

**THE REPUBLIC OF UGANDA
IN THE HIGH OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS CAUSES NO. 902 OF 2014
AND MC.NO. 1030 OF 2014
[ARISING FROM CIVIL SUIT NO. 315 OF 2014]**

- 1. GEORGE LUKANGA**
- 2. JOHN KYABAGU**
- 3. BURUHAN SSEMAKULA..... APPLICANTS**
- 4. KATO MOSES**

VERSUS

PATRICK DAVID KANAKULYA..... RESPONDENT

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

This is my ruling with respect to the two applications which were amalgamated by consent of counsel of both parties on 17/9/14. I find it necessary to give a brief background of HCCS.No.315/14 from which both these applications emanate. Patrick David Kanakulya the plaintiff in the main suit, claims ownership of land known as Busiro Block 201 Plot 35 by virtue of being an administrator of the estate of the late Christopher Katerega the former owner of the suit land. He claims that the 1st and 2nd defendants have trespassed upon the suit land fenced off the burial grounds on it and this, with the assistance of the 3rd and 4th defendant.

In MA.902/14, the applicants (who are the defendants in the main suit) seek an order of dismissal of the main suit on account of late service of summons. On the other hand, in MA. 1030/14, the applicant (who is the plaintiff in the main suit) seeks leave to extend time within which to serve the same summons.

The applicants in MA.902/14 argue that the summons were sealed on 12/6/14 and service effected upon the 3rd applicant/defendant on 18/7/14, the later who accepted service on behalf of all the applicants. They argued that such summons had expired and had no legal effect and therefore, that the suit cannot be maintained. David Kanakulya by his affidavit of reply admitted the service but argued that the onus of effecting service fell on the process server of his lawyer who failed to do his duty. That as a litigant, he played no pivotal role in the service and the mistake of that clerk should not be visited upon him. He further argued that court registries

are bound to receive court documents even when filed late, and the main suit is still maintainable until a decision is made by this court.

The application to extend time within which to serve the summons of Civil Suit 315/14 was based on S.96 & S.98 CPA. Again Patrick Kanakulya repeated most of his averments made in reply to MA.902/14, and in addition, stated that he honestly believed that both the summons and application in the proceedings with respect to MA.761/14 were served upon the respondents by the process server at the same time. He further argued that this being a land dispute, court should accommodate him and allow extension of time to serve the summons, and the respondents would not be prejudiced thereby. Conversely that if the application is not allowed, he will be prejudiced as the suit land accommodates burial grounds which are being put to waste.

In response to MA.1030/14, Buruhani Ssemakula the 3rd respondent stated in his affidavit, that the application was served upon him and other respondents 9/9/14 long after summons in the main suit were served and after the application to strike out the head suit had been filed. He argued that the applicant slept on his rights to apply to extend time within which to serve the summons. He argued therefore that the head suit is an illegality that cannot be cured by an application, and he will be prejudiced if it is maintained on the record.

Since this is an amalgamated action I will consider the arguments of both counsel concurrently but shall take into account the fact that MA.902/14 was filed first in time. On request of the court, both counsel filed written submissions and provided authorities in support of the applications.

The basis of MA.902/14 is that service of the summons in respect of the head suit was done out of time. Both counsel agreed and it is a fact that the relevant law would be order 5. R. 1, R2 & R3 CPR. I will give emphasis to the 2nd rule which provides as follows;

- a) *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.*
- b) *Where summons have been issued under this rule, and –*
 - i) *Service has not been effected with twenty-one days from the date if issued; and*
 - ii) *There is no application for an extension of time under subrule (2) of this rule; or*

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

Counsel for the applicant argued, and I agree that service of summons must be done within 21 days and failure to apply for an extension would attract dismissal of the suit without notice. He further argued that the suit is bad in law as no extension was sought within the statutory period of 15 days and in such instance, the court has no jurisdiction to issue fresh summons to a party who has not complied with those provisions. In this counsel relied on the Court of Appeal judgment in **Rwabuganda Godfrey Vs Bitamisi Namuddu CA.87.10**

There was no serious contest on these points by David Kanakulya because he did admit that his counsel (or in particular the clerk/process server of the firm) failed to take the necessary step within the statutory time. He argued however that under S.96 & 98 CPA, Court has jurisdiction to enlarge time where a fixed period has expired and it is necessary for the ends of justice or to prevent abuse of court process. Mr. Kanakulya's counsel argued that the objective of service is to give notice to the other side and thereby afford him an opportunity to act upon that action against them and late service would not prejudice the defendants. He also relied on a host of authorities. However, I noted that most of them were in respect of Rule 4 (now R.2(2) Judicature Supreme Court rules. With due respect, I decline to be bound by those authorities because they dealt with a particular section on appeals to the Supreme Court and should not apply here where a specific provision has been made in the Civil Procedure Rules that apply to this court.

I have already agreed with counsel for the defendants that the provisions of O.5 rule (1), (2) and (3) are couched in mandatory terms and have routinely been regarded as such by this court. See for example **Rwabuganda Godfrey Vs Bitamisi**. However I do agree with counsel for Patrick Kanakulya that the object of service is meant mainly to satisfy the tenets of natural justice and due process i.e. to give notice to the other side and afford them an opportunity to respond to the allegations made against them in the plaint. I find the authority provided by counsel for David Kanakulya useful in this aspect. That is, in **Intercar (U) Ltd Vs Spear Motors Ltd CA.88/08**, the Court of Appeal took the liberal view that the mandatory provisions of O.5 r1(3)(C) can be qualified in certain circumstances. The court was of the view that the purpose of summons has its background in the doctrine of natural justice i.e. is to give notice to the party on whom it is made and give him a chance to resist the action. That the mandatory provision should be

qualified where the appellant has filed his defense because that shows that they are now aware of the suit and made a reply to it. In their view, the mandatory provisions of Order 5 have been superseded by article 126(2) (e) of the Constitution. The court then concluded that a Judge can use her discretion to extend time to serve summons if the defense is already filed on record.

However, the same court in **Rwabuganda Godfrey Vs Bitamisi Namuddu (supra)** was of a different view. They sought to apply the provisions of O.5 strictly and set aside an *ex parte* decision of the Land Tribunal which allowed the issuance of fresh summons to a party who had not complied with the provisions of O.5 r2 CPR. The court held the opinion that the *ex parte* decree and judgment of the Land Tribunal that followed the substituted service was a nullity.

In the two authorities above, the Court of Appeal appears to have a contradictory interpretation of mode and times of summons under Order 5 CPR. However, I do hasten to add that even the court in **Inter Car (U Ltd Vs spear Motors (U) Ltd (supra)** did agree that the provisions of O.5 CPR are mandatory but can, in view of the supremacy of the Constitution (Art.126(e) in particular) and the particular circumstances of each case, be waived. This liberal view appears to run strongly through other decisions of the Court of Appeal where they have chosen to treat certain procedural rules as merely directory and not mandatory. I find the quote from Smith's Judicial review of an Administrative Action 4th Ed. 1980 at pg 142 (quoted in election appeal 26/2007) instructive,

“ In assessing the importance of the provision, particular regard may be had to its significance as protection of individual rights, the relative value that is normally attached to the rights that may be adversely affected by the decision and the importance of the procedural requirement in the overall administration scheme established by the statute.

Although nullification is the natural and usual consequence of disobedience, breach of procedural or formal rules is likely to be treated as a mere irregularity if the departure from the terms of the Act is of a trivial nature or if no substantial prejudice has been suffered by those for whose benefit the requirements were introduced or if serious public inconvenience would be caused by holding them to be mandatory or if the court is for any reason disinclined to interfere with the act or decision that is impugned”.

Service of summons is clearly a procedural action meant to alert a party of proceedings against them. It is but just one small albeit important step required to be taken in a long range of proceedings that will allow a dispute to be heard and adjudicated upon by a court. The circumstances of this case are such that summons which should have been served not later than 3/7/14 were instead served on 18/7/14, a mere 15 days late. The defendants did not deny the fact of service and did in fact file a defense to the suit. They have not in any of their proceedings shown how late service has prejudiced their defense or affected the case in general. The head suit is not yet dismissed and in my view, its dismissal may in fact result into a public inconvenience as it would mean filing of a fresh suit and the possible attendant interlocutory proceedings. Again, going by the facts in the written statement of defence filed in the head suit, the parties are known to each other, with each claiming a stake (as administrator/beneficiary respectively) to the estate of the same deceased person. In such circumstances the court is inclined to encourage an expeditious trial than de-support it.

The above notwithstanding, I do agree with counsel for the defendants that their filing of a defense should not be treated as a waiver by them of the irregularities now being raised against late service. However, the provisions of O.9 rule 2 ought to be read in conjunction with 0.9 r. 3 (a) (b) which provide that a defendant who wishes to dispute jurisdiction owing to any irregularities in the summons or its service, should give notice and then make a specific application to set aside the summons or service of the service on him. In fact under rule 0.9 r. 3(6) where a defendant does file such an application their deference on file is to be treated as a submission by them to the jurisdiction of the court in the proceedings.

In my view therefore I choose to treat late service of the summons as a mere technicality that does not go to the root of the suits existence. I thereby find that the circumstances of this case merit exercise of my discretion to allow the application to extend the time within which service of summons in Civil Suit No.315/14 can be extended. Since the summons have already been served and the defendants do not deny such service, it is deemed that the head suit is properly maintainable before me and shall take its course. Thereby MA.902/14 is dismissed and MA.1030/14 is allowed. However, since the plaintiff admitted his wrong, I decline to allow him

costs in both applications. Accordingly, the interim order granted by the learned Registrar in MA.762/14 is maintained on the record until further orders to the contrary.

However, before I take leave of this case, I need to mention that my attention was drawn from facts related in the Written Statement of Defense of the head suit here (and not controverted by Mr. Kanakulya, the plaintiff) to the fact that there is an existing dispute in the Family Division, **HCCS. No. 42/08 George Lukanga & Anor Vs Patrick David Kanakulya**. It is clear that some of the parties and the issue in dispute in HCCS. No.42/08 are the same as those in the head suit before me. In the family division the present defendants are the plaintiffs and claim to be beneficiaries of the estate of the late Christopher Katerega (hereinafter called the deceased) and that Mr. Kanakulya obtained administration of the deceased's estate fraudulently. The nature of the defense in that case is not disclosed but in HCCS. No. 315/14 (which was filed five years later), Patrick Kanakulya claims ownership of the suit land having obtained administration as a grandchild and administrator of the deceased's estate. The defendants have a parrel claim to the said land as beneficiaries of the same estate. Although the suit land was not specifically quoted in the earlier suit, I can assume that it is one of the properties owned by the deceased's estate. In my view therefore, it is important that the succession issues be settled first. In fact, a verdict in the first case would completely resolve the dispute before me.

Therefore, I order that hearing of both HCCS. No.315/14 shall be stayed until final disposal of HCCS. No.42/08 at the Family Division.

My order with regard to costs shall be as here before stated.

I so order.

EVA K. LUSWATA
JUDGE
16 February 2015