

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 2060 OF 2022
(ARISING FROM CIVIL SUIT NO. 1244 OF 2021)

WAKISO DISTRICT LAND BOARD APPLICANT

VERSUS

NATIONAL FORESTRY AUTHORITY RESPONDENT

BEFORE: HON. JUSTICE. DR. FLAVIAN ZEIJA

RULING

This application was brought by way of Notice of Motion under section 96 and 98 of the Civil Procedure Act Cap 71, Order 51 rule 6 and Order 52 rules 1 & 3 and Order 9 rule 21 of the Civil Procedure Rules, S.I 71-1 for orders that;

1. *The Order of this Honorable Court that the suit proceed ex-parte against the Applicant be set aside.*
2. *The Applicant be granted leave to appear and defend the suit.*
3. *Costs be in the cause.*

The application was supported by the affidavit of Lutalo John, the District Principal Assistant Chief Administrative Officer and Secretary to the District Land Board, in which the grounds of the application were set out. Basically, the deponent stated that the Applicant has never been served or re-served with summons to file a defense and pleadings for Civil Suit No. 1244 of 2021. That as a matter of fact, it is in October 2022 during client briefing over other matters, that M/s Nambale Nerima & Co. Advocates brought to the attention of the Applicant the

existence of HCCS No. 1244 of 2021; National Forestry Authority vs. Lala Apartments Limited & Wakiso District Land Board. That the affidavit of service of Kiyemba Pius dated 15th May 2022 contains falsehoods and inconsistencies as far as it states that service was effected on the Applicant whereas not.

It was submitted for the Applicant that arguing this application is a moot exercise since the Respondent conceded the application when parties appeared in court on 17th February 2023. The record shows that the Respondent did not file an affidavit in reply although Court had directed that it be filed by 3rd March 2023.

It is also worth noting that when the parties appeared in court on 17th February 2023, Counsel for the 1st Defendant in the main suit expressed to court his intention to apply to be added as a party to the application as a necessary party. I have perused the record and I find no formal application by Counsel for the 1st Defendant to be added as a party to the application. Instead, he chose to file an affidavit in reply to the application on the basis that the 1st Defendant is an interested party in this application, reasoning that it is why the Applicant served the application together with the supporting affidavit on the Lawyers of the 1st Defendant. If the 1st defendant desired to be heard in this application, it ought to have filed an application to be added as a party. Other wise Counsel for the 1st defendant proceeded in a wrong way when he filed an affidavit in reply to application where his client is not a party.

Representation

The Applicant was represented by Nambale, Nerima & Co. Advocates while the Respondent was represented by the Legal Department National Forestry Authority.



Decision of Court

The gist of this application is that the Applicant was not served with summons to file a defense in the main suit. I have perused the affidavit of service of a one Kiyemba Pius dated 15th May 2023 wherein he stated that on 28th April 2022 he proceeded to the 2nd Defendant's Offices in Wakiso District, on reaching the reception he found a lady who informed him that she could not receive the pleadings because the Secretary to the Board was not in office. That the said unknown lady advised him to instead see Mr. Kasozi the Registrar of Titles, from another office. On reaching Mr. Kasozi's office, the said Mr. Kasozi advised the process server to call the Secretary Wakiso District Land Board for advice on who to receive on his behalf. That the process server immediately called the said Mr. Kasozi, on telephone number 0756093604, who advised that the documents be taken to the registry of Wakiso District Local Government for acknowledgment. That the process server then proceeded to the main reception of the Wakiso District Local Government and found a lady who directed him to the registry. That on reaching the registry, he found a Gentleman who acknowledged receipt by stamping and signing on his return copy.

The Applicant contested the affidavit of service for containing the following falsehoods and inconsistencies: That Mr. Kasozi is not the Registrar of Titles but he is instead the Senior Land Management Officer, Wakiso District Local Government. The telephone number 0756093604 which the process server claims to have called does not belong to the Secretary of the Board and he has never used it.

I have also found that the gentleman said to have received the pleadings at the registry is not identified. It is therefore doubtful on who in particular service was effected. Order 5 of the Civil Procedure Rules lays out the rules of service and rule 10 thereof stipulates that wherever 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. The essence of this rule was laid out by the Supreme Court of Uganda in the case of **Geoffrey**

Gatete & Another Vs William Kyobe, Civil Appeal No. 7 of 2005 where Justice Mulega, held that there can be no doubt that the desired and intended result of serving summons on the defendant in a civil suit is to make the defendant aware of the suit brought against him or her so that he has the opportunity to respond to it by either defending the suit or admitting liability and submitting to judgment. The surest mode of achieving that result is serving the defendant in person.

Under Order 29 rule 2 of the Civil Procedure Rules service on a statutory Corporation is provided for in the following terms:

"Subject to any statutory provision regulating service of process, where the suit is against a Corporation, the summons may be served –

1. on a secretary, or on any director or other principal officer of the Corporation; or
2. by leaving it or sending it by post address to the Corporation at the registered office, or if there is no registered office, then at the place where the Corporation carries on business."

The rule makes it permissible to serve summons on a secretary, any director or other principal officer of the Corporation. A principal officer is neither a secretary nor a director. The provision is clear that it has to be either a secretary or a director or other principal officer. It follows that the word "Secretary" used here is akin to Corporation Secretary or Company Secretary.

If the narrative in the affidavit of service that the process server was unable to serve the Secretary of Wakiso District Land Board personally, was anything to go by, my view is that substituted service would have been most appropriate in the circumstances. **Order 5 r 18 CPR** stipulates that where court is satisfied for any reason that the summons cannot be served in the ordinary way, the court shall order the summons to be served by substituted service in the prescribed manner. Under **sub-rule (2)** thereof, substituted service shall be as effectual as if it had been made on the defendant personally. Having failed to serve the



Secretary of the Board in the ordinary way, the process server went on a frolic of his own resulting in the current set of circumstances.

In the circumstances, I am inclined to believe that the summons in this case were not properly served on the Applicant.

I have taken note of the concerns contained in the affidavit in reply by Lala Apartments (1st Defendant in the main suit), deponed by Ssebyala Baptist of Magna Chambers. One would have expected that since Lala Apartments Limited was a party to the main suit, it should not have been intentionally omitted by the Applicant from participating in this application so that all controversial questions are conclusively determined. Nonetheless, prudence would have necessitated that the 1st defendant in the main suit formally applies to be added as a necessary or interested party to the application. In paragraph 4 of its affidavit in reply, it was deponed for the 1st Defendant that through its lawyers, the 1st defendant indicated its desire to be added as a Respondent on 17th February 2023 when the parties appeared in court for schedules to file submissions in this application. An expression of a desire to be added as a party to the application does not in my view amount to an application. The proper procedure and forum is well known to Counsel for the 1st Defendant who instead opted to file a reply to an application to which he was not party, on the premise that he had been served with the application which implied that the Applicant recognized the 1st Defendant as an interested party.

Nonetheless, without losing gist of the application, I have not found that granting this application will be prejudicial to any of the parties in the main suit. This court is duty bound to ensure that at all times, and as far as possible, real questions in all matters in controversy between the parties are completely and finally determined and all multiplicities of legal proceedings concerning any of those matters are avoided. Although the Applicant's written statement of defence was filed out of time, the Respondent did not oppose this application.

In the end result, this application is allowed with orders that;

- a) The Order of this Court for Civil Suit No. 1244 of 2021 to proceed ex-parte against the Applicant is hereby set aside.
- b) The Applicant is granted leave to appear and defend Civil Suit No. 1244 of 2021.
- c) Costs of this application shall abide the outcome of the main suit.

Dated at Kampala this 23rd day of March 2023



Flavian Zeija (PhD)

PRINCIPLE JUDGE