

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
MISCELLANEOUS APPLICATION NO. 250/2015

ARISING FROM HCCS NO 108/2011

ARISING FROM HC AC NO 582/2009

NABANJALA GORRET.....APPLICANT

VERSUS

NABUKALU HELLEN.....RESPONDENT

BEFORE HON LADY JUSTICE PERCY NIGHT TUHAISE

RULING ON A PRELIMINARY POINT OF LAW

When this application came up for hearing, the respondent’s counsel raised a preliminary point of law that the application was incompetent as it was signed by the Registrar on 17/08/2015 but was only served on the respondent’s counsel on 11/02/2016. Counsel submitted that this was way outside the time stipulated under Order 5 rule 1(2) of the Civil Procedure Rules (CPR) which requires service to be effected on the opposite party within 21 days from the date the summons is issued. He submitted that the only exception under the rule is when the applicant applies to court to extend time of service within fifteen days from the date of the expiry of the summons. He submitted that the consequence of the failure to serve within the stipulated time is that the suit shall be dismissed under Order 5 rule 1(3)(a) of the CPR. Citing various authorities, the respondent’s counsel further submitted that the present application was served six (6) months out of time, that is, it was sealed by court on 17/08/2015 and served upon the respondent on 11/02/2016; and that the respondent did not seek leave to serve the Notice of Motion out of time yet it is a mandatory requirement of the law.

The applicant, representing herself, submitted in her written submissions in reply that she formally submitted her application for leave to appeal out of time into the Registry on 11/08/2015 expecting the same to be filed upon the mother file and fixed for hearing; that despite

frequenting the registry on a daily basis, she was surprised to learn that the entire filing process, endorsement and hence service could not proceed because the pleadings and the mother file had been misplaced and could not be located, which prompted her to officially complain to the High Court Registrar and eventually the Chief Registrar; that later the Registrar located the same and fixed it for hearing on 23/02/2016; that the respondent never served any reply to the fixed Notice of Motion though they claimed to have done so at the hearing where they instead went ahead to raise the instant preliminary objections. She cited the Civil Procedure Act and Order 5 rules 7, 8 & 16 of the CPR to support her submissions. She contended that the Registry was in this case responsible for the delays. She also argued that the respondent did not formally plead the preliminary objection in her reply, and that the applicant only got to know it through the respondent's counsel's submissions and not even at the previous sitting; that she is taken by surprise against the rules of natural justice. She also argued that the Limitation Act states that for limitation purposes a cause of action only arises where there are competent parties and that in this case there is no competent party and that the delay is a sole responsibility of the court system. She submitted that she filed the application in the registry on 11/08/2015 and it was sealed on 17/08/2015, that the Registry then misplaced it and later located it after several months and fixed the same for 23/02/2016.

The respondent's counsel submitted in rejoinder that the applicant's submissions that her failure to serve the application within the prescribed time was court's mistake or that the Registrar was in the wrong. He submitted that the documents speak for themselves that the date of filing is 11/08/2015; that it is trite law that an application is valid only when it is signed by a Judge or any such appointed officer and it is sealed within the meaning of Order 5 r.1(5) of the CPR. He also submitted that the laws cited by the applicant are out of context, and that it is not true that the applicant was ambushed since the respondent averred to it in paragraphs 2, 3 and 4 of her affidavit in reply, that the applicant should have applied for leave to serve the summons out of time which she did not do, and that therefore her application was incompetent and should be dismissed.

I will first address the applicant's submissions that respondent did not formally plead the preliminary objection in her reply and that the applicant only got to know it through the respondent's counsel's submissions and not even at the previous sitting; that she is taken by

surprise against the rules of natural justice. With respect, this cannot be the position since paragraphs 2, 3 and 4 of the respondent's affidavit in reply state that the respondent intended to raise the very preliminary objection she has raised in the instant application.

On the question of whether or not the respondent was served out of time without leave, Order 5 rule 1(2) of the CPR provides that:-

*“service of summons issued under sub rule 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.**”* (emphasis mine).

The record indicates that the instant application was filed by the applicant on 11/08/2015, as indicated by her signature on the application as well as the “Received” stamp of this court. The application was signed and sealed by the Registrar of this court on 17/08/2015, as indicated by the Registrar's stamp and seal on the same document. The hearing date that was fixed in the application reads 23/02/2016. The affidavit of service by this court's process server indicates that the applicant personally picked her copy of the application and signed on the court's copy on 09/02/2016, and that the respondent's counsel application was served with the application on 11/02/2016. This position is confirmed by the “Received” stamp M/S Nsambu & Co Advocates as well as the applicant's signature on the copy of the Notice of Motion. The correspondence on record, annexed as **A** and **B** to the applicant's supporting affidavit, indicates that within the months of August to November 2015, the mother file could not be located within the court registry.

In the given premises, it is clear that the failure on the applicant's failure to serve the respondent within the time stipulated under Order 5 rule 1(2) of the CPR was not of her making. In my opinion, Order 5 rule 1(2) of the CPR and all the cases cited by the respondent's counsel would not be appropriate in the circumstances of this case where the file got misplaced and where the hearing date of the application was fixed long after the same had been signed and sealed by the Registrar of the court. The omissions of court should not be visited on the litigant.

All in all the preliminary point of law is overruled with no order as to costs.

Dated at Kampala this 5th day of July 2016.

Percy Night Tuhaise

Judge