THE REPUBLIC OF UGANDA

IN THE HIGH COURTOF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO. 2090 OF 2021

(Arising out of Civil Suit No. 589 of 2020)

1. **NAKIBUUKA MADINAH**
2. **NAKATUDDE AIDAH.....APPLICANTS**

VERSUS

NAMUTEBI NANKYA AISHA.....RESPONDENT

Before: Lady Justice Alexabdra Nkonge Rugadya

RULING:

Introduction:

This application seeks to reinstate ***Civil Suit No. 589 of 2020*** which was dismissed by this court on 16th August, 2020.

The law:

I have carefully perused the pleadings and the arguments made in submissions by each side which I choose not to reproduce as the details are already on record. Suffice to state that the law under ***Order 11A rule 1(2) of the CPA***, under which this court had dismissed the main suit requires that where a suit has been instituted by way of plaint the plaintiff is mandated to take out summons for directions within 28 days from the date of the last reply or rejoinder referred to in ***Order 8 rule 18(5)*** of the rules. In effect therefore, summons for directions cannot be taken out before the close of the pleadings.

Consideration of the issue by court:

The question in this application as I understand it rotates around the issue as to what point were the pleadings considered to be closed for the due compliance of the amended rules; and also whether or not in the circumstances of this case, this court has the discretion to reinstate the suit.

The record reveals that the main suit was instituted on 24th August, 2020. Summons and plaint were served to the defendant (respondent) on 8th September, 2020 and it is not in dispute that the WSD by the respondent was filed on 17th September, 2020 through the firm of ***M/s Kavuma, Kabenge & Co. Advocates***. The applicants maintain however that the WSD was never served to them.

Court also takes note that the firm of ***M/s Lukwago, Matovu & Co. Advocates*** took over from the ***M/s Kavuma, Kabenge & Co. Advocates*** after receiving instructions from the respondent/defendant on 9th April, 2021.

The said firm of ***M/s Lukwago, Matovu & Co. Advocates*** in their submissions claimed that this was eight (8) months after the pleadings had been already been filed, served and closed. That from the time of filing the suit nothing had been done by the applicants to expedite their matter. According to them therefore, the applicants had no *locus* to file the application since the suit had abated on the 16th August, 2021, and that the application was therefore a waste of court's time.

The applicants' counsel's arguments in submission was that they were not served with the WSD until the 9th September, 2021 after new counsel for the respondent/defendant who initially had failed to trace the WSD filed by the previous counsel were later able to trace it after writing to this court.

It was after the close of the pleadings that they were able to file their reply to the WSD and subsequently filed summons for directions, respectively on 21st September, 2021 and 1st October, 2021.

That however while following up the matter they learnt that the case had abated under ***order 11A rule 1*** and dismissed prematurely by this court on 17th August, 2021 since according to them by the time of the abatement they had not been served by the defendant and therefore the pleadings were still ongoing. To support that position, he cited the case of ***Seruwu Jude vs SWANGZ Avenue Ltd, Civil Appeal No. 0039 of 2021.***

Learned counsel therefore submitted that it would be just equitable and in the interest of justice that this court exercises its discretionary powers to reinstate the suit since all the necessary

pleadings by the applicants, including the summons for directions were filed after the closure of the pleadings and therefore within the time as stipulated.

Counsel for the applicants cited the decision in ***Misc. Appeal No. 25 of 2020 Kagimu Moses Gava& 7 others vs Sekatawa Muhammed & 12 others.***

In that case, court had made a finding that the intention of the framers of ***Order 11A rule 1 of the CPR*** (as amended) was to mitigate the delays and inefficiencies brought on by the actions of the officers of court and parties in civil proceedings. That in order that these rules achieve the desired objective, a holistic and judicious approach to their application should be adopted.

I have no reason to disagree with the above mentioned principles as enumerated in that appeal. However with all due respect, counsel for the applicants ought not to miss the point that pleadings come to a close generally under two scenarios:

In the first scenario it is anticipated that all pleadings required to be on record would be filed within the time as court would direct. Within that context therefore, the filing of a rejoinder would mark the close of the pleadings.

In the second scenario, pleadings would invariably come to a close when the time within which to file and serve them as stipulated in the summons (or rules) has expired and no such pleadings: WSD or a rejoinder (as the case may be) have been filed.

As stated in ***Kagimu Moses Gava& 7 others vs Sekatawa Muhammed & 12 others (supra)***, the case cited by learned counsel for the applicants, there are several exceptions laid out under ***Order 11A rule 1(4) of the CPR*** where a plaintiff would not be required to file summons for directions.

As one of those exceptions, he/she may apply for a default judgment under ***order 9 rules 6 and 7 of the CPR.*** In addition the framers of this law (whether by design or inadvertence) left out another obvious exception where for instance the defendant may fail to file a defence within the stipulated time.

From the provisions of ***order 8 of the CPR***, the defendant is required to effect service within a period of 15 days. Thus unless he/she applies for extension of time the pleadings must close. The plaintiff is required then to apply to court to have the matter set down for hearing.

In ***Order 9 rule 10 of the CPR***, where the defendant does not file a defence, upon compliance with ***order 5 of the CPR***, the matter is to proceed as if he/she filed a defence and the plaintiff may set down the suit for hearing *exparte*. (***Order 9 rules 11(2) of the CPR).***

The plaintiffs/applicants in the present case did not follow up on that process which was not affected by the amendment in the rules; and as such were not vigilant in pursuing their rights in court.

As a matter of fact they waited to be served with the WSD more so out of time, and never brought it out to the attention of court that they were never served but instead decided to rely on the letter dated 16th August, 2021 by the respondent's counsel as their proof that they had not been served with the WSD. (***Annexture D*** attached to the application).

The letter clearly intended to put in order the record of the defence file for the new counsel. There is nothing to show from the contents of their correspondence that there was acknowledgement of the fact that the applicants had not been served with the WSD by the previous counsel or that in searching for the WSD, they were intending to serve the applicants.

In my view if the applicants had not been duly served they had the option to file to apply to court to set down the matter for hearing, which step they did not take up.

That said letter had been copied to the learned counsel for the applicants. In the absence of any other reason to think differently, after filing the suit on 24th August, 2020, the applicants had waited for another year before taking up further action to have the case prosecuted. They only did so, against the spirit of the rules as amended, upon receiving a copy of that correspondence from the respondent's counsel.

The fact that the applicants had to wait for that long before taking up appropriate action would defeat the whole purpose for which the amended rules were intended. It also goes without saying that the summons by the registrar were issued a month after the suit had abated, and therefore the summons were issued in respect of a nonexistent suit.

Be that as it may, the court in the case cited by counsel for the applicants took the trouble to discuss the distinction between abatement of the suit under ***order 17 rule 5(1) of the CPR*** as amended and ***order 11 A rule 2 and 6 of the CPR*** under which this court had dismissed the suit.

Under ***order 17 rule 5(1) of the CPR,*** abatement of the suit takes place automatically where no application is made or step taken by either party for a period of six months after the mandatory scheduling conference, with a view of proceeding with the suit.

By virtue of ***order 11 1(A) Rule 7 o***f the rules where a suit has abated the plaintiff may subject to the law of limitation file a fresh suit and as such in this case retains the discretion to allow reinstatement, if satisfied as I indeed I am, that it would save the time and expense involved in filing a fresh trial.

For the above reasons, I would allow this application, only subject to payment of costs to the respondent/defendant.

Alexandra Nkonge Rugadya

Judge

26th April, 2022.

Delivered by email

26/4/2022.