THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.025 OF 2022

(Arising out of Civil Suit No.052 of 2018)

NAMUTEBI SAFINA::APPLICANT

VERSUS

1. **LUBEGA JAMILU**
2. **HIGH TECH PROPERTY AGENCY LTD**
3. **SSERUNJONJI FAISAL *alias* FAROUK**
4. **MOSES KAGGA BBIRA::RESPONDENTS**

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.

The applicant brought this omnibus application by way of chamber summons under the provisions of ***Section 33 of the Judicature Act cap.13, Section 98 of the Civil Procedure Act cap.71, Order 5 rules 9, 10 & 32, Order rules 19 & 31, and Order 51 rule 6 of the Civil Procedure Rules SI 71-1*** seeking orders that:

a. ***The applicant be granted leave to amend her plaint in Civil Suit No.52 of 2018;***

b. ***That the applicant be granted leave to file a reply to the respondents' written statement of defence in the main suit and her written statement of defence to the respondents' counter claim;***

c. ***The summons against the 1st and 2nd defendants in the main suit be renewed;***

d. ***Costs of this application be in the cause.***

Grounds of the application:

The application is supported by an affidavit sworn by Ms. Namutebi Safina, the applicant, which sets out the grounds of the application.

Briefly, that she is the plaintiff in ***Civil Suit No.52 of 2018*** wherein she sued the respondents for their fraudulent dealings, and trespass on her land at Nakatema, and that upon perusal of the plaint which was filed on 31st January 2018, it was discovered that some material facts that were relevant to the case were not captured, while some were mistakenly represented by the applicant's former lawyers.

That under *paragraph 16* of the plaint, it was stated that the defendants are trespassers on the suit *kibanja,* yet the applicant initially owned the land equitably and later acquired a legal interest in the suit property, and that under *paragraphs 8 & 9,* it was misrepresented that the applicant/plaintiff exchanged the suit land with the 1st & 2nd defendants whereas not, because she has never exchanged, or entered into any transactions with the above mentioned defendants for the sale of the land.

That based on the advice of her lawyers, it is the applicant's belief that while the main suit is still pending the hearing and final determination by this court, the plaint is still wanting because there are facts that need to be clarified, and that the amendment will not prejudice the respondents in any way that cannot be compensated for by costs.

In addition, that while this court has powers to grant an order for amendment for pleadings to enable it determine the real issues between the parties, the amendment shall not in any way change the cause of action in the main suit.

Further, that neither the proof of service of the summons on the 1st & 2nd respondents, nor the applicant's response to both the written statement of defence and respondents' counter claim was filed owing to the negligence of her former lawyers ***M/s Mayanja Arinaitwe Advocates & Solicitors,*** thus the mistakes of counsel should not be visited on the litigants; and that this court has power to renew summons against a defendant for purposes of meeting the ends of justice.

The applicant also averred that this court has power to enlarge time to do an act and that it is just and equitable that the orders sought herein are granted.

Consideration by court:

A perusal of the affidavit of service dated 1st April, 2022 indicates that this court process server served ***M/s Nalukoola, Kakeeto Advocates & Solicitors*** which firm represents the 3rd and 4th respondents. The affidavit in reply was filed on 1st April, 2022 by the 4th respondent Mr. Moses Kagga Bbira.

The said firm also filed written submissions for both the 3rd and 4th respondents. Impliedly, the 1st and 2nd respondents were never served with this application which had been filed on 7th January, 2022. Accordingly, they did not file any response.

Order 5 rule 1 (2) provides that service of the summons issued under ***order 5 rule 1(1) of the Civil Procedure Rules*** shall be effected within 21 days from the date of issue; except that the time may be extended on application to the court made within 15 days after the expiration of the 21 days, showing sufficient reasons for the extension.

Order 5 rule 1 (3) of the Civil Procedure Rules is equally instructive. It states thus:

Where summons have been issued under this rule and –

a) service has not been effected within twenty one days from the date of issue; and

b) there is no application for extension of time under subrule 2 of this rule; or

c) the application for extension of time has been dismissed,

the suit shall be dismissed without notice.

In respect of this application, the directives of this court to the applicant were that the application and submissions were to filed/served by 25th March, 2022. Service was effected to the 3rd and 4th respondents by the court process server who duly explained in her affidavit of service why she had to serve the application on 28th March, 2022 instead of 25th March, 2022 as directed.

What counsel for the applicant did not however explain was why the 1st and 2nd respondents who were crucial to this application were not served and why no prayers were made to seek leave of court to file the application out of time. It was incumbent upon the applicant's side to ensure that the process server reached out to each of the parties involved in the matter.

Going by the rules as highlighted above, and for the proper management of the present application, the first step ought to have been therefore imploring court to allow the applicant to effect service of the directives out of time to the respondents, since they had been made parties, not only to the main suit but to this application as well.

The judgment in Supreme Court decision in ***Bitamisi Namuddu vs Rwabuganda Godfrey Civil Appeal No. 016 of 2014*** availed to court by counsel for the 3rd and 4th respondents is binding to this court.

Order 5 rule 1 of the CPR is written in plain, clear and unambiguous terms. Where summons are issued and service is not effected within 21 days from the date of issue and no application for extension of time is made, the suit (application in this case) shall be dismissed, without notice. Needless to add, the rules equally applied to directives of court. In the view of this court, serving some respondents with the directives of court and leaving out the rest would not constitute proper service of this application.

Accordingly, the prayers made to amend a suit and the filing of a reply to a counterclaim before making the 1st and 2nd respondents aware of the case against them, would be premature.

Counsel cited the provisions of ***order 8 rule 1(2) of the CPR*** which provides that a reply to the counterclaim shall be served upon the defendant within 15 days after filing. That ***Order 8 rule 18(3)*** thereof subjects a defence to a counterclaim to the rules applicable to general defences.

A party who is genuinely interested in prosecution with expediency does not to wait as the applicant did in this case, to seek for orders to amend the suit, renew summons and/or serve a counter defence out of time, four years after filing the suit.

The defence of mistake of former counsel raised by the applicant with all due respect, would not in those circumstances apply as sufficient ground to redeem the applicant's own dilatory conduct.

Counsel raised another issue which court also considers pertinent. That the application which only bears the date of filing was not signed by a judge or registrar or sealed by a seal of court. That this was a fundamental defect which is incurable, rendering the application incompetent and incurable. That position is also supported by the authority in: ***Isingoma Michael vs Law Development Centre MA No. 234 of 2019.***

Counsel also cited the case of ***Hussein Badda vs Iganga District Land Board and others: MA No.478 of 2011,*** where it was held that for an application to be valid it must not only be fixed but also signed and sealed by court.

Whereas therefore the prayers sought in the application lie within the discretion of this court to grant, court can only do so when the application is properly before it, and if all parties are on board.

I could not agree more therefore with the points generally raised by the counsel for the 3rd and 4th respondents, to the extent that the failure by the applicant to ensure that all the above were duly complied with renders the entire application prematurely and incompetently before this court.

I accordingly dismiss it with costs to the 4th respondent.

Alexandra Nkonge Rugadya.

Judge

27th October, 2022

Delivered by email
27/10/2022