THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MASAKA

MISC. APPLICATION NO. 053 OF 2020

(ARISING FROM HCCS NO. 49 OF 2014)

SSENTONGO VINCENT FERRER :: APPLICANT

VERSUS

1. COOPERATIVE BANK (IN LIQUIDATION)
2. MUGABE ROBERT
3. KAKOZA HAMZA
4. MUKIIBI PETER
5. KIWANUKA GWAVU EDWARD
6. BANK OF UGANDA ::: RESPONDENTS

<u>Before; Hon. Justice Victoria Nakintu Nkwanga Katamba</u>

<u>RULING</u>

This is an application brought by Chamber Summons under Article 126 (2) (e) of the Constitution of the Republic of Uganda, Sections 98 and 100 of the Civil Procedure Act, Orders 6 Rule 19, 23 & 31 and Order 1 Rules 10(1) (2) and Rule 13 of the Civil Procedure Rules, seeking orders that;

1. The sixth Respondent be added as a party (Defendant) to Civil Suit No. 49 of 2014;
2. This Court be pleased to grant the Applicant/Plaintiff leave to amend his Plaint in Civil Suit No. 49 of 2014;
3. Provision be made for costs of the application.

The grounds of the application as contained in the Applicant`s affidavit in support of the application are briefly that;

1. The Applicant instituted a suit against the Respondents in which he seeks a declaration that the sale of his land comprised in Buddu Block 365 Plot 106 at Kakunyu was illegal, irregular, unlawful and void;
2. That the sixth Respondent was the Liquidator of the first respondent and thus wrongfully sold the Applicant`s land;
3. That the sixth Respondent acted negligently in selling the Applicant`s land;
4. That the intended amendment is necessary to enable the Applicant plead new facts to include relief against the sixth Respondent and to enable the court determine the real questions in controversy as amongst the parties in finality;
5. That the intended amendments do not change the cause of action neither do they depart from the Plaintiff`s original claim;

The 6th Respondent filed an affidavit in reply through its Counsel who averred that the application is fundamentally incompetent and materially defective as it was served out of time and as such should be struck out with costs. The application is barred in law under section 124 of the financial institutions Act 2004 which bars suits against the Central Bank for anything which is done in good faith under the Act. The first Respondent is already party to the suit and it is not necessary to add the Central Bank which was not privy to the dealings between the Applicant and the 1st Respondent. The application should be dismissed with cots as it amounts to an abuse of the court process.

Both parties made oral submissions in court.

Counsel for the Respondents raised preliminary objection to the effect that the application is fundamentally defective as it offends Order5 Rule 1(2) of the CPR having been served out of time for service of summons. He cited the case of Michael Mulo vs Peter Katabalo Misc. Appeal No. 6 of 2016 where the court observed that the provisions

of Order 5 Rule 1 are mandatory. Counsel raised another preliminary objection that this application is barred in law under Section 124 of the Financial Institutions Act 2004 as amended which bars suits against the Central Bank or any of its officers for anything done or intended to be done in good faith under the Act.

In response to the 1st preliminary objection, Counsel for the Applicant argued that the application could not be issued for service because it had been forwarded to the judge for a date after it had been endorsed by the Deputy Registrar on the 18th day of August 2020. The date was fixed on the 21st September 2020 and issued for service on the 23rd September and 5th October on the Respondents within the time for service stipulated under the law. He prayed that the delay should be treated as an administrative glitch and a mistake occasioned by court which should not be visited on the Applicant.

Regarding the 2nd preliminary objection, Counsel submitted that Section 124 of the Financial Institutions Act only bars proceedings against the central bank for acts done in good faith and averred that the Applicant intends to adduce evidence of fraud and negligence showing that the central bank did not act in good faith. He further responded to the submission that the central bank was not privy to the matters between the 1st Respondent and the Applicant that, the central bank is being sued in the capacity of liquidator of the 1st Respondent as it had taken over the running of the bank in as far as recovery and payments of debts was concerned. He prayed for the preliminary objections to be overruled.

In rejoinder, Counsel for the Respondents reiterated his arguments that the summons were served out of time and that Counsel for the Applicants wants to adduce evidence on the bar as to when the summons were issued for service.

Determination of the Preliminary Objections

Service of summons;

The law on service of summons is contained in the provisions of **Order 5 Rule 1(2)** that, "***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 of the twenty-one days showing sufficient reasons for the extension."*** This provision applies *mutatis mutandis* to service of summons, hearing notices as well as applications such as this instant application.

In the instant case and from the pleadings, the summons were filed in this court on the 17th day of August 2020 and issued on the 18th day of August 2020. Counsel for the 6th Respondent submitted that the summons was served on the 6th Respondent on the 5th day of October 2020 which was out of the prescribed time of service within twenty-one days. To this, Counsel for the Applicants conceded and further submitted that the summons was issued for service on the 21st day of September 2020 due an administrative delay in the court.

The term issue as used in Order 5 Rule 1(2) means and refers to the date when the summons is endorsed by the Deputy Registrar or officer of court mandated with the obligation. It does not mean when the summons is handed over for service to the necessary party physically but the date endorsed on the summons. The summons before this court were clearly issued by the Deputy Registrar on the 18th day of August 2020 which is the date endorsed on the summons along with the Deputy Registrar`s signature and seal of this court.

The Applicant however did not serve the summons on the 6th Respondent until the 5th day of October 2020 when the time for service of twenty-one days as stipulated in Order 5 Rule 1(2) had already expired. Counsel submitted that the delay was caused by Court as the file had been forwarded to the Judge to fix a hearing date.

The law under Order 5 Rule 1(2) establishes the option/remedy of applying for extension of time when the twenty-one days have already elapsed. The Applicant had this option and chose not to exercise the same and this cannot be cured by Counsel attempting to adduce evidence from the bar disguised as submissions.

The effect of non-compliance with Order 5 Rule 1(2) is provided for in Order 5 Rule 1 (3) as follows;

"*Where summons have been issued under this rule, and –*

> ***(a) service has not been affected within twenty-one days from the date of issue; and***
>
> ***(b) there is no application for an 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."***

Counsel for the Respondents prayed for the application to be dismissed for being incompetent having been served out of time.

The general principle of law is 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 deed this court is a court of justice and depending on the circumstances of a case, the court may rightfully exercise its discretion to do justice without undue regard to technicalities and irregularities in following court procedure. ***(Article 126 (2) (e) of The Constitution, 1995, enjoins courts to administer substantive justice without undue regard to technicalities.)***

In Byaruhanga and Company Advocates v. Uganda Development Bank, S.C.C.A No. 2 of 2007*, (unreported)* the Supreme Court decided that*;*

"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."

In the instant application, Counsel for the Applicant submitted that although the summons was signed and dated the 18th day of August, 2020 by the Deputy Registrar, it was thereafter forwarded to the Judge for the hearing date to be fixed which date was fixed on the 21st day of September 2020. Service of the summons was then served on the Respondents on the 23rd day of September 2020 and the 5th day of October 2020 which time was within the twenty-one days stipulated in the law for service of summons.

I am inclined to believe Counsel for the Applicant`s submissions as I understand the administration of this court and also being well aware with the facts at hand. In that regard, I will not punish the Applicant for the delays occasioned by this court.

In the interest of justice and exercise of this court`s discretion, Counsel for the 6th Respondent`s first preliminary objection that the application is competent having been served out of time, is over ruled since the delay was occasioned by the administration of this court.

Whether the application is barred in law?

Counsel for the 6th Respondent submitted that the application is barred in law under Section 124 of the Financial Institutions Act 2004 as amended which Section bars suits or proceedings against the Central Bank or any of its officers, employees for anything done or intended to be done in good faith. Counsel further bases his argument on his

submission that the 6th Respondent was not privy to the matters between the Applicant and the 1st Respondent but was simply a regulator.

Counsel for the Applicant responded and submitted that bar on proceedings against the Central Banks is premised on acts done in good faith and yet the proposed amendment details incidents of fraud and negligence by the 6th Respondent. Further, that the 6th Respondent is not being sued as a statutory regulatory body but in its capacity as the 1st Respondent`s liquidator.

The law;

Section 124 of the Financial Institutions Act 2004 as amended provides that; "***No suit or other legal proceedings shall lie against the Central Bank or any officer, employee or agent of the Central Bank for anything which is done or is intended to be done in good faith under this Act***."

It would appear clear from the above provision that the Central Bank or any officers acting under its authority are protected by the law against suits or other proceedings for acts done or intended to be done in good faith. The bone of this protection is `acts done or intended to be done in good faith`.

In the instant application, the Applicant seeks to amend his plaint. The proposed amendment is attached to this application in which he avers and pleads particulars of fraud by the 6th Respondent acting in its capacity as the 1st Respondent`s Liquidator. Although this is not conclusive that the 6th Respondent acted in bad faith, the allegations as proposed in the amendment would require the 6th Respondent to adduce evidence that the alleged acts were performed in good faith. To go into further determination of these allegations would be preempting the main suit.

However, I find that the protection granted by the Central Bank for acts done in good faith under Section 124 of the financial institutions act 2004 as amended would require

the Central Bank to adduce sufficient evidence that indeed the acts in question were done in good faith when this protection is being threatened or challenged.

It is not presumed that all acts done by the Central Bank are done I good faith or intended to be done in good faith especially when such actions are put in question. The Central Bank should be ready to adduce sufficient to guarantee this protection by proving that indeed the acts in question were done in good faith and in the instant case, this can only be determined in the main suit.

Further, Counsel for the Respondents argues that the 6th Respondent was not privy to the matters between the 1st Respondent and the Applicant but was simply acting in its statutory duty as a Regulator. In response, Counsel for the Applicant submitted that the 6th Respondent is being sued in its capacity as liquidator of the 1st Respondent as at the time the cause of action arose.

Section 99 (3) of the Financial Institutions Act 2004 as amended gives the Central Bank power to be a liquidator on determination that a financial institution should be liquidated or to appoint any other person as liquidator. In the instant application, the Central Bank (6th Respondent), was liquidator for the 1st Respondent.

Under **Section 100 (1) a),** the liquidator may bring or defend any action or other legal proceedings in the name and on behalf of the financial institution. This means that the liquidator for any financial under liquidation including the Central Bank may sue or be sued in its capacity as liquidator on behalf of the financial institution under liquidation.

In ***Kanyeihamba & 320 Ors v Nzeyi & 2 Ors (HCT - 00 - CC - CS - 361 - 2010) [2013] UGCOMMC 78 (2 May 2013),*** court found the need to add Bank of Uganda as party to the suit as a nominal defendant, by virtue of its capacity as liquidator.

I therefore find that Counsel for the Applicant`s submission on the capacity for which the 6th Respondent is being sued stands as against Counsel for the Applicants argument

that the 6th Respondent was not party to the matters between the 1st Respondent and the Applicant.

For that reason, this application is not barred in law despite the 1st Respondent being a party to the main suit. The 2nd Preliminary objection therefore has no merit and it is hereby dismissed.

I so order.

Dated at Masaka this 29th day of January, 2021

Victoria Nakintu Nkwanga Katamba

Judge