discretion to extend time within which to file an affidavit in reply to the application for judicial review.

He submitted that he was bringing this application because the right to a fair trial is guaranteed by Article 28 (1) of the Constitution and that under this right a person is entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law. He also submitted that he was bringing this application to under Article 126 (2) (e) of the 1995 Constitution which provides that courts have to administer justice with undue regard to technicalities and that it's only fair, equitable and in the interest of justice for the applicant to be allowed to file an affidavit in reply.

In support of the application, the applicant relied on **Eriga vs Vuzzi & 2 Ors (Misc. Civil App No. 0009 of 2017) [2017] UGHCCD 41**, where Justice Stephen Mubiru stated that, to deny the application that right in the circumstances of this application would in essence be denying him access to justice and a fair hearing both of which are guaranteed by the Constitution. Justice can still be done despite the relatively short delay found in the instant case in pursuing this remedy.

Counsel for the applicant submitted that in the instant case, the Human Resources Manager who received the court documents on behalf of the Applicant is a lay person with no knowledge of the court procedure and therefore its only just and equitable that this Honourable court finds it fit to grant the Applicant extension of time within which to file the affidavit in reply.

He submitted that the Applicant was not guilty of dilatory conduct because he acted quickly on learning that it had not responded to the respondent's application for judicial review. He cited the

case of **Molly Kyalikunda Turinawe and 4 others v Engineer Ephraim Turinawe & another (supra) Kisakye, JSC** held that three questions to be determined before disposing of an application for extension of time are (1) Whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the appeal (2) whether the applicant is guilty of dilatory conduct (3) whether any injustice will be caused if the application is not granted.

Counsel also referred the court to the case of **Kiyimba vs Dooba Enterprises Ltd (Misc. App No. 89 of 2012) UGCOMMC 174 (27 April 2012)** where the applicant instructed his assistant to take documents to his counsel, but the assistant did otherwise. The court noted that he did not completely fail to take any step as the applicant had demonstrated a strong desire to defend himself on the merits of the case. Because of this the court granted the applicant leave to file his defence out of time.

He also relied on the case of **Dhilon and Anor vs Dhilon [2006]1 EA page 66-67** the High court held that:

> **"the main concern of the court is to do justice to the parties and the court will not impose condition on itself to fetter the wide discretion given to you by the rules…"**

Furthermore , counsel for the Applicant , submitted that besides having good reasons for not filing the affidavit in reply, the Applicant had three good defence to the Respondent's case. Firstly, that that the Respondent caused financial loss to the Respondent and it is only just that the application for judicial review is heard inter parties to resolve the actual issues between the parties. He referred to the case of **Banco Arabe Espanol v Bank of Uganda (1999) 2 EA 22** where the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

Secondly, counsel submitted that the Respondent's application for judicial review was bound to fail because the matter was not amenable to judicial review. He submitted that judicial review is only available against a public body on a public law matter and in essence two requirements need to be satisfied; that the body challenged must be a public body and that it must involve claims

based on public law principles and not enforcement of private law rights. He submitted that in the case of the respondent, he had filed an application for judicial review against the applicant, which is a private company and his application was bound to fail. He referred the court to the case of **R v East Berkshire Health Authority ex parte Walsh [1984]3 WLR 818**, where **Sir John Donaldson MR** said at page 824 that the remedy of judicial review is only available where an issue of public law is involved.

Thirdly, that the respondent's case was bound to fail because he should have filed it in the Industrial Court instead of the High Court, which is a specialised court mandated under **Section 7 of the Labour Disputes (Arbitration and Settlement) Act, 2006** to handle employment matters. In conclusion, counsel for the applicant asked the court to allow the applicant to file its affidavit in reply to the application for judicial review.

Counsel for the respondent submitted that the applicant was duly served with the Notice of Motion as per the affidavit of service on record. That the matter came up twice on 28th November 2017 and 31st May 2018 without the applicant's affidavit in reply and that for that reason the applicant has not shown any reasonable explanation for not filing an affidavit in reply.

He cited the case of **Yahaya Kariisa vs Attorney General & Another SCCA No. 7 of 1994** where court observed that:

> "…**discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable in the given set of circumstances".**

Counsel for the respondent submitted that the application lacks merit, it is an abuse of court process and the same should be dismissed with costs.

Counsel submitted that the respondent in her affidavit of reply states that she filed the application for judicial review against the applicant on the 13th July 2017 and the same was served on the applicant on 18th July 2017, at its head office in Masindi. That the affidavit of service as sworn by Mr Tumwesige Leonard, a court process server showed that one Ms. Ruth N. Mubaala received on behalf of the applicant and stamped on the same and that the applicant also under paragraph 4 of the affidavit in rejoinder acknowledges being served with the notice of motion.

He further submitted that despite having been effectively served with the pleadings, the applicant herein voluntarily elected to waive its right to be heard as guaranteed under Article 28 (1) and 44 (c) of the Constitution of the Republic of Uganda when it did not file a reply. That the applicant does not adduce sufficient reasons which prevented it from filing a reply as required by law and that the only glaring reason the applicant adduces is forgetting to forward the documents to the lawyers and also misplacing the same. That this is only an expression of very high degree of negligence on the part of the applicant's Human Resource and Administrative Manager who would be expected to keep records of the company.

He averred that the applicant is guilty of inordinate delay and that it has not shown any sufficient cause for not filing an affidavit in reply in time when it was duly served with the Notice of Motion. He asked court to dismiss the application with costs against the applicant and to order Misc. cause No. 09 of 2008 to proceed exparte as against the applicant.

In conclusion, counsel for the applicant submitted that according to Halsbury's Laws of England, 4th Edition, Vol. 37 (practice and Procedure) at paragraph 393, that the very nature of the judicial process requires an effective and appropriate sanction to compel due compliance by the parties to the proceedings with the rules of Court or the orders of the court. Such non-compliance is treated as 'default' and the sanction for such default is that, in the case of the defendant, a 'default' judgment entered against him. A default judgment is the expression of the coercive power of the court obtained as a result of a failure by a party to follow any rules of procedure or orders of court.

Determination of the Application

Order 51 rule 6 of the Civil Procedure Rules provides that:

> **"Where a limited time has been fixed for doing any act or taking any proceedings under these rules or by order of the court, the court shall have power to enlarge the time upon such terms, as if any, as the justice of the case may require, and the enlargement may be ordered although the application for it is not made until after the expiration of the time appointed or allowed; except that the costs of any application to extend the time and of any order made on the application shall be borne by the parties making the application, unless the court shall otherwise order".**

It is clear from Order 51 rule 6 of the Civil Procedure Rules that the court can extend the time for doing certain acts under the Rules. The Rules do not however provide a blanket cheque for extension of time. The party asking for the extension of time has to show that he was prevented by sufficient cause from taking a particular step in time. In **Molly Kyalikunda Turinawe and 4 others v Engineer Ephraim Turinawe & another (supra) Kisakye, JSC, Supreme Court Civil Application No. 27/2010 (2012 UGCS 5 (25/01/2012)** held that three questions to be determined before disposing of an application for extension of time are (1) Whether the applicant has established sufficient reasons for the court to extend the time in which to lodge the appeal (2) whether the applicant is guilty of dilatory conduct (3) whether any injustice will be caused if the application is not granted. Although this decision was about enlarging time for filing an appeal, the principles governing the extension of time for appeals equally applies to the instant application in which the applicant is seeking to be allowed to file an affidavit in reply in opposition of an application for judicial review filed by the Respondent.

According to the evidence on record, the Respondent duly served the Application for Judicial Review on the Human Resource Manager of the Applicant Company on 18th July 2017. The Human Resource Manager admitted that she indeed, received the Application but being a lay person, she did not treat the pleadings with the seriousness that they deserve. She also deponed that she misplaced the Application. I share the views of the Respondent's counsel that the Human Resource Manager acted with negligence in dealing with the Application. I do not agree with her , that being a lay person, she did not fathom the implications of the Application given that the Application was challenged the dismissal of the Respondent from the Applicant company, which dismissal must have been processed by the Human Resource Department, which I believe is headed by the Human Resource Manager. That being the case, any reasonable person, would have expected the Human Resource Manager to read through the Application and quickly make it available to Management for appropriate action.

Secondly, the Human Resource Manager is literate and can read documents written in English, and her level of intelligence is far beyond that of ordinary litigants, who can be excused for being totally illiterate in English language and matters of the law. However, for people like the Human Resource Manager, the court expects them to do better than the Applicant's Manager did. The question then is whether I should visit the negligence of the Human Resource Manager on the Applicant Company? The answer to this question is not straightforward as the law provides some

exceptions or escape clauses where the ends of justice demand that cases be heard and determined on merit particularly in cases where the Applicant can show that it acted with heightened urgency on learning about the default or where the Applicant has a good defence to the Respondent's case. These exceptions have been refined over the years and find great expression in article 126(2) (e) of the Constitution, which provides that substantive justice shall be administered without undue regard to technicalities.

The spirit of article 126(2)(e) of the Constitution was best expressed in **Banco Arabe Espanol v Bank of Uganda (1999) 2 EA 22** , where the Supreme Court held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits and that errors or lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.

Turning to the instant case, it is on record that as soon as the Applicant was filed with the hearing notice for the Application for Judicial Review, they immediately filed the present application for extension of time to file the affidavit in reply. So despite the negligence of the Applicant's Human Resource Manager, I find that the Applicant, through its advocates took the right steps in remedying the situation and ensuring that the Applicant has a defence to the Respondent's action. Should I therefore exercise my discretion to allow the Applicant to file its affidavit in reply out of time? This will depend on whether my decision fits within the parameters for the exercise of discretion. In **Yahaya Kariisa vs Attorney General & Another SCCA No. 7 of 1994**, the Supreme Court observed that:

> "...**discretion is the faculty of determining in accordance with the circumstances what seems just, fair, right, equitable and reasonable in the given set of circumstances".**

Is it therefore just, fair and equitable that the Applicant should be given chance to file its affidavit in reply out of time. As I have observed above, the administration of justice requires that disputes be heard on merit to reinforce confidence in the administration of justice and secondly, that substantive justice be given preference over technicalities. These two cardinal principles in my view weigh heavily in favour of the Applicant who despite , the shortcomings of its Human Resource Manager acted quickly in seeking the court's leave to enlarge the time for filing the

affidavit in reply. I will therefore, allow the application but on condition that the Applicant pays the Respondent the costs of this Application so that she is not prejudiced. The taxed costs of the Application will be paid by the 17th of August 2020.

Before taking leave of this matter, the Applicant said that it has a good defence to the Respondent's Application. The defence relates to whether the Respondent's Application is amenable to judicial review and relatedly, whether it was right for the Respondent to have filed her Application in the High Court instead of the Industrial Court, which is a specialised institution for determining industrial disputes. These objections are substantive issues that I would rather, leave to be determined during the hearing of the substantive application for judicial review suffice to say that the High Court has unlimited jurisdiction to hear cases.

Decision

In the result, this application is allowed. The Applicant is directed to file its affidavit in reply within 15 days from the date of this ruling. The Applicant is ordered to pay to the taxed cost of this application to Respondent by 17/8/2020 or else the leave I have granted will lapse.

Gadenya Paul Wolimbwa

JUDGE

27/06/2020

Gadenya Paul Wolimbwa
Judge

This decision will be emailed to the parties by the Registry of the Court on 30th June 2020.

Gadenya Paul Wolimbwa

JUDGE

27/06/2020

Gadenya Paul Wolimbwa
Judge