

MA.1656 OF 2017-PAUL VS KAMPALA FINANCIAL SERVICES LTD (RULING)

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[LAND DIVISION]
MISCELLANEOUS APPLICATION NO.1656 OF 2017**

(Arising from Civil Suit No. 127 of 2010)

PAUL MBABAZI:.....:APPLICANT

VERSUS

- 1. KAMPALA FINANCIAL SERVICES LTD**
- 2. ESTATE OF THE LATE TURYAGASIRWA ANNET**
- 3. MUHURIZI JULIUS**
- 4. COMMISSIONER FOR LAND REGISTRATION:.....:RESPONDENTS**

BEFORE: HON. MR.JUSTICE HENRY I. KAWESA

RULING

This application was brought under Section 98 of the Civil Procedure Act Cap 71, O.6 rr.19, 31; O.1 r.10(2) of the Civil Procedure Rules SI NO.71-1 for orders that;

1. Leave be granted to the Applicant to add the 2nd, 3rd and 4th Respondents as Defendants to Civil Suit No.127 of 2010 by way of amendment.
2. Leave be granted to the Applicant/ Plaintiff to amend Civil Suit No.170/2010, file and serve the Respondents/Defendants the amended plaint.
3. Costs of the application be provided for.

The grounds upon which the application is premised are supported by an affidavit sworn by the Applicant. He avers therein that he has discovered new and important evidence which was inaccessible at the time of filing the main suit. That the new evidence directly links the 2nd, 3rd, and 4th Respondents to the dealings in the suit land as it was discovered that during the pendency of the main suit, the 1st Respondent transferred the suit land to the 2nd Respondent who was a

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witness to the mortgage transaction. That the transfer was meant to defeat the outcome of the main suit. A copy of the search certificate was attached as annexure “A”.

It is further averred that the 4th Respondent refused to register a caveat that had been lodged by the Applicant and went ahead to transfer the suit land into the names of the 2nd Respondent in collusion with the 1st and 3rd Respondent. Additionally, that the 2nd Respondent is a sister to the 3rd Respondent, a director in the 1st Respondent Company, who was closely, engaged in the business dealings of the 1st Respondent and thus the need to sue her. That as such, the plaint needs to be amended to make appropriate adjustments. A copy of the intended amendment was attached as “B”. Also still, that the amendment is intended to enable Court to deal with the issues between the parties more effectually in the interest of justice.

The application was opposed by the 1st and 3rd Respondent through an affidavit they filed under protest on ground of non-service. I wish to first in order to determine whether the application deserves Court’s determination. In their affidavit, the deponent averred that during the month of July 2018, a clerk from the chambers of the Applicant’s Advocate left with their Advocate two copies of a “supplementary affidavit” and “written submissions both filed on 6th April, 2018 unaccompanied by the chamber Summons. Further, that upon being asked why these were unaccompanied by the chamber summon and its affidavit, the clerk promised to bring them later. Additionally, that the clerk never returned hence prompting their Advocate to get a photocopy of the application from the Court Registry.

The Applicant did not file an affidavit in rejoinder to refute the above averments. There is also no affidavit of service on record to controvert the 1st and 3rd Respondents assertions. The same is true in respect of the rest of the Respondents. The Applicant’s Counsel filed written submissions which also did not address Court in respect of this concern.

In his written submission, Counsel for the 1st and 3rd Respondents’ appearance was in no way a waiver of their right to service of the application. He cited O.9 r2 of the Civil Procedure Rules which provides that;

“The filing of a defence by the defendant shall not be treated as a waiver by him or her of any irregularity in the summons or service of the summons or in any order giving leave to

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serve the summons out of the jurisdiction or extending the validity of the summons for the purpose of service.”

Counsel accordingly prayed that the application be dismissed with costs for failure to effect service of the same.

The record indicates that this application was filed on the 13th November 2017. It further indicates that the 1st and 3rd Respondents’ reply was filed on the 10th August, 2018; roughly 9 months past the filing of the application. The record also indicates that the one of the last times the parties appeared before Court, on the 13th February, 2018, Counsel for the 1st and 3rd Respondents to be ignorant of this application as he stated to Court that all applications were dismissed. This coincides with what the 1st and 3rd Respondents averred to in paragraphs 7 and 8 of their affidavit in reply that the Applicant had previously instituted a similar application but was dismissed for want of prosecution.

Considering these circumstances and the 1st and 3rd Respondents’ uncontroverted averments, I am convinced that the Applicant omitted serving the application on the 1st and 3rd Respondent.

Having noted as above, the question now is whether this is fatal to the instant application?

The law regarding service of Court process is provided for under O.5 and O. 49 r.2 of the Civil Procedure Rules SI 71-1. The said rules are intended to obtain the presence of the adverse party to the claim and to provide full information about the nature of the claim made against him or her. The provisions are in consonance with the rules of natural justice which entitle a party to a proceeding to the right to fair hearing. Service of a Court process is crucial for the invocation of the Court’s jurisdiction. Where a Court process is not served on the opposite party, Courts have on several occasions held that proceedings against him or her are incompetent. See ***Orient Bank Ltd versus Avi Enterprises Ltd HCC No.002 of 2013; Grace Nakiyemba versus Semugenyi Godfrey & Other HCCS No.397 of 2016; Rashida Abdul Karim versus Suleiman Adris HCMA No. 09 of 2017***, among others.

In certain cases, Courts have overlooked rules of procedure for substantive justice where the adverse party waived his or her right to formal service by entering appearance within time prescribed by the rules. See ***Rashida Abdul Karim versus Suleiman Adris HCMA No. 09 of 2017***.

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This is however unlike in the instant application as the 1st and 3rd Respondent appeared under protest. Their Counsel cited O.9 r2 of the Civil Procedure Rules in support of this. The said provisions are intended to give a Defendant the privilege of appearing without submitting to the jurisdiction of Court by protesting any irregularity in a Court process.

Applications like the instant one follow the same pattern as of the plaint and a defence. As such, it follows that a Respondent is entitled to the same privilege a Defendant would be entitled to under a written statement of defence. Because the 1st and 3rd Respondents were not served with the instant application, I find that this Court has no jurisdiction over them. I would be pleased to find otherwise but for the fact that their reply was filed outside time and under protest. Additionally, proceeding with the application would also be prejudicial to other Respondents who also appear not to have been served by the Applicant.

For those reasons, I find that non-service of the instant application upon the Respondents was fatal to the instant application. I am thus unable to look into the merits of the application.

Consequently, the application is dismissed with costs to the 1st and 3rd Respondents.

I so order.

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Henry I. Kawesa

JUDGE

14/03/2019

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14/03/2019:

Nyero Peter for he Applicant.

Applicant present.

Respondent absent.

Counsel absent.

Nyero:

Matter is for Ruling of the application.

Court:

Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

14/03/2019