

UGANDA / JUDGMENT

Kercan v Britam Insurance Co. Uganda (Miscellaneous Application 8 of 2023) [2024] UGHC 971 (3 October 2024)

[2024] UGHC 971

COURT

High Court of Uganda

BEFORE

Acellam, J

CASE / FILE NUMBER

Miscellaneous Application 8 of 2023

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT ARUA

MISCELLANEOUS APPLICATION NO. 008/2023

(ARISING FROM CIVIL SUIT NO. 014 OF 2018)

KERCAN P. PROSPER::::

(suing on behalf of Onen Nasur Maxim) 10

VERSUS

BRITAM INSURANCE CO. UGANDA::::

BEFORE HON. JUSTICE COLLINS ACELLAM

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RULING

Brief Introduction

This is an application brought by way of Notice of Motion under Section 83(a), (b), (c) and (d), and Section 98 of the Civil Procedure Act Cap 71 as amended for orders that;

1. The Judgement, Decree and all resultant Orders passed under Civil Suit No. 014 of 2018 against the Applicant be called and revised by the High Court. 2. That the Trial Chief Magistrate H/W Sayuni David acted within his jurisdiction but with material irregularity that caused injustice to the Applicant. 3. That the Trial Magistrate acted illegally when he held that there was no action against the Respondent.

25 Background

It is contended that in 2018, the Applicant filed Civil Suit No. 014 of 2018 against the Respondent for trespass to goods mainly definite and was seeking for damages. The Respondent raised a preliminary objection that the suit did not disclose a cause of action against the Respondent, and Court determined this PO by dismissing the suit as the POs

were sustained on 17th December 2021 before H/W Robert Mukanza. On 24th January 2023, the Applicant then filed this Application for revision of the orders on grounds of material irregularities and illegality.

Grounds of the Application

The grounds on which this application is based on, are stated in the affidavit of the Applicant. The affidavit of the Applicant deponed on 24th January 2023 states that he 35 filed a suit against the Respondent as a donee on behalf of the donor Onen Nasur Maxim for wrongful seizure of goods to writ a motor vehicle Registration No. UAZ 109 B in the name of Kibeherire Robert Byaruhanga. That the donor bought the motor vehicle from Kikomeko Musa who was an agent of Kibeherire Robert Byaruhanga and paid all the cost 40 price. That the said Kibeherire Robert Byaruhanga then deceived the defendants and

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- S presented to them a forged logbook on which they based and paid him indemnity on a forged logbook in the name of the Respondent. That the defendant used Nansana Police to seize the motor vehicle from the Plaintiff's home, all the logbooks presented by the Defendants were forged and investigations by the Police at Paidha show that the motor vehicle was sold to Onen Nasur Maxim by Kikomeko Musa on 24/04/2017.
- 10 That Counsel for the Respondent raised a PO that the suit disclosed no cause of action against the defendant and the Trial Magistrate dismissed the suit because of the same. The dismissal of the suit was illegal as the suit sufficiently discloses a cause of action against the Defendant. That much as the Chief Magistrate acted within his jurisdiction, he acted illegally to sustain the PO, he failed to exercise the jurisdiction vested in Him 15 and this is a matter fit for revision.

Grounds in opposition

In opposition, Mr. Anthony Mwebaze, the Legal Manager of the Respondent Company, in his affidavit deponed on 3rd March 2023, he contends that this application does not disclose any cause of action against the Respondent, defective abuse of court process and a disguised appeal. The Respondent at this point informed Court that he shall raise 20 preliminary points of law that; the application does not disclose any cause of action against the Respondent; that the affidavit in support of the application is incurably defective and that it contains deliberate falsehoods; and that the application is barred and bad in law.

- 25 The Respondent further contends that he denies the capacity and competence under which the deponent swore this affidavit, the Respondent is the registered and lawful owner of the said motor vehicle as per the insurance policy where the original owner was compensated by the Respondent. The Respondent secured registration of the said car legally and changed ownership after compensating the rightful owner under the
- 30 subrogation principle. Allegations of fraud and forgery were not pleaded by the Applicant in the Trial Court, the application does not contain any ground for revision as the Trial Magistrate determined the matter according to the law. The suit was dismissed by H/W Robert Mukanza on 17th December 2021, not H/W Sayuni David as stated by the Applicant, it was a sober interpretation of the law and analysis of evidence and there was
- 35 no illegality committed by the Trial Magistrate. It is in the interest of justice that this application is dismissed with costs to the Respondent.

Grounds in Rejoinder

In rejoinder, the Applicant refutes the assertions by the Respondents that service of the Application out of time abates the application and results in its dismissal. The Applicant

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states whereas they agree that the service was out of time, court has been reluctant to allow rules of procedure to defeat the cause of justice as was stated in the case of *Gen.* Sejusa VS Attorney General Judicial Review case No. 178 of 2015 and in reliance on the provisions under Article 126(1), 2(c), Section 33 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act Cap 71 as amended. Order 3 rule 1 of the CPR authorizes a person to appear on behalf of another with whom they do business together, 45

- S and therefore since the right person to appear in court is in DRC where there has been instability, it is proper for the donee to appear. That there was a cause of action against the Respondent and the Trial Magistrate failed to exercise his jurisdiction and acted with material irregularity that caused injustice to the Applicant therefore this is a matter fit for revision.

- 10 The Applicant concludes that the decision of the Trial Magistrate dismissing the suit be overturned and the respondents found guilty, an order of damages, costs and interest for this application and in the court below.

Representation

During the hearing, the Applicant was represented by *M/S Sserwadda & Co. Advocates* whereas the Respondent was represented by *M/S CR. Amanyanya Advocates & Solicitors*.

Before I proceed to the merits of the application, I want to note that I have perused through the application and all the supporting documents or affidavit and affidavit in reply, Both Counsel for the Applicant and Respondent filed their submissions which I have duly put into consideration to come up with this Ruling. There was rejoinder

20 made on record.

I also note that whereas the Registrar of this Court wrote to the Chief Magistrate Nebbi Court on 25th/01/2023 requesting to forward the original case file with certified copies of proceedings and judgement to the High Court and exhibits if any, none of all these are on this case file as of September 2024, and this Court has therefore been unable to

25 rely on any of the same but utilized the pleadings and annexures filed by both parties in regard to this application.

I shall now proceed to enlist the issue in contention.

The Respondent in their submissions filed on 18th April 2023 raised 3 preliminary objections and I shall start by resolving the same.

30 a) The application was served out of time without leave of court.

b) The applicant has no locus to bring this application against the Respondent.

c) The suit is based on defective powers of Attorney.

d) The suit is frivolous and vexatious and does not disclose any cause of action against the Respondent.

35 Determination

a) The application was served out of time without leave of court.

<u>Submission of Respondent</u>

Counsel contends that the Applicant filed his pleadings on 24th January 2024, they were endorsed by this court on 25th January 2023, but they were served on 22nd February 2023.

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Order 5 rule 1(2) of the CPR provides for service of summons within 21 days from the date of issue; except that the time may be extended on application to court, showing

- 5 sufficient reasons for the extension. The Applicant served expired summons, there was no application to serve the said out of time or renewal of the same as per the law therefore according to the provisions of Order 5 rule 1(3) (a) of the CPR and the cases of Kanyabwera vs Tumweba [2005] 2 E. A 10; Centenary Enterprises Ltd vs Greenland Bank (In Liquidation) among others, such a failure leads to dismissal of the suit or
- 10 application. Therefore, since there was no application for extension of time and there are penalties for noncompliance with the order, this application is incompetently before Court and ought to be dismissed with costs.

Submission of Applicant

Counsel for the Applicant submits that whereas they agree that the service was served out 15 of time, Court has been reluctant to allow rules of procedure to defeat the cause of justice as was in the decision of Gen. Sejusa vs Attorney General Judicial Review case No. 178 of 2015. Counsel also relied on the provisions of Article 126 (1) and clause 2 (c) of the Constitution of the Republic of Uganda, 1995 as amended, Section 33 of the Judicature Act and Section 98 of the CPA to state his argument that judicial power is derived from

the people and shall be exercised by the Courts in conformity with values, norms and aspirations of the people.

Counsel concludes that Counsel for the Respondent consented to the late service and went ahead to argue the merits of the application.

Consideration of Court

25 Order 5 rule 1(2) and (3) of the Civil Procedure Rules state that;

- (2) Service of summons issued under subrule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twentyone days, showing sufficient reasons for the extension.

30 (3) Where summons have been issued under this rule, and—

- (a) service has not been effected within twenty-one days from the date of issue; and
- (b) there is no application for an extension of time under subrule (2) of this rule; or
- (c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.

In the case of Nankabirwa Eva Walusimbi vs Mariam Namugenyi Sozi HC CS NO. 130 35 of 2017, Lady Justice Alexandra N. Rugadya ruled on a preliminary objection under order 5 rule 1(2) CPR and stated that;

> "The rules which as correctly pointed out are handmaidens of justice. They are flexible enough to allow a defendant who for some justifiable reason may have failed to effect service within the stipulated time, to file an application for the fresh summons to be issued and for the enlargement of the time within which the same is to be effected... Although a court may choose to disregard the

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technicalities for the sake of administering justice, as per Article 126(2)(e) of the Constitution, the said article is not a panacea for all ills. In appropriate cases court will not hesitate to strike out pleadings, given the fact that one of the aims and overriding objectives of the rules is to enhance expeditious disposal of suits and curtail abuse of process for ulterior motives... For these reasons, such noncompliance with the procedures necessary for the renewal of summons to file a defence is a fundamental defect and not a mere technicality that can be cured through the powers of this court."

In the instant case, Counsel for the Applicant actually concedes that the Application was served out of time. Counsel then references the reluctance of Court in allowing rules of procedure to defeat the cause of justice.

I shall make reference to the case of Rashida Abdul Karim Hanali & Anor Vs Suleiman *Adrisi HCMA No. 0009 OF 2017* wherein Hon. Justice Stephen Mubiru stated that;

"in the instant case, the court is mindful of the mischief sought to be cured by the requirement for strict compliance with the periods of time stipulated in Order 5 of The Civil Procedure Rules. The entire scheme of that Order aims at only one thing; to obtain the presence of the defendant to a claim and to provide full information about the nature of the claim made against him or her expeditiously without undue delay. This is consistent with the requirement of Article 28 (1) of The Constitution of the Republic of Uganda, 1995 to the effect that in the determination of civil rights and obligations, a person shall be entitled to a fair, speedy and public hearing. This is achieved by effecting personal service failure of which substituted service may be allowed in such situations as the rules permit."

For these reasons, such noncompliance with procedures necessary for the service of summons under Order 5 of the CPR is a fundamental defect and not a mere technicality 30 that can be cured through the inherent powers of this Court. I therefore agree with Counsel for the Respondent and opine that service of this Application within the stipulated time was mandatory and since there was not any application for extension of time within which to serve the application, this Court is empowered to dismiss this 35 application by virtue of Order 5 rule \$1(3) (b)\$ of the CPR.

Regarding (b) and (c) of the objections raised by Counsel for the Respondent, I have perused the court record and established that whereas reference was made to a power of attorney in the Application by the Applicant, the same was not attached to the Applicant's pleadings.

"Locus standi is the legal capacity of a person that enables him or her to invoke the 40 jurisdiction of the court in order to be granted a remedy. The requirement is that the locus standi to institute a suit must be established at the time of filing the suit. This is done by expressly pleading facts which give rise to the legal standing to institute the suit. It should not be left to court to guess where one derives the authority from. (See

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Fakrudin Vallibhai Kapasi & Anor versus Kampala District Land Board & Anor, \$\mathsf{S}\$ HCCS 0570 of 2015)", as was stated in the case of Samuel Mubiru Kizito v Edward Sekabanja Kato T/A Sekabanja Co Advocates HC Miscellaneous Application 1844 of 2022.

In the instant case, the Applicant only explains why he is suing on behalf of Onen Nasur Maxim in his Rejoinder while responding to this PO by the Respondents.

In light of the authorities cited above, in the absence of an executed and registered power of attorney attached to the application, I find that the application was illegally commenced by the Applicant. He did not have the locus standi and therefore no cause of action against the Respondent.

15 In conclusion, the Preliminary objections raised by the Respondent are upheld.

For all the above reasons, I accordingly dismiss this application without going into the substantive issue of revision of the orders in CS No. 014 of 2018. The Applicant may file a fresh suit, subject to the Law of Limitation since no appeal was filed against the orders and this application was filed over a year after the orders were delivered.

20 This Application is dismissed with costs to the Respondent.

I so order.

Dated at Arua this.....

Collins Acellam

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JUDGE

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