THE
REPUBLIC
OF
UGANDA
IN
THE
COURT
OF
APPEAL
OF
UGANDA,
AT
KAMPALA
CIVIL
APPEAL
NO.
016
OF
2004
THE
CITY
COUNCIL
OF
KAMPALA[illegible]APPELLENT

.....

AND

CRESTED
CRANE
TOURS
AND
TRAVEL
LTD::::::::::::::::
RESPONDENT

CORAM:
HON
JUSTICE
SOLOMY
BALUNGI
BOSSA
JA;
HON
JUSTICE
RICHARD
BUTEERA,
JA;
HON
JUSTICE
KENNETH
KAKURU,
JA.

JUDGMENT
OF
HON
JUSTICE

KENNETH KAKURU, JA

This appeal arises from a decision of Hon.Justice V.F. Musoke-Kibuuka dated 21st August 2003 in Civil Suit No. 966 of 1999.

The appellant was the defendant in the original suit and in which judgment was entered in favour of the respondent 21/8/2003.

At the hearing of this appeal Mr. Bernard Mutyaba Ssempa appeared for the

appellant and Mr. Benson Tusasiirwe appeared for the respondent.

Initially there were three grounds of appeal set out in the Memorandum of Appeal. However, at the commencement of this appeal Mr. Mutyaba Sempa learned counsel for the appellant withdrew grounds 2 and 3 leaving

only
ground
one
for
determination.
I
must
state
that
learned
counsel
for
the
appellant
rightly
withdrew
the
grounds
because
they
were
too
general
and
offended,
in
my
view
the
provisions
of
Rule
86
of
the
Rules
of
this
court.
Had
he
not
withdrawn
them
I
would
still
have
been
inclined
to
strike
them
out.

Therefore,
there
is
left
only
one
ground

for
determination
in
this
appeal,
that
IS
ground
one,
which
states
as
follows:

(1)
"The
learned
trial
judge
erred
in
law
and
in
fact
when
he
made
a
finding
that
the
appel/ant
was
duly
served
with
the
statutory
notice.
J~

It
is
not
in
dispute
that
the
appellant
is
a
statutory
body,
a
Local
Government,
and
as
such
the
respondent

was
required
to
serve
upon
it
a
Statutory
Notice
of
Intention
to
sue
under
the
provisions
of
the
Civil
Procedure
and
Limitations
(Miscellaneous
Provisions)
Act.

Counsel
for
the
appellant
urged
that
the
appellant
was
not
served
with
a
Statutory
Notice
of
Intention
to
sue.
That
no
evidence
whatsoever
was
adduced
at
the
trial
to
show
that
the
notice
was
served
upon
the

appellant by the respondent in accordance with the law. That although a Statutory Notice was issued by the respondent dated 8/2/1999, it was never effectively served. However, he conceded that a copy of the notice was annexed to the plaint. He also conceded that it bears a stamp of appellant's legal department, the City Advocate's Office.

He urged that, the stamp and signature as indicated on the copy of the notice were not enough to prove effective service upon the appellant. Counsel contended that the mode of service of a Statutory Notice of Intention to sue is set in Regulation 26 of the third schedule of the Local Government Act, Cap 243 which provides that summons and notices or

other documents required to be served upon a District or urban councils shall be served by delivering it to or by sending it by registered post to the Chief Administrative Officer or the Town Clerk.

He relied on the case of Micheal Sansa and others versus Kampala City Council (HCCS No 482 of 1999) (unreported) in which the High Court held,

(f;
I.Af
{jVV

in
that
particular
case,
that
a
notice
served
which
was}
Qft
the
City
Advocate's
Office
did
not
comply
with
Regulation
26
of
the
Local
Government
Act.
He
also
cited
the
decision
of
this
court,
in:

The
City
Division
Council
of
Rubaga
Versus
Jimmy
Muyanja,
(Civil
Appeal
No.
14
of
2002,)
which
cited
the
case
of
Micheal
Sansa

and
others
Versus
Kampala
City
Council
(Supra)
with
approval.

In
reply
learned
counsel
for
the
respondent
urgued
that,
the
service
was
effective.
He
contended
that
service
upon
the
City
Advocate
was
effective
service
upon
the
Town
Clerk.
He
urged
that
although
the
matter
was
framed
as
an
issue
it
was
never
pleaded
and
was
not
canvassed
by
either
party
in
evidence
in

chief
or
cross
examination.
He
fully
associated
himself
with
the
finding
of
the
learned
trial
judge.

It is trite law that failure to serve a Statutory Notice of Intention to sue upon government, Local Government or scheduled Corporation, before filing a suit, renders the whole suit incompetent. See: Kampala City Council Versus Nuliyati [1974] EA 400.

The Mode of Service of the Statutory Notice is set out under Rule 26 of the third schedule of the Local

Government Act Cap 243 which provides as follows:

"26Mode of Service of summons etc

(1) Any summons, notices or other document required or authorised to be served on a district, urban or sub-county council shall be served by delivering it to or by sending it by registered post addressed to, the Town Clerk, Chief Administrative Officer or Chief of the

sub-
county
of
the
council.
"
It
was
contended
by
counsel
for
the
appellant
that
there
was
none
compliance
with
this
rule
as
service
was
never
affected
on
the
Town
Clerk,
therefore
there
was
no
effective
service.
However,
in
his
submission
before
this
Court
he
conceded
that
the
City
Advocate
was
an
agent
of
the
Town
Clerk
and
that
service
upon
him
would
be

effective
service.

I
entirely
agree
that
service
upon
the
City
Advocates
is
effective
service
upon
the
Town
Clerk.

Indeed this is what Hon Justice V. Zehurikize (J) of the High Court held, when he stated in the case of Micheal Sansa Ltd and others VS KCC (Supra) which was cited and relied upon by the counsel for the appellant. At page 8 of his judgment he states as follows:

{lifservice had been effected on the City Advocates, it would

have been effective service for the purpose of Regulation 26, see Impact Proces Ltd (Supra). This is because a City Advocate is a clear agent of the Town Clerk, who is known to be responsible for legal matters of the City Council': (Emphasis mine)

In the case of Impact Process Ltd Vs City Council of Kampala HCCS No 929 of 1997 (unreported).

Hon J. H. Ntagoba (P.J) (as he then was) held that service upon the City Advocate was effective service upon the Town Clerk. He however struck out the suit, as the Statutory Notice in that particular case had been served upon a filing clerk in the office of the City Advocate. Clearly therefore the issue for determination in this appeal is whether the learned

trial judge erred when he held that there was effective service upon the City Advocate as an agent for the Town Clerk.

In the case of Impact Process Ltd Vs City Council of Kampala (Supra) evidence was adduced to show that service had been effected on a filing clerk.

In the case of Micheal Nsansa and others Versus KCC, (supra) it was shown by evidence in court that service had been effected on one Esther a clerk in the City Advocates Office. Court rightly found that there was no effective service upon the City Advocate.

In the case of City Division of Rubaga Versus Jimmy Muyanja, (Civil Appeal No. 14

of
2002).
(unreported)

This
court
was
required
to
determine
an
issue
that
had
been
raised
at
the
trial
which
had
not
resolved
by
the
trial
judge.
That
is:

"Whether
the
Statutory
Notice
had
been
served
upon
the
appellant
in
that
case."

In
that
case
the
matter
had
been
brought
in
issue
by
way
of
preliminary
objection.
Court
decided

to resolve it upon hearing evidence. Evidence adduced in court on this issue, was that the person who is said to have effected service delivered the document to the Secretary of the Town Clerk at the reception of the Town Clerk's Office and a gentleman signed her delivery book.

In her lead judgment, Hon Lady Justice C.N.B Kitumba (as she then was)

observed as follows:

'Personal knowledge of the person to be served is not necessary for effective service. Be that as it may, I am not convinced the service was effected on the appellant because of the following reason:

Firstly, the Statutory Notice which is annexture A in reply to the respondent's written statement of defence and the delivery book exhibit P5 does not bear either a known signature of the Assistant Town Clerk or the appel/ant's stamp.

Secondly, PW2's testimony is that she typed the Statutory Notice on 3rd August 2000 and served it on the appellant on the

same day. However, the Statutory Notice is dated 1stAugust 2000.

Thirdly, PW2 testified in cross examination that she does not know what a Statutory Notice is. It is possible that if she served any document to the appellant it might have been something else and not a Statutory Notice. "

Clearly from the above, evidence was adduced in court as

to
service.
The
Statutory
Notice
did
not
bear
any
stamp
of
the
office
at
which
it
was
served.
Court
correctly
found
that
there
was
no
effective
service.

The
above
case
is
clearly
distinguishable
from
the
one
from
which
this
appeal
arises.
In
this
case
Paragraph
4
of
the
plaint
specifically
avers
that

"The
Statutory
Notice
of
Intention
to
Sue
was

duly
served
upon
the
defendant.
It
is
annexed
to
the
plaint
as
annexture
'F'."

Annexture 'F' bears a rubber stamp with the following inscriptions:

Legal Department

City Advocates Office

12Feb 1999

P. O. Box 7010 Kampala

The stamp also bears a signature.

In the appellant's written statement of defence which has only 4 paragraphs none of them specifically traverses paragraph 4 of the plaint. Paragraph 2 of the written

statement of defence simply states that paragraph 4 of the plaint is denied.

At the hearing of this appeal Mr. Mutyaba Sempa strongly argued that paragraph 3 of the written statement of defence effectively traversed paragraph 4 of the plaint. Paragraph 4 of the written statement of defence reads as follows:

"The suit is barred by Act 20 of 1969

and the Local Government Act, 1999 and the defendant will move court at or before the hearing that it be struck out with costs. If

When the hearing of the case proceeded at the trial, Mr. Mutyaba Sempa who was is also counsel for the plaintiff, now appellant did not raise any preliminary objection at all, in regard to the Statutory Notice.

The issue, whether or not the suit was barred by statute was never raised as a preliminary objection neither was it framed as an issue. It seems to have been abandoned.

The issue of the service of Statutory Notice was framed as an issue at the scheduling conference. The Statutory Notice was not listed among "agreed documents" at the conferencing.

The suit then proceeded with the testimonies of witnesses.

The plaintiff called three witnesses and the defendant now appellant called one witness. None of the witnesses testified on the issue of service of the Statutory Notice at all. Counsel for the defendant then did not raise it at all in the cross examination.

Surprisingly, both counsel submitted on the

issue in their written submissions.

In his submission on appeal Mr. Mutyaba Sempa did not deny knowledge of annexture 'F' to the plaint. His argument was that service was not effective as the notice was not served on the Town Clerk in person. He later conceded that service on the City Advocate was effective service on the Town Clerk for the purpose

of
Rule
26
of
Schedule
3
of
the
Local
Govt

Act.

He
strongly
argued
that
service
on
any
person
at
the
City
Advocates
Office
could
not
be
effective
service.

He relied on the authorities of the City Division of Rubaga Versus Jimmy MuyanjaCivilAppealNo14of2002 (CourtofAppeal)(unreported).(supra) and Micheal Nsansa and others Versus KCC (HCCS No 482 of 1999). (unreported).

I have already noted that in these two cases the facts are clearly distinguishable from those from which this appeal arises. In both cases cited above, evidence was adduced as to service, witnesses

were called and cross examined.

However, in this particular case before me, the judge and the parties seem to have accepted annexture 'F' to the plaint as part of the evidence at the trial. The only issue was its evidential value.

The learned trial judge was satisfied that the Statutory Notice was received, stamped and signed in acknowledgement of receipt

by the legal department of City Advocates Office, Kampala on 12th Feb 1999.

In my view annexture 'F' was prima facie evidence of service. Since, the respondent had presented prima facie evidence of service, in my view he discharged his evidential burden. The evidential onus then shifted to the appellant. The onus shifted to the appellant to show that service was not

effective.
It
was
up
to
him
to
show
that
it
had
been
effected
upon
a
"sweeper"
or
"tea
girl"
or
a
clerk
as
counsel
for
the
appellant
submitted,
in
this
court.

It was, upon the appellant to show or prove that the stamp was a forgery or the signature was unknown. He did not. I hasten to add that because he had not pleaded any defence to paragraph 4 of the plaint, rules of evidence would not have permitted him to adduce evidence on a matter that was not pleaded in defence.

Be
that
as
it
may,
he
ought
to
have
raised
the
issue
at
least
in
cross
examination.
He
did
not.

It
is
trite
law
that
one
who
alleges
must
prove.
The
burden
of
proof
therefore
lies
on
the
plaintiff.
However,
once
this
burden
is
discharged,
the
evidential
burden
shifts
to
the
defendant,
or
respondent
as
the
case
may
be.

InthecaseofCol

(Rtd)
Dr.Besigye
KizzaVs
Museveni
Yoweri
Kaguta
and
another,
Supreme
Court
Election
Petition
No
1
of
2001
(unreported).
Hon.
Odoki
C.J
had
this
to
say
on
the
shifting
onus
at
page
176
of
his
judgement.

'~s
far
as
the
shifting
of
the
burden
of
adducing
evidence
is
concerned,
it
is
stated
in
Sarker's
Law
of
Evidence
Vol
1,
14'h
edition
Reprint
1997,
pages

1338
-1340
as
follows:

It
appears
to
me
that
there
can
be
sufficient
evidence
to
shift
the
onus
from
one
side
to
the
other
if
the
evidence
is
sufficient
prima
facie
to
establish
the
case
of
the
party
on
whom
the
onus
lies.

11

What
is
meant
is
that
in
the
first
instance
the
party
on
whom
the
onus
lies
must
prove
his
case
sufficiently
tojustify
ajudgment
in
his
favour
if
there
is
170
evidence.
Sloney
Vs
Easlborne
Rd
Council
(1927)
1
Ch.
367,
397"

In
the
same
case
Besigye
Vs
Museveni
(supra)
Justice
Tsekooko
JSC
statesonpage
143ofhisjudgment.

':...Once
the
petitioner
had
proved

fabrication
and
falsity,
the
burden
shifted
to
first
respondent
to
prove
otherwise"

See
also
the
judgment
of
this
court
in
the
case
of
James
Mboijana
Vs
Caroline
Mboijana
(Civil
Appeal
No
87
2002)
unreported."

In
my
view,
the
respondent
discharged
his
burden
when
he
produced
a
copy
of
the
Notice
of
Intention
to
Sue,
duly
stamped
and
signed
as
already

indicated above. At that point the evidential burden shifted to the appellant to prove that the notice was never received. He failed to do so. In fact he opted not to challenge the service both in his written statement of defence and in cross examination.

Consequently, the evidence on record as to service of the notice remained unchallenged. This is how this

case is distinguishable from that of Micheal Ssansa (supra) and that of Jimmy Muyanja (supra).

Suffice it to say, I entirely agree with the reasoning and conclusion of the learned trial judge on this issue.

This ground therefore must fail. Since it is the only ground for determination, this appeal fails, and it is accordingly dismissed with costs, in this court and in the court below.

Dated at Kampala, this ~ day of September 2013.

Kenne~

JUSTICE OF THE COURT OF APPEAL