

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
REVISION CAUSE NO. 021 OF 2023
(ARISING FROM MISC.CAUSE NO.263 OF 2021)

NAMUTEBI PROSSY ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

**BUMBA JOHN LIVINGSTON(T/A Diggers & Associates On behalf
of Bitwaye Robert) ::::::::::::::::::::::::::::::::::: RESPONDENT**

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING.

1. Namutebi Prossy hereinafter referred to as the applicant brought this application against Bumba John Livingston (t/a diggers & associates on behalf of Bitwaye Robert) **hereinafter** referred to as the respondent under Section 83 and 98 of the Civil Procedure Act, and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules for orders that;
 - i) The ruling and orders of Chief Magistrate's Court at Nateete delivered by His Worship Mugezi Amon Magistrate Grade One

dated the 21st day of February' 2022 be revised for want of legality.

ii) Costs of the application be provided for.

Background;

2. The applicant being dissatisfied with the decision of the chief magistrate court of Kampala at Nateete in Misc. Cause No.263 of 2021 by His Worship Mugezi Amon delivered on the 21st February 2022 in favor of the respondent which application was brought under the Distress for Rent (Bailiffs) Act Cap 76, the learned magistrate in the heading of his ruling indicated that he was determining Misc. Cause No.29 of 2021 instead of Misc. Cause No. 263 of 2021, the applicant was dissatisfied with the same ruling, hence this application.

Applicant's evidence;

3. The application is supported by an affidavit in support deposed by Namutebi Prossy the applicant which briefly states as follows;

i) That the respondent filed Misc. Cause No.263 of 2021 seeking for orders for distress for rent.



- ii) That the aforementioned application was heard but not yet determined, instead court determined Misc. Application No.29 of 2021 which I was not aware of.
- iii) That the said decision further determines the proprietary-rights between the applicant and the Respondent wherein the learned Grade One Magistrate states that the applicant has no proprietary rights in the contested property.
- iv) That proprietary rights cannot be determined in an application for distress for rent as it was done by the learned magistrate.
- v) That the ruling of the learned Grade one Magistrate is tainted with illegality/material irregularity and injustice which necessitates revision of his orders by this Honorable Court.

Respondent's evidence;

4. The application is responded to by an affidavit in reply deposed by Bitwaye Robert on behalf of the respondent which briefly states as follows;

- i) That the respondent avers and contends that Miscellaneous Cause No. 263 of 2021 was heard and the same determined

in a ruling that was delivered by His Worship Mugezi Amon on the 21st day of February 2022 but however mistakenly numbered by court as Misc, Cause No.29 of 2021 instead of Misc Cause 263 of 2021

- ii) That the respondent avers that there is no Misc. Cause No. 29 of 2021 as the same refers to Misc. Cause No. 263 for which the respondent / applicant instituted against the applicant (herein) and a ruling was delivered on the 21st day of February 2021, and as such the applicant's allegations of Misc. Cause No. 263 of 2021 being undetermined is a total lie and unfounded.
- iii) That Misc. Cause No.263 of 2021 was in respect to distress for rent and indeed the ruling delivered by His Worship Mugezi Amon on the 21st February 2021 was in respect of distress for rent in which it was established and proved that Bitwaye Robert was the Landlord, ownership of the premises and proof of payment of rent, as elements to prove distress for rent.
- iv) That the respondent avers and contends that in no way did the ruling /decision in the application for distress for rent

delivered by His Worship Mugezi Amon determine the applicant's proprietary rights.

- v) That the applicant filed H.C.C.S No. 910 of 2021 and Civil. Appeal No.29 of 2022 before this Honorable court regarding the same claim, which she all failed to prosecute.

Representation;

5. The applicant was represented by Brian Kirumira of Lawgic Advocates whereas the respondents were represented by Matovu Charles of M/s Ssekyewo, Matovu &Co. Advocates. Both parties filed their affidavits and submissions which I have considered in the determination of this application.

Issues for determination;

Whether this court should revise the orders granted in Misc. Cause No.263 of 2021?

What remedied are available to the parties?

Resolution and determination of the issues;



6. Before I delve into the merits of this application, both parties raised preliminary objections in their submissions for resolution and determination by this court.
7. The applicant raises a preliminary objection in regards to the validity of the affidavit in reply deponed on behalf of the respondent where the applicant submits that the said affidavit in reply was filed out of the provided timelines for filing an affidavit in reply as per the civil procedure rules and she therefore prays for the same to be struck off record.
8. The civil procedure rules under order 8 rule 1(2) provide for the timelines when a party might file his or her reply where the rule under sub rule indicates how a party is to file the reply with in 15 days from the date of service of summons.
9. I am alive to the fact that there has been concerns as to whether the said timelines in the civil procedure rules apply to applications of this nature where parties file affidavits in reply, courts have pronounced themselves on the same through different decisions. I will draw reference to the decision in **Labu Saidi Chepchulei Vs Ocen Ambrose And Ors Misc.App No.10 Of 2022 Before Justice Henry Peter Adonyo** where he stated that the 15 days timeline

provided for in the civil procedure rules for a party to file his or her defense apply in situations of affidavit evidence as well. Once a party files his affidavit in reply after the 15 days from the date of being served with the application the same party is considered to be outside the doors of justice. Once a party finds himself outside the doors of justice then he ought to seek leave of court to have the same affidavit in reply filed out of time validated by court.

10. In the instant application, the applicant submits that the instant application was served on the respondent on the 15th of December 2023, this is a fact that is not disputed by the respondent.

11. Therefore, this means that the 15 days timeline started to run from the 15th of December 2023 when the respondent was served with the said application, the said 15 days were to elapse on the 30th of December 2023. However, the respondent filed his affidavit in reply on the 9th of January 2024, this is a fact that is not disputed by the respondent in his submissions.

12. The respondent submits that the timelines specified in the civil procedure rules do not apply to affidavits and he further states



how affidavits should only be filed within a reasonable time before the hearing of the application, something which he did.

13. I find the submissions of the respondent misdirected in the instant application, if affidavits in reply were to be filed within reasonable time and not within the timelines provided for in the civil procedure rules then parties would have filed when they so wish and desire leading to endless litigations.

14. Therefore, I have no option but to find that the affidavit in reply filed in this application by the respondent is improperly before this court. This is to help cure the sloppy and noncompliance behavior with court process by litigants, there was no reason furnished by the respondent as to why the affidavit in reply was filed out of time and there was no any proof of seeking leave of court to have the same reply filed out of time validated. Consequently, the affidavit in reply filed on the 9th of January 2024 is hereby struck out.

15. The respondent raised a preliminary objection in his submissions regarding the validity of the application served onto him by the applicant and he further states that the same application was defective since it lacked the signature of the

judicial officer and the seal of court hence the same should be struck out.

16. Counsel for the respondent relied on various authorities that classify a notice of motion as a summon as provided for under 0.5 rule 1 of the civil procedure rules. **(See; Isingoma Micheal vs Law development centre 234 of 2019, Merrian-webster dictionary).**

17. A summon as its definition prescribes is a power of court to require an appearance by the defendant/respondent, in other words it is the voice of court.

18. The civil procedure rules under 0.5 rule 1(5) further state that every summon shall be signed by the judge or such officer as he or she appoints and shall be sealed with the seal of court.

19. I will draw reference to the decision in **Kinyara Sugar Ltd Vs Kyomuhendo Pamela MA 61 Of 2020 Before Justice Byaruhanga Jesse Ruggyema** where he stated that where a notice of motion is not signed by a judge or registrar or officer appointed for that purpose and sealed by the seal of court, then that is a fundamental defect which is incurable and hence the application is incompetent and a nullity.



20. I am of the view that the rationale behind this requirement is to ensure that the notice of motion is issued under proper authority and by the proper office, failure to comply with this requirement is fatal.
21. A court document issued by the high court initiating proceedings must be endorsed by an officer of court and sealed accordingly, this requirement is amplified by the fact that the application has to be served upon the opposite party and the basis of its authenticity is the signature of the judge or such officer of court appointed for the purpose and to bear a seal.
22. Failure to adhere to this requirement may lead to absurdities for example fraudsters may take advantage and use unauthenticated court processes to intimidate their adversaries for purposes of extortion, in future courts may find themselves flooded with unauthentic official court documents once compliance with order 5 rule 1(5) is swept under the mere technicality carpet.
23. In the instant application, the respondent submits that he was served with a defective notice of motion that was not signed by a judicial officer neither was it sealed by court.



24. The applicant in her submissions in rejoinder states the preliminary point of law is an after thought since the respondent raises the same after acknowledging receipt of the application and he did not state the same in his affidavit in reply. The applicant relies on the decision of Lady Justice Cornelia Kakooza Sabiiti in **International Medical Link Vs Abii Cline and Laboratory Services Ltd Misc.App No.1818 of 2021** who stated that if a defendant appears before this court after filing of the suit against him or her and he is informed on the nature of the claim and the date fixed for reply thereto, it must be deemed that the defendant has waived his right to have summons served onto him if such a defendant goes ahead to file a defence to the suit before he or she is formally served in accordance with the rules of service of summons.

25. This is a decision I find contrary to the facts at hand, in the instant application the contention speaks to the validity and authenticity of the summons served onto the respondent not service of the summons onto the respondent. In a claim of service of summons, a party waives his right to bring the said claim once he or she appears in court regarding the suit which was filed

against him and the court explains the nature of the claim to him and the date to file his reply. However, in an action involving validity and authenticity of the summons, courts will have to scrutinize the same summons to ensure that they are authentic and issued by the proper authority once it takes cognizance of the same.

26. The applicant further submits that the hearing notice served on the respondent was signed and sealed by court justifying the validity of the not signed and not sealed notice of motion.

27. The requirement to have the notice of motion signed and sealed by court is a legal requirement and non-compliance of the same is fatal. The Applicant ought to first have the same notice of motion signed and sealed by court then served onto the respondent. **(See; *Kaur Vs Ciy Auction Mart Ltd (1967)EA 108.*)**

28. The applicant prays for the same objection to be overruled due to the fact that the respondent raised the same after filing his affidavit in reply, I find the applicant's prayer misconceived since a preliminary objection is defined to mean an error on the face of pleadings which rise by clear implication out of the pleadings and which, if argued as a preliminary objection may dispose off the

suit. The validity of the preliminary objection is rooted to the test whether it is able to dispose off the suit if argued regardless at what stage it is brought before the determination of the suit.

(See; Mukisa Biscuits Manufacturing Co.Ltd Vs West End Distributors Ltd (1969) EA 696)

29. Further I bring to the notice of the parties that a trial judge has the discretion to dispose off a preliminary objection at any time at or after the hearing of the suit once it is brought to his or her notice. ***(See; Crane Bank Ltd (In Receivership) Vs Sudhir Ruparellia And Meera Investement Ltd, Court Of Appeal, Civil Appeal No.252 Of 2019)***

30. As far as the stage at which court is required to rule on a preliminary objection is concerned, the rules of procedure appear to leave the question to the discretion of the judge.

31. I take cognizance of the fact that both counsel have cited a number of authorities, the position of the law has been succinctly clarified by the **Supreme Court of Uganda in Uganda Telecom Ltd Vs ZTE Corporation, SCCA No.03 Of 2017**, the supreme court was invited to determine whether a trial judge has discretion to defer a ruling on a preliminary objection at or after the hearing.

The supreme court had this to state; ***Any party shall be entitled to raise a preliminary objection which can be a point of law at any time before ,at and after the hearing which objection shall be determined and disposed off by court except by consent of the parties or by order of court or on application of either party.***

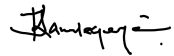
32. In summary the supreme court held that a party may raise a preliminary objection before or at the commencement of the hearing or after hearing the arguments if any from both sides court may make a ruling at that stage, upholding or rejecting the preliminary objection, the court may also defer the ruling on the objection after the hearing of the suit.

33. From the foregoing, it is therefore my view that the requirement of the notice of motion to carry a signature of a judicial officer and seal of court is not a matter of form but a legal requirement and the omission of the same is a fundamental defect.

34. In the premises, it is to the finding of this honorable court that the present application is incompetent and premature before this court and it is accordingly dismissed with no orders as to costs.



I SO ORDER.



NALUZZE AISHA BATALA

JUDGE

21/02/2024