

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA
HOLDEN AT MBALE**

**HCT-04-CV-MA-236-2014
(FROM HCCS NO. 0012-2012**

NOAH OWORA.....APPLICANT

VERSUS

- 1. JAMES MAGODE IKUYA**
- 2. OTHIENO AKIKA EMMANUEL.....RESPONDENTS**

BEFORE: THE HON. MR. JUSTICE HENRY I. KAWESA

RULING

Applicant moved this court by Notice of Motion under S. 33 of the Judicature Act and Section 98 of the Civil Procedure Rules.

The grounds were that applicant be granted leave to file his defence in the matter. Applicant swore an affidavit showing that he learnt of the matter while in court following up another matter. He averred that he was never served with summons and the affidavit of service was a lie. He further stated that he has a defence to the suit, and it would be unfair to condemn him unheard. He prayed that the application be allowed.

Counsel Othieno for his Attorney reiterated the above grounds in submission and rejoinder.

For the respondent, **James Magode Ikuya**, swore an affidavit in reply stated that applicant was duly served by the process server, and his affidavit in support is full of falsehoods. Respondents were represented in court by **Counsel Bwire** who argued in submissions that:

1. The application is incompetent because it is a mere denial.

2. Applicant is guilty of dilatory conduct.
3. Affidavit in support is defective.
4. Application is misconceived and superfluous.

Having perused the pleadings and submissions, the issue is;

- i) Whether the applicant was effectively served with summons to file a defence and
- ii) Whether he is entitled to a grant of leave to file a Written of Statement of Defence in the matter at this stage.

I resolve the issues as herebelow.

(i) Whether applicant was effectively served with summons to file a defence.

The requirement for effective service of summons is mandatory under the procedures stated under O.5 of the Civil Procedure Rules. Where service is effective O.5 r. 17 of the Civil Procedure Rules requires the filing of an affidavit of service as proof of such service.

On record is an affidavit of service deponed by Ronald Nambale of C/o Nyote and Co. Advocates (who are counsel for plaintiffs). The affidavit paragraphs in 2, 3, 4, 5, and 6, shows that though defendant was served he declined service.

The defendant (Applicant) has deponed his affidavit rebutting the contents as false and a lie, in his paragraphs 3 and 4, thereof.

Counsel Bwire argued that the appellant ought to have gone further in his affidavit to give details of the lies and also state where he was on 6 July 2012. However **Counsel Othieno** in rejoinder maintained that paragraph 3 and 4 gave enough detail.

Without going into those details, affidavit evidence is evidence in its own right. The law of evidence under section 101 and 102, places the burden of proof on the one who wants to be believed or who alleges. In this case the applicant's affidavit alleges that he was not served, and to prove so he relies on the contents of the affidavit of service. He said it contains lies. The

respondent also relies on the same affidavit of service to assert that the service was done effectively. The onus is therefore on the plaintiff/Respondent to prove by the content of the affidavit of service on record that the said service was proper.

An examination of that affidavit of service from paragraphs 1, 2, 3, 4, 5 shows that this service was not effective. There was an attempt to serve defendant but he;

“said he could not sign on the original copy in acknowledgement of service till he consulted his lawyer,.....told me to check on him on July 10, 2012..... I requested for my original copy but he refused telling me to check...”

The Process Server took papers to an alleged defendant, but did not effectively get them served, or acknowledged, he even failed to retrieve a copy back to court. He came back empty handed and swore the affidavit. Now in this scenario where defendant denies service, what is there on record for court to believe the plaintiff’s version and not defendant? In his affidavit he mentions no witnesses who saw him attempt to serve the defendant. The affidavit therefore upon challenge by the defendant, cannot pass the test for effective service.

Courts have required strict compliance with personal service of process of court to avoid such scenarios.

In UTC V. Katongole & Anor. (1975) HCB 336 Court held that:

“Proper effort must be made to effect personal service, but if it is not possible service may be on an agent.”

However in Waweru Kiromo [1969] EA 172 (K), Court further guided that:

“If the Process Server does not serve the defendant personally and serves the wife who refuses to sign, this service is not effective.”

In Nzioki S/o Mutweita v. Akamba Handicraft Industries Ltd (1954) 27 KLR further guidance is given that:

“The affixing of a copy of the summons is no service if diligence has not been shown in trying to find the defendant, and the mere fact that the defendant is not at home on one occasion is not enough.”

From those earlier decisions by courts, I am persuaded to take a similar strict requirement for compliance while affecting service of court process. Even where a defendant appears to be difficult to serve, one attempt is not enough. A second attempt with more elaborate cautionary measures would suffice for instance using a “Court Process Server,” going with a 3rd party who notes on the summons and confirms that process has been served in his presence etc. The affidavit of service must be detailed enough to explain all such diligence taken in order to serve effectively. This diligence was also emphasized by the Court in Waswa & Anor. V. Ochula & Ors 1991 (ULSR) 161 (SC):

“Affidavit of Service under O.5 r. 12....., the address of the person identifying the individual served must be annexed to the affidavit.”

The import of all this is that service of court process is not a “mere casual practice” to be hurriedly or incompetently done with the hope of covering the gaps using an affidavit of service. Service itself must be effective and in my view, the affidavit of service sworn by **Nambale**, indicates that the defendant was not effectively served.

As there was no effective service, the arguments that the applicant is out of time to be allowed to file a Written Statement of Defence cannot hold. It has long been a rule of practice as long ago as in Kudanga v. NIC (1977) HCB 243 where the court observed that time runs from date of effective service of summons.

The arguments raised that applicant should have followed O.51 r. 6 of the Civil Procedure Rules for extension is misconceived. This leaves me with the question of dilatory conduct.

The facts show that the applicant was vigilant. He was not effectively served. He found out from court. He immediately filed this application and even offered a defence as annex ‘A’ to show his diligence. This combined with the fact that plaintiffs used a Process Server from the

law firm of the same counsel representing them to serve the defendants raises doubts as to whether, this court should hold the “delay” to respondent against the defendant.

I do know that equity helps the vigilant. The plaintiff has had all the time to move the suit forward but never did so. Time has passed and as noted in paragraph ‘5’ of **Noah Owora’s** affidavit there is no judgment on file yet, and no serious proceedings have been conducted, therefore the balance of convenience in equity would aid his vigilance and persuade this court to find that he is not guilty of any dilatory conduct.

Finally on the issues raised about the affidavit in support being defective, I do not agree. As pointed out by **Counsel Othieno** the deponent did not depone to any information, and there was therefore nothing faulty in his affidavit.

The sum total of all my findings above is that the applicant has proved the application. I hereby grant the application, and order that applicant be allowed to file his defence to the suit, and have it served upon all parties herein within 15 days from the date of reading this Ruling. I so order. Costs to abide the main cause.

Henry I. Kawesa

JUDGE

26.10.2015