

THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA AT FORT PORTAL  
CIVIL SUIT NO. 0060 OF 2021

GAMA DISTILLERS LTD ..... PLAINTIFF

VERSUS

BIKANZA EZRA ..... RESPONDENT

BEFORE HON. JUSTICE VINCENT WAGONA

RULING

**Introduction:**

This ruling follows an oral application made by Counsel Wohinda Enock for the respondent under Order 11A Rule 2 and 6 of the Civil Procedure (Amendment) Rules 2019 asking court to dismiss Civil Suit No. 60 of 2021 on ground that it abated under the said order.

**Background:**

The plaintiff filed Civil Suit No. 0066 of 2021 seeking to recover a sum of UGX 115,439,700/= arising from a contract of supply of liquor bottles and sachets, special damages, interest thereon, general damages and costs of the suit. The summons to file a defence were issued by the Registrar of this court on the 14<sup>th</sup> day of September 2021 and served upon the defendant. On the 22<sup>nd</sup> day of September 2021, the defendant filed his defense though there appears to be no evidence on record as to whether it was served. On the 9<sup>th</sup> day of December 2021, summons for directions were signed by the Registrar where the matter was scheduled for directions on the 13<sup>th</sup> day of December 2021 before the Registrar.

On the 13<sup>th</sup> day of December 2021, when the matter came up before the Registrar for directions, none of the parties appeared or their lawyers and the Registrar forwarded the file to the presiding judge because the parties were absent. Subsequently hearing notices were extracted for the 22<sup>nd</sup> day of June 2022 and they were endorsed on 17<sup>th</sup> May 2022 but the same were not served because all the copies are still on court record. Fresh notices were further taken out on the 29<sup>th</sup> day of August 2022 where the matter was scheduled for mention on the 31<sup>st</sup> of August 2022 with a view of making progress in the case. When the matter came up on the said date, counsel for the defendant raised the said point of law.

**Representation:**

**Mr. Enock Wohinda** of M/s LOI Advocates appeared for the plaintiff and **Mr. Obam Andrew** of M/s Ahabwe James & Co. Advocates appeared for the Defendant.

When the suit came up for mention with a view of progressing the case before the court on the 31<sup>st</sup> day of August 2021, Counsel for the defendant raised a preliminary point of law contending that the suit at hand had abated under Order 11A Rules 2 and 6 of the Civil Procedure Rules as Amended and asked court to dismiss the same with costs. Counsel submitted that under the said order, upon filing a suit, the plaintiff must take out summons for directions within 28 days from the date of the last reply or rejoinder. He contended that the defendant's written statement of defense was filed on the 28<sup>th</sup> day of September 2021 and there was no reply filed by the plaintiff. That summons for directions were not taken out thus the case abated. That court had no powers to proceed on a suit which had abated and to support his assertion, he cited the case of **Ddamulira Vs. MSS XSABO Power Ltd, Misc. Appn No. 46 of 2021** where court upheld the position that the case had



abated after lapse of 28 days before summons for directions were taken out and thus prayed for the suit to be dismissed.

Counsel for the plaintiff in reply submitted that Order 11A Rules 2 and 6 of the Civil Procedure Rules as amended is clear and it is to the effect that where a suit is instituted by plaintiff, the plaintiff shall take out summons for directions within 28 days from the date of the last reply or rejoinder. That the summons for directions was extracted on time but there was an administrative delay and the date was allocated by court though the summons were not served on the parties. That court moved itself and the file was forwarded to the trial judge. That being an administrative issue, the plaintiff had no control as the registrar was not at the station. That the amount claimed is a liquidated demand and in the absence of any reasonable defence, the defendant is only buying time. He prayed that the objection be overruled and the matter proceeds.

In rejoinder counsel for the defendant reiterated his earlier submissions. He added that there is no room for administrative gaps under the rules. That it is the plaintiff to extract the summons for directions not court; that the illegality cannot be cured. In my view after consideration of both parties' submissions, two issues arise for determination by court that is:

- (1) Whether the plaintiff's suit abated under Order 11A Rules 2 and 6 of the Civil Procedure Rules as Amended.
- (2) Remedies Available to the parties

**Decision of Court:**

Order 11A R 2 of the Civil Procedure Rules states thus;

*"Where a suit has been instituted by way of a plaint, the plaintiff shall take out Summons for Direction within 28 days from the date of the last reply or rejoinder referred to in Rule 18 (5) of Order VIII of these Rules."*

Rule 60f of the Civil Procedure Rules as amended provides:

*"If the plaintiff does not take out a Summons for Direction in accordance with sub rules (2) or (6), the suit shall abate."*

There seems to be contradictory jurisprudence over the interpretation of the said rules specifically on the context under which the verb "shall" was used.

In the case of *Abdul Ddamulira Vs. MSS Xsabo Power Ltd, Misc. Application No. 46 of 2021* arising from Civil Suit No. 21 of 2020, the Hon. Justice Oyuko Anthony Ojok gave the said verb a strict meaning where in his view he stated that the said order imposes a mandatory obligation and that if no summons for directions are taken out after 28 days from the date of the last reply or rejoinder, the suit abates automatically.

The Hon. Lady Justice Florence Nakachwa in *Geoffrey Waswa Vs. Amy for Africa Ltd & 2 others, Civil Suit No. 127 of 2020*, on the other hand in her ruling on a preliminary point of law that the suit had abated under order 11A R 2 & 6 of the Civil Procedure Rules as Amended attempted to give the contextual application of the verb "shall" in legislative sentences and she stated thus:

*'Consideration of the principles governing shall in a legislative sentence in its ordinary significance, shall is a word of command. It is a word which should normally be given compulsory meaning because it is intended to denote an obligation. The auxiliary verb shall should be used only where a*

*person is commanded to do something. However, shall is sometimes intended to be directory only. In that case, it is equivalent to May and would be construed as merely permissive to carry out the legislative intention. This usually applies in cases where no right or benefit accrues to any one where no public or private right is merely impaired by its interpretation as directory."*

In addition to the above the Hon. Lady Justice Olive Kazaarwe Mukwaya in *Kagimu Moses Gava & 7 other Vs. Sekatawa Muhammad and 11 others, Civil Appeal No. 25 of 2020* arising from Civil Suit No. 145 of 2020 while interpreting the implications of Order XIA Rules 2 and 6 she stated at page 8 thus:

*"It is this court's opinion that the intention of the framers of Order XIA rule 1 of the Civil Procedure Amendment Rules 2019 was to mitigate the delays and inefficiencies brought on by the actions of officers of court and the parties in civil proceedings. In order that these rules achieve the desired objective, a holistic and judicious approach to their application should be adopted by the courts".*

From the reading of the entire order XIA of the Civil Procedure (Amendment) Rules of 2019, what comes to my mind is that the order was intended to speed up trials by curtailing unnecessary delays. It was not intended to be used as a sword against parties' live claims by strangling all under the guise that the summons for directions procedure was not strictly adhered to. Each case should be considered on its own merits and peculiarities. It is my humble view that the application of the said order should not be a universal one but should be applied on a case by case basis.

Articles 28 and 44 of the Constitution stress the right to a fair hearing which includes availing parties an opportunity to present their cases and a decision is made after taking into account the views of either party to a suit. In some circumstances it would not serve any great purpose to have the suit abated under Order XIA Rules 2 and 6 yet later parties can file the same claims.

In addition to the above, it has been observed by court in numerous decisions that the Civil Procedure (Amendment) Rules 2019 are still new and introduced drastic changes in our justice system therefore a strict interpretation of the same at an initial stage would cause great injustice to the parties. The same should be applied gradually so as not to cause injustice to the litigants. (*See Settaba Fullugensio Vs. Kizito Musoke and Anor, Tem Injunction Appeal No. 452 of 2020 arising from M.A No. 11000 of 2020 also arising from Civil Suit No. 984 of 2020*).

In the matter before me, the plaintiff extracted summons and the same were endorsed by court on the 9<sup>th</sup> day of September 2021 where the same were scheduled for direction before the Registrar on the 13<sup>th</sup> day of December 2021. The summons were not served and on the 13<sup>th</sup> day of December 2021, when the matter came up before the Registrar for directions, none of the parties or the lawyers were present and the Registrar forwarded the file to the presiding judge to handle. The matter was later fixed for 22<sup>nd</sup> June 2022 and later to 31<sup>st</sup> 2022 when the point of law at hand was raised. In my view there was effort to have the matter prosecuted. The plaintiff filed a statement of her witness and the matter was scheduled for cross examination of the said witness. I deem it unfair to have the suit abated, which is alive and breathing, on the sole basis that summons for directions were not taken out within 28 days after closure of the pleadings.



I therefore in the circumstances of this case, overrule the preliminary objection raised by Counsel for the respondent. I make no order as to costs.

The matter is accordingly fixed for mention on 3/10/2022 for further directions.

**Dated at High Court Fort portal this 2<sup>nd</sup> day of September 2022.**



Vincent Wagona

**High Court Judge**