**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT MASINDI**

**MISC.APPLICATION NO. 069 OF 2021**

(Arising From Civil Suit No. 046 of 2015)

**BYENKYA FRANCIS :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**1. LEMI CHRISTOPHER**

**2. KENTI ROBERT**

**3. SHIMBONDA JOEL PEPE**

**4. AMUZA NAKALANGA**

**5. ROBERT TINKA :::::::::::::::::::::::::::::::::::::::::::::::::::::::::::: RESPONDENTS**

***Before: Hon. Justice Byaruhanga Jesse Rugyema***

**RULING**

[1] The Applicant brought this application pursuant to **S.98 CPA, O.6 rr.8, 10, 28, 29 & 30, O.8 r.3, O.9 rr.8, 10 & 11(2)** and **O.52 rr.1 & 2 CPA** seeking for orders that the Respondents Written Statement of Defence filed by the Respondents on the 14th day of October, 2015 in **C.S No.046 of 2015** be struck out for being filed outside the time lines provided by law without leave of this Honourable court and that the W.S.D offends **O.6 rr.8, 10, 28, 29 & 30** and **O.8 r.3 CPR.**

## Counsel legal representation

[2] The Applicant is represented by **Counsel Steven Lwasa** of **IBC Advocates, Kampala** while the Respondents are represented by **Counsel Simon Kasangaki** of **Kasangaki & Co. Advocates, Masindi.** Counsel for the Applicants orally raised a preliminary objection regarding the legality of the affidavit in reply by **Robert Tinka,** the 6th Respondent and filed written submissions in respect of the application. Counsel for the Respondents on his part also filed written submissions

in response to the preliminary objection and in opposition to the application.

## Consideration of the Application and Preliminary Objection

[3] Counsel for the Applicant submitted that the Respondents' W.S.D dated and filed in court on 14/10/15 was filed outside the timelines provided by law, that **O.8 r.1(1)(2) CPR** provides for a defence to be filed within 15 days after service of summons. It was his further submission while relying on the authorities of **Stop and See Ltd Vs Tropical Bank Ltd H.C.M.A. No.333 of 2010** and **Patrick Senyondwa Vs Lucy Nakito H.C.M.A No.1103 of 2018** that a reply or defence to an application has to be filed within 15 days. That failure to file within the 15 days would put the defence or affidavit in reply out of time prescribed by the rules. Once a party is out of time, he or she needs to seek leave of court to file the defence or affidavit in reply outside the prescribed time. (Refer to **O.12 r.3 CPR**).

[4] As regards the legality of the W.S.D, counsel submitted that **O.6 r.8 CPR** provides that the denial need to be specific and not evasive; **O.6 r.10 CPR.** While relying on the authority of **Nakaziba Vs A.G, H.C.M.C No. 295/2018** and **Nabwami Vs A.G, H.C.C.S. No.117/2015,** Counsel submitted that when a party in any pleadings denies an allegation of fact, the opposite party, he or she must not do it evasively but answer the point of substance. It is not a defence once it discloses no answer to the allegations made against it.

[5] Counsel contended that in the instant application, the affidavit in reply is vague, evasive and too general without specifically responding to the specific averments in the affidavit in support of the application.
In light of the above, counsel prayed that the W.S.D filed out of time and the affidavit in reply to the present application do not meet the legal requirements of the law and both should be struck out with costs.

[6] On the other hand, counsel for the Respondents submitted that in the first instance, there was no service of court process in **C.S No.046 of 2015** filed by the Applicant against the Respondents for them to file a defence. That the Respondents only discovered the existence of the head suit from court on 13/10/2015 after receiving from the Applicant

a notice to evict them from the suit land on the grounds that he had filed a suit. That as a result, the Respondents promptly filed their W.S.D on 14/10/2015. While relying on the authority of **Goodman Agencies Ltd and Anor Vs Highland Agricultural Export Ltd, H.C.M.A No.364 of 2013,** counsel for the Respondents argued that the joint W.S.D filed on the 14/5/2015 was not outside the timelines set by court or the law. There is no effective service of the summons return on court file. The plaintiff cannot claim that the Respondents did not reply in time to summons to file a defence which were not effectively served on them in the first place. That a judgment based on an ineffectual service will be set aside by court; **O.5 r.16 CPR** and **Kibuuka Nelson & Anor Vs Yusuf Zziwa H.C.M.A No. 225 of 2008 [2008] UGHC 171.**

[7] As regards whether the joint W.S.D offended **O.6 rr.8,10,28,29 & 30 and O.8 r.3 CPR** counsel for the Respondents submitted and argued that the defence filed in court is a reasonable defence which sufficiently answers the plaintiff's claim and was specific traverse to the plaint hence it is an adequate defence for intents and purposes. That it was neither vague, evasive, nor general for it pleaded that the suit land is for **Bashir Ali** on whose account the Respondent occupied the suit land.

## Background and facts of the application

[8] On 1/9/2015, the plaintiff/Applicant **Byenkya Francis** filed **C.S No.046 of 2015** against the defendants/Respondents for inter alia, a declaration that the suit land constitutes the estate of the late **Laziro Kampimpini,** mother to the plaintiff/Applicant who passed on in 1974, a declaration that the defendants are trespassers and an eviction order against the defendants from the suit property situate at **Kimengo-Myebya village, Masindi District.**

[9] On 14/10/2015, the defendants/Respondents filed a joint Defendants' Written Statement of Defence denying the plaintiff/Applicant's allegations and contended that with the exception of the 1st defendant/Respondent who is a relative to a one **Mr. Bashir** are tenants in possession and use of the suit land on account of **Mr. Bashir Ally** whom the plaintiff/Applicant knows and sued in the **Office of CAO Masindi**, in the **Chief Magistrate's court of Masindi** in **C.S No.005 of 2002,** in the **Office of the Presidential Land Task Force** and copies of the dismissals of the same were accordingly attached.

[10] The defendants/ Respondents contended that the plaintiff/Applicant's claim is frivolous, vexatious knowingly brought against wrong parties and should therefore be dismissed with costs.

[11] The suit proceeded on the preliminaries with the participation of the parties and their respective counsel i.e, mediation and scheduling until on 27/7/2021 when the plaintiff/Applicant filed the present application seeking for orders that the defendants/Respondents' WSD filed on the 14th day of October, 2015 in **C.S No.46 of 2015** was filed out of time and that it offended **O.6 rr.8, 10, 28, 29 & 30 and O.8 r.3 CPR.**

[12] Counsel for the defendants/Respondents conceded that the W.S.D was filed outside the 15 days prescribed by **O.8 r.1 (1) & (2) CPR** but attributed it to none service of the summons to file a defence. That the defendants/Respondents only learnt about it when the plaintiff/Applicant attempted to evict them basing on the fact that he had filed a suit.

[13] The issues for determination therefore are;

1. Whether there was effective service of the summons to file a defence upon the defendants/Respondents.
2. Whether the W.S.D was filed outside the timelines provided by law without leave of this honourable court.
3. Whether the W.S.D filed by the defendants/Respondents offend O.6 r.8, 10, 30 and O.8 r.3 CPR.

## 1st issue; Whether there was effective service of the summons to file a defence upon the defendants/Respondents.

[14] I have carefully considered the submissions of the parties and the authorities referred to me. Proof of service of summons is by affidavit of service as per **O.5 r.16 CPR** which provides thus;

> *"The serving officer shall in all cases in which the summons has been served under r.14 of this Order, make or annex or cause to be annexed to the original summons, an affidavit of service stating the time when and manner in which the summons was served and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of*

*summons."*

The filing of an affidavit of service as proof of service is a mandatory requirement under the provisions of **O.5 r.16 CPR** and is designed to ensure that there was actual service and that it was carried out properly; **Goodman Agencies Ltd Vs Highland Agricultural Export Ltd (supra).** It would be dangerous for courts to accept the fact that there was service of summons when summons were not signed by the defendant (See Allen J in **Osuna Otwani Vs Bukenya Salongo [1976] HCB 62).**

[15] In this case, the suit was filed on **1/9/2015** and as per the affidavit of service on record dated **10/11/2015** and filed on **11/11/2015,** service was purportedly effected on the defendants/Respondents on the **22/9/2015**. The Respondents nevertheless filed their joint WSD on the **14/10/15**.

[16] The affidavit of service on record filed by **Adam Nyikiriza,** the process server, is to this effect;

*"3. That on the 22nd day of September 2015, I proceeded to Myebe village in Kimengo Sub County the fixed place of abode of the five defendants.*

*4. That by the help of the chairman, I reached the home of the first Defendant.*

*5. That I introduced myself and the purpose of my visit to the first Defendant.*

*6. That the first Defendant called the 2nd Defendant who came and I accordingly served them with the summons.*

*7. That both Defendants 1 and 2 received the summons but declined to sign on my copy."*

The process server as per the above excerpt, it is clear that he did not disclose the names of the chairman who he claims identified and witnessed the delivery or tender of the summons to the defendants/Respondents at the material time as required by **O.5 r.16 CPR.**

[17] Again the affidavit of service is silent about the service of the other defendants/Respondents i.e, the 3rd-5th defendants/Respondents. This is contrary to the requirements of **O.5 R.9 & 10 CPR** which require, where there are more defendants than one, service of the summons has to be made on each defendant in person unless he or she has an agent

empowered to accept service. In this case, there is no evidence that the 1st and 2nd defendants were agents of the 3rd-5th defendants.

[18] In **M.B Automobile Vs Kampala Bus Service [1966] E.A 480**, it was held that the disclosure of the name of the person who identified and witnessed delivery or tender of summons to the defendant at the material time was a statutory requirement. Failure to disclose the name of the identifying person rendered the affidavit of service defective for non-compliance with the provisions of **O.5 r.17 (now 16) CPR.** It was therefore wrong for the Registrar to have acted on such an affidavit of service, See also **Handiro Engineering Service & 2 Ors Vs Bwambale Salveri H.C.C.A No.8 of 2016 [2017] UGHCCD 21.**

[19] In the instant case, I find and hold that the failure to record the name of the person i.e the area chairman identifying the person to be served, the time of service and personal service of all the defendants/Respondents rendered the affidavit of service on record incurably defective, see also **Dr. B.B Byarugaba Vs Alison Kantarama Emeribe H.C.M.A No.229/2019.**

[20] However, despite the ineffective service of summons, the defendants/Respondents in this suit did not opt to challenge the service but opted to file a WSD. It is the contention of the Applicant's counsel in his submissions in rejoinder that by the fact that the defendants/Respondents filed their joint W.S.D on the 14/10/2015, the purpose of the summons was achieved and was effective upon them and thus they cannot be seen to deny service of court summons upon them after close to 7 years and wait until when the Applicant has filed the present application.

[21] However, in **Hwan sung Fish Factory & Anor Vs Christopher Semugenyi M.A No.688 of 2010 (C.A)** court observed thus;

> *"The affidavit of service was filed four months later, what is court To make of that? A defence (WSD) has been filed, but counsel for the Applicant states that O.9 r.2 states that a defence does not act as a waiver. Counsel for the Respondent states that prejudice has been occasioned in this case. The record shows that after all this occurred, court annexed mediation took place... It was when mediation failed that the file was sent to trial and hence the question of service is resurrected. I have considered all this and*

*it appears that the trial process has started in that court...*
*It would be in my view too late and too technical to raise issues of service at this stage. Court is under section 98 of the Civil Procedure Act (CPA) and section 33 of the Judicature Act expected to resolve disputes in such a way as to prevent an abuse of court process...*
*Both parties did not follow the rules and process and both parties have started the court process. It is in my view unjust and too late to revive it."*

[22] In this case, counsel for the Applicants queries the defendants/Respondents for denying service of court summons upon them after close to 7 years since 2015. However, equally this court wonders why and what the Applicant has all long been waiting for since 2015, he never objected to the filing of the defence until **27/7/21** when he filed the present application. I believe both parties sat on their available options for the greater reason that the dispute be investigated by the court on its merits.

[23] The filing of a defence by the defendants/Respondents would not be treated as a waiver by them to challenge any irregularity of the summons or service of the summons. It follows therefore that all having occurred, on the issue of late filing of the W.S.D by the defendants/Respondents, I am inclined to believe the defendants/Respondents reason advanced for the late filing of the WSD; they had not been served, they learnt about the existence of the suit from elsewhere.

[24] For purposes of ensuring that justice is done and all issues resolved, since both parties have started the court process, i.e, conclusion of mediation and now, the process of scheduled conferencing, I find no prejudice caused to either party by their respective failure to follow the rules. It is prudent the trial of the suit commences for determination of the controversies at hand.

[25] The foregoing in my view disposes of both the 1st and 2nd issue.

**3rd Issue: Whether the WSD filed by the defendants/Respondents offend O.6 r.8, 10, 30 and O.8 r.3 CPR.**

[26] I have perused both the plaint and the W.S.D. Whereas the plaintiff/Applicant in the plaint is seeking for inter alia; declarations and orders that the suit land constitutes the estate of the **Lozira Kampimpini,** the mother of the plaintiff, that the defendants/Respondents are trespassers thereon and an eviction order against the defendants/Respondents from the suit property, the defendants/Respondents on the other hand denied the plaintiff/Applicant's allegations. They averred that with the exception of the 1st defendant who is a relative to a one **Bashir Ally,** they are tenants in possession and use of the suit land on account of **Mr. Bashir Ally.** That therefore the suit is frivolous, vexatious being brought against wrong parties.

[27] Upon perusal of the application however, I find that the Applicant included **Bashir Ally** as a party yet the plaint on record missed him out. In such a situation, it is my view that the plaintiff/Applicant ought to have considered to apply to amend and add the said **Bashir Ally** as a defendant to the plaint if he wished to have him as a party **(O.1r.3 CPR)** subject to the law of limitation. Since on record there is an order vide **Masindi Land Tribunal Claim No.05/02** under which **Byenkya Francis** the present plaintiff/Applicant sued **Bashir Ally** and the claim was dismissed on 17/2/2005, the plaintiff/Applicant, though entitled to maintain the present defendants/Respondents, he would not without any formal application, merely include **Bashir Ally** in this application as a party, the suit against him would be subject to the law of limitation.

[28] On the other hand, **Bashir Ally** himself, if interested in safe guarding his interest in the suit land could apply to be added as a defendant and the defendants themselves could as well apply to have him added as a defendant **(O.1r.10(2) CPR)** for purposes of having all the controversies in the matter resolved. However, the failure by either parties to include the said **Bashir** as a party to the suit does not render either the suit or the W.S.D defective.

[29] As to whether the W.S.D is evasive, **O.6 r.8 CPR** provide thus;

> *"It shall not be sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the*

*statement of claim…but each party must deal specifically with each allegation of fact which he or she does not admit the truth, except damages."*

**O.6 r.10 CPR** provides thus;

*"When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he or she must not do so evasively, but answer the point of substance."*

**O.8 r. 3 CPR** provides that;

*"Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be admitted in the pleading of the opposite party, shall be taken to be admitted…"*

[30] In the instant case, the W.S.D specifically admitted the particulars of the defendants **(paragraph 20 of the plaint)** and the jurisdiction of the cause of action **(paragraph 11 of the plaint).** Then, specifically denied the plaintiff's claim **(paragraph 3 of the plaint),** facts consisting the cause of action **(paragraph 4 of the plaint)** and that the suit land formed part of the plaintiff's home **(paragraph 8 of the plaint).** Then in **paragraph 3(a) of the WSD**, the defendants answered the points of substance of claim by stating that the suit land belongs to **Bashir Ally** and that except the 1st defendant, they occupied the suit land as his tenants.

[31] I do agree with counsel for the defendants that the WSD sufficiently answered the plaintiff's claim and was specific in traversing the plaint. The WSD is therefore nether vague, evasive nor general.

[32] As regards the legality of the affidavit in reply by the 6th Respondent on his behalf and on behalf of the rest of the Respondents, I am again in agreement with counsel for the defendants/Respondents that it specifically answered the material particulars of both the Applicant's affidavit in support and the application. It specifically responded to the applicant's application as being frivolous, vexatious and an abuse of court process because the affidavit of service of the summons of the suit upon which the Application is anchored was defective. The deponent contended that it is not true that the deponent and the co-respondents were served with summons to file a defence, according to them, they only discovered the existence of the head suit from court on **13/10/2015** after receiving threats of eviction by the Applicant from the suit land based on mere fact that the Applicant had filed a suit.

Then lastly, the affidavit in reply denied the W.S.D as offending **O.6 r. 8, 10, 28, 29 & 30** and **O.8 r.3 CPR.** That the W.S.D is neither vague, evasive nor general. So, it is not correct for counsel for the Applicant to claim that the affidavit in reply is too generalized and evasive. It specifically denied the depositions of the applicant and answered them in substance.

[33] In respect to the Respondents' claim that the instant application is defective for having been filed against **Lemi Christopher,** an alleged dead person and that the Respondents **"Kenyi Robert"** and **"Robert Tinka"** are one person, in the first instance, I find no proof adduced by the Respondents that the Respondent **Lemi Christopher** is dead. The fact however remains that by the time the filing of the pleadings in the main suit were concluded, **Lemi Christopher** was alive because he endorsed the joint W.S.D as the 1st defendant. For **"Kenyi Robert"** being the same or one person with "**Robert Tinka**"; that is a matter that can be sorted out during the identification of the parties at the trial of the suit.

[34] The rest of the matters or issues which counsel for the Applicant expected to be included in the pleadings such as; proof of ownership of the suit land and in what capacity the defendants/Respondents came to be in possession /occupation of the suit land are matters for trial on the merits of the suit.

[35] All in all, I find that the application and the preliminary objections lack merit and are overruled. The application is dismissed with costs.
The suit is to proceed on its merit.

Order accordingly.

Signed, Dated and Delivered at Masindi this **9th** day of **September, 2022**.

**Byaruhanga Jesse Rugyema**
**JUDGE.**