

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 1796 OF 2021

ARISING FROM CIVIL SUIT No. 200 of 2020

(Formerly Civil Suit No. 394 of 2013)

1.TURINAWA RWAGOMANI AMOS

2.BARIGYE BENON AHAMED

3.KARUHANGA STEPHEN-----APPLICANTS

Vs

1.NKUUNA ABDULLAH

2. NASANDE ANGELLINA

3. S.V & SONS (U) LIMITED

(Through its lawful attorney

Lubega George William) -----RESPONDENTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

RULING

This application was brought by way of notice of motion seeking that the Respondents' Written Statement of Defence and Counter Claim be struck out and costs be provided for.

When this matter came up for hearing, Counsel for the Respondents raised a preliminary objection to the effect that the Applicants' motion was served out of time and ought to be struck out under Order 5 rule 1 of the CPRs. He submitted that the Applicant filed his application on the 4th October 2021, it was fixed for hearing on the 2nd June 2022 and

endorsed by the court on the 9th May 2022 but only served on the Respondents on the 12th August 2022. Counsel argued that this was beyond the 21 days within which to serve and was done without leave of court. Counsel maintained that there was no application to be extended and prayed that it be struck out and Court proceeds on the pleadings before it. Counsel invited this court to consider the decisions in **Ssenkubuge Gladys & Anor versus Kibirango Joyce MA 1704 of 2019** and **Karyobwera versus Tumwebwa 2005 EA at page 86** which agreed with his position.

In reply, Counsel for the Applicants opposed the objection and submitted that Order 5 Rule 1 was not applicable to motions of this nature. He contended that this court entertained this application and even adjourned it once. Counsel further submitted that it is Order 52 rule 1 that ought to be applied in this instance since this application was brought by way of Notice of Motion. Under that rule, time within which to serve is not prescribed so as to seek Court to give extension of time. In such cases, Counsel submitted, recourse must be had to section 34(2) of the Interpretation Act which provides for the computation of time. Counsel maintained that Order 5 rule 1 applies to the procedure to be followed when filing a plaint and the procedures governing motions and plaints are different. He relied on R.H. K Ddungu v The Cooperative Bank Limited (in Liquidation) MC No. 33 of 2012. In that case, the learned Judge held that the service of summons under Order 5 rule 1(a) only applies to an ordinary suit filed under the CPRs.

In conclusion Counsel implored this court to find that the instant application did not expire since it is properly on court record and to dismiss the objection with costs.

By way of rejoinder, Counsel for the Respondents reiterated his submissions and added that the factual aspects of the cases cited by Counsel for the Applicant are distinguishable. He emphasised that the issue was time not the nature of the pleading and in this case, the Notice of Motion was served out of the 21 days and ought to be struck out.

RESOLUTION

It is not in dispute that the Notice of Motion application was served upon the Respondents 21 days out of time. Counsel for the Respondent submits that this does not matter since

the application is not bound by the timelines set out under Order 5 rule 1 since it is not a suit commenced by Plaintiff and secondly that this court entertained the parties at the previous sitting, and therefore, this application was properly before the court.

Section 2(x) of the Civil Procedure Act Cap 71 defines the word; 'suit' and it is instructive in this matter;

"suit" means all civil proceedings commenced in any manner prescribed.

Section 2(q) gives the meaning of prescribed as;

'means prescribed by the rules'.

The question at the crux of the preliminary objection is whether the Notice of Motion in the instant case could be defined as a suit within the meaning of section 2(x) of the Civil Procedure Rules. I perused the Notice of Motion. It was filed on the 4th October 2021 and was duly signed by Counsel for the Applicant. There is no signature of the Deputy Registrar on the motion. In **Civil Procedure and Practice in Uganda by M. Ssekaana & S.N Ssekaana at page 173**, notices of motion were distinguished from summons;

'As a rule all notices of motion must be signed by the party or his solicitor or advocate and one of the distinguishing features- between summons and a notice of motion is that while the former must be signed and is usually signed by a judge or some other officer of court authorised to do so, a notice of motion must be signed by the applicant himself or his advocate. The obvious reason is that a summons is issued by the authority of court and regarded as a command directed by the court concerned. But a motion is usually brought by a party seeking some sort of relief or remedy from the court and must be therefore signed by him...'

See also **Bazira Construction Engineering Works Limited v EA Steel Corporation (1992-1993) HCB 220 & Masaba v Republic (1967) EA 488**

In the instant motion, the relief sought by the Applicant is to have the Respondents' Written Statement of Defence and Counter Claim struck off the court record. It was not instituted by summons but by an application duly signed by the Applicant's advocate.

Order 5 rule 1 of the CPRs provides;

ORDER V—ISSUE AND SERVICE OF SUMMONS.

1. Summons.

(1) When a suit has been duly instituted a summons may be issued to the defendant—

- 5 *(a) ordering him or her to file a defence within a time to be specified in the summons; or*
- (b) ordering him or her to appear and answer the claim on a day to be specified in the summons.*

Order 5 rule 1 of the CPRs specifically deals with summons and not notices of motion. I am thus persuaded by the decision in **R.H. K Ddungu**, supra that **Order 5 rule 1** governs
 10 suits commenced by ordinary suit/plaint through the issuance of summons to file a defence by the court. And that notices of motion are provided for separately under **Order 52 of the CPRs**. I am also of the view that **Order 49 rule 2 of the CPRs** deals with ‘how’ orders, notices and documents shall be served and not ‘when’ they shall be served.

It is a fact that the instant application was not commenced by way of summons. Therefore,
 15 the 21- day period within which to serve the summons under Order 5 rule 1 does not apply. Where a party moves court by notice of motion, it is presumed that they are desirous of the relief sought and it is the fixing of the hearing of the motion by the court, upon the request of the applicant that dictates the time lines for service on the opposite party. Which explains why there are no time lines for service specifically provided for. The
 20 law presumes it shall be done.

In conclusion, I agree with Counsel for the Applicants submissions and find no merit in the preliminary objection. It is overruled with costs.

25 **Olive Kazaarwe Mukwaya**

JUDGE

13th September 2022

Delivered by email to Counsel for the parties.