

UGANDA / JUDGMENT

Kasande v Editor Red Pepper & Anor
(Misc. Application No. 35 of 2013) [2013]
UGHCCD 124 (23 September 2013)
[2013] UGHCCD 124

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Misc. Application No. 35 of 2013

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****CIVIL DIVISION****MISC. APPLICATION NO. 35 OF 2013**

(Arising from HCCS No. 296 of 2010)

MURANGIRA KASANDE VENNIE ::::::::::::::: APPLICANT**VERSUS****THE EDITOR RED PEPPER & ANOTHER ::::::::::::::: RESPONDENT****BEFORE: HON JUSTICE STEPHEN MUSOTA****RULING**

This is an application brought by Notice of Motion under S. 98 CPA, O. 8 r 19 CPR, O. 52 r 1, (2) and (3) CPR by Murangira Kasande Vennie represented by M/s Blaze Babigumira Solicitors and Advocates for orders that:-

1. The Written Statement of Defence filed in court on the 17th December 2010 but served on counsel on 13th September 2012 be struck off.
2. An interlocutory judgment be entered.
3. The suit be fixed for formal proof of damages.
4. Costs of the application be provided for.

The general grounds for the application are that:-

1. The summons to file a defence and a plaint were served on the defendant on the 13th day of December 2010.
2. The defendant filed a WSD on 17th December 2010.
3. The WSD was not served on counsel for the plaintiff until the 13th September 2012.
4. The inordinate delay in serving the WSD on counsel for the plaintiff highly prejudiced the plaintiff and it delayed the disposal of the case.
5. The inordinate delay in serving the WSD on counsel for the plaintiff rendered the service of the WSD a nullity and invalid.
6. It is in the interest of justice that this application be allowed.

The grounds of application are echoed in the supporting affidavit to the application.

The defendants/respondents represented by M/s Mutabingwa & Co. Advocates filed an affidavit in reply contending that the filed a WSD. That there is no law whatsoever requiring the defendant to serve a Written Statement of Defence which does not contain a counterclaim within a specific time. That if counsel for the applicant was vigilant he would have obtained the WSD himself from court because it was filed in time. That by not so doing and failing to fix the suit for hearing shows that counsel for the plaintiff lacks seriousness. Finally that this application is brought to court in bad faith, lacks merit and is a waste of courts time.

In his brief submission, Mr. Babigumira for the applicants contended that the provisions of O. 8 rr 1 and 19 CPR are mandatory. That filing a WSD is complete when it is served on the other party. That he received the WSD late but without prejudice. He referred to four authorities to support his position and for my guidance to wit:

1. **Abdu Salongo Vs Kasese Town Council [1991] HCB 163.**
2. **Mwesigwa Geoffrey Phillip Vs Standard Chartered Bank of Uganda Misc App. 200 of 2011.**
3. **Nile Breweries Ltd Vs Bruno Ozunga T/A Nebbi Boss Stores HCCS 0580-2006**
4. **Mark Graves Vs Balton MA 0158 – 2008.**

In his submission in reply, Mr. Mutabingwa relied on the affidavit in reply and the supplementary affidavit. He contended that it is not true that filing a WSD is only complete if it is served on the plaintiff. That there is no time limit in the rules requiring service of WSD on the opposite party. That filing a WSD which is sealed by court is enough to prove that it was filed and is governed by O. 9 r 1 CPR. That O. 8 r 19 CPR under which this application is brought does not give a time frame in which a WSD must be served.

Learned counsel referred me to the case of **Simon Tendo Kabenge Vs 1. Barclays Bank (U) Ltd, 2. Phillip Dandee HCT-00-CV-MA-NO. 263-2010** (Zehurikize J) and contended that infact learned counsel for the applicant got the WSD and even generated a scheduling memorandum. That this application is an afterthought and is based on wrong interpretation of the law. He prayed that this application be dismissed with costs.

I have considered the application as a whole and related the same to the submissions by both learned counsel. I have perused the authorities cited for my guidance. I am inclined to agree with the submissions by Mr. Mutabingwa for the respondents and the decision by my brother Justice V. T Zehurikize in **Simon Tendo Kabenge Vs Barclays Bank (U) Ltd & Phillip Dandee** (supra).

After perusing O. 8 r 19 CPR I failed to come across a requirement that a defendant must file his/her defence and serve it on the plaintiff within the time allowed to file a defence.

O.8 r 19 CPR provides that:-

“subject to rule 8 of this order the defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence by delivering the defence or other pleading at the address for service of the opposite party”.*

O. 8 r 8 CPR provides that:-

“Where a defendant by his or her defence sets up any counterclaim which raises questions between himself or herself and the plaintiff together with other persons, he or she shall add to the title of his or her defence a further title similar to the title in a plaint, setting forth the names of all the persons who, if the counterclaim were to be enforced by cross-action would be defendants to the cross-action and shall deliver to the court his or her defence on such of them as are parties to the action together with his or her defence for service on the plaintiff within the period within which he or she is required to file his or her defence”.*

O. 8 r 19 CPR simply provides for the filing of a defence and any pleadings subsequent to filing the defence. It also provides for delivering of duplicate copy of the defence or other pleadings to the opposite party but no time limit is given for doing this. As rightly held by Zehurikize J in **Simon Tendo Kabenge’s** case (supra), the opposite party is not necessarily the plaintiff. The opposite party can as well be the defendant in the case of any pleading filed subsequent to the filing of his or her defence. For example, where the defendant files a counterclaim and the plaintiff files a reply to the counterclaim or to a written statement of defence, the defendant would be the opposite party. The time within which to deliver the defence or any other pleadings subsequent to the filing of the defence at the address of service of the opposite party is not stated in O. 8 r 19 CPR and there is no reason why it should be imported or implied. The said rule merely adds more details on the filing of a defence and further provides for the filing of any pleadings subsequent to filing the defence and directs delivery of those pleadings and the address of the opposite party. However in its discretion court can limit the time within which service of the defence should be effected on a plaintiff.

O. 9 r 1 CPR provided interalia that once a WSD is sealed then;

“----- the copy of the defence so sealed shall be certificate that the defence was filed on the day indicated by the seal”.

It cannot therefore be true as submitted by learned counsel for the applicants that filing a defence is complete only when it has been served on the plaintiff within the time allowed to the defendant to file his or her defence. The filing of a WSD is complete the moment O. 8 r 1 and O. 9 r 1 CPR are complied with.

O. 8 r 19 CPR on which this application is based deals with the filing of a defence which contains a counterclaim. In this case the filing of the defence and counterclaim must be done within the time allowed to file the defence.

The only instance where time to serve a defence in form of a reply is prescribed is under O. 8 r 11 CPR. Once a person named in a defence as a party to a counterclaim is served with a counterclaim he/she had to file a reply within 15 days after service. He/she is obliged to serve the reply upon the defendant within 15 days of filing it.

The above position of the law notwithstanding modern legal practice demands that litigants and their advocates must be vigilant in following up their case for speedy delivery of justice. Resorting to rules of procedure at the expense of delivery of substantive justice must be discouraged in order to serve the expectations of the people.

In the instant case, this application was unnecessary since both counsel had gone ahead to generate a joint scheduling memorandum. It only served to delay the determination of this suit. The applicant would not be prejudiced at all if this suit proceeded soon after scheduling. For reasons I have given herein, I will find that this application lacks merit. It will be dismissed. Costs shall be in the cause. Hearing shall proceed inter partes.

Stephen Musota

J U D G E

23.09.2013

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