



- c. Parties appeared for mediation on 24<sup>th</sup> August, 2020 and the same did not take off because the Respondents had not filed a defense and medication summary;

In his affidavit in reply, Ibrahi Musana, the 1<sup>st</sup> Respondent's Head of Recovery stated that the Written Statement of Defense was filed within time and omission of the date was a simple error which should not be visited on the litigants.

Both Parties filed written submissions.

Counsel for the Applicant submitted that the Respondent has not provided any justifiable ground under the law for not striking out his Written Statement of Defence and counterclaim that was filed out of time. Counsel relied on Order 8 Rules 1, 2 & 19 of the Civil Procedure Rules to file a defense and argued that the defense filed out of time is no defense, further that the litigant was not diligent and as such cannot rely on mistake of counsel.

Counsel further argued that the summons to file a defense to the counterclaim was endorsed on 8<sup>th</sup> October 2020 which could not have been possible if the defense was filed on 10<sup>th</sup> December, 2019.

In response, Counsel for the Respondents submitted and prayed for court to exercise its discretion under Section 98 of the Civil Procedure Act to enlarge time and validate the Respondents' Written Statement of Defence and counter-claim. Counsel argued that it is in public interest and important to avoid multiplicity of proceedings that the Respondents' Written Statement of Defence and counter-claim be maintained.

Counsel further submitted that the litigants should not be punished for mistake of counsel and that as counsel, they are willing to bear costs of the application to the tune of Uganda Shillings 700,000/= being time counsel's time spent at court and transportation.

**Consideration of the application;**

The application is for striking out the Respondent's defense and counterclaim filed out of time without leave.

Time for filing a Written Statement of Defence is provided for under Order 8 Rule 1(2) of the Civil Procedure Rules that a defence should be filed within 15 days following service of the summons.

In the instant case, summons to file a defense in Civil Suit No. 75 of 2019 were issued on the 7<sup>th</sup> day of November, 2019 and service was effected on the Respondents on 13<sup>th</sup> November, 2019.

The Respondents did not file a defence until the 10<sup>th</sup> day of December, 2019 which was 9 days past the stipulated time of 15 days.

The Respondent's Head of Recovery in his affidavit in reply averred that the defence was filed within time which is untrue. Counsel for the Respondent acknowledged that the Written Statement of Defence was indeed filed out of time and then prayed for court to enlarge time and validate the defence.

From the foregoing, Counsel is acknowledging that there was an illegality and praying to court to condone such illegality. Counsel justified his prayer that the validation and enlargement of time is intended to avoid a multiplicity of proceedings.

This court has discretion indeed under *Section 98 of the Civil Procedure Rules* to administer justice, however such discretion has to be exercised in consideration of the case in its entirety.

The Applicant alluded to not just an illegality of filing the defense out of time without leave but also the allegation that the Written Statement of Defense was falsely dated by the Respondent to reflect that it had been filed on 10<sup>th</sup> December 2019 does not seem to be the case.

Although there is no evidence to prove that Counsel engaged in such unprofessional conduct, I have perused the record and established that the 2<sup>nd</sup> Defendant filed a written statement of defense on the 10<sup>th</sup> day of December, which was endorsed by Court Deputy Registrar on the 17<sup>th</sup> day of December, 2019.

The Respondents Written Statement of Defense which was purportedly filed on the 10<sup>th</sup> day of December 2019, was served in company of summons to file a counter-defence which was endorsed on the 8<sup>th</sup> day of October, 2020. It is very unlikely that both pleadings filed on the same date could be endorsed eight months apart.

I note that the Respondent has not adduced any sufficient cause or ground as to why the Written Statement of Defense was filed out of time and yet seeks to have the time enlarged and defense validated. In the case of *Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003* court held that;

*“ it is trite law that time can only be extended if sufficient cause is shown. The sufficient cause must relate to the inability or failure to take necessary step within the prescribed time. It does not relate to taking a wrong decision. If the applicant is found to be guilty of dilatory conduct, the time will not be extended”.*

The Respondent and her Counsel could have applied and sought leave to file a defense out of time, but rather chose to override the rules of procedure and file a pleading illegally. Such conduct shall not be condoned by this court.

The Respondent further seeks to rely on the principle of mistake of counsel to claim that the negligence to file the defense was counsel’s fault and should not be borne by the Respondent.

In the case of *Sabiiti Kachope and 3 others v Margaret Kamuje, Supreme 5 Court Civil Application, No. 31 of 1997*, Oder JSC, (as he then was), it was held that:

*‘For applications of extension of time such as the present one, a mistake or Negligence of the applicant’s Counsel maybe accepted as a proper ground for granting relief such as the*

*leave to file out of time. The discretion of Court is not fettered as long as sufficient reason has been disclosed to justify court's exercise of its discretion in favor of the Applicant. In the present application, the inordinate delay was caused by the Applicant's previous Counsel. Therefore, the Applicants have shown sufficient reason to justify the Court's discretion in their favor.'*

The Respondent's affidavit in reply clearly reveals that the Respondent was not aware that the Written Statement of defense was filed out of time until receipt of the instant application. This shows a laxity on her part and therefore, the Respondent is not a diligent litigant who can rely on mistake of counsel for failure to take certain steps in time.

In the result, this application is hereby allowed and the Respondent's Written Statement of Defence and counter-claim in Civil Suit No. 075 of 2019 is hereby struck out/off the record with costs.

I so order.

Dated at Masaka this 17th day of January, 2022

**Signed;**



**Victoria Nakintu Nkwanga Katamba**

**Judge**