

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO.1441 OF 2018

(Arising from Civil Suit No.937 of 2017)

SSEMWANGA ALEX

(Suing through his Lawful Attorney

TUSUBIIRA ALLAN);:.....:APPLICANT

VERSUS

RWAKISETA TINAAGO:.....:RESPONDENT/PLAINTIFF

Before: Lady Justice Alexandra Nkonge Rugadya.

RULING

Introduction:

This application was brought under the provisions of **Section 98 of the Civil Procedure Act and Order 5 rule 1 (3) (c) of the Civil Procedure Rules SI 71-1** seeking orders that **Civil Suit No.937 of 2018** be dismissed or struck out as against the applicant for want of proper service; and that costs of the application be provided for.

Grounds of the application:

The grounds upon which the application is premised are contained in the affidavit in support of Mr. Tusubiira Allan, the applicant's lawful Attorney who is also the 8th defendant under the suit.

He stated *inter alia*, that the respondent filed **Civil Suit No.662 of 2014** wherein the applicant filed his Written Statement of Defence but the same was never fixed for hearing. That sometime in July, 2018, Tusubiira was called by the LC1 Chairman of Lumuli who informed him that the respondent had instituted another suit, **Civil Suit No.937 of 2017**, and that the copies of the summons and plaint had been brought to him, for Mr. Tusubiira to collect.

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The applicant's attorney had picked the documents and delivered them to his lawyers who informed him that the same had been served out of time. That when the applicant's lawyers wrote to the respondent's lawyers requesting them to properly serve the court papers, they insisted however that they had properly served the applicant.

5 In addition, that the respondent and his lawyers have never made any attempts to serve the applicant with court process as required by law and that since the respondent has a similar suit to wit **Civil Suit No.662 of 2014**, he will not be prejudiced if the instant suit is struck out. He therefore prayed that the suit should be struck out for want of service.

10 The respondent opposed the application through his affidavit in reply which together with the submissions however were filed on 7th June, 2019, more than one month out of the time as directed by this court on 5th April, 2019.

I therefore chose to disregard the said reply.

Representation.

15 The applicant was represented by **M/s Kabuusu Muhumuza & Co. Advocates** while the respondent was represented by **M/s Jambo & Co. Advocates**. Both Counsel filed written submissions in support of their respective clients' cases as ordered by this court.

Consideration of the Application by Court.

The law.

20 Service of court process is generally governed by **Order 5 of the Civil Procedure Rules SI 71-1**, which provides for service of summons. It states:

"1. When a suit has been duly instituted a summons may be issued to the defendant-

a. ordering him or her to file a defence within a time to be specified in the summons; or

25 **b. ordering him or her to appear and answer the claim on a day to be specified in the summons.**

30 **2. Service of summons issued under subrule (1) of this rule shall be effected within twenty one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty one days, showing sufficient reasons for the extension.**

3. 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

35 **b) there is no application for an 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.”

5 Before filing any complaint against late service, the defendant who is served out of time would have to start counting from the period of 21 days, added to the 15 days' allowance within which the plaintiff is required by law to file the application for the extension of time.

By virtue of **order 8 rule 1 (2) of the CPR**, the defendant must file his WSD within 15 days after service of the summons. Late service of the summons to file a WSD is sufficient reason for granting an application for extension of the period within which to file a WSD, which however was not done in this case.

10 Under **Order 5 r.10 Civil Procedure Rules**, it is also a requirement that service of summons shall be made to the defendant in person or his/her appointed agent.

It provides:

“10. Service to be on defendant in person or on his or her agent.

15 **Wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient.”**

“Personal service” entails leaving a copy of the document served with a person upon whom the service is intended to be effected.

20 In **Erukana Omuchilo vs. Ayub Mudiwa [1966] EA 229**, the court held that service on the defendant's agent is effective service only if the agent is empowered to accept service. It is also the settled position that proper effort must be made to effect personal service but if it is not possible, service may be made to an agent or an advocate. (**See: Kiggundu vs. Kasujja [1971] HCB 164**).

25 Similarly, service of court process may be effected on the defendant personally or on an agent by whom the defendant carries on business and such service on an agent is effectual. (**See: Lalji vs. Deuji [1962] EA 306; UTC vs. Katongole [1975] HCB 336**). Also worthy of note is that for service to be deemed proper and effective, there must be proof of service by a serving officer or process server, who must file a return of service.

30 In the instant case, it is the applicant's contention that he was not properly served with court process since service was not only out of time but also effected on the LC1 chairman. The record indicates that the summons to file a defence was issued on 14th June, 2018.

The same should have been served on the applicant or his agent within 21 (twenty one) days, which in this case was on before 6th July, 2018. The respondent however still had the 15 days within which to seek extension of time.


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But be that as it may, in *paragraphs 5 and 7* of his affidavit in support, the application avers that the LC1 chairman had called him and informed him about the court documents and upon such receipt of the court documents, his lawyers had written to the respondent's lawyers requesting them to serve them properly.

5 That letter was delivered on 5th July, 2018 which presupposes that he received them before 5th July, 2018. The applicant thus acknowledges having received the court documents, although informally.

The affidavit of service filed by the respondent indicates that the defendants were served on 15th June, 2018. But from the application, the actual date on which he was served through
10 the LC 1 chairman is not provided; and to make matters worse, the acknowledgment of the receipt of court papers was neither signed nor dated. It was service made through the LC Chairman's spouse. Rather unprecedented manner of service.

While the law recognizes the role of the local authorities to help in having the defendant understand the contents of the summons per *Magela v. Kakungulu (1976) HCB 289*, it
15 does not recognize local authorities as agents of parties to a suit.

There is also nothing on record to show that the LC1 Chairman was the agent of the applicant, empowered to accept and/ or receive the service.

Order 3 r.2 CPR clearly spells out who a recognized agent is. It provides as follows;

"2. Recognized agents.

20 ***The recognised agents of parties by whom such appearances, applications and acts may be made or done are—***

(a) persons holding powers of attorney authorising them to make such appearances and applications and do such acts on behalf of parties; and

25 ***(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorised to make and do such appearances, applications and acts."***

30 Service through the chairman's spouse was most certainly not personal service or qualify to be service through the agent of the applicant. Where a specific procedure is provided for, the parties are obliged to follow it.

Court also noted that there is no WSD on file by any of the defendants under the main suit, despite the fact that a number of them but not all had acknowledged service by signing on the court papers, as early as 2018. Some were not served in person.

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I have also had the opportunity to peruse the plaint in the earlier suit **Civil Suit No. 662 of 2014**, noting that it had been dismissed by J. Kaweesa, on 13th April, 2019.

5 The applicant who is the 8th defendant in that suit is among a total number of 39 defendants alleged to be trespassers on the land comprised in **Busiro, Block 383 plot 687 and 688**, and against whom eviction orders were sought.

In the present suit under which this application was filed, the applicant is also the 8th defendant among the 39 defendants and similar orders are sought in relation to the same piece of property.

10 It would be in the applicant's interest therefore to defend himself against the allegations raised in the suit, lest an order affecting his rights on the suit land is issued. I would therefore decline to grant the order to strike off the suit but allow the respondent/plaintiff to effect proper service to each defendant in this suit and proper proof of service be presented to court.

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15 **Alexandra Nkonge Rugadya**

Judge

28th April, 2022

Delivered by email
29/4/2022.

Kabupaten Jember