THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT FORT PORTAL

CIVIL SUIT NO. DR. MFP 13 OF 1991

ABDU SSALONGO::PLAINTIFF

VERSUS

KASESE TOWN COUNCIL::DEFENDANT

M/S KABACO UGANDA LTD

BEFORE: THE HONOURABLE MR. JUSTICE I. MUKANZA.

RULING

When this case was called for hearing the learned Counsel representing the plaintiff raised a preliminary point of law that he has never been served with written statement of defence by the learned Counsel representing the defendants and hence this ruling to resolve he matter.

In his submission Mr. Mwesigwa who appeared for the plaintiff stated that this case was fixed by consent of all counsels in court hearing on that day. The fixtures arose after that Court had ruled that the amended plaint filed by the plaintiff was properly filed and ought to be acted upon. That suppose the defendants had to file their respective defences within 15 days of ruling. To his knowledge neither of the defendants had filed their defences. He did not know whether they had any defences on record and even if they were there they were improperly filed and the filing was null end void because he had never been served with any of the defences. Filing a defence is governed by order rule 19 of the Civil Procedure Rules. In that order the defence could be filed in two stages both of which are mandatory. The first was to place it on record and the second is to deliver it to the plaintiff. If that was not done then there was no proper service. He continued to submit that it is sheer common sense that where the pleadings were not properly filed the suit could not commence because then he did not know what their defences were. He did not want to

accuse his professional brothers but that act was intended to delay the hearing of the case because his client had, informed him that the defendants had filed the temporary injunction in this Court to stop development of the suit property until the suit is disposed of. Those were grave allegation because if it were true the parties had committed a criminal case of disobeying a Courts order he tended to agree with his client that failure of the defendants to serve their defences gave them opportunities to develop the land. That would defeat the purposes of the instant case. He ended by submitting that he could not proceed in the absence of their defences.

On the other hand Mr. Kagaba the learned Counsel who appeared for the first defendant submitted that when the plaint was amended they complied with order 8 rule 19 of the CPR. The defence was filed within 15 days. For the purpose of the suit the written statement of defence in respect of the defendant No.1 was filed on 7/5/92 and it was received by the court and there was no need to pay any fees because there as no fees raised order 8 rule 1 of the CPR. The word used is “filed” and it is read in conjunction with order 5. Just like in the case of plaint the period of filing a defence is computed after services. In effect that means filing the defence is different from serving it on the opposite party. In the case of plaint, filing must precede service and any subsequent impropriety or delay a service could not invalidate a defence, it would he unfair to say that filing was done at the same time as service. It is common knowledge that the defendant is not expected to be looked for.

Turning to rule 18 of the same order 8, after they had filed a defence they delivered a copy to their client with instructions that they approach a process server of Kasese. They were reliably informed that he did so in the name of Peter with instructions that he served written statement of defence upon the plaintiff whose shop is near the tax park of Kasese. They further instructed their client that the Court process *server* prepares an affidavit of service and have the same filed in Court here. He verily believed the plaintiff was served even if they did not have documentary evidence to that effect. That even if the document was not delivered to the plaintiff through the short comings of the Kasese Court there is no date set which limits service to the opposite party. They were therefore not time barred. Mr. Kagaba continued that the learned Counsel representing the plaintiff lives in Kampala and they were prepared to serve him there.

As regards violation of the order of the Court he submitted that it was an accepted fact in this Court that the second defendant was legally allocated plots 103-107 Rwenzori Road in Kasese Town Council. The plots did not involve disputes between him and the plaintiff and the latter had no claim over them. The plaintiffs claim is in what was plot No.I Rwenzori Road which plot was supposed to be adjacent to the plots allocated to the second defendant. All the developments that have taken place subsequent to the issue of the order were on the second defendant's plot which were nut in issue at all. No development is being made on plot No.1 Rwenzori Road. On the day he delivered the written statement of defence to Kasese the plaintiff ran to the Police and complained that the second defendants were violating the order. The police were shown the map, the plot in issue and the adjourning plot of the second defendant. The police found that any development done on the plot was away from the plaintiff's land.

They dismissed the plaintiff as a liar and trouble shooter based on false reports. He was not surprised that if the plaintiff made false reports to the Police in the same vain made a false report to his lawyer. He invited the Court to reject the allegation advanced by the plaintiff's lawyer as being untruthful since this was a very difficult situation to make a decision on. I would he unsafe to pass any verdict against any of the defendants unless the Court moved to the scene. He requested the Court to reject the Counsels allegation.

Mr. Mwene Kahima the learned Counsel representing the second defendant submitted that they were not to blame if Mr. Mwesigwa/Rukutana the Counsel appearing for the plaintiff did not know that there were any defences filed. That piece of ignorance was not their fault. His instruction to the filing Clerk was to file the defences. They filed their defences on 27/4/92 and the clerk was instructed to leave an extra copy of the written statement of defence in the Court file because the following day was the date fixed for the hearing of an application in Court here. He contended that his learned friend Mr. Mwesigwa/Rukutana must have known that there was a written statement of defence originating from the second defendant otherwise he would have been interested in ousting the second defendant from Court on 28th April, 1992. Since the filing of the written statement of defence by the second defendant this case had proceeded in some aspects and his a learned friend Mr. Rukutana had proceeded in those proceedings. The reason why he had left a copy it was because there was little time between 27th and 28th April, 1992. The rules of Court are rules of Court but a diligent Advocate would have

observed what was happening in the file here. On his part he was surprised that Mr. Rukutana had raised those issues that morning because when he met him in Kampala on 29th May, 1992 among some of the things they discussed was the present case. That Mr. Rukutana seemed to be concerned about the defences of the first defendant and not that of the second defendant. And even then the learned Counsel was serious about coming to attend Court that morning and he thought he had picked up the defence from the file. That the file analyzes the defence of the second defendant that has been filed.

About the accusation that the second defendant intended to delay the case the learned Counsel submitted that he was sure the second defendant would be the most interested person to see that the present case was finalized because he had developed fully his three plots I03-107 and this *was* a very expensive development which had then stalled. He could not proceed because a person supposed to be allocated the adjourning plot had alleged matters which were not consistent with development. That his client has expensive developments on the land but the plaintiff had nothing.

About the allegation that his client was defying the orders of the Court he submitted that his learned brother was doubtful about the allegation. If the learned Counsel was certain that certain violation had occurred he would have made use or order 37 of the Civil Procedure He should have made an application to this Court and not a report because this was not an RC Court because the Counsel for the plaintiff had addresses this court and said that a report had been made to the police. That should be left to the police. They were the most qualified to carry cut the investigation. They made out the investigations and dismissed the allegations. Kasese had interlia RCS, Police and etc. The Court would have had something to act upon if there was an application. He suggested that if they could not proceed an early hearing date could be fixed.

In reply Mr. Mwesigwa Rukutana submitted that he was very much amazed y the unmannerly address of the learned Counsel appearing for the second defendant. Those were not arguments of substance. He was wondering how a Counsel could file a written statement of defence on the file and feels a Counsel would come end pick it up. The learned Counsel referred me to order 8 & 1. He submitted that rule 1 should be read together with rule 19 of the same order. He submitted that the rule qualified what is contained in rule 18. The marginal note was the filing of the

defence. He stood by his earlier submission that there was no filing of the written statement of defence.

The learned Counsel continued to submit that Mr. Kagaba the learned Counsel who appeared for the first defendant suggested that even if the defence was not served in time there was not time limit in which he should, be served. Mr. Kagaba tried to be creative how defence could be filed and served at the same time. He contended that the instant case did not require that and he did not say that was the law. Reading Order 8 Rule 19 of the Civil procedure Rules one discovers that the two have o be done within 15 days. He invited this Court to disregard that suggestion by his learned friend.

He continued Hr. Kagaba suggested of a strange procedure of serving *the* written statement of defence to the plaintiff which the latter has to pass over to the process server. He submitted that rules were not made in vain. They were made to avoid the absurdities. The address for service was that contained in the plaint. That was not complied with. The question was whether he was served with the defence. He argued that he was not served with any and even if the service was made on his client it would have been null and void. The plaintiff is a lay man. He did not know what was contained in t*he* defence and was not an emissary. And for him though he lived in Kampala which is a long distance from Fort Portal but despite that distance he had filed all his documents, the learned Counsels representing the defendants could not therefore plead that distance stopped them from filing the documents. He *was* not agreeable either with Mr. Kagaba that the case would have proceeded on that day because the opposite Counsels were prepared but he was not since papers were not properly fixed. His learned friends had no locus standi except to examine question of damages but in the interest of just he was ready to concede to the late filing of the statement of defence if both defendants mere condemned to pay costs of that day which costs included transport to and from Kampala, fuel, servicing of the vehicles, and accommodation and the costs should be paid immediately and not later than the next hearing date. The defendants deserved that treatment because they were grossly negligent in handling the Suit.

The learned Counsel was agreeable with the suggestions of the learned Counsel representing the first defendant that inorder to safeguard the violation of the temporary injunction it was proper

for the Court to visit the locus in quo. Both Counsels could be sent to the site to ascertain the position. That the second defendant had only sinister designs that was why he did not want the court to move to the locus in quo.

This Court had the occassion to listen very attentively to the able submissions of the learned Counsels representing the parties and had at the same time perused some documents in connection with the matter before the Court. It is pertinent to note at this stage that the learned Counsel representing the first defendant filed in his written statement of defence to the amended plaint on the 7th day of May 1992 whereas the learned Counsel appearing for the second defendant filed in his papers (written statement of defence) on 27th April, 1992. In essence when the application for the temporary injunction was argued in Court here on 28/4/92 the second defendant had already filed in his written statement of defence to the amended plain; whereas the first defendant had not done so yet. It was the contention of the learned Counsel representing the plaintiff that he had not yet been served with written statement of defence from the Counsels representing the defendants and as such the trial of the instant case could not commence on the date it was called for hearing i.e. 1/6/92.

Now let me look at the relevant rules pertaining to the matter under dispute. Order 8 rule 1 of the Civil Proce3ure Rules states:-

"The defendant may and if so required by the Court at the time of issue of the summons or at any time thereafter shall, at or before the first hearing or within such time as the Court may prescribe file his defence. Where a defendant has been served with a summons in the form provided by subrule (I) (a) of the rule 1 of order *5* he shall unless some other or further order be made by the Court file his defence within 15 days after he has entered an appearance in the suit."

The provisions of the 3bove rules had been complied with by the learned Counsels representing the defendants in that on 1/6/1992 the date on which the instant a suit was scheduled to commence the defendants had already entered appearance and had also filed in their written statement of defence within the stipulated period.

As I stated earlier on the learned Counsel appearing for the plaintiff contended that he had never been served with the written statement of defence by 1st June, 1992.

Order 8 rule 19 of the Civil Procedure Rules provides:-

"Subject to the provisions contained in rule 8 or this order, a defendant shall file his defence and either party shall file any pleading to the Court for placing upon the record and by delivering a duplicate thereof at the address for service of the opposite party.'

In the instant case as I have held earlier on the learned Counsels filed in their written statement of defence within time by placing the same on the records that is the Court file but at the same time allegedly by delivering a duplicate thereof at the address for service of the opposite party. Mr. Mwesigwa the learned Counsel appearing for the plaintiff gave his address as C/O Eagen House P10t No. *28* Luwum Street P.O. Box 11442 Kampala. There is no evidence that the plaintiffs Counsel was served with the defence at the Kampala address. I am of the opinion that besides filing their written statements of defence in the Court file here the learned Counsels should have at the same proceeded and served the plaintiff with a duplicate of their written statement of defence at the Kampala address. That is the law any way. I do however agree with the submission of the learned Counsel representing the second defendant that Mr. Mwesigwa must have known when this Court was hearing the preliminary objection to the temporary injunction on 28/4/1992 that there was in the Court file a written statement of defence by the second defendant otherwise the learned Counsel could not have permitted the 2nd defendant to be heard in the said application but still I am of the view that in itself was no evidence of service of the written statement of defence to the plaintiff's Counsel. Similarly I do not agree with Mr. Mwene Kahima Counsel appearing for the 2nd defendant that because he met Mr. Mwesigwa Rukutana the learned Counsel appearing for the plaintiff in Kampala and that among other things they discussed was the present case. That was indeed no evidence of service of the written statement of defence by the 2nd defendant's Counsel on the plaintiff's Counsel.

In the same vain I do not agree with the learned Counsel for the 1st defendant that because they delivered a copy of the defence to their client in Kasese with instruction that they approach a process Server of Kasese Court who in turn would serve the plaintiff that was sufficient service. Ofcourse the plaintiff had engaged a lawyer whose address was well known to Mr. Kagaba. I do not see good cause why he chose to serve the plaintiff personally. I hesitate to mention that no

such service was effected on the plaintiff's Counsel or the plaintiff himself, perhaps an affidavit to that effect would have very much assisted the Court.

As to the contention by Mr. Mwesigwa that the defendants were violating the temporary injunctions granted to his client and that the Court could move to the locus in quo and view the site. I am of the view that it will be highly prejudicial to this case to visit the locus in quo at this stage before I have entertained the matter. Equally I do not see sufficient cause for sending the learned Counsels representing the parties to visit the locus in quo and see the disputed land. I *am* of the view that if such violation has occurred at all there is a remedy to meet such situation under S. *37* rule 2 (3) of the Civil Procedure. The learned Counsel has to move this Court with a notice of motion.

From that has transpired above the objection by Mr. Mwesigwa that he has never bean served with written statement of defence is upheld with costs. However his prayer that the Court moves to visit the locus in quo or that the court sends two of the Counsels to see the disputed plots is overruled. The learned Counsel is advised to move this Court with an application.

I. MUKANZA

J U *D G* E

6/7/1992