THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA
CIVIL MISCELLANEOUS APPLICATION NO. 0043 OF 2021
(ARISING OUT OF CIVIL SUIT NO. LD-0004 OF 2019)

THE REGISTERED TRUSTEES OF MADI WESTNILE DIOCESE :: APPLICANT

VERSUS

1. LUCIA EYOTARU
2. KOYORU JUDITH
3. SABELA ORTIA
4. ONZIMA PHILLIAN
5. DAVID NYAKURU
6. NYATI JAMES
7. CANDIA SAMUEL
8. OGUZU RICHARD :: RESPONDENTS

BEFORE: Hon Justice Isah Serunkuma.

RULING

This application was brought under section 98 of the Civil Procedure Act, Order 9 rule 12 and Order 52 rules 1 & 3 of the Civil Procedure Rules for orders that the interlocutory judgement entered against the applicant in Civil Suit No. LD-0004 of 2019 be set aside, the applicant be granted leave to appear and defend the suit, and for costs of the application.

The application is premised on grounds that the applicant was prevented by sufficient cause from filing a defence in Civil Suit No. 004 of 2019, namely, that counsel instructed to handle the matter and file a defence failed to do so on account of conflict of interest since some of the respondents are her clients. The applicant contended that it was not immediately notified of the development and as such, failed to file its defence within the prescribed time. The applicant further pleaded that Civil Suit No. 004 of 2019 involves land registered in the name of the applicant, which has been in possession of the same and made various developments thereon including the construction of a hospital.

The grounds were supported by an affidavit deposed by Rt. Rev Charles Collins Andaku, the Bishop of Madi West Nile Diocese, who stated that he received a summons in Civil Suit No. 0004 of 2019 sometime in 2019 and instructed the Diocesan Secretary and the management of the hospital occupying the suit land to file a defence. He also instructed counsel Daisy Bandaru, the counsel of West Nile Diocese, to handle the matter. Unknown to him, a defence was not filed. He only came to learn of this when the case came up for mention on 22nd April 2021.

Rt. Rev Charles Collins Andaku further deposed that had he known, he would have acquired an alternative legal representation for the applicant in time. He stated that he was informed by the said counsel Daisy Bandaru that she did not file a defence because the 6th and 7th respondents were her clients. Counsel Daisy Bandaru declared her conflict of interest to the hospital management on 7th May 2019.

The deponent further stated that he was informed that an interlocutory judgment was entered against the applicant and the matter was fixed for hearing on 7th September 2021. Rt. Rev Charles Collins Andaku stated that the applicant desires to defend the main suit, which involves a dispute over land registered in the name of the applicant and where the applicant has been in possession since 1947.

The application was further supported by an affidavit deposed by counsel Bandaru Daisy Patience who stated that she received instructions from Rt. Rev Charles Collins Andaku on 6th May 2019 to handle Civil Suit No. 0004 of 2019 on behalf of the applicant. When she conducted a client interview with Ondoma Jimmy, the Administrator of the applicant's hospital which is on the suit land, she discovered that she was conflicted since the 6th and 7th respondents were her clients in another matter before the Chief Magistrates Court of Arua. She declared her conflict of interest to the said Ondoma Jimmy and asked him to relay the information to Rt. Rev Charles Collins Andaku. Counsel pleaded that her mistake in failing to inform Rt. Rev Charles Collins Andaku personally about her inability to represent the applicant in the main suit should not be visited on the applicant who has at all material times demonstrated willingness to defend the suit.

The application was opposed by an affidavit in reply deposed by Onzima Philliam, the 4th respondent, who stated that this application was filed on 7th July 2021 and served on 6th October 2021 outside the prescribed 21 days for service and the applicant did not seek and obtain extension of time for service. Further, Onzima Philliam stated that a summons in the main suit were served on the applicant who did not file a defence. On that basis, the court entered an interlocutory judgment against the applicant. Onzima further deposed that M/s Bandaru & Co. Advocates represented the applicant throughout mediation and did not withdraw from the conduct of the main suit because of the alleged conflict of interest. He further deposed that the applicant does not have a good defence in the main suit and that the respondents' lawyers have been in constant communication with the applicant's officials and constantly reminded them to file a defence in the main suit.

The applicant filed an affidavit in rejoinder deposed by Nasser Godfrey, the Diocesan Secretary of West Nile Diocese who stated that whereas the application was filed on 7th July 2021, it was fixed for hearing on 4th October 2021 and served on 6th October 2021. He reiterated that the applicant did not file a defence in the main suit owing to counsel Daisy Bandaru's mistake of not informing the applicant in time of her inability to act in the matter due to conflict of interest. Had the applicant been made aware of the conflict of interest in time, it would have immediately engaged the services of another lawyer.

Representation

At the hearing, learned Counsel Samuel Ondoma of M/s Alaka & Co. Advocates represented the applicant. Learned Counsel Emmanuel Candia of M/s Candia Advocates & Legal Consultants represented the respondents. Both parties filed written submissions, which I have taken into consideration.

Applicant's submissions.

Counsel submitted that this application be allowed on the grounds that the applicant's failure to file a written statement of defence on time in the main suit was due to the mistake of counsel Bandaru Daisy Patience who was conflicted and did not notify the applicant. Counsel added that this mistake should not be visited on the applicant who is innocent. He relied on the case of

Siraje Kasumbakali v Cairo International Bank Ltd; HCT Miscellaneous Application No. 0711 of 2007 where it was held that mistake, fault or dilatory conduct of an advocate cannot be visited on the litigant and should not debar the litigant from enforcing his rights. He also relied on the case of F.L Kaderbhai & another v Shamsherali M. Zaver Virji & Another; SCCA No. 020 of 2008, where it was held that an error by counsel is not necessarily visited on his client.

Counsel further submitted that this court has wide discretion to allow this application. He relied on the case of Standard Chartered Bank of Uganda Ltd v Ben Kayuya & Barclays Bank (U) Ltd [2006] HCB 1 where it was held that the existence of a specific procedure, provision or remedy cannot operate to restrict or exclude the court's inherent jurisdiction under section 98 of the Civil Procedure Act which gives wide residual powers to correct any injustice.

Secondly, counsel submitted that the subject matter of the main suit is a land dispute, which is sensitive and requires investigation on its merits. He averred that since the applicant is the registered proprietor of the suit land and in possession of the same, it would suffer irreparable loss and damage if the application is not allowed. Counsel pointed out that the applicant constructed a non-profit hospital, Kuluva Hospital, a Nursing and Midwifery school and a primary school on the suit land, which benefit the entire population of West Nile, Congo and South Sudan. In the premises, counsel submitted that this is a proper case for this court to exercise its inherent powers conferred by section 98 of the Civil Procedure Act and section 33 of the Judicature Act.

Thirdly, counsel contended that the applicant is desirous of defending the suit and there are other suits pending before this court between the same or similar parties over the suit land. He submitted that if this application is not allowed, the other suits would be rendered nugatory.

Counsel pointed out that whereas the application was filed on 7th July 2021, the applicant could not pick and serve it on time on the respondents due to the lockdown that was imposed by the Government of Uganda to prevent the spread of COVID – 19. Counsel further submitted that

Order 5 rule 1 of the Civil Procedure Rules applies to summons in suits but does not apply to applications such as the instant application brought by notice of motion. He added that this court has power under Order 9 Rule 12 of the Civil Procedure Rules to set aside the exparte interlocutory judgement and grant leave to the applicant to file its Written Statement of Defence in the main suit.

Respondents' submissions

The respondent's counsel raised a preliminary point of law to the effect that the application was served out of time. He contended that whereas the application was filed on 7th July 2021 and endorsed by court on the same date, it was served on the respondents on 6th October 2021 contrary to the provisions of Order 5 rule 1(2) of the Civil Procedure Rules which states that summons shall be effected within 21 days from the date of issue, except that the time may be extended on application made within 15 days after the expiration of the 21 days, showing sufficient reasons for the extension. He referred to Order 5 rule 1(3)(b) of the Civil Procedure Rules which provides that if the application for extension of time is not filed within the 15 days pursuant to Order 5 rule 1(2) of the Civil Procedure Rules, the suit shall be dismissed without notice. Counsel relied on the case of **Rashida Abdul Karim Hanali & Another v Suleiman Adrisi; Miscellaneous Application No. 009 of 2017** where it was held that the word 'shall' in Order 5 rule 1(2) of the Civil Procedure Rules prima facie makes the requirement of service within 21 days mandatory and automatically invalidates summonses and notices which may have been issued and are not served within 21 days of issuance. Counsel relied on **Kanyabwera v Tumwebaze [2005] 2 EA 86 at 93** where it was held that the provisions of Order 5 of the Civil Procedure Rules are mandatory and should be complied with. He also relied on the case of **Sam Akankwatsa v United Bank of Africa Ltd; Miscellaneous Application No. 1233 of 2017** for the same principle that the provisions of Order 5 rule 1 of the Civil Procedure Rules are mandatory. In conclusion, counsel prayed that this application be dismissed with costs to the respondent.

With regard to the merits of the application, learned counsel for the respondents submitted that the applicant was aware at all times that it had not filed a defence. He referred to the respondents' evidence to the effect that the applicant's counsel, Bandaru Daisy, who doubles as

the Diocesan Chancellor, and it's Diocesan Secretary were aware that the applicant had not filed a defence. Counsel relied on the case of **Babigumira v Global Trust Bank Ltd & 7 others; Miscellaneous Application No. 0677 of 2013**, where it was held that the knowledge of a director or officer of a corporation of such suit is imputed on the corporation. In conclusion, counsel submitted that the application is bad in law and should be dismissed with costs.

Court's analysis

The respondents raised a preliminary objection, under paragraph 3 of the affidavit in reply, to the effect that the application is bad in law having been served outside the period of 21 days for service of summons prescribed under Order 5 rule 1 of the Civil Procedure Rules.

In rejoinder, the applicant pleaded under paragraphs 4, 5, 6 & 7 of the affidavit in rejoinder to the effect that whereas the application was filed on 7th July 2021, it was only fixed for hearing on 4th October 2021 and handed over to the applicant on the same day, whereupon the applicant proceeded to serve the respondents on 6th October 2021.

The applicant's counsel submitted that the application was filed on 7th July 2021, but due to the lockdown imposed by the Government to prevent the spread of COVID- 19, the applicant could not pick the application from the court's registry and serve the same on the respondents in time.

Order 5 rule 1 of the Civil Procedure Rules provides that;

> *ORDER V—ISSUE AND SERVICE OF SUMMONS*
>
> *1. Summons.*
>
> *(1) When a suit has been duly instituted a summons may be issued to the defendant—*
>
> *(a) ordering him or her to file a defence within a time to be specified in the summons; or*
>
> *(b) Ordering him or her to appear and answer the claim on a day to be specified in the summons.*
>
> *(2) Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on*

application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension.

(3) Where summons have been issued under this rule, and—

(a) Service has not been effected within ***twenty-one days from the date of issue****; and*

(b) There is no application for an extension of time under subrule (2) of this rule; or

(c) The application for extension of time has been dismissed; ***the suit shall be dismissed without notice.***

The above Order is applicable to issuance and service of all court processes. I do not agree with the submission of the applicant's counsel that Order 5 rule 1 of the Civil Procedure Rules applies only to issuance and service of summons to defendants in suits and does not apply to applications like the present case, which are instituted by way of Notice of Motion supported by an affidavit. The Rule speaks in terms of a ***'suit'*** and **section 2(x) of the Civil Procedure Act** defines a ***'suit'*** to mean all civil proceedings commenced in any manner prescribed. The manner of commencement of the present suit is prescribed under Order 9 rule 12 and Order 52 rules 1 & 3 of the Civil Procedure Rules. This qualifies it as a suit in the meaning prescribed under section 2(x) of the Civil Procedure Act and Order 5 rule 1(1) & (2) of the Civil Procedure Rules. Further reference may be made to **Order 49 rule 2 of the Civil Procedure Rules** which provides as follows:

2. Orders and notices, how served.

All orders, ***notices and documents*** *required by the Act to be given to or served on any person shall be served in the manner provided for the service of summons*

Order 49 rule 2 above specifically prescribes the manner of service of orders, notices and documents according to the service of summons as provided under Order 5 rule 1 of the Civil Procedure Rules. In the result, counsel's submission that Order 5 rule 1 CPR does not apply to service of applications brought by way of Notice of Motion is untenable. I am fortified in my view by several decisions where the provisions of Order 5 rule 1 of the Civil Procedure Rules have been applied by this court to suits commenced by way of a Notice of Motion with an affidavit in support, including the matter of **Gladys Ssenkubuge & Another v Kibirango Joyce; HC Miscellaneous Application No. 1704 of 2019. [2021] UGHCLD 108.**

Having found as I have that Order 5 rule 1 of the Civil Procedure Rules is applicable to the present case; the rule directs service of court process within 21 days from the date of issue. According to the record, the present application was filed on 7th July 2021 and endorsed by this court on the same day. However, it was issued to the applicant almost 3 months later on 4th October 2021, whereupon the applicant proceeded to serve the respondents on 6th October 2021. The applicant averred in its affidavit in rejoinder that the court fixed the hearing date on 4th October 2021 then handed the application over to the applicant on the same date. Learned counsel for the applicant attributed the delay in fixing and issuing the application to the lockdown imposed by the Government of Uganda to curb the spread of COVID – 19. This court takes judicial notice of the directives of H.E the President of Uganda issued on 6th and 18th June 2021 where he ordered a national lockdown in a bid to prevent the spread of COVID- 19. Indeed, pursuant to the said Presidential directives, the Learned Chief Justice issued Revised Guidelines for the Courts of Judicature on 21st June 2021 titled *'Revised Contingency Measures by the Judiciary to prevent the spread of COVID-19.'* The Guidelines were to remain in force for 42 days from 18th June 2021. This included the period when the present application was filed on 7th July 2021.

Guideline 5 thereof on *'Hearing of cases'* directed that all court hearings and appearances remain suspended with the exception of only the urgent matters. With these circumstances in mind, I am inclined to believe the applicant's account that the court delayed in fixing this application and subsequently issuing process for purposes of service on the respondent. The delay should by no means be visited on the applicant.

Nevertheless, Order 5 rule 1(2) of the Civil Procedure Rules prescribes 21 days from the date of issue, and not from the date of filing or the date of endorsement of process by the court. The Black's Law Dictionary, 9th edition, page 908 defines *'issue'* to mean *'to be put forth officially'* or to *'send out or distribute officially.'* Drawing from this definition, it is my considered view that endorsement of court process is distinguishable from issue of court process. Issuance connotes formal dispatch of court process to the parties for purposes of service or execution, upon completion of endorsement and other related actions taken by the court officers. Endorsement precedes issuance and while court process may be endorsed with the seal of court and signature

of the Judicial Officer, it may not be ready for dispatch or issuance to the parties as was the case in the present application where the application was filed and endorsed on 7th July 2021 but the hearing date was fixed on 4th October 2021. As I have already found, time under Order 5 rule 1 of the Civil Procedure Rules begins to run from the date of issue of summons or court process, which in the present case was 4th October 2021. In the premises, I find that the application was served well within 21 days from the date of issue of court process. The preliminary objection therefore fails.

I will proceed to resolve the merits of the application.

This application was brought under Order 9 rule 12 of the Civil Procedure Rules for orders that the interlocutory judgement entered against the applicant in Civil Suit No. 0004 of 2019 be set aside, with effect that the applicant be granted leave to appear and defend the suit.

Order 9 rule 12 provides that:

> *12. Setting aside ex parte judgment.*
>
> *Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just.*

To succeed in an application brought under Order 9 rule 12 of the Civil Procedure Rules, the applicant has to show good cause. (Ref: Okech Verkam v Centenary Rural Development Bank; HCMA No. 93 of 2019 [2020] UGHC 36.) Furthermore, the Supreme Court while interpreting the provisions of Order 9 rule 12 CPR in the leading authority of Nicholas Roussos v Gulam Hussein Habib Virani & another; SCCA No. 009 of 1993 [1993] UGSC 19, held that under Order 9 rule 12 CPR, the Court is given a wide discretion to make such orders as the justice of the case requires. (See also: Patel v. E.A. Cargo Handling Services (1974) E.A. 75). In Kimani v. McConnell (1966) E.A. 547, 555, it was held that the rule confers upon the court what would appear to be absolute discretion to be exercised judicially in light of the facts, circumstances and merits of the

particular case. The court further held that the test upon which the exercise of discretion under the rules was to be based was whether in light of all the facts and circumstances both prior and subsequent to the respective merits of the parties, it would be just and reasonable to set aside or vary the judgement, if necessary, upon terms to be imposed.

In the present case, the applicant contended that its failure to file a Written Statement of Defence on time in the main suit was due to the mistake of counsel Bandaru Daisy Patience who was conflicted and did not notify the applicant on time. Under paragraph 10 of the affidavit in support of the application, the Diocesan Bishop of the applicant deposed that he only got to know that the applicant had not filed a defence in the main suit on 22nd April 2021 when the case came up for mention. The said counsel Daisy Patience Bandaru deposed a further affidavit in support of the application where she stated under paragraph 5 & 8 thereof that on 7th May 2019, she met the then hospital Administrator, a one Ondoma Jimmy, and on realizing that she had a conflict of interest, advised the said Ondoma Jimmy to notify the Bishop of the conflict of interest immediately so that the applicant could take necessary steps to engage a different lawyer to handle the case. She further deposed that she did not personally notify the Bishop of her inability to act in the matter under the belief that the Hospital Administrator, Ondoma Jimmy, would communicate her stand to the Bishop.

It appears to me, based on the above evidence, that the mistake, if any, leading to the applicant's failure to file a Written Statement of Defence, was one of the said Ondoma Jimmy, the Hospital Administrator, failing to relay Counsel Bandaru Daisy's advice to the Bishop. I do not see how counsel made a mistake when she informed the said Ondoma Jimmy of her inability to act in the matter. If anything, the mistake was of the said Ondoma Jimmy and not of counsel. In the result, I find the ground of 'mistake of counsel' untenable in the particular circumstances of this case where counsel communicated her stand in time to an Administrator of the applicant who failed to relay the communication to the Bishop.

Further, I do not understand how the applicant could have proposed mediation and subsequently responded to mediation hearing notices without knowledge of its failure to file a defence. I hold that the error of failure to file a defence was well within the knowledge of the Diocesan Secretary who requested mediation and attended the mediation proceedings. He should have brought the matter to the attention of the Bishop. I also note that while the applicant claims to have learnt of the alleged mistake of counsel on 22nd April 2021, this application was filed about 2 months and 15 days later on 7th July 2021.

In the case of **Okech Verkam v Centenary Rural Development Bank; HCMA No. 0093 of 2019 [2020] UGHC 36,** this court rightly observed that before the Applicant can be excused from the mistakes of his counsel, he must show that he was not in any way negligent and that he took proactive steps in correcting the errors of his counsel, when he first became aware of the default. Proactiveness in this matter would include the applicant taking urgent steps to file an application to set aside the default judgment. In the present case, the applicant failed to demonstrate such proactiveness when it filed the application 2 months and 15 days later.

For the above reasons, this court agrees with the respondent that the applicant has failed to demonstrate good cause for which discretion should be exercised under Order 9 rule 12 of the Civil Procedure Rules to set aside the interlocutory judgement. The application is dismissed with costs to the respondents.

I so order.

Dated and Delivered on this 31st day of MARCH 2023.

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Isah Serunkuma
JUDGE