

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT Jinja
MISC.APPLICATION NO. 334 OF 2022
ARISING FROM MISC.APPLICATION NO. 265 OF 2022
(ARISING OUT OF CIVIL SUIT NO. 50 OF 2022)

**DEPARTED ASIANS PROPERTY
CUSTODIAN BOARD..... APPLICANT**

VERSUS

MUSA BALIKOWA..... RESPONDENT

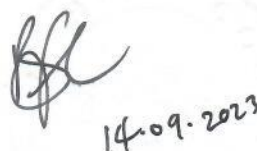
BEFORE: HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA
NTAMBI

RULING ON A PRELIMINARY OBJECTION

Brief facts

The Applicant filed Civil Suit No. 50 of 2022 in this Honourable Court. The Respondent and another then filed Misc. Application No. 265 of 2022 wherein they requested for the applicants to furnish security for costs of UGX 200,000,000 before the hearing of Civil Suit No. 50 of 2022. His Worship Waninda Fred K.B, the Deputy Registrar of this Honourable Court, while hearing the application ruled in favour of the Respondents and ordered that the Applicant deposits UGX 70,000,000 as security for costs within 30 days on the Registrar High Court Account in Bank of Uganda. That the Applicant then filed Misc. Application No. 334 of 2022 for setting aside the orders of the Deputy Registrar in Misc. Application No. 265 of 2022. The application was supported by the affidavit of Mr. George William Bizibu, the Executive Director of the Applicant.

The instant Application was filed in Court on the 7th December 2022 and was sealed by the Deputy Registrar on the 22nd December 2022. An affidavit of service dated 7th January 2023 was filed in the Court on the 31st January 2023 indicating that the respondent had been served on the 6th January 2023. The respondent, Musa


14.09.2023

Balikowa, filed an Affidavit in Reply filed in Court on the 17th January 2023 but did not serve the Applicant. When the matter came up for hearing on the 27th February 2023, the respondent informed court that he had tried to serve the applicant that morning but the applicant's counsel declined service. The applicant's counsel raised an objection on point of law that the applicant intended to serve the affidavit in reply out of time.

Representation

The Applicant was represented by Counsel Bwire John together with Counsel Ssemaganda Sharif of M/s Wafula & Co. Advocates and Kian Associated Advocates while the Respondent was represented by Counsel Guma Davis of M/s Guma & Co. Advocates.

Submissions


Counsel for the applicant raised a point of law stating that the affidavit in reply filed by the respondent was not filed within fifteen days as prescribed by law. That since the Application was served on the Respondent on 6th January 2023, any attempts by the Respondent to serve the affidavit in reply past 21st January 2023 offends the provisions of the Civil Procedure Rules (CPR). Counsel for the applicant argued that the respondent's attempts to serve the affidavit in reply more than a month later is service out of time and can only be entertained by court where the offending party has filed an application seeking extension of time which had not been done by the respondent in the instant case. Counsel for the applicant relied on the case of **Simon Tendo Kabenge vs Barclays Bank & Anor SCCA 17 of 2015** where the Supreme Court held that;

"service of the defence or reply to the Application is complete upon fulfilling 2 steps which is filing in the court registry and serving the plaintiff/ Applicant. That once the two steps are not met then the person relying on the documents served out of time does not have locus"

Counsel for the applicant further submitted that in the case of **Stop and See Vs Tropical Bank Limited MA 33/2010**, Court held that;

"the principles regulating service of summons equally apply to the rules of filing and serving replies to the application"

Counsel for the applicant prayed to this court that the affidavit in reply be struck out with costs so that the Applicant can proceed exparte under O.9 r10 of the CPR as amended which provision of the law allows the applicant to proceed exparte in



14.09.2023

circumstances where the reply/defence is not filed and served as envisaged under the law. Counsel for the applicant argued that they had perused the court file on the 8th February, 2023 and discovered that there was no reply on court record. Counsel argued that he suspected the reply was filed later than 8th February, 2023 and stamped with an earlier filing date. Counsel indulged court to look at the date on the receipt for the filing fees to ascertain when money was deposited in the bank. Court informed counsel for the applicant that the receipt indicated 17th January 2023.

In reply, Counsel for the respondent submitted that as per the record the affidavit in reply was filed on the 17th January 2023. On not being served on the applicant within the 15 days, counsel for the respondent relied on O.51 r.6 of the CPR which gives Court wide powers to enlarge time to do any act or take any proceedings within the law. Counsel further submitted that a mere lapse that the applicant was not served with the affidavit in reply in time should not deny the respondent a chance to be heard.

Court asked the Respondent's Counsel why he had failed to serve the affidavit in reply within the prescribed time. In reply, Counsel for Respondent informed Court although attempts had been made to effect service on the Applicant on 17th January 2023, his clerk had failed to locate the Applicant's advocate's law firm. Court further inquired from counsel for the respondent on what happened between 17th January 2023 and 27th February 2023 when the matter came up for hearing. In reply, the Respondent's Counsel informed Court that another attempt to effect service on the Applicant on the 31st of January 2023 was made, but regrettably the Applicant's clerk declined to accept service.

The Respondent's Counsel also informed Court that although he had failed to serve the Applicant with the affidavit in reply, he had not filed an affidavit of service explaining the circumstances that occasioned this failure.

Counsel cited the case of **Re-Christine Namatovu Tebajjukira (1992 – 93) HCB 85** where it was held that;

"...in the administration of justice, disputes should be investigated and decided on their merits and that mere lapse should not bar litigants from pursuing their rights"

Counsel also referred to the case of **Oburu & Anor Vs Equity Bank (U) Ltd MA 809 of 2015** where court relied on O.51 r.6 of the CPR to validate the affidavit in reply and allowed the matter to proceed on merit. Counsel for the respondent then prayed that the respondent be accorded an opportunity to be heard. He prayed to



14.09.2023

Court for time be extended to enable the respondent to serve the affidavit in reply out of time.

In rejoinder, counsel for applicant argued that the application of this appeal filed by the applicant clearly indicated the address of the applicant on the second page of the application. He submitted that since this is a case arising out of an appeal, parties had been previously exchanging documents from the time Civil Suit. 50 of 2022 had been filed and that the respondent's counsel had been serving documents on the applicant's law firm. Counsel dismissed the Respondent's reason for failing to serve the affidavit in reply as being the failure to located the Applicants advocate's law firm as false.

Counsel for the applicant further submitted that O.51 r.3 of the CPR cited by counsel for the respondent under which he seeks refuge is premised on the time expiring on Sunday which is not applicable to the instant case. That in the instant case, the respondent filed the affidavit in reply on the 17th of January 2023 and as of 27th February 2023 when the matter came up for hearing, 40 days had lapsed and yet the affidavit in reply had not been served yet on the Applicant. Counsel for applicant argued that there is no affidavit of service on record to prove the failed attempts of service by the Respondent. Applicant's Counsel further submitted that although O.51 r.6 of the CPR gives this court powers to enlarge time, the same can only be allowed under justifiable circumstances. That in the instant case, the Respondent had failed to furnish Court with any justifiable reason that prevented him from serving the affidavit in reply in time. Counsel reiterated his earlier prayer that the affidavit in reply be struck off with costs as mandated under O.8 r.19 of the CPR and allow the Applicant to proceed exparte. Counsel for applicant further prayed that in the alternative without prejudice to the above submissions, that if Court is inclined to allow the affidavit in reply that the same be allowed with costs of UGX 2,000,000 since the applicant travels from Kampala and has hired the two lawyers and that costs be paid before the next hearing.

Analysis

The arguments above raise serious matters which in my opinion are preliminary though substantive and I will discuss them in the way they have been raised and discussed. I will begin by pointing out that this Court is enjoined **under Article 126(2)(e)** of the Constitution of the Republic of Uganda to administer substantive justice without undue regard to technicalities. In an application of this nature, this Court is mindful of the fact that the purpose of all litigation is to try as much as



14.09.2023

possible to promote justice so that all matters in controversy between parties are fairly adjudicated upon; and determined. With that in mind, I shall now resolve the preliminary objection.

Order 8 rule 1 of the Civil Procedure Act provides that:

(1) The defendant may, and if so required by the court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the court may prescribe, file his or her defence.

(2) Where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons.

Further Order 8 rule 19 of the Civil procedure act provides that:

"Subject to rule 8 of this Order, a defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the defence or other pleading at the address for service of the opposite party."

The Supreme Court case of **Simon Tendo Kabenge vs. Barclays Bank & Anor SCCA No. 17 of 2015**, cited to me by the applicant's counsel, *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 15th 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 instant case it's not disputed that the respondent filed the affidavit in reply in Court on time within the 15 days as required by law. What is in contention is that the respondent's counsel failed to serve the affidavit in reply on the applicant within 15 days as required by law, on which this preliminary objection is based. Counsel for the respondent having conceded to the fact that indeed he did not serve the affidavit in reply on the applicant, the burden was on counsel for the respondent to justify and prove the reasons for failure of service. Counsel for the respondent explained to this court that he failed to serve the applicant's counsel on basis that that his clerk could not locate the law firm of the applicant. Counsel for the applicant



14.09.2023

however objected to this and noted that the submission by counsel for the respondent for failure to locate the counsel for applicant's firm was misconceived and tainted with falsehoods as this was an appeal where the parties had been exchanging court documents previously. I agree with Counsel for the applicant in that regard that counsel for the respondent cannot feign ignorance as to the address of the applicant's counsel's law firm.

With the guidance of the decision of **Simon Tendo Kabenge vs. Barclays Bank & Anor (supra)**, I believe that Counsel for the respondent has not furnished this Court with any justifiable reasons that led to the failure to serve the affidavit in reply on the Applicant in time. However, the respondent's failure of service is attributed to Counsel Davis Guma'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 the premises, I am constrained not to visit counsel's negligence onto his client.

The High Court has inherent powers under **O.51 r.6 of CPR** and **Sec 33 of the Judicature Act, Cap 13** which states that;

"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."

Therefore, in the interests of justice, I am inclined to allow the Respondent's affidavit in reply. However, I will grant the applicant's prayer that Respondent's counsel personally bears the costs for the day of UGX 1,500,000 for his negligence that culminated in failure to serve the applicant the affidavit in reply in time.

I also make further orders that: -

- a) The Respondent's Counsel today 14/09/2023 serves the affidavit in reply in this application to the Applicant's Counsel without fail.
- b) The Applicant's Counsel files written submissions to this appeal by 21/09/2023
- c) The Respondent's Counsel files written submissions in reply by 28/09/2023.
- d) The Applicant Counsel file a rejoinder if any by 05/10/2023
- e) Ruling to be delivered on 26/10/2023.



14.09.2023

I so order.



.....
HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA NTAMBI
JUDGE

Ruling delivered on 14th September, 2023.