

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

CIVIL SUIT NO. 396 OF 2012

- 1. ZIRIYO EDISON**
- 2. NAKANDI KAVUMA**
- 3. KAJUMBA MUGANGA EVA :::::::::::::::::::::::::::::::::::::::PLAINTITTS**
T/A ST. CATHERINE'S CLINIC

VERSUS

- 1. KAMPALA CAPITAL CITY AUTHORITY**
- 2. KAMPALA DISTRICT UNION OF**
PEOPLE WITH DISABILITIES LTD. ::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE HON. MR. JUSTICE BASHAIJA K. ANDREW

R U L I N G:

This ruling is pursuant to a preliminary objection raised by Mr. Peters Musoke, Counsel for the 2nd defendant, that the amended plaint was filed out of time without leave of court. Counsel submitted that the order to amend the plaint was made on 16/04/2014 giving the plaintiff ten days within which to file amended plaint, but that the order was not complied with until late on 05/05/2014 beyond the ten days. Citing **Order 6 r.23 CPR** to the effect that an amended pleading must be filed within the time allowed, Counsel submitted that where the law stipulates that an act must be done within a certain time, then it must be done within that time for it to be valid unless leave of court to extend time has been first obtained.

Counsel submitted that in the instant case no such leave of court was obtained, and that as such there was no plaint before court. Counsel relied for that proposition on case of **UNEB vs Mparo General Contractors, Court of Appeal Civil Reference No. 99 of 2003.**

Mr. Peters Musoke went on to submit that the 2nd defendant's written statement of defence was served on 03/11/2014 and amended written statement of defence was served on the plaintiff's Counsel on 21/05/2014, and that the court order required that any rejoinder be filed within ten days from the date of receipt of the amended written statement of defence. Counsel also pointed out that the rejoinder itself was filed in court on 18/08/2014 and not by 01/06/2014 or 31/05/2014 which was the ten days as ordered. That again no leave of court to file out time was sought.

Counsel cited **Order 6 r.25 CPR** that if a party obtains leave to amend but does not do so within time allowed by the order, the party will not be permitted to amend after expiration of time unless time is extended by court. Counsel argued that since no such extension was obtained by the plaintiff the pleadings are invalid.

Counsel also submitted they were not served with any court papers if there was any extension sought. Citing **Order 8 r.19 CPR**, Mr. Peters Musoke submitted that service on the opposite party must be done within the time allowed and that the provision is mandatory. To buttress these submissions on that point Counsel cited the case of **Nile Breweries Ltd vs. Bruno Ozunga T/a Nebbi Boss Stores HCT-CS-580-2006**.

Counsel also submitted that the suit was filed by four plaintiffs; but that the original 3rd plaintiff Namyalo Layton does not appear on the amended plaint and that instead of four plaintiffs they are now only three. Counsel argued that leave of court to remove a party should have been obtained under **Order 1 r.10 CPR**. Counsel prayed that since the original plaint was defective, which was the reason why court granted the plaintiff's prayer to amend the plaint; and that since the amended plaint did not comply with the order of court, there is no plaint and it should be struck out under **Order 6 r.30 CPR** with cost set the 2nd defendant.

In reply Mr. Birungi Wycliffe, Counsel for the Plaintiffs, conceded that the amended plaint was indeed filed out of time allowed in the order of court; and

apologized to court and Counsel for the 2nd defendant for the delay to file and serve. Counsel attributed the fault to lack of due diligence on the Counsel who was responsible for handling the particular assignment. Counsel argued that although the late service out of time was received with protest by Counsel for the 2nd defendant, he filed their written statement of defence, and served the same on the plaintiffs on 21/05/2014. Counsel argued that failure to file the amended plaint in time has not prejudiced the 2nd defendant, and that in any case, the 1st defendant does not seem to mind about the late filing; and that it is in the interest of justice that the matter be determined on merits since the pleadings are now before court.

Counsel submitted that the directions which court gave on 16/05/2014 are more administrative and for proper management and administration of the case and constitute good practice. Counsel supported this argument with the case of ***Mugabo & 90 O'rs vs Kimala & 4 O'rs, H.C. Misc. Appl. No. 631 of 2011*** where Tuhaise J held that a directive was more or less administrative in nature. Counsel also cited the case of ***Jim Muhwezi vs. Attorney General & A'nor, Const. Petition No. 0 of 2008*** where it was held that the main roles of the Judicial Officer are, to adjudicate over disputes in society; to interpret the law; and to enforce the law. Based that authority Counsel sought to distinguish the ***UNEB vs. Mparo General Contractors Ltd (supra)*** which made reference in respect of time stipulated by law as opposed to the instant case where time limited was by directive of court.

Mr. Birungi also cited ***Section 33 Judicature Act (Cap.13)*** as to the wide powers of this court to do justice so that as far as possible all matters in controversy between the parties are completely and finally determined and to avoid all multiplicities of legal proceedings. Counsel also cited the plethora of cases to the effect that justice shall be done without undue regard to technicalities within the context of ***Article 126 (2) (e) of the Constitution.***

Regarding removal of the 3rd plaintiff without leave of court, Counsel Birungi submitted that the issue had earlier been resolved before the trial Judge then Hon. Justice J. Murangira when the 3rd plaintiff expresses the interest of withdraw; which was allowed, but that by that time the pleadings had been already done and that the court the granted leave to proceed with the suit without the 3rd plaintiff. Counsel prayed that the objective be overruled.

Resolution:

I will start with the last point as regards the failure by the plaintiff to apply to court under **Order 1 r.10 CPR** before removing the 3rd plaintiff as party from the plaint. I have had the benefit of reading the proceedings of court. I have, however, not come across any order of court whereby the 3rd plaintiff was struck out of the pleadings. That said, however, I have noted from the joint scheduling conference which was duly endorsed by Counsel for all the parties on 04/04/2014 and filed on court record on 09/04/2014 that in the plaintiffs' facts (in paragraph 2), only the 1st, 2nd, and 4th plaintiffs are actually parties to the suit. Even in the list of witnesses, only the 1st, 2nd, and 4th plaintiffs are listed as witnesses. The 3rd plaintiff appears to have been altogether left out. The purpose of the scheduling conference under **Order 12 CPR** was stated in the case of **Tororo Cement Co. Ltd vs. Frokina International Ltd., CACA No. 21 of 2000**, as *inter alia*, to iron out issues of disagreements and agreements so that only those points upon which the parties disagree are made issues for trial. In short, a scheduling conference is the final nutshell of the case which the parties intend to present before court.

In the instant case, Namyalo Layton was omitted from plaint in plaintiffs' case as a party. As such there is no case which she has against the defendants. It would thus not be necessary, though it would have been desirable, to apply to court have her name removed under **Order 1 r.10 CPR**, since she was removed by the parties at

the scheduling stage. If it is true as Counsel for the plaintiffs contends that the trial Judge then allowed the matter to proceed after the 3rd plaintiff opted out, then I find that no prejudice was occasioned to the defendants even in absence of a particular court order on record to that effect.

Regarding the issue that the plaintiffs filed their amended pleadings out of time set by court and did not seek leave of court to extend the time, I find that indeed the plaintiffs failed to meet the time limit set in the court order. The plaintiffs also neither sought nor obtained extension of time to file their pleadings out of time set in the court order. Counsel for the plaintiffs conceded that much.

The question to answer in such circumstances, in my view, is whether the defendant/opposite party has been prejudiced because of the failure by the plaintiffs to comply with the time limits set by court, and whether such a prejudice, if any, cannot be compensated by award of costs. In the case of ***Mohan Musisi Kiwanuka vs. Aisha Chand, SCCA No. 14 of 2002***, it was held that no prejudice is suffered by a party if it can be compensated by costs. Although the case is dealing specifically with amendments that introduce a separate or additional cause of action to an already existing one, I find that the principle applies generally to amendments of pleadings.

I am of the view that the answer to both questions above is in the negative that the defendants would not be prejudiced. In coming to that conclusion, I have been informed mainly by the fact that other than complaining that the plaintiffs did not follow the time limits set by court in the order for amendment, Counsel for the 2nd defendant did not show what prejudice the 2nd defendant has suffered as a result of the failure of plaintiffs to adhere to the time limits set in the court order.

Secondly, it has not been shown by the 2nd defendant that the prejudice, if any, could not be compensated by costs. Thirdly, I have also noted that the 2nd defendant filed an amended written statement of defence answering to all issues

raised in the amended plaint even though they were served late out of time set by the court order. In my view, this shows that parties are interested in having their case heard on merits despite the procedural lapses of the failure by one of the parties to comply with time limits set by court in filing. Courts do not exist for punishing erring parties that fail to strictly adhere to procedural requirements. Courts exist to adjudicate the real substance of disputes and to ensure that justice is administered without undue regard to technicalities in the context of **Article 126(2) (e) Constitution**.

Finally on this point, I wish to agree with Counsel for the plaintiffs that the **UNEB case (supra)** is distinguishable from facts of the instant case as it was clearly dealing with time limits stipulated by law. In the instant case, the time limits were set by court. I am acutely alive to the general position in the case of **Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd vs. Uganda Revenue Authority, HCMA 42 of 2010**, about the importance of complying with court orders where the learned Judge relying on the case of **Hadkinson vs. Hardkinson [1952] All E R 567** per **Romer J.**, held that disregard of an order of court is a matter of sufficient gravity, whatever the order maybe.

However, since court directions are pre-emptive in nature, they should be regarded essentially as intended to regulate the progress of litigation, and to encourage the resolution of disputes as speedy as possible. They are very often extended even by agreement of parties. **See: S.96 CPA; Order 51 r.7 CPR;** or even waived by them. Court can, in the interest of justice, abridge them. This is the spirit of the holding in **Mugalo & 90 O'rs vs. Kimala & 4 O'rs (supra)** which was earlier cited by Counsel for the plaintiffs. This is quite distinguishable from a situation where the time limits set by statutes. Indeed as was held in **Re-Kiwanuka [1977] HCB 42, Order 51 r.6 CPR** and **Section 96 CPA** cannot be used to extend time set by statute.

On the whole, I find that the objections do not go to the root of the case. I overrule.
The main suit will proceed for hearing on merit.

BASHAIJA K. ANDREW
JUDGE
25/11/14