THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI

MISCELLANEOUS APPLICATION NO.0056. OF 2019

(ARISING FROM CIVIL APPEAL NO.0064 OF 2015)
(Arising from Misc.App. No 18/2015 & C.S.No.63/2013)

1. **ERIC KWEZI**
2. **ASHER KIIRYA**
3. **JULIUS WABYONA ::: APPLICANTS**

VERSUS

1. **NOBERT KYOMUHENDO MUGUNGU**
2. **ERIC BYARUHANGA**
3. **BUHANGA WILSON :: RESPONDENTS**

RULING

BEFORE: HON. JUSTICE BYARUHANGA JESSE RUGYEMA

[1] This is an application brought under the provisions of **Section 98 CPA, Section 33 of the Judicature Act** and **Orders 43 r.1 & 52 rr.1&2 CPR** for orders that the Respondents' Memorandum of Appeal Vide **Civil Appeal No. 064 of 2015** be dismissed for want of prosecution and that costs of this Application be provided for.

[2] The grounds upon which this Application is premised are set out in the affidavit in support of the Notice of Motion sworn by **Wabyona Julius**, the 3rd Applicant. The grounds briefly are;

1. That the Applicants sued the Respondents vide Masindi Chief Magistrate's Court **C.S No. 063 of 2013**.
2. That after scheduling and filing witness statements, the Respondents filed an application to amend their written Statement of Defence and the same was dismissed on 17/9/2015.
3. That the Respondents being dissatisfied with the ruling, filed a Memorandum of Appeal vide **Civil Appeal No.064 of 2015** in

October 2015 against the ruling of court in the application to amend.

4. The Respondents were served with the Memorandum of appeal on 16th October 2015.
5. That for a period of about 3½ years, the Respondents and their lawyer never bothered to take any positive steps to pursue their Appeal.
6. That the Respondents are not interested in pursuing the appeal and are only using the appeal to frustrate and block the Applicants from utilizing the land in dispute.
7. That it is in the interest of justice that this application is allowed and the Appeal be dismissed.

[3[In the affidavit in reply deponed to by **Buhanga Wilson**, the 3rd Respondent herein, stated briefly as follows;

1. That this application is incurably defective and an abuse of court process for not complying with the rules of this honourable court.
2. That the Applicants sued the Respondents Vide **C.S No. 063 of 2015(Chief Magistrate Court Masindi)** and **Vide M.A No. 018 of 2015** the Respondents applied for leave of court to amend their W.S.D but the application for leave to amend their pleadings was dismissed.
3. That on 2/10/2015, the Respondents filed a memorandum of appeal and on 16/10/2015, it was served upon the opposite counsel (Legal Aid Project Masindi branch).
4. That the 3rd Respondent embarked on pursing transfer of the mother file from the lower court to the Appellate court but to be told by the Registry staff of the Chief Magistrate's Court that the file could not be traced.
5. That without the mother file, it became difficult for the Respondents and their lawyer to prepare a record of appeal as

they required the certified record of proceedings and the ruling of the lower court.

6. That the Respondents are willing to proceed with the hearing of the appeal now that the ruling has been availed by the Applicants.
7. That it's only fair, just and equitable that **Appeal No.64 of 2015** that has been pending in this court owing to the absence of the mother file be fixed, heard and disposed of on the merits.

Counsel Legal Representation and submission

[4] The Applicants were represented by Counsel **Susan Zemei** of **M/s Zemei, Aber Law Chambers, Masindi** while the Respondents were represented by Counsel **Tugume** of **Tugume-Byensi & Co Advocates, Kampala.** Both counsel filed their respective written submissions as directed by court.

[5] Counsel for the Applicants submitted that the Applicants filed **C.S No. 63 of 2015** in the Chief Magistrate's court of Masindi in 2013. That the Respondents filed an application to amend their W.S.D vide **M.A No.18 of 2015** but the same was dismissed. The Applicants then appealed the ruling in **M.A No. 18 2015** to this court but for unknown reasons, the appeal has never been heard to the detriment of the Applicants since 2015 to date.

[6] Counsel for the Applicants contended that since the filing of the Appeal on 2/10/2015, it is now close to 5 years and the Appellants/Respondents have never taken steps to have the matter heard. That it is instead the Applicants that have continuously followed up the Appeal to have it disposed of because proceedings in the main case in the Chief Magistrate's court have since 2015 been halted pending the outcome of the appeal.

[7] She contended further that the Applicants have been greatly prejudiced by the laxity and delay that has been exhibited by the Respondents and their counsel without a justifiable reason. That the Respondents have

not furnished sufficient evidence to show the reasons why they have never taken any steps to pursue the appeal. That the record of proceedings from the Chief Magistrate's court in **M.A No.18 of 2015** from which this appeal originates was availed to the Respondents on **17th/9/2015** and therefore, the Respondents' averment that they had no record of proceedings to be able to secure hearing notices is false and misleading.

[8] Counsel concluded that the Respondents have not shown sufficient reasons as to why this appeal should not be dismissed.

[10] Counsel for the Respondents on the other hand submitted that in the 3rd Respondent's affidavit in reply, he pleaded that the application is incurably defective and does not comply with the Rules of procedure. On that background, counsel raised preliminary objections on 2 points of law that the application is incompetent and ought to be struck out with costs;

1. The Application is incompetent for failure to comply with the requirements of **O.6 r.2 CPR**. That the application is not accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied upon. That a Notice of Motion is a pleading under **Section 2 of the CPA** and therefore has to comply with provisions of **O.6 r.2 CPR**. He relied on the authority of **UWIZERA NORBERT Vs THEOPHILUS RUGYERO H.C.CIVIL APPLN. No. 12/18 (Kabale).**
2. That the Application is bad in law and incompetent for being served outside the time prescribed by law of effecting service and without the Applicants seeking an extension to serve the application before the time for applying the extension expired. That under **O.5 r. 1(2),** service of the application ought to have been effected on the opposite party within 21 days from the date the motion was issued. The Applicants failed to comply with the

mandatory requirements of **O.5 r.1(2) CPR** and that as a result, the application is incompetent and ought to be struck out.

[11] In reply to the above preliminary objections on the points of law, counsel for the Applicants submitted on the 1st objection of point of law that their application was brought under **Section 33 of the Judicature Act**, **Section 98 CPA** and **O.54 rr. 1, 2 & 3 CPR** and with an affidavit in support and not under **O.6 r.2 CPR** that appears to be in mandatory terms and applicable to plaints and Written statements of defence. That in interlocutory applications like the instant, evidence is fully embedded in the affidavit in support of the application. The legal prerequisites do not call for summary of evidence and to support an application by Notice of Motion. She submitted that the objection is misconceived and should be summarily dismissed with the contempt it attracts. She relied on the authority of **N.SHAH & CO LTD Vs M.K.FINANCES LTD CONSTITUTIONAL APPN No.26 of 2014 (Arising from Constitutional Petition No. 22 of 2014).**

[12] As regards the 2nd objection on the point of law, she argued that the objection of service is only a technicality that is curable under **Article 126 (2) (e) of the Constitution of Uganda, 1995.** That the Respondents received and filed affidavits in reply and that the noncompliance with the rules of service did not in any way prejudice them and they did not plead any prejudice occasioned by such service upon them and their counsel.

Decision of court.

Issue 1: Whether the failure by the applicant to accompany the Notice of Motion application with a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied upon rendered the application fatal.

[13] **O.6 r.2 CPR** provides that

> *"Every pleading shall be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities to be relied on except that an additional list of authorities may be provided later with leave of court.*

[14] I have looked at the Notice of Motion application in the instant case and as conceded by counsel for the applicants, the application is not accompanied by the **brief summary of evidence to be adduced, a list of witnesses** and **a list of authorities to be relied upon**. Counsel for the Respondent's objection was that the application contravenes **O.6 r. 2 CPR** and that therefore it is incompetent and ought to be struck out on that ground.

[15] In **HON.MINISTER OF INTERNAL AFFAIRS Vs KAGWA ANDREW & 5 ORS H.C.CIVIL MISC.APPN.No.660 of 2002**, Justice Engonda-Ntende (as he then was) while accepting that a Notice of Motion is a pleading which is therefore covered by this rule and that the rule or provision appear to be couched in mandatory terms with the only exception made for additional list of authorities observed thus;

> *"The rule however does not state the consequences of non-compliance as the legislature in its wisdom, left the question open…The use of the word shall may or may not be mandatory. In the context of this particular provision, I am not able to read into it that there is only one inevitable consequence of non-compliance with the rule and that is rejection of the offending pleading. Nevertheless, if a court is to exercise its discretion not to reject the pleadings filed in violation of the provision, there must be some sort of explanation or reason put forward by the party in default upon which the discretion may be exercised. The Respondent has provided no explanation for non-compliance with the rule."*

[16] The Judge proceeded to find the objection sufficient to dismiss the application with costs. In **UWIZERA BOBERT Vs THEOPHILUS RUGYERO KABALE H.C.M.A No.012 of 2018,** Hon Justice Moses Kazibwe did not find merit in the argument by counsel that filing a case summary to a notice of motion application to be no longer a legal requirement. The fact that **O.6 r.2 CPR** still existed in the civil procedure rules sufficed to show that it is a legal requirement and he proceeded to dismiss the application with costs to the Respondents.

[17] In **SAMWIRI KIBUUKA Vs ERIYA LUGEYA LUBANGA H.C.M.A No.656 OF 2005 [2005] UG COMM C 56,** Justice Lamech M.Mukasa (RTD) also in agreement that a notice of motion is a pleading and **Section 2 CPA** and that **O.6 r.1(b) CPR** require every pleading to be accompanied by a brief summary of the evidence to be adduced, and a list of witnesses, documents and authorities to be relied upon, cited the observation of Justice Ntagoba P.J in **RICHARD MWIRUVUMBI Vs JADA LTD H.C.C.S. No. 978 of 1996** that the above rule was intended to avoid the situation in which parties ambush their opponents with matters not contemplated. However, that **O.48 CPR (now O.52)** specifically provides for motions and other applications. **Rule 3** of the Order provides;

> *"Every Notice of Motion shall state in several terms the grounds of the application and where any motion is grounded on evidence by affidavit a copy of the affidavit intended to be used shall be served with the Notice of Motion."*

[18] The Judge proceeded and held that;

1. This is a specific provision as to what shall accompany this particular type of proceeding as opposed to the general provision under **O.6r.1 CPR.** It is trite law of statutory interpretation that where there is a specific legislative provision and a general provision on a particular matter or procedure, the specific provision takes precedence over the general provision **(SULE PHARMACY LTD Vs REGISTERED TRUSTEES OF KHOJA SHIA JENALI H.C.M.A No.147 of 1999).**

2. That the Application by Notice of Motion and accompanied by an affidavit, evidence is by an affidavit. Evidence to be relied upon is already availed to the opposite party. Similarly, the witness is the deponent to the affidavit, the documents are normally annexed to the affidavit and in most cases the authority will be the law under which the application is brought. Therefore, an application by Notice of Motion supported by an affidavit is an exception to the general requirement in **O.6 r. 1 (b) CPR**.

[19] I am persuaded by this authority and its reasoning. In the instant application, counsel for the Applicant appear to explain that the reason for her failure to accompany the application with the summary of the evidence to be relied on and the list of witnesses is because evidence she was to rely on was fully embedded in the affidavit in support of the Application. This court is vested with discretion not to reject the Applicant's pleading as it is not the inevitable consequence of non-compliance with the Rules and also appear to be the position in the binding decision of **N.SHAH & CO LTD Vs M.K.FINANCES LTD CONSTITUTIONAL APPN No.26 of 2014 [2016] UGCC2.**

[20] The foregoing objection is therefore in the circumstances rejected and I find the failure by the Applicant to accompany the notice of motion with the summary of evidence to be relied upon and the list of witnesses is not fatal to the application.

Issue 2: Whether the Applicant's failure to serve the Application within the time stipulated by O.6 r. 1(b) CPR rendered the application fatal.

[21] As correctly and rightly observed by Hon.Justice Byabashija K. Andrew in **FREDRICK JAMES JJUNJU & ANOR Vs MADHIUAM GROUP LTD & ANOR H.C.M.A No.688 of 2015(Land Division)**

> *"Applications whether by chamber summons or Notice of Motion, and/or hearing Notices, are by law required to be served following the manner of the procedure adopted for service of Summons under **O.5 r.1(2) CPR***

(See also **AMDAN KHAN Vs STANBIC BANK (U) LTD H.C.M.A No.900 OF 2013 and KANYABWERA Vs TUMWEBAZE [2005] 2 EA 86.**

[22] **O.5 r.1 (2) CPR** 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 fifteen days after the expiration of the twenty-one days showing sufficient reasons for the extension."

[23] In the instant application, the record indicates that the instant application was filed by 23/4/2019 and was sealed and issued by court **7th May, 2019** and this is when the computation of the time for service on counsel for the opposite party began to run. The application was however not served upon the Respondents until **18/06/2019** when counsel for the Respondents received it under protest for the late service as clearly recorded on the copy of the Notice of Motion served upon counsel for the Respondents. In this case, the Respondents were served with the application after more than 1 month from the date of issue of the notice of motion. This service was clearly after the stipulated 21 days required to serve the application as required by **O.5 r.1 (2) CPR**.

[24] Counsel for the Applicant argued while conceding service of the application out of the stipulated time that the objection as to service of this application is only a technicality that is curable under **Article 126(2) (e) of the Constitution of the Republic of Uganda**. In my view however, **Article 126(2) (e)** may not come to her aid. In **MICHAEL MULO MULAGGUSSI Vs PETER KATABALO H.C.MISC.APPLN No. 06 OF 2016,** it was held that provisions of **O.5 r.1 CPR** are couched in mandatory terms which must be observed and cannot be ignored as a technicality; see also **ORIENT BANK LTD Vs AVIS ENTERPRISES H.C.C.A NO.2/2013 and KANYABWERA Vs TUMWEBAZE [2005] E.A 86.**

[25] Under **O.5 r.1(3) CPR**, it is provided that,

> *"Where summons have been issued under this rule, and-*
> *a) service has not been effected within the twenty-one days from the date of issue; and*
> *b) there is no application for extension of time under sub-rule (2) of this rule; or*
> *c) the application for extension of time has been dismissed,*
> *the suit shall be dismissed without notice."*

[26] In the final result therefore, from the foregoing, I find that in the circumstances where the Applicant effected service out of the prescribed time and had not sought extension of time to do so, renders the application fatal and liable for dismissal without notice. The objection is therefore viable. The Application is incompetent and it ought to be dismissed. It is accordingly dismissed with costs to the Respondents.

[27] I however noted that counsel for the Applicant while submitting on the merits of the Application stated that the record of proceedings from the Chief Magistrate's court in **M.A No. 18 of 2015** from which this appeal originates was availed to the Respondents on 17/9/2015. On the other hand, the Respondents' complaint is that they pursued the record from the lower court to enable them and their lawyer prepare the record of appeal to no avail.

[28] I have looked at a copy of the lower court record, it was actually certified on 2/9/2016 and not 17/9/15 as counsel for the Applicant would want this court to believe. 17/9/2015 was the date when the ruling was delivered and not the date when the record was certified. The Respondent intimated in the affidavit in reply that now that the record is available, they are ready to proceed with their appeal. In view of the history of this appeal regarding its over stay in the system, I therefore direct as follows;

1. The Appellants/Respondents to file written submissions in support of the appeal 14 days from the date of the delivery of this ruling and serve them upon the Respondents' counsel.
2. The Respondent is also given 14 days from the date of receipt of the Appellants' submissions to file their respective submissions.
3. The Appellants are given 5 days to file a rejoinder if any. Thereafter, the file shall be set for judgment.

Order accordingly.

Byaruhanga Jesse Rugyema

JUDGE.

06th/09/21.