

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. APPLICATION NO. 161 OF 2020
(ARISING FROM CIVIL SUIT NO. 55 OF 2020)

CHINA RAILWAY NO.3

ENGINEERING GROUP CO. LTDAPPLICANT/DEFENDANT

VERSUS

SEGKEN SERVICES LTD RESPONDENT/PLAINTIFF

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

This is an application brought under Order 36 Rules 2 and 4 of the Civil Procedure Rules, and Section 98 of the Civil Procedure Act Cap 71; seeking Orders that;

1. The Defendant/Applicant has a defence to the whole of the Plaintiff's claim,
2. Costs of the application be provided for.

The grounds of the application are that; triable issues exist requiring the suit to be heard and determined on merit and in that regard, that the Defendant/Applicant acknowledges the fact that a sub-contract for relocation of electricity lines was executed with the Respondent and the Respondent was to be paid on condition that that UNRA paid such sum to the contractor which to date has not happened. Payment of the contractual sums in installments was subject to approval of the works done, by the Consultant Engineer and the said approval has never been done.

In his affidavit in reply, Segawa Sotius raised a preliminary point of law that the applicant has no audience as the application for leave to appear and defend was filed out of time

without first obtaining leave to enlarge time. The application should be dismissed and the prayers in the summary suit be granted.

Both Parties made written submissions on the preliminary point of law.

Counsel for the Respondent submitted that the summons was served on the 27th day of November 2020 and this application was filed on the 9th day of December, which was out of the 10 days stipulated by the law.

Counsel for the Applicant submitted that the Applicant received summons in a summary suit on the 27th day of November, 2020 and this application was filed in court on the 9th day of December 2020. Order 51 of the Civil Procedure Rules provides for exclusion of Sundays in computation of time, and Rule 8 on the exclusion of the first day. The summons was served on 27th November and the days started running on the 28th day of November, excluding the 29th day of November and 6th day of December which were Sundays, the days stopped running on the 9th day of December which is when the Applicant filed this application. Counsel prayed that this court finds no merit in the point of law and dismisses it with costs.

In rejoinder, counsel for the Respondent submitted that Order 51 Rule 2 of the Civil Procedure Rules does not apply to summary suits under Order 36 and relied on the case of *Pinnacle Projects LTD vs Business Motion MA. 362 of 2010*.

Determination of the Application;

The Applicant brought this application under Order 36 rules 2 and 4 of the Civil Procedure Rules SI 71-1. Order 36 Rule 2 provides for suits that may be instituted by summary procedure which include suits where the Plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest.

Order 36 rule 4 provides that an application by a defendant under a summary suit seeking leave to appear and defend should be accompanied by an affidavit.

Before proceeding to considering the preliminary point of law raised by the Respondent, I should note that an application for leave to appear and defend should be brought under Order 36 Rules 3 and 4, and not Rules 2 and 4 as in the instant application.

Order 36 Rule 3 (1) & (2) provides for the application by the defendant to appear and defend that;

(1) “Upon the filing of an endorsed plaint and an affidavit as is provided in rule 2 of this Order, the court shall cause to be served upon the defendant a summons in Form 4 of Appendix A of these Rules, or in such other form as may be prescribed, and the defendant shall not appear and defend the suit except upon applying for and obtaining leave from the court.

(2) In default of the application by the defendant or by any of the defendants (if more than one) within the period fixed by the summons served upon him or her, the plaintiff shall be entitled to a decree for an amount not exceeding the sum claimed in the plaint, together with interest, if any, or for the recovery of the land (with or without mesne profits), as the case may be, and costs against the defendant or such of the defendants as have failed to apply for leave to appear and defend the suit”.

Order 36 Rule 3 of the Civil Procedure Rules requires a defendant in a summary suit to seek leave of court to appear and defend upon receipt of the summons in Form 4 of Appendix A.

The time for filing an application to appear and defend is stated in Form 4 (Summons under summary suit), and it states that, “You are required within ten days from the service of this summons to apply for leave from the court to appear and defend this suit.”

It is the Respondent’s preliminary objection that the instant application intended to seek leave to appear and defend was filed out of time.

In the instant case, the summons was served on the 27th day of November 2020, and this application was filed on the 9th day of December 2020. Counsel relied on **Order 51 Rules 2**

and 8 of the Civil Procedure Rules to argue that the application was filed within the time stipulated under the law as the rules provide for exclusion of Sundays, and the first day of extraction of summons.

Order 51 Rule 2 of the Civil Procedure Rules provides that;

“Where any limited time less than six days from or after any date or event is appointed or allowed for doing any act or taking any proceedings, Sunday, Christmas Day, Good Friday, and any other day appointed as a public holiday shall not be reckoned in the computation of the limited time.”

From the reading of the above provision, it is only applicable where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days. It means that if a party is directed to take a certain step and they are given six days or less to take that step, time will only run during official working days, public holidays and weekends would be excluded in computation of time.

Form 4 (Summons in summary suit) provides for the time of service to be 10 days. Order 51 rule 2 is therefore not applicable to time of service of summons under Order 36.

Order 51 rule 8 provides that; “In any case in which any particular number of days not expressed to be clear days is prescribed under these Rules or by an order or direction of the court, the days shall be reckoned exclusively of the first day and inclusively of the last day.”

Form 4 is very clear as to the number of days within which an application for leave to appear and defend should be filed and it is to be filed within 10 days from the date of service of the summons. Since the provision establishes the timelines clearly within which the application should be filed, Order 51 Rule 8 is therefore not applicable in the circumstances. Counsel for the Applicant’s argument relying on Order 51 Rules 2 and 8 therefore does not stand.

The summons in the instant case was served on the 27th day of November 2020, and this application was filed on the 9th day of December 2020. The application should have been filed in this court within 10 days but not later than the 6th day of December 2020. This application was filed 3 days later than it should have been. It is therefore true that it was filed out of time without any orders of this court extending the time for filing.

Justice Christopher Madrama Izama in the case of *Stop and See (U) Ltd v Tropical Africa Bank Ltd (MISC. APPLICATION NO 333 OF 2010)* stressed that time within which to file and serve court documents is of essence and such provision should be interpreted as mandatory and applied strictly.

The summons in the instant was served on the Defendant on the 27th day of November, 2020, and they were duly served at the Defendant's office legal department. The affidavit in support of the instant application was sworn by the defendant's legal officer. It very clear that the defendant was not only aware that a summary suit had been instituted against it, but it's legal officers were also aware of the same. It is of no surprise that they did not bother to seek leave for extension of time or even attempt to raise sufficient cause as to why the application was never filed in the prescribed time. The application should have been filed within the 10 days prescribed by the law.

Before I take leave of this matter I wish to note that this application is also vague in as far as it does not clearly state the orders sought. As noted earlier, this application should have been brought under Order 36 rules 3 and 4 which provide for the application for leave to appear and defend. The Applicant further prayed for orders that;-

- 1. *The Defendant/Applicant has a defence to the whole of the Plaintiff's claim***
- 2. *Costs of this application be provided for***

The first order prayed for above is simply one of the grounds that should be relied on for the application seeking leave to appear and defend. The application was not brought under the proper law and the orders sought are inconceivable by this Court.

The rationale behind summary procedure was stated in the case Supreme Court decision in *Civil Appeal No. 08 of 2015 Post Bank (U) LTD versus Abdu Ssozi in the judgment of Tumwesigye JSC at page 6 that* “..... Order 36 was enacted to facilitate the expeditious disposal of cases involving debts and contracts of a commercial nature to prevent defendants from presenting frivolous or vexatious defences in order to unreasonably prolong litigation. Apart from assisting the courts in disposing of cases expeditiously, Order 36 also helps the economy by removing unnecessary obstructions in financial or commercial dealings. If the defendant fails to apply for leave to appear and defend within the prescribed time (which is 10 days), the plaintiff is entitled to a decree for an amount claimed in the plaint with interest, if any (Order 36 Rule 3(2))”.

Order 36 is free standing and all the necessary procedures, steps, proceedings under suits instituted according to that order, are all provided therein. Rules as to computation of time according to Order 51 are not applicable to the procedure under Order 36. The provisions therein are meant to fulfill expeditious disposal of suits and if the Defendant does not adhere to the rules prescribed, the law will be invoked accordingly against them.

Consequently, the preliminary point of law raised by the Respondent is upheld, the instant application is therefore time barred and is hereby dismissed with costs to the Respondent.

I so order.

Dated at Masaka this 20th day of April, 2021

Victoria Nakintu Nkwanga Katamba

Judge