

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

**MISCELLANEOUS APPLICATION NO.2127 OF 2021  
(Arising from Civil Suit No.837 of 2021)**

**TWINOMURIISA JORDAN .....APPLICANT**

**VERSUS**

**SAMUEL MUGUME .....RESPONDENT**

**BEFORE: HON. MR. JUSTICE HENRY 1. KAWESA**

**RULING**

This application was brought by way of chamber summons under O. 7 R.II (a) and O. 6 RR 29 and 30; O.26 RR 1, 2(1) and 3; and O. 52 RR 1 and 3 of the Civil Procedure Rules SI 71-1; and Section 98 of the Civil Procedure Act Cap 71; and Section 33 of the Judicature Act Cap 13.

The application seeks orders that;

1. The Respondent/Plaintiff's Civil Suit No.837 of 2021 be struck out for nonservice of the summons to file a defence within the time permitted by law.
2. The Respondent/Plaintiff's plaint in Civil Suit No. 837 of 2021 be struck out for being frivolous, vexatious and disclosing no cause of action against the Applicant.

3. In the alternative, the Respondent furnishes the sum of UGX 500,000,000/- (*five hundred million shillings only*) as security for costs in this Court for the defense of Civil Suit No.847 of 2021 before the Court.
4. That costs for the application be provided for.

The grounds of the application, which I shall not reproduce, are supported by the affidavit of Twinomurisa Jordan, and opposed by the affidavit in reply of Samuel Mugume. The Applicant also filed an affidavit rejoinder.

Counsel for both parties made written submissions, the details of which are on Court record and which I shall not reproduce save where necessary.

Counsel for the Applicant raised issues, in his submissions, which I shall adopt.

These are:

1. Whether the Respondent/Plaintiff's Civil Suit No.837 of 2021 is incompetent and should be struck out for non-service of summons to file a defence as permitted by law.
2. Whether Civil Suit No.837 of 2021 is frivolous, vexatious and discloses no cause of action against the Applicant.
3. Whether the Respondent should furnish security for costs.

But before delving into the issues above, I shall first address the preliminary objection raised by the Applicant's Counsel in his

written submissions in rejoinder. This is to the effect that the affidavit in reply was filed out of the 15 days allowed by the law. Counsel supported his submission with O.8 R. 1(2) of the Civil Procedure Rules SI 71-1, and the case of *Stop and See (U) Ltd versus Tropical African Bank HCMA No.333 of 2010*.

The Respondent's Counsel did not reply to the objection simply because it was raised in a rejoinder.

### **Resolution**

I have looked at the affidavit in reply. This shows that it was filed on the 07<sup>th</sup> day of December, 2021. The affidavit of service on record indicates that the application was served upon the Respondent on the 22<sup>nd</sup> day of November, 2021. Counsel for the Applicant's calculation indicates that the affidavit in reply was filed out of the 15 days' period as mandated by law, probably on the 16<sup>th</sup> day; and this is true only if the 22<sup>nd</sup> day of November 2021 is also reckoned.

But Section 34(l)(a) of the Interpretation Act Cap 3 excludes the day in which any act or thing is done in reckoning of time. This means that the 22<sup>nd</sup> day of November 2021, when service was made upon the Respondent, is excludable. The result is that the Respondent filed his reply within 15 days of service of the application. In view of the above, Court overrules the objection raised by the Applicant's

Counsel as regards late filing.

I shall now determine the issues raised.

**Issue No.1:**

Whether the Respondent/Plaintiff's Civil Suit No.837 of 2021 is incompetent and should be struck out for non-service of summons to file a defence as permitted by law

Order 5 R.1 (2) of The Civil Procedure Rules provides as follows;

Service of summons issued under sub-rule (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.

It is now settled law that the above provisions are mandatory, according to the *Supreme Court* case of **Kanyabwera versus Tumwebaze [2005] 2 EA 86, at 93**, cited by the Applicant's Counsel. Accordingly, the provisions automatically invalidate summonses to file a defence which may have been issued and are not served within twenty-one days of issuance.

The Applicant's evidence is that he became aware of the main suit on 27<sup>th</sup> October 2021 when his lawyers of M/s Marlin Advocates were checking the Registry on the status of other pending cases concerning to him. That through his lawyers, he applied to have a photocopy of the plaint; and also discovered that no affidavit of service had been filed thus confirming the non-service of summons.

As for the Respondent, his evidence is that the Applicant was served with the summons to file a defence in his presence as per

the affidavit of service on record. Both Counsel, of course, argued in supported of the respective assertions of the parties.

## Resolution

I start by reminding myself of the principle that the burden of proof in civil matters is on he who alleges, and must be discharged on the balance of probabilities (*Olanya James versus Ociti Tom & 3 Others HCCA No.0064 of 2017*). It is therefore, upon the Applicant to prove that he was never served on the balance of probabilities.

According to 0.5 r. 16 of the Civil Procedure Rules, proof of service of summons is by an affidavit of service, and this must state the time when and the manner in which summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery of summons.

There is an affidavit of service on record sworn by a one Tracy Musiimenta of M/S Nyote & Co. Advocates. She states herein that the 1<sup>st</sup> Respondent, among others, was difficult to reach for purposes of service, but that she traced him at Raja Chambers Parliamentary Avenue with the help of the Respondent and served him in the Office of a one Matovu Moses, the 2<sup>nd</sup> Defendant in the main suit.

Further, that the Applicant was identified by the Respondent who apparently knew him well. That the Applicant refused to sign on his copy of summons and instead directed his employee whom he called Nakidde Catherine to receive on his behalf, which she did by signing on the copy. The affidavit of service indeed bears a

duplicate copy of summons endorsed by the said Nakidde Catherine. But all this is expressly disputed by the Applicant, who denies being at Raja Chambers at any one time and knowledge of the said Nakidde Catherine.

This Court is faced with an accusation and a counter-accusation based on affidavit evidence. In the absence of any further proof, I do not see any of either party's evidence outweighing the other. But I have alluded to the other evidence in the affidavit service supporting the Respondent's assertion. The Applicant never exercised his right to call the deponent of this affidavit for cross examination in order to discredit her depositions. In the circumstances therefore, I give the said depositions a benefit of the doubt.

On the overall, I find that the Applicant has not proved, on the balance of probabilities that he was not served with the summons. Further, I know that under O.5 r.14 Civil Procedure Rule, Court may declare the summons to have been duly served, if satisfied that the Defendant refused so to endorse it.

In this case, I find that the Applicant refused to endorse the summons when served upon him personally. As such, declare that the summons was served upon the Applicant.

This issue is thus found in the negative.

**Issue No.2:**

Whether Civil Suit No.837 of 2021 is *frivolous, vexatious* and discloses no cause of action against the Applicant

Counsel for the Applicant properly cited the applicable law in situations as the instant one. This includes 0.7 11(a), and (e) of the Civil Procedure Rules S.I-71 ,respectively providing that a plaint shall be rejected where it discloses no cause of action, and where the suit therein is shown to be *frivolous* and *vexatious*.

Further, Counsel for the Applicant properly submitted, relying on Auto Garage and Others versus Motokov (No.3) (1971) EA 514, that a cause of action is established if the plaint shows (1) that the plaintiff enjoyed a right, (2) that the right has been violated, and (3) that the Defendant is liable. Additionally, Counsel well quoted the proposition that "*it must be noted that the Court must look at the pleadings (plaint) while determining whether a cause of action has been made out. The plaintiff must clearly come out as the person aggrieved by the violation of a right and the Defendant as the person who is liable*" (The Alifar Keya 11938) EACA 18).

Relying on the authorities, Counsel for the Applicant submitted that the plaint does not disclose any cause of action against the Applicant on ground that the Respondent does not enjoy any right in the subject matter before Court. This was unsurprisingly disputed by his colleague, the Respondent's Counsel, who argued on the contrary and in support of the Respondent assertion that his plaint discloses a cause of action and that the suit is not *frivolous* and *vexatious*.

## **Resolution**

I have looked at the plaint of Civil Suit No.837 of 2021. This indicates that the plaintiff seeks a relief of;

- i. A declaration that the Respondent/1<sup>st</sup> and 2<sup>nd</sup> Defendants were registered as the proprietors of the suit land comprised in Folio 21, KCCA FRV 446, Upper Close Plot 12A at Naguru Kampala at different times through fraud.
- ii. Cancellation of the 1<sup>st</sup> Defendant/Respondent's name from the title deed for the land comprised in Folio 21, KCCA FRV 446 Plot 12A Upper Hill Close, Naguru Kampala.
- iii. A declaration that all transactions relating to the said land be registered in the names of the Respondent/ 1<sup>st</sup> and 2<sup>nd</sup> Defendants were fraudulent
- iv. An order that the said land be registered in his name or in the alternative the access road is restored.
- iv. Permanent junction
- v. General damages.

I have considered the whole plaint and allegations disclosed therein. From thence, I observe that the plaint discloses no allegations showing that the Respondent had or has any registrable right in the suit land, and which may warrant a consideration of reliefs (i) to (iii) and partially relief (iv). Yes, he claims that the Respondent was fraudulently registered as proprietor of the suit land, but the plaint does not disclose that he had or has any proprietary right in the suit land. The best the



plaint can disclose is that his land lies adjacent to the suit land and that he once applied to the authorities for a title deed of the suit land, but got no reply.

However, the plaint indicates that the plaintiff used the suit land as an access road, and that he was blocked from using the access road by the 2<sup>nd</sup> Defendant, and subsequently the 1<sup>st</sup> Defendant/Respondent who is the current registered proprietor of the suit land. For this cause alone, I find that the plaint discloses that the Respondent enjoyed a right, (2) that the right has been violated, and (3) that the Respondent is liable. Accordingly, I find that the plaint discloses a cause of action.

On the claim that the suit is *frivolous* and *vexatious*, Counsel for the Applicant ably cited the case of **Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No.217 of 2015**, wherein it was observed that;

*"An action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense"*

**(Kivanga Estate Ltd versus National Bank of Kenya Ltd Civil Appeal No.217 of 2015).**

Upon a review of the plaint, I find that the Respondent's claim in Civil Suit No.837 of 2021 does not fit in the description above as his claim has a legal basis, and not is *vexatious*. The plaint discloses that his land neighbours the suit land which he used as

an access road. I do not see any lack of bona fides involved in instituting the said suit as it is the Respondent/Defendants who might have caused trouble by blocking the alleged access road.

In the result, therefore, this issue is found in the Respondent's favour.

### **Issue No.3:**

#### Whether the Respondent should furnish security for costs

The law on security for costs is Order 26 Rule 1 of the Civil Procedure Rule. The provides that;

*"Court may if it deems fit order a plaintiff in any suit to give security for the payment of all costs incurred by any Defendant..."*

The conditions for consideration on whether or not to make an order for security for costs have been elucidated in several cases, including; **Anthony Nambo & Anor versus Henry Kaala 119751 HCB 215, & G. M. Combined (U) Ltd versus A. K. Detergents (U) Ltd. SCC. A. No. 34 of 1995.** These are:

1. Whether the Applicant is being put to undue expenses by defending a *frivolous* and *vexatious* suit;
2. That the Applicant has a good defense to the suit.

It is only after the above factors have been considered that factors like inability to pay would come into account (*G.M. Combined (U) Ltd versus A.K. Detergents (U) Ltd. SCC.A. No. 34 of 1995*).

I have already found hereinabove that the plaintiff's suit against the Respondent is not *frivolous* and *vexatious*. The 1<sup>st</sup> condition above does not, therefore, suffice in this case.

Because of the preceding finding therefore, it would be a vain effort to delve onto the 2<sup>nd</sup> condition. The result is that the Applicant has not demonstrated the necessary conditions for grant of an order of security for costs.

Accordingly, this order is denied.

### **Conclusion**

This application is dismissed on the basis of the findings above. The Respondent is awarded the costs of the application.

I so order.

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Henry I. Kawesa

**JUDGE**

4/02/22

4/02/22:

Brenda Tusiima for the Applicant.

Both parties absent.

Counsel for the Respondent absent.

Dorothy; Court clerk.

Ruling delivered.

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Ayo Miriam Okello

**DEPUTY REGISTRAR**

4/02/22