

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
CIVIL SUIT NO. 130 OF 2017

NANKABIRWA EVA WALUSIMBI..... PLAINTIFF

VERSUS

MARIAM NAMUGENYI SOZI.....DEFENDANT

Before: Lady Justice Alexandra Nkonge Rugadya

RULING ON A PRELIMINARY OBJECTION

Introduction:

The defendant's counsel in this matter seeks to challenge the late service of summons by the plaintiff, claiming that the summons were issued on 24th February, 2017 and that on 21st March, 2017 instead of filing an application for the extension of time within which to serve fresh summons, the plaintiff counsel had applied to court for its renewal by letter, which process is unknown under the **Civil Procedure Rules**, hence amounting to an illegality, which this court should not condone. He submitted therefore that such failure to serve summons was not a mere technicality but rather touched the core foundation upon which the right to be heard is premised.

In response, the plaintiff counsel however while admitting that the summons had expired before being served, submitted that he had applied by letter and was granted fresh summons on 21st March, 2017 which had been duly served upon the defendant on 6th April, 2017 within the time as stipulated by the rules.

1


That the application for renewal and or extension of the summons was done within a period of 15 days from the expiry of the 21 days of the issuances of the original summons, as stipulated under the law.

Consideration of the issue:

5 I have carefully considered the submissions from both sides.

Order 5 rule 1 (2) provides that service of summons must be effected within 21 days from the date of issue; except that time may be extended upon application to court, which must be made within 15 days after the expiration of the 21 days.

10 The rules which as correctly pointed out are handmaidens of justice. They are flexible enough to allow a defendant who for some justifiable reason may have failed to effect service within the stipulated time, to file an application for the fresh summons to be issued and for the enlargement of the time within which the same is to be effected.

15 In ***Ejab Family Investments and Trading Company Ltd vs Centenary Rural Development Bank Ltd, HCCS No. 001 of 2014***, court noted that the use of the word *shall* under **order 5 rule 1(2) of the Civil Procedure Rules** *prima facie* makes mandatory the requirement to effect summons within the twenty-one days. (See also: ***Kanyabwera vs Tumwebaze [2005] 2 EA 86 AT 93***). The application for extension must be made formally to court.

20 It is not in contention that the original summons had expired on 24th February, 2017, which had prompted the plaintiff side to write to court seeking fresh summons on 21st March, 2017, some 25 days after the expiry of the original summons.

The objection in this application as I perceive it is therefore two-fold.

25 In the first place, the request for extension of time by learned counsel for the plaintiff which ought to have been presented by way of a formal application, was made irregularly, through a letter dated 21st March, 2017. As noted by this court, it was made without counsel availing to court with any reason as to why the original summons were never served.

Secondly, the letter of request which counsel for the plaintiff seems to suggest was an application for extension was filed outside the 15 days stipulated by law.

Court accordingly committed an illegality when it relied on a plain letter instead of a formal application with reasons, to justify the grant of the fresh summons.

30 Thus in effect three wrongs were committed in respect of this particular application. The first is failing to serve the defendant when the summons were originally served.



Having failed to serve the plaintiff ought to have applied formally, with reasons to court to support the request for enlarging time within which to serve the defendant. The reasons must be presented by way of affidavit evidence.

5 Failure by the registrar of this court to consider the above omissions and his failure to adhere to the rules of procedure were illegalities which court cannot condone. (***Makula International versus His Eminence Cardinal Nsubuga (1982) HCB 11.***)

It has been stated before that the rules of procedure are intended to serve as the hand maidens of justice, but not to defeat it. (***Iron and Steel Wares Ltd vs C. W Martyr and Company (1956) 23 EACA 175 at 177.***)

10 Although a court may choose to disregard the technicalities for the sake of administering substantive justice, as per **article 126 (2)(e) of the Constitution**, the said article is not a panacea for all ills.

In appropriate cases court will not hesitate to strike out pleadings, given the fact that one of the aims and overriding objectives of the rules is to enhance expeditious disposal of suits and curtail
15 abuse of process for ulterior motives.

If these propositions are correct as I think they are, it would follow that a suit would be liable for striking out at any stage, upon expiry of the stipulated periods.

For those reasons, such noncompliance with the procedures necessary for the renewal of summons to file a defence is a fundamental defect and not a mere technicality that can be cured
20 through the inherent powers of this court.

It goes to the jurisdiction of court, as declared earlier by this court in ***Asimwe Francis vs Tumwongyeirwe Aflod HCMA No. 103.*** Thus any purported application or service after the stipulated time limits would be ineffective and/or therefore of no legal consequence.

I have also carefully perused the record in search for an affidavit of service. I have found none.
25 The claim made that the defendant had been served through her daughter on the date indicated as 6th April, 2017 were mere submissions from the bar.

These anomalies cannot be ignored, and in my view the filing of the defence could not be perceived as a waiver to those mandatory requirements. I am supported in this by the provisions of **order 9 rule 2 of the CPR.**

30 By virtue of **Order 5 rule 3 (b) of the CPR**, where there is failure to adhere to the twenty one days rule, such failure would empower this court to dismiss the suit, without any notice, more so where, as noted in this case, there was no proper application for the extension of time.




For those reasons therefore, I hereby dismiss the suit with costs.


Alexandra Nkonge Rugadya

5 **Judge**

16th August, 2021

Delivered by email
17/08/2021


G.