

UGANDA / JUDGMENT

Mulaggussi v Katabalo (Misc. Appeal No.006 of 2016) [2018] UGHCLD 36 (19 April 2018)

[2018] UGHCLD 36

COURT

HC: Land Division (Uganda)

BEFORE

Kawesa, J

CASE / FILE NUMBER

Misc. Appeal No.006 of 2016

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISC. APPEAL NO.006 OF 2016

MICHEAL MULO MULAGGUSSI..... APPLICANT

VERSUS

PETER KATABALO..... RESPONDENT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Respondent raised a preliminary objection against this application on grounds that it violates the provisions of O.49 R2 of the Civil Procedure Rules.

Counsel for the Respondent's point was that summons were issued on 20th October 2016 and served on the Respondent on 23rd November 2017. He argued that under O.5 R2 of the Civil Procedure Rules; it is a requirement that service is done in 21 days from the date of issue. He also referred to O.5 R (1) (3) which provides that if no application for time to be enlarged is made, then the application should be dismissed. He referred to the cases of **Lubega & Anor versus Madhvani Group Ltd. (Misc. Application No. 688 of 2015)** and the case of **Lubega Robert versus Walonze Malaki Civil Appeal No. 036 of 2016**.

In response, Counsel for the Applicant stated in submission that it is true the application is dated 20th October 2016; and the sealing of the application took sometime after the application was dated. Counsel conceded that an application not sealed is not an application, and that it was in early November that they were able to serve the application which was not a fault of the Applicant. He argued that this is a technicality which does not solve the issue.

I have looked at the law and the pleadings. This application raises issues regarding service of summons. This procedure is found in O.5 R1 (2) of the Civil Procedure Rules which governs the procedure of service of summons.

According to the *Supreme Court decision of* ***Kanyabwera versus Tumwebwa (2005) 2 EA 86**,*it is stated that;

“What the rule stipulates about service of summons, applies equally to service of hearing notices”

This provision means that the reference to the procedure of service of summons under O.5 R1 (2) (2) of the Civil Procedure Rules applies to service of hearing notices and applications for purposes of the provisions relating to the issuance and service.

This means that this Court has to establish if service is complied with O.5 r1 (2) of the Civil Procedure Rules, which stipulates that;

“Service of summons issued under sub rule (1) of this rule, shall be affected within twenty one days from the date of issue, except that time may be extended on application to Court, made within fifteen days after the expiration of twenty one days, showing sufficient reasons for the extension”

Applying the above law to the instant application, the chamber summons were dully endorsed by the Registrar on the 20th day of October 2016.

From the law that’s the date for which computation of time for service began to run. The summons was served on the opposite Counsel on 23rd November 2017. (See paragraph 3 & 5 of the affidavit in reply). This fact was conceded by Counsel for the Applicant though he blamed the late service on the Registrar of Court who he said delayed to seal the summons.

This scenario was considered by my brother *Justice Andrew Bashaija* in the case of ***Juju & Anor versus Madhvani Group Ltd.*** *(supra)*, where he considered a similar issue and observed that;

“Secondly even the blame for the mistake on Court is misplaced. Mr. Ahamya falsely and without any basis imputes wrong doing on the Registrar, it cannot be emphasized enough that an application is valid only when it has been signed by the Judge or such officer he/she appoints and it is sealed with the seal of Court within the meaning of O.5 r1(5) of the Civil Procedure Rules”

In the case before me, there is no evidence to show that the Registrar failed or omitted to seal the documents on time. Therefore, the plea by Counsel for the Applicant that his client is not at fault and is not tenable. The argument that this application is a technicality is also not tenable. This is because a technicality is a procedural mishap which does not go to the root of the matter. However, this application raises a specific provision of the law which must be observed and cannot be circumvented using the provisions of Article 126 of the Constitution. The provisions of O.5 r (1) are couched in mandatory terms. This position has been the opinion of my learned sister *Justice Eva Luswata* in her Judgment in ***Orient Bank Ltd versus Avis Enterprises HCCA NO. 2/2013,*** and followed in ***Lubega Robert Smith & Ors versus Walonze Malaki; Civil Appeal No. 036/2016.*** All the above cases followed the *Supreme Court* decision in ***Kanyabwera versus Tumwebaze (2005) EA 86*** which held that this rule is of strict application.

I do find this position as the true stand of the law, in that service affected out of the prescribed time without seeking extension, renders the application liable for dismissal without notice.

I therefore agree with Counsel for the Respondents' preliminary objection that this application is incompetent and ought to be dismissed.

The application is accordingly dismissed with costs to the Respondent.

I so order.

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Henry I. Kawesa

JUDGE

19/4/2018

19/4/2018:

Tibamanya Urban for the Applicant.

Nasser Serunjogi for the Applicant.

Applicant present.

Respondent absent.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

19/4/2018

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