

THE REPUBLIC OF UGANDA.
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA.
FAMILY DIVISION.
MISCELLANEOUS APPLICATION NO. 0391 OF 2022.
(Arising out of Civil Suit No. 103 of 2007).

GEORGE MUKASA KYAGABA:::::::::::::::::APPLICANTS


VERSUS

NABUUSO ROSE RUSIYATA:::::::::::::::::RESPONDENT

Before: Hon Lady Justice Ketrah Kitariisibwa Katunguka.

Ruling

Introduction:

1. **GEORGE MUKASA KYAGABA** (herein called ‘the applicant’); through his counsel Semakula Charles Muganwa, (brings this application against **NABUUSO ROSE RUSIYATA** (herein called ‘the respondent’) by way of Notice of Motion by Counsel seeking orders that;
 - a. The Respondent is in contempt of the court orders vide Consent Decree HCCS No. 103 of 2007 dated 12th December 2009 

- b. The Respondent avails the applicant with 27 acres of land comprised in Kyadondo, Block 180 at Kitukutwe;(herein called ‘the suit land’);
 - c. The Respondent hands over to the applicant the title and transfer form for the suit land.
 - d. The Respondent abides by the terms of the consent decree dated 12th December 2009.
 - e. The respondent renders to court an account of how she dealt with the suit land.
 - f. The Respondent bears the costs of this application.
 - g. Any other relief this honourable court deems fit be granted.
2. The grounds of the Application are contained in the Notice of Motion and Affidavit in support deposed by George Mukasa Kyagaba and briefly that; the applicant and respondent reached a consent Decree dated 12th December 2014 where the applicant was to receive 28 acres from the suit land; the applicant has received nine (9) acres out of 28 acres; the respondent is the registered owner of Kyadondo Block 180 plot 209 measuring 3 acres and 64 decimals of land; the respondent has sold most of the land comprised in Kyadondo Block 180 leaving only plot 209 which is still in her name; the respondent has no intention of complying with the terms of the Consent Decree; the respondent is in actual contempt of the said Consent Decree.
3. The Application is supported by a Consent Decree, the mutation form, the Certificate of title for the land in issue, a memorandum, the court order.
4. The Application is opposed by the respondent who, through her counsel Bahati Victor, filed an affidavit in reply contending that; On the 5th day of November 2022,she received a call from the Chairman LC1 of Kitukutwe in Kira



Municipality, asking her to go to his office to pick some court documents which request she obliged by reporting and picked this application from the Chairman of Kitukutwe; Misc. Application No. 391 of 2022 is stale in law for want of service; because the notice of motion in Misc. Application No. 391 of 2022 was sealed by this Honourable Court on the 16th day of May 2022 and it was mandatory that it be served by the 7th day of June 2022;

5. The Applicant having failed to serve Misc. Application No. 391 of 2022 within the legally mandated time which expired on the 7th day of June 2022, needed to file an application for leave to serve the application out of time; the said application for leave to extend time within which to serve had to be filed in this court within 15 days from the date of expiry of 21 days from the date of sealing of Misc. Application No. 391 of 2022;
6. The false affidavit of Mr. Emma Mubiru that he served the application on the respondent on the 21st day of August 2022 is further evidence that Misc. Application No. 391 of 2022 is stale for failure to serve within the legally prescribed time;
7. It is just and equitable that this court be pleased to dismiss Misc. Application No 391 of 2022 with costs to the Respondent for the application is stale for want of service.
8. In the alternative but without prejudice to the foregoing, she denies in toto that the Applicant is entitled to any of the remedies sought against her in Misc. Application No. 391 of because:
 - a) The Applicant's capacity in the Estate of Bernado Kasaato Kasirye (the respondent's late father) is not known; she is not aware of a consent decree



dated 12th December, 2009 but one dated 12/11/2009 and sealed by court on the 13/11/2009 which decree is a subject of a review application on the basis of mistake and illegalities before this Honourable Court vide Misc. Application No 162 of 2012;

- b) The size of land belonging to the estate of the, late Bernado Kasaato Kasirye in Kyadondo Block 180 land at Kitukutwe is not known to her as the Applicant has never filed an inventory which would help detail the size of Kyadondo Block 180 land at Kitukutwe;
- c) The Applicant has received more than 28 acres of land out of Kyadondo Block 180 from the respondent; Kyadondo Block 180 Plot 844 (4.230 ha), Kyadondo Block 180 Plot 850 (1.034 ha) and Kyadondo Block 180 Plot 853 (0.465 ha) summing up to 5. 729 hectares which is equivalent to 14.156359 acres and not 9 acres as falsely alleged by the Applicant’.
- d) The Applicant's claim for Kyadondo Block 180 Plot 209, is the Applicant's continued dishonest & fraudulent desire to deprive the respondent of her beneficial rights in her late father's estate;
- e) The averments made by the applicant are tainted with falsehoods and lack any merit; she the respondent is a law abiding person and duly complied with the consent decree by giving the Applicant all the land earmarked for him under the consent decree even when she is still challenging the said consent decree;
- f) The Applicant has not handed over to her all of the 200 acres that he was supposed to give her under the consent decree in Kyadondo Block 180 and she the respondent has only received 164.47 acres out of the 200 acres and has given the Applicant in full;
- g) She continues to demand from the applicant more land, which he has not handed over to her- the land in Munyonyo, Kisenyi and Bululi among others

and he even refused to share information with her regarding that land as was required by the consent decree;

- h) The Applicant is in contempt of the express order of this court to deliver before this court the Letters of Administration in respect of the estate of her late father vide Misc. Application. No. 133 of 2013, the Applicant continues to be in contempt of court as he has never filed any inventory in respect to the estate of late Bernado Kasaato Kasirye ever since he was granted Letters of Administration;
- i) The consent decree, the basis of the Applicant's complaints is a subject of a review application by this Honourable Court on account of mistakes and illegalities and this court is yet to pronounce itself on validity or lack of it;
- j) The Applicant is the one in contempt of court orders with respect to the administration of the estate of late Bernado Kasaato Kasirye; this application has no merit, it is premised on falsehood, brought in bad faith and without clean hands and should be dismissed with costs to the respondent.

Both Counsel filed written submissions.

The case

9. The respondent is the biological daughter of the late Bernard Kasaato Kasirye who died intestate on 26/3/1993; the applicant obtained letters of administration to the estate of the late Bernard Kasaato Kasirye on 6/6/1995 vide the Chief Magistrates Court of Mengo, Administration Cause No.67 of 1995; the respondent instituted Civil Suit No.103 of 2007 against the applicant herein seeking orders that the letters of administration to the estate of her late father granted to the applicant/defendant be revoked on an account of fraud and mismanagement of the estate;

10. By consent, the parties agreed to settle the dispute out of court; a consent decree dated 12/11/2009 was duly signed by both parties and their respective counsel; the same decree was endorsed by this court on 13/11/2009; the terms of the consent decree were as follows: -

- a. That the plaintiff shall withdraw and forfeit the above civil suit upon receiving all the assets belonging to her late father Benardo Kasaato Kasirye (B.K.K);
- b. That the defendant has agreed to hand over all property to the beneficiary of the estate of the late Kasaato Benardo Kasirye excluding those that are a subject matter in the pending civil suits as follows: -
Land at Kitukutwe, Block 180 comprising of 200 acres; A kibanja in Mengo currently comprised of a garage and a video hall; 12 acres of land in Kyaggwe comprising of Kasozi estate; Land in Kyaggwe comprising of 12 acres Buduggala estate;
- c. The plaintiff agrees to give the defendant who is Administrator of the above late Benardo Kasaato Kasirye (B.K.K) estate the following: - The land in Kitukutwe on Block 180 comprising of 27 acres; The land in Kitukutwe on Block 180 comprising of an acre where the defendant's house and shops are located; Full ownership of Kibanja in Mengo where his houses are located and land comprising of a washing bay;
- d. The balance of the estate of the late Isaya Gawedde at Kyaggwe and Kasozi comprising of approximately 126 acres has been left in the hands of the defendant.



- e. The defendant shall in consultation with the plaintiff have the right to pursue cases pending in court concerning the estate of the late Benardo Kasato (B.K.K) who was the plaintiff's father as an administrator to the estate vide civil suit no.12 of 2004- Mukasa Kyagaba V. Nsubuga Benedicto & Civil Appeal No.13 of 2006 –George Mukasa Kyagaba Vs. Patel. However, the plaintiff will in consultation with the defendant meet costs incidental to the pending cases;
 - f. That each party bears its own costs of the suit.
11. The applicant's case in this application is that he gave the respondent several transfer and mutation forms for the land comprised in Kyadondo Block 180; however, that as agreed under 3(a) and (b) of the aforesaid consent decree, wherein the respondent committed to give the applicant 28 acres out of Kyadondo Block 180 at Kitukutwe; the applicant has so far received 9 acres; the respondent is in contempt of the consent decree as she has failed or refused to give or transfer to the applicant 19 acres of the suit land.

Point of law raised by the counsel for the respondent.

12. The notice of motion in Miscellaneous Application No.391 of 2022 was sealed by this court on the 16th day of May 2022, should have been served by the 7th day of June 2022; but it was not; because the affidavit of service deposed by Emma Mubiru shows that the affidavit was served upon the respondent on the 21st day of August 2022; (although she refers to the affidavit as false);. that on 5/11/2022, she received a call from the Chairman LC1 of Kitukutwe in Kira Municipality requesting her to pick some court documents. The respondent prays that the application be dismissed with costs.

Counsel for the respondent submitted on the issue as to **whether the failure to serve the notice of motion within the set time is fatal.**

13. He cited Order 5 rule 1(2) of the Civil Procedure Rules and the case of Rashid Abdul Karim Hanali & Anor V. Suleiman Adrisi, Misc. App. No.0009 of 2017; for the proposition that the word ‘shall’ in Order 5 r. 1(2) the Civil Procedure Rules prima facie makes the requirement mandatory and failure to comply with the provisions, automatically invalidates summons; that a Notice of Motion is a summons and therefore the rule applies to this application; the applicant having failed to serve the application within the mandatory set time in law makes the notice of motion invalid.

14. In rebuttal, the applicant’s counsel submits that it is not in question as to whether the notice of motion was served or not since the same is not contested by the respondent and it is proven by the fact that they were able to file an affidavit in reply; that the service of court summons by Emma Mubiru and his affidavit of service deposed on the 27th day of January 2023 were overtaken by proceedings of court on the 5th day of October 2022 where it was directed that the respondent be served through the Local Chairperson and the same was done.

Consideration of the point of law:

15. I have perused the notice of motion in question; it was signed and sealed by the Deputy Registrar on the 16th day of May 2022; the affidavit of service on record reports that the respondent was served with the notice of motion on 21/8/2022; which she read through but refused to acknowledge receipt of the same. **Order 5 rule 1 (2) of the Civil Procedure Rules** mandates that service of



summons should be effected within 21 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. In this case, the 21 days expired on 7/6/2022 before service could be effected.

16. The matter came up for hearing on 5/10/2023; counsel for the applicant was present; in the absence of the respondent, court by its own motion directed that fresh service of summons be effected on the respondent in the presence of the L.C.1 chairperson; The fact that the respondent was served through the L.C.1 chairperson is confirmed under paragraph 4 of her affidavit in reply where she admits that on 5/11/2022, she received a call from the L.C.1 chairperson of Kitukutwe in Kira Municipality requesting her to go to his office to pick court documents; to which she states to have obliged.

17. There is no filed affidavit of service to prove the exact date and the circumstances under which the subsequent service of summons was effected on the respondent at the office of the L.C1 chairperson. In the absence of such affidavit of service, I shall rely on the date of 5/11/2022 as admitted by the respondent on which she was called by the L.C.1 chairperson to receive the summons; the applicant filed an affidavit in rejoinder but did not dispute this date as contended by the respondent. It is trite that when facts are sworn in an affidavit and these are not denied or rebutted by the opposite party, the presumption is that such facts are accepted as adduced. (see **Massa Vs. Achen (1978) HCB 297**).

18. I disagree with the proposition by counsel for the applicant referring to the affidavit of service deposed by Emma Mubiru dated 27/1/2023; counsel states



this affidavit of service was overtaken by proceedings of court on 5/10/2022; first of all, considering the date of the said affidavit, it could not have been over taken by events since court's directives to serve the respondent in the presence of the L.C.1 chairperson were issued before affidavit was deposed. Secondly, I have carefully examined the said affidavit of service, the process server is deposing in respect of service of the applicant's affidavit in rejoinder on counsel for the respondent which was effected on 12/1/2023;

19. I have considered the arguments of both counsel. It is my finding that the subsequent timelines within which to serve the respondent commenced on 5/10/2022 which is the date when court gave the directives; when the time within which to serve is extended by court like in this case, unless specific time lines are given, service must be done in accordance with the timelines under O5 of the Civil Procedure Rules; because the basis for the legal requirements is that one has time to let the other party know of the existence of a case against them; the framers and drafters deemed 21 days as sufficient time; in the case at hand the 21 one days therefore expired on 25/10/2022 yet the respondent received the summons on 5/11/2022; I find that the service of summons was not effected within time. Courts have held that service after the stipulated time limits would be ineffective and or therefore of no legal consequence; and that court has no jurisdiction to deal with an application until it has been served and an affidavit filed on court record. (see: **Nankabirwa V. Namugenyi UGHCLD CS No.130 of 2017; Nyanzi V. Nassolo & 2 Others Micellaneous Application No.4 of 2021) 2023 UGHCCD 128**).

20. **Order 5 rule 1(3) of the Civil Procedure Rules** stipulates that "*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.”;

In Rashida & Anor V. Adrisi (MA No.9 of 2017) 2017 UGHCLD held that the timelines in the rules are intended to make the process of judicial adjudication and determination swift, fair, just, certain and even-handed. Indeed, public policy demands that cases be heard and determined expeditiously, since delay defeats equity and denies the parties legitimate expectations. I hold the same view; In my view the argument should not be that the other party has responded but it should be that the applicant could not serve in time for justifiable reasons; but where no effort is made to show cause why time within which to serve should be extended, the rest is, in my view, moot for there is nothing to serve if a notice or summons has expired. The point of law has merit, and it is upheld.

The application is dismissed with costs.



Ketrah Kitariisibwa Katunguka

Judge

3/08/2023

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