

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.2003 OF 2021
(ARISING FROM CIVIL SUIT NO.241 OF 2021)

1. ASABA CHARLES

2. KIIZA GERALD OSMAN

(Administrators of the Estate of the

late RWAHERU AKIIKI MARGRET):.....APPLICANTS

VERSUS

LUBEGA ACHILES:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING.

Introduction:

This application was brought under **Sections 98 of the Civil Procedure Act Cap. 71, Section 33 of the Judicature Act Cap.13** and **Order 6 rule 19 of the Civil Procedure Rules SI 71-1** seeking for orders that;

1. leave be granted to the applicants to file their written statement of the defence out of time;

2. costs of the application be provided for.

Grounds of the application:

The grounds of the application are contained in the affidavit in support deposed by **Mr. Asaba Charles** wherein he *inter alia* states that; the respondent filed **Civil Suit No.241 of 2021** against the applicants and that upon discovering the same, the applicants directed the process server to have them served through their lawyers **M/s Matovu N. J & Co. Advocates**. Service was effected on 26th March 2021.

That on 4th October 2021, the applicants however withdrew instructions from **M/s Matovu N. J & Co. Advocates** and instructed **M/s Owoyesigire Muhereza & Co. Advocates** to take over conduct of the matter. That upon their new counsel's perusal of the court file, the applicants were advised that their former lawyer did not file a defence on their behalf and that the time for filing the same has since lapsed.



That the applicants have a plausible defence that raises triable issues that merits adjudication and that the failure to file a defence in time was occasioned by the mistake of former counsel which should not be visited on the applicants otherwise they will suffer greatly if **Civil suit No.241 of 2021** is heard and determined without according them a hearing on account of their failure to file a defence.

In addition, that it is in the interest of justice that the time within which to file the defence be extended as the application has been filed without delay and that the respondent will not be prejudiced in anyway if the time for filing the defence is extended.

The application was opposed through the affidavit in reply of Mr. Lubega Achilles who deponed that through his lawyers, the respondent filed applications for a temporary injunction as well as an interim injunction vide **Miscellaneous Applications No.491 of 2021 and 490 of 2021** which were served on the applicants through their former lawyers.

That the applicants chose to reply to the same but still opted not to file a written statement of defence and that the applicant has since instructed his lawyers to ensure that the main suit is tried expeditiously and that is why they have since taken out summons for directions.

In addition, the respondent's lawyers have since applied for a default judgement to be entered in favor of the respondent, have the matter set down for formal proof and heard ex parte against the applicants.

Further, the respondent's lawyer called the applicants' lawyer and categorically made it clear that he would only consent to the filing the written statement of defence out of time provided the applicants paid costs of **Ugx 3,000,000/=** since they were the defaulting party.

Further, that based on the advice of his lawyers, the defence of mistake of former lawyers is not a blanket defence that every litigant should invoke to default on the strict timelines set by law; and that the respondent is already prejudiced by the applicant's failure to file their written statement of defence in time as he has had to pay his lawyers a tune of **Ugx 3,000,000/=** to apply for a default judgement and also defend the instant application.

The applicants also filed an affidavit in rejoinder to the respondent's stating that the claim for payment of instructions fees as a condition precedent to filing a written statement of defence is selfish and is intended to frustrate the applicant's efforts to seek justice from this court.

Representation:

The applicants were represented by **M/s Owoyesegire Muhereza & Co. Advocates** while the respondent was represented by **M/s Luzige Lubega Kavuma & Co. Advocates**.



I have carefully read and considered the submissions of both counsel in support of their respective client's cases, the details of which are on court record and which I have taken into account in considering whether or not the applicants merit the prayers sought.

5 From the pleadings, evidence and submissions of both parties, I find that the main issue of consideration is whether or not there are sufficient grounds to merit the grant of leave to file out of time a written statement of defense in **High Court Civil Suit No.241 of 2021**.

10 The general position of the law as held in numerous cases is that time can only be extended if sufficient cause is shown and such sufficient cause must relate to the inability or failure to take necessary step within the prescribed time. (See: **Rosette Kizito Vs Administrator General & Ors Supreme Court Civil Application no 9/1996 reported in Kampala Law Reports Vol 5 of 1993 at page 4; see also; Hadondi Daniel vs Yolam Egondi Court of Appeal Civil Appeal No 67 of 2003**)

Counsel argued the applicants' failure to file their defence within time was not only occasioned by the mistake but also the negligence of their former lawyers.

15 In the case of **Andrew Bamanya Vs Shamsherali Zaver SC Civil Application No. 70/2001**, it was held that the mistakes, faults and lapses or dilatory conduct of counsel should not be visited on the litigant.

20 It was further held that the other principle governing applications for extension of time is that disputes should be heard and decided on merit. In addition court found that it would be a denial of justice considering the circumstances of the case to shut the applicant out from exercising his rights.

25 It is now settled law that if a party instructs counsel, he assumes control over the case to conduct it throughout, the party cannot share the conduct of the case with his counsel. See: **Hajati Safina Nababi Vs Yafesi Lule Court of Appeal Civil Appeal No.9 of 1998**). It is counsel duly instructed who ought to know the importance and the dire consequences of failing to adhere to the time lines. That constitutes part of his/her professional work.

30 Administration of justice should normally require that the substance of the dispute should be investigated and decided on the merits and any errors and lapses should not necessarily debar a litigant from pursuing his rights. (**Francis W.Bwengye vs Haki Bonera HC CA No. 0033 of 23009**). No prejudice is suffered by a party if it can be compensated by costs. (See: **Mohan Kiwanuka Vs Aisha Chand SCCA No. 14 of 2002**).

I do agree that the applicants cannot be blamed for the mistake/failure by counsel to take the necessary steps to file the written statement of defense, having filed replies to the applications for temporary injunction and interim injunction.

35 I will therefore allow the application, with costs in the cause.

The applicants shall file and serve their written statement of defence within 10 (ten) days from the date of delivering this ruling. The respondent shall file a reply thereto within a period of 7 (seven) days after receiving the WSD.

Costs shall be in the cause.

5 **I so order.**

.....
Alexandra Nkonge Rugadya
Judge

10 10th January, 2022

Delivered by mail

Alexandra Nkonge Rugadya

10/1/2022.