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**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 688 OF 2015
(ARISING FROM CIVIL SUIT NO. 508 OF 2014)**

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- 1. FREDRICK JAMES JJUNJU
- 2. LUWEDDE VICTORIA ::: APPLICANTS

VERSUS

- 1. MADHIVANI GROUP LTD
- 15 2. COMMISSIONER LAND REGISTRATION::::::::::::: RESPONDENTS

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

The Applicants herein brought this application under *Section 98 of the Civil Procedure Act (Cap.71); Order 44 rr.2, 3 & 4 of the Civil Procedure Rules (SI 71 – 1)* seeking
20 orders that leave be granted to the Applicants to appeal against the ruling of this court on preliminary points of law raised by the 1st Respondent’s Counsel in *HCCS No. 508 of 2014*; and that costs of the application be provided for.

At the commencement of the hearing, Mr. Paul Kutesa, Counsel for the 1st Respondent,
25 raised an objection on a preliminary point of law. He contended that this application is incompetent as it was served out of time stipulated by the law. Counsel submitted that the application was signed and sealed by the Registrar on 22.07.2015 but was only served on the 1st Respondent’s Counsel on 20.8.2015 which was way outside the time stipulated under *Order 5 r. 1(2) CPR*, which requires that service be effected on the opposite party
30 within 21 days from the date the summons is issued.

Mr. Kutesa pointed out that the only exception under the rule is when the applicant applies to court to extend time of service within 15 days from the date of the expiry of summons. Counsel submitted that the consequence of the failure to serve within the stipulated under **Order 5 r.1 (3) (a) CPR** is that the suit shall be dismissed. To back this
35 proposition Mr. Kutesa relied cited the case of **Amdan Khan vs. Stanbic Bank (U) Ltd., HCMA No. 90 of 2013.**

Mr. Kutesa further submitted that they were served on 20.08.2015 with *Annexure "B"* to the affidavit of service, which is copy of the application, and that they received it under protest because of service upon them out of time. That the 1st Respondent, in paragraph 4
40 of the affidavit in reply, put the Applicant on notice that the application is incompetent owing to the failure to serve it in time, and failure to apply for extension of time within which to serve the application out of time as required by the law, but that the Applicants ignored the notice and instead pursued an incompetent application. Mr. Kutesa argued that the Applicants cannot benefit from leniency of court as such leniency cannot be
45 exercised in absence of an application extending time within which to serve the application. Counsel submitted that this application should be dismissed with costs.

In reply Mr. Sam Ahanya, Counsel for the Applicants, in a rather long winded submission stated that although the application seems to have been filed out of time it was actually not intended. That it was filed on 22.07.2015 during court vacation. That
50 court could not fix any date for hearing then, and that when the application was received by court, it was erroneously endorsed by the Registrar on the same date on 22.07.2015. That it was only after 17.08.2015 that Counsel for the Applicants received copy of summons with a date entered for hearing on 13.10. 2015, and the Applicant's Counsel

served it on the 1st Respondent's Counsel on 20.08.2015. Mr. Ahanya argued that this
55 gives the assumption that the date the summons was issued by court was the date a
hearing date was issued and time began to run; which would inadvertently mean that by
the time it was served on 20.08.2015 it amounted to late service and even then the
Applicants would not be able to have filed an application for extension of time because it
would be out of time

60 Counsel submitted that the said error was not intended but was an oversight on part of
both court and Counsel for the Applicants and should not be visited on innocent litigants.
For this proposition Mr. Ahanya cited ***Edith Nantumbwe Kizito & 3 O'rs vs. Mariam
Kutesa, CA Civ. Ref. No. 98 of 2008***, where it was held, inter alia, that mistake of
Counsel should not be visited on an innocent litigant. Counsel submitted that this court
65 considers the opinion in the cited case and dismisses the preliminary objection.

In rejoinder, Mr. Kutesa reiterated the earlier submissions adding that there is no mistake
as alleged because Counsel for the Applicants does not admit there was any either on his
or his clients' part. To that end Mr. Kutesa distinguished the case of ***Edith Nantumbwe
Kizito & 3 O'rs vs. Mariam Kutesa***, from facts of the instant case because in the former
70 case, the Court of Appeal was considering extension of time where the Applicant had
filed an application for the extension which is not the same as in the instant application
where the Applicants failed to file one. Mr. Kutesa further submitted that no grounds
have been advanced by Counsel for the Applicants who only stated that time did not start
to run on 22.07.2015 but on 17.08.2015. Mr. Kutesa further faulted submissions of
75 Counsel for the Applicants as giving evidence from the Bar and prayed that it should be
rejected. Mr. Kutesa also observed that Mr. Ahanya was falsely trying to impute

wrongdoing on part of the Registrar by suggesting that the Registrar backdated the summons.

Citing the case of *Hussein Badda vs. Iganga District Land Board & 4 O’rs HCMA 479 of 2011* Mr. Kutesa argued that an application is valid only when it has been signed and sealed with the seal of court within the meaning of *Order 5 r.1(5) CPR*, but that the instant application was duly signed and sealed by the Registrar on 22.07.2015 and that it is when time began to run. Counsel reiterated the prayer that the application be dismissed for being incompetent.

Resolution:

I will start by stating the position of the law. Applications, whether by Chamber Summons or Notice of Motion, and/ or Hearing Notices, are by law required to be served following after the manner of the procedure adopted for service of summons under *Order 5 r.1 (2) CPR*. This position was taken in the case of *Amdan Khan vs. Stanbic Bank (U) Ltd. HCMA 900 of 2013* in which this court followed the Supreme Court decision in the case of *Kanyabwera vs. Tumwebwa [2005] 2 EA 86*, where at page 94 of the judgment Oder JSC (R.I.P) held as follows;

“...What the rule stipulates about service of summons, in my opinion, applies equally to service of hearing notices.”[Underlined for emphasis].

It would appear clearly from the above decision that reference to the procedure of service of summons under *Order 5 (supra)* also applies to service of hearing notices and applications for purposes of the provisions relating to the issuance and service. Therefore, the service of the instant application had to comply with the procedure of service of

summons under **Order 5 r.1 (2) CPR**. For ease of reference I quote the relevant portion
100 below;

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

105 [Emphasis added].

In the instant application, the Notice of Motion was duly endorsed and sealed with court seal by the Registrar on 22.07.2015. For all intents and purpose that is the date of filing from which computation of the time for service on the opposite party began to run. The Applicants did not serve the application on Counsel for the 1st Respondent until
110 20.08.2015 at 1:00pm when it was received under protest owing to the late service upon them. Clearly the 21 days stipulated in the rule had long expired and any service of the application was out of time set by the law.

At that point, the Applicant had the option of invoking the exception in the provisions of **rule 1(2) of Orders 5 CPR**, to apply for extension of time within 15 days from the expiry
115 of the initial time stipulated for the service. The Applicants choose not to exercise that option, which inevitably locked them out of the only options available under the law for service of their application upon the 1st Respondent. Therefore, the service of the application upon the 1st Respondent’s Counsel outside the time prescribed by law for such service without applying to court for the extension of time within which to serve the
120 application renders the application incompetent before court.

Apart from the above default, I still find no merit in Mr. Ahamya's statements from the Bar. He stated that when the application was filed on 22.07.2015 it was received by the Registrar, but that no hearing date was given and that when later they received the application on 15.08.2015 they found that it had been endorsed as filed on 22.07.2015 and fixed for hearing in October, 2015, and that they proceeded and served it on the 1st Respondent on 20.08.2015. Counsel then submitted that this was a mistake of both the court and Counsel for the Applicants which should not be visited on innocent litigants. He cited the *Nantumbwe Kizito case (supra)* for that proposition.

With due respect to Mr. Ahamya, it is not true that his or the Applicants' failure to serve the application within the time prescribed by law was a "mistake of the court and Counsel". From his own statements, Mr. Ahamya clearly suggests that there was no mistake by Counsel at all. In fact he does not own up to one. He only states that it was court which after receiving the application on filing on 22.07.2015 did not give a hearing date and that by 15.08.2015 when he received the application it was out of time. In effect he blames court for the mistake, and this is no mistake of Counsel to speak of. The *Nantumbwe Kizito case (supra)* is thus inapplicable to facts of this case.

Secondly, even the blame for the mistake on court is misplaced. Mr. Ahamya falsely and without any basis imputes wrong doing on the Registrar for backdating the application to read 22.07.2015. This is a very serious matter and Counsel would do better to desist from such outrageous and totally unsupported allegations. The documents speak for themselves and the date on the application is the 22.07.2015 as the date of filing and issue of the summons. It cannot be emphasised enough that an application is valid only when it has been signed by the Judge or such officer he or she appoints and it is sealed with the

seal of court within the meaning of *Order 5 r.1(5) CPR*. See: *Nakato Brothers Ltd vs. Katumba (1983) HCB 70; Hussein Badda vs. Iganga District Land Board & 4 O'rs(supra)*.

Mr. Ahanya made yet another outlandish claim in his letter addressed to the Registrar
170 dated 15.10.2015. This was just after Counsel had been granted an adjournment
specifically to respond to the preliminary objection because he was not ready. He claimed
that the Court Clerk to the trial Judge herein informed him on 22.07.2015 when they filed
the application that no date could be allocated for any file during court vacation, and that
they should return later. Counsel never got the said Clerk to put in an affidavit to confirm
175 these otherwise unsubstantiated claims. If anything the Clerk verbally expressed no
knowledge of such facts. This simply shows how desperate Counsel sought for
scapegoats for his own shortcomings; which borders on unprofessionalism, which should
be condemned strongly. Lawyers should desist from laying blame of their own
professional failures and incompetence on court officials. The net effect is that this
180 application is incompetent, and it is dismissed with costs.

185 **BASHAIJA K. ANDREW**
JUDGE
22/10/2015

Mr. Paul Kutesa, Counsel for the 1st Respondent present.

190 Mr. K.P. Eswar, Director of the 1st Respondent present.

Mr. Sam Ahanya, Counsel for the Applicants absent.

Applicants absent.

Mr. G. TumwKirize, Court Clerk present.

Ms. H. Nansera, Court Transcriber present.

195 Court: Ruling read in open Court.

BASHAIJA K. ANDREW
JUDGE
22/10/2015

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