

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**MISC APPLICATION NO. 820 OF 2021**  
**[ARISING FROM CIVIL SUIT NO. 298 OF 2021]**

**TUNA DEVELOPMENT COMPANY LIMITED::::::::::::: APPLICANT**

**VERSUS**

**UGANDA POST LIMITED**  
**T/A POSTA UGANDA::::::::::::: RESPONDENT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**RULING**

The Applicant brought this miscellaneous application under Order 9 Rule 10, 11(2), Order 52 Rule (1), (2) and (3) CPR SI 71 1, S.33 Judicature Act, Cap 13 and S.98 CPA Cap 71 and all enabling laws. The application is by Notice of motion for orders that;

1. An Interlocutory judgment be issued against the defendant in default of filing defense to Civil Suit No. 298 of 2021.
2. The suit be set down for hearing ex-parte.
3. Costs of the application be provided for.

The application is based on grounds contained in the affidavit of Natuhwera Betty the applicant's director which briefly states;

1. The Applicant served the Respondent with summons to file written statement of defense (WSD hereinafter) in the head suit on 18<sup>th</sup> October, 2021.
2. The Respondent was expected to file the WSD latest on 2<sup>nd</sup> November, 2021 but failed to do so within time stipulated by the law and in the summons.
3. The Respondent did not apply for the extension of time within which to file WSD nor seek court's validation of the defense filed out of time.
4. That it is fair and just for the court to enter default judgment against the Respondent for failure to reply to the counterclaim.

The Respondent filed an affidavit in reply through Charles Opio-Ogwal-Company Secretary opposed the application and contended as follows:

1. The respondent filed the written statement of defense on 29<sup>th</sup> October 2021, the respondent was within the prerequisite time before the expiry on 2<sup>nd</sup> November 2021.
2. That there is no way a default judgment and or an interlocutory judgment can be entered yet the defense was filed within time.
3. That the non-service of the defense upon the Applicant was due to lapse and or mistake of counsel who did not ensure service and or check with court record as to whether the defense had been endorsed.
4. That counsel only picked the written statement of defence from court on 4<sup>th</sup> November 2021 and effected service on the 5<sup>th</sup> November 2021 upon the applicant.
5. That the Respondent prayed for the defense to be allowed, the time enlarged for service of the same and or validating of the defense and for hearing to proceed inter parties.

The applicant was represented by *Kamba Hassan and Julius Turinawe* while the respondent was represented by *Kiiza James*.

The issue for court's determination are;

*Whether the Respondent filed its written statement of defense within the requisite time and whether the Applicant is entitled to an interlocutory judgment.*

### **Determination**

The applicant's counsel submitted that the steps of filing a defense is provided for under the CPR beginning with the provisions of Order 8 r 1 (2) which reads as follows;

*"where a defendant has been served with a summons in the form provided by rule 1(1)a of Order 5 of these rules, he or she shall, unless some other or further order is made by the court, file his or her defense within fifteen days after service of the summons."*

From the foregoing, the law requires that a defendant files his/her defense within fifteen days from the date of receipt of summons by delivering copies of the WSD to a proper officer of court who shall then sign and affix an official seal on the documents. After the seal is fixed, a copy of the WSD shall be served onto the opposite party. It therefore follows that filing involves two steps which are placing the WSD on court record and further serving the same to the opposite party.

The applicant counsel submitted that the respondent cannot seek refuge under Article 126 (2)(e) of the constitution of Uganda for failure to follow timeline fixed by the CPR. The Supreme Court in *Mulindwa George William vs. Kisubika Joseph SCCS No 12 of 2014*, emphasized the inapplicability of Article 126 (2) (e) on grounds that it does not do away with the requirement that litigation must comply with the Rule of procedure in litigation. The

Article merely gives constitutional force to the well settled common law principle that rules of procedure act as handmaidens of justice.

Counsel further submitted that the respondent filed the WSD on 29<sup>th</sup> October 2021 but did not serve the same upon the applicant until the 5<sup>th</sup> day of November 2021 way out of time.

Defense counsel submitted that WSD was filed within stipulated time of 15 days of service of summons though the same was not served for one reason which was on grounds of mistake / negligence of Counsel Alice Mayanja in not ensuring that the WSD is filed and served within the required time by not following up with court clerks in ascertaining if the defense had been lodged in compliance with the law before service can be effected.

### *Analysis*

Counsel for the respondent having conceded to the fact that indeed they did not serve Written Statement Defence in time for one reason or another is clear indication Written Statement of Defence was not duly filed. The respondent's failure is attributed to Counsel Alice Mayanja's negligence.

Supreme court has held in the case of *Capt Philip Ongom vs. Catherine Nyero Owota, SCCA No.14 of 2001* that a litigant should not bear the consequences of an Advocate's default....''

It is trite law that a litigant who has instructed lawyers to pursue their case cannot be condemned for not being vigilant in prosecuting their matters. See the case of *Yowasi Kabiguruka vs. Samuel Byarufu CACA NO.18 OF 2008*

In this premise I am constrained not to visit counsel's negligence onto her client. The Supreme Court case of *Simon Tendo Kabenge vs. Barclays Bank & Anor SCCA No. 17 of 2015*, cited to me by both parties, the learned Justice stated that if the 15 days have crystallized but the defense is filed on court record although not served on the opposite party then itself would prevent a default judgment from being entered. It further stated that in instances

whereby the 15<sup>th</sup> day a defense is on court record but for unexplainable delay on part of the court, the Written Statement of Defence is not signed and sealed to enable service on the opposite party, then court may not allow a default judgment against the defendant. The unexplainable delay must however be subject to proof and the burden is on the defense counsel.

In the present case, as the Written Statement of Defence was not served to the Applicant due to the lawyer's negligence and rather not unexplained delay on part of the court. However the Supreme Court decision is not exclusive of other reasonable factors or even restrictive to other reasons from being given.

This court being a court of justice invokes its powers under **Sec 33 of the Judicature Act, Cap 13** that states, " *The High Court shall grant absolute or on such remedies as any of the parties to a cause or matter is entitled to in respect of any legal or equitable claim properly brought before it, so that as far as possible all matters in controversy between the parties maybe completely and finally determined and all multiplicities of legal proceedings concerning any of those matters avoided.*"

In my view, counsel's negligence as envisaged above can suffice to be yet another justifiable reason this court can consider not to grant a default /interlocutory judgment from being entered. I am therefore fortified in the circumstance to state that an interlocutory judgment/default judgment cannot be granted due to reasons stated above.

It bears emphasis however, that a defendant who fails to file pleadings is still entitled to a hearing and especially when he/she appears in court. Such a defendant can decide to reply solely on point of law which is embedded in the case presented by the plaintiff without the need to file pleadings or adduce evidence thereon. Such a defendant may decide to rest their case on the plaintiff's case and merely wish to address the court on issues raised by the plaintiff's case. The pleadings provide the framework for the presentation of evidence at trial as they identify the issues which constitute the focus of the dispute.

This court further notes that the applicant duly filed a reply to defence titled “*REPLY TO DEFENDANT’S WRITTEN STATEMENT OF DEFENCE*” on the 18<sup>th</sup> November 2021 and on 19<sup>th</sup> November 2021 the filed the present application. It is not clear why the applicant decided to bring such an application where the position of the law has been well settled by the Supreme Court; *Simon Tendo Kabenge vs. Barclays Bank & Anor SCCA No. 17 of 2015*.

Applications of this nature are wastage of courts valuable time and the courts are choking with several miscellaneous applications filed by advocates which has significantly contributed to increased volume of work and hence backlog of cases.

This application is dismissed with costs to the respondent.

I so Order

**SSEKAANA MUSA**  
**JUDGE**  
**24<sup>TH</sup> OCTOBER 2022**