

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
MISCELLANEOUS CIVIL APPLICATION No. 0009 OF 2017
(Arising from Civil Suit No. 1 of 2017)

1. RASHIDA ABDUL KARIM HANALI}
2. MOHAMED ALLIBHAI } APPLICANTS

VERSUS

SULEIMAN ADRISI RESPONDENT

Before: Hon Justice Stephen Mubiru.

RULING

This is an application under the provisions of Order 5 rules 1 and 3 of *The Civil Procedure Rules*, section 98 of *The Civil Procedure Act* and section 33 of *The Judicature Act*. It seeks to strike out the plaint for failure to serve summons in the above matter on the first and second applicants, and to vacate the ex-parte interim orders made in that suit against the applicants.

It is supported by the affidavit of the second applicant in which he depones that by a certificate of repossession dated 11th April 1994, the first applicant repossessed property comprised in plot 2 New Lane Arua which property the respondent too claims as grantee of a lease offer by Arua District Land Board dated 21st February 2013 which offer was revoked on 20th January 2017 as having been made in error as a result of which the title deed LRV 488 Folio 25 which had been issued to him was on the same day called for cancellation. Nevertheless, sometime in mid February 2017 the second applicant learnt from the area L.C1 Chairman that the respondent had filed a suit against both applicants together with two other parties and had secured an ex-parte interim order restraining the applicants from “trespassing on the plot, disturbing and collecting rent from tenants, alienating the suit land and in any way doing any activity in respect of the suit land.” He sent his legal officer to the court registry to confirm whether indeed any proceedings had been filed against the two of them and it was confirmed as true but has to-date they have not been served with summons to file a defence, hence this application.

In his affidavit in reply, the respondent contends that the L.C1 Chairman of Oli Bus Park Cell is an agent of the second applicant and service on him of the interim order was effective service upon the second applicant since he did not know the address of the applicants. The applicants were served through their postal addresses by registered mail (speed post) posted on 27th January 2017. His lawyers have since then by a letter dated 13th March 2017 sought issuance of fresh summons to file a defence, for service upon the applicants. The other two defendants in the suit were duly served with the plaint and summons to file a defence as indicated in the affidavit of service filed in court on 10th March 2017.

In his submissions, counsel for the applicants Mr. Ambrose Tebyasa contended that the affidavit in reply does not contain an explanation for the failure to serve within the stipulated 21 days and there is no pending application for extension of time. Therefore the proceedings are rendered incompetent and a nullity as failure to serve the applicants even if the other parties are served, is fatal since failure to serve court process is not a mere technicality. He cited the Nigeria Court of Appeal decision of *Chief Raphael Onwuka v. Lukuman Owolewa* and prayed that the plaint / suit is struck out with costs.

In reply, Mr. Ondoma Samuel, Counsel for the respondent opposed the application and argued that the applicants were duly served with summons to file a defence through their postal addresses. It was difficult to effect personal service on the applicants and therefore they were served by posting the plaint and summons. Under Section 98 of *The Civil Procedure Act*, the Court has inherent powers to overlook technicalities in order to meet the ends of justice. This is a delicate matter since the certificate of title of the respondent is on the verge of being cancelled if the application is granted. The applicants became aware of the proceedings when they received a copy of the interim order. They should therefore be deemed to have been served.

I have carefully considered the submissions of both counsel. Amendments to *The Civil Procedure Rules* were introduced on 24th July 1998 (see *The Civil Procedure (Amendment) Rules, 1998; S.I. 26 of 1998*) as part of measures taken to allow more expedient justice for those with legitimate claims. Order 5 rules 1 (2) of *The Civil Procedure Rules* provides as follows;

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 added).

The use of the word “shall” prima facie makes that requirement mandatory. This provision automatically invalidates summonses to file a defence which may have been issued and are not served within twenty one days of issuance. It is meant to eliminate suits which are filed for the sake of achieving collateral objectives other than the genuine determination of justiciable disputes and as a means of expeditiously disposing of frivolous or speculative suits. It is thus settled law that the provisions of Order 5 of *The Civil Procedure Rules* are mandatory and should be complied with (see *Kanyabwera v. Tumwebaze* [2005] 2 EA 86 at 93).

A plaintiff, who fails to serve within the stipulated twenty one days from the date of issuance of the summons upon him or her for service, will not *ipso facto* lose the right to do so beyond that period, provided the Court permits him or her to do so for reasons which it must state in writing. Extension of the time within which to serve the summons must be sought “within fifteen days after the expiration of the twenty-one days.” Under Order 5 rule 32 of *The Civil Procedure Rules*, the application must be made by summons in chambers. The requirement of a formal application “showing sufficient reasons for the extension” imposes a duty on Court to apply its mind to the reasons advanced by the plaintiff for his or her failure to serve within the twenty one days and to record the reasons for extending the time. In other words, there is no mechanical extension of time for serving summons to file a defence. The Court must be satisfied by evidence on record and state the precise reasons for its permitting the plaintiff to do so beyond the stipulated period. Such evidence cannot be adduced by way of a letter such as counsel for the respondent wrote to court on 13th March 2017 seeking fresh summons to issue. An application for extending the validity of summons which have not been served must be made, by filing an affidavit setting out the attempts made at service and their result, and the order may be made without the advocate or plaintiff in person being heard.

The power of the Court to extend the time for filing of the written statement is however restricted, on a plain reading of the rule, to applications made within fifteen days reckoned from the date of expiry of the twenty one days within which service of the summons should have been effected. The words used by the Rules Committee for conveying its intention are unambiguous

and the only plain, literal and logical interpretation that can be given to the provision read as a whole is that the Court cannot extend time in respect of applications made beyond the fifteen days. The summonses were issued to counsel for the respondent for service on 14th January 2017. Consequently they should have been served on the applicants latest 4th February 2017, failure of which the extension ought to have been sought formally latest 20th February 2017, yet he made the informal application for extension of time almost a month outside time on 13th March 2017.

It is argued by counsel for the respondent that the court should in the interests of justice disregard these irregularities. That submission is apparently inspired by the general principle that the rules of procedure are “intended to serve as the hand-maidens of justice, not to defeat it.” (See *Iron and Steel Wares Limited v. C.W. Martyr and Company (1956) 23 E.A.C.A. 175 at 177*). In a deserving case, the court may rightfully exercise its discretion to overlook the failure to comply with rules of procedure, upon such conditions as it may deem fit intended to guard against the abuse of its process. Article 126 (2) (e) of *The Constitution, 1995*, enjoins courts to administer substantive justice without undue regard to technicalities. For that reason each case is to be decided on its facts. In *Byaruhanga and Company Advocates v. Uganda Development Bank, S.C.C.A No. 2 of 2007, (unreported)* it was left to the discretion of the judge to decide whether in the circumstances of a particular case and the dictates of justice, a strict application of the laws of procedure, should be avoided. The Supreme Court decided in that case that;

A litigant who relies on the provisions of article 126 (2) (e) must satisfy the court that in the circumstances of the particular case before the court it was not desirable to have undue regard to a relevant technicality. Article 126 (2) (e) is not a magical wand in the hands of defaulting litigants.

However, in the instant case, the court is mindful of the mischief sought to be cured by the requirement for strict compliance with the periods of time stipulated in Order 5 of *The Civil Procedure Rules*. The entire scheme of that Order aims at only one thing; to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him or her expeditiously without undue delay. This is consistent with the requirement of Article 28 (1) of *The Constitution of the Republic of Uganda, 1995* to the effect that in the determination of civil rights and obligations, a person shall be entitled to a fair, speedy and

public hearing. This is achieved by effecting personal service failure of which substituted service may be allowed in such situations as the rules permit.

If the defendant appears before the Court after the filing of the suit against him or her, and he or she is informed about the nature of the claim and the date fixed for reply thereto, it must be deemed that the defendant has waived the right to have a summons served on him if such a defendant goes ahead to file a defence to the suit before he or she is formally served in accordance with the rules of service of summons. Such a waiver can be determined from the record and also from the subsequent conduct of that party. The same position will arise when a party *suo motu* appears before the Court prior to actual service of summons either by himself or through counsel. In such a case, it would rather be too technical a view to take that service of summons in the ordinary course should still to be insisted upon and to hold that further proceedings in the suit would take place only thereafter. This is neither the purpose nor the way to look at the various provisions of *The Civil Procedure Rules*. It is not possible for me to countenance a situation in which the defendant though present in the Court, is still allowed to insist that unless proper service of summons be made upon him or her, he or she should be deemed to be unaware of the proceeding. Where therefore defendants on their own motion file defences to the suit, it becomes superfluous to still insist that summons should be served upon them.

That notwithstanding, it is not sufficient for a plaintiff to institute suit against a party and not take steps to effect service of summons. A defendant must be invited to submit to the authority of the court in order for the legal process of setting down the suit for trial to commence. The Summons must be served in the manner provided for in the rules to enable the defendants to submit to the jurisdiction of this court. It therefore follows that their knowledge of the existence of the suit is not sufficient to proceed against them. They may be aware of the suit but unless they are prompted by the summons in the manner provided for in the rules, the jurisdiction of the court over them is not invoked and therefore they may in exercise of their rights choose never to appear or respond to the suit and nothing can happen to them. Consequently, the suit will never proceed against them and neither can the plaintiffs obtain interlocutory judgment against them nor set it down for hearing against the defendants since no interlocutory judgment can be entered

in a suit except in default of filing a defence. Therefore until a defendant is served with summons to file a defence, there is no basis for him or her to answer to the suit.

The question is whether failure to adhere to such clear and elaborate procedural requirements of Order 5 of *The Civil Procedure Rules* on the validity of and service of summons outside the stipulated time periods is a mere procedural technicality that can be sacrificed at the altar of substantive justice. In my considered view, a summons to file a defence is a judicial document calling upon the defendant to submit to the jurisdiction of the court and if the party is not given that opportunity to so appear and either defend or admit the claim, there is no other way he or she will submit to the jurisdiction of the court. This rule therefore cannot be mere procedural technicality. A court has no jurisdiction to deal with a filed plaint until a summons to file a defence has been served and a return of service filed, which step alone will activate further proceedings in the suit. Until summons have been issued and served, the suit is redundant.

Article 126 (2) (e) of *The Constitution of the Republic of Uganda, 1995*, is not a panacea for all ills and in appropriate cases the court will still strike out pleadings such as this considering that one of the aims and overriding objective of the amendment of Order 5 of *The Civil Procedure Rules* was to enhance expeditious disposal of suits and curtail the abuse of court process for ulterior motives. If this proposition is correct, as I think it is, it would follow that a suit would be liable for striking out at any stage upon expiry of the stipulated periods before the summons duly issued is served. 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 (see *Fitzpatrick v. Batger & Co. Ltd* [1967] 2 All ER 657).

It is for those reasons that non-compliance with the requirements of renewal of summons to file a defence is considered a fundamental defect rather than a mere technicality and it cannot be cured by inherent powers since issuance and service of summons to file a defence goes to the jurisdiction of the court (see *Mobile Kitale Station v. Mobil Kenya Limited & Another* [2004] 1 KLR 1; *Orient Bank Limited v. Avi Enterprises Ltd.*, H.C. Civil Appeal No. 002 of 2013; *Western*

Uganda Cotton Company Limited v. Dr. George Asaba and three others, H.C. Civil suit No. 353 of 2009 and Asiimwe Francis v. Tumwongyeirwe Aflod, H.C. Misc. Application No.103 of 2011).

In this case, the summonses to file defences issued in respect of the applicants expired on 4th February 2017, without any action having been taken by the respondent and his counsel to extend their validity. It is not possible to revive them by way of the letter filed by counsel on 13th March 2017. Since none of the applicants has engaged in conduct constituting waiver of their right to be duly served and submit to the jurisdiction of this court, the suit against them lapsed the moment the summons became stale for non-compliance with the requirements of Order 5 r 1 (2) of *The Civil Procedure Rules*.

Consequently, civil suit No. 0009 of 2017 is struck out as against the applicants and the interim order issued there-under is set aside as against the applicants. The applicants are awarded the costs of this application.

Dated at Arua this 23rd day of March 2017.

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Stephen Mubiru
Judge