

UGANDA / JUDGMENT

Opio v Lamunu (HCMA 192 of 2021) [2022] UGHCCD 322 (18 August 2022)

[2022] UGHCCD 322

COURT

HC: Civil Division (Uganda)

BEFORE

Adonyo, J

CASE / FILE NUMBER

HCMA 192 of 2021

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The Republic of Uganda

In The High Court of Uganda Holden at Soroti

High Court Miscellaneous Application No. 192 of 2021

(Arising from High Court Civil Suit No. 005 of 2012)

Opio Alvin ::::::::::::::::::::::::::::::

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Versus

Lamunu Margaret ::::::::::::::::::::::::::::::

Before: Hon. Justice Dr Henry Peter Adonyo**Ruling****Application: 15**

This application is brought by way of Notice of Motion under section 98 of the Civil Procedure Act, Order 51 rule 6 and Order 52 rules 1 and 8 of the Civil Procedure Rules for orders that;

- 1. That an order for extension of time within which to file a written statement of defence out of time be granted.
- 2. Costs of the application be provided for.

<u>Grounds of Application:</u>**This application is based on the following grounds: -**

- 1. That Civil Suit No. 005 of 2012 was originally instituted by the Respondent against one Etengu Joham on 19th day of April 2012.
- 2. That the Respondent later on sought leave of court to amend the plaint by adding the Applicant as 2nd Defendant.
- 3. That the amended plaint was served upon the father of the Applicant/2nd Defendant on the 11th day of June 2015 and he informed Counsel for the Respondent that the Applicant/2nd Defendant is a minor.
- 4. That Counsel for the Respondent on the 6th day of April 2016 informed Court about the status of the applicant being a minor.
- 5. That my former lawyers Ewatu & Co. Advocates on the 22nd day of June 2016 filed Miscellaneous Application No. 55 of 2016 arising from Civil Suit No. 005 of 2012 seeking leave for appointment of guardian to represent the applicant/minor.
- 6. That Miscellaneous Application No. 55 of 2016 was on the 29th day of June allowed by consent of both counsel before His Worship Ayebare Tumwebaze Thadius.
- 7. That His Worship Ayebare Tumwebaze Thadius directed both parties to file amended pleadings but the same has not been done to date.
- 8. That His Lordship Justice Batema NDA without pleadings being amended, proceeded to conduct, in the absence of the applicant Alternative Dispute Resolution Proceeding which resulted into the impugned judgment.
- 9. That the applicant being aggrieved by the decision of the learned judge by entering the judgment in in his absence filed Miscellaneous Application No. 29 of 2021 seeking review.
- That Hon. Justice Tadeo Asimwe on the 26th day of November 10. 2021 allowed the application and ordered that Civil Suit No. 005 of 2012 be heard interparty.
- 11. That upon instructing the current lawyers to pursue the case, it was discovered that the former lawyers had not filed the written statement of defence.

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- 12. That the said failure to file a written statement of defence was occasioned by mistake of Counsel that should not be visited on the innocent applicant.
- 13. That the applicant has plausible defence that raises triable issues that merit adjudication by this Honourable court.
- 14. That substantial loss shall result to the applicant if this application is not granted.

- 15. That it is fair and just that this application for order of extension of time within which to file a written statement of defence out of time be granted.
- This application is supported by an affidavit sworn by Anyimo Harriet, the 15 *guardian ad litem* to the applicant.

In the reply the respondent admitted paragraphs 1 to 6, denied paragraphs 7 to 10. Stated that paragraphs 11,12 and 13 are within the applicant's knowledge and it was the decision of the court to order for a retrial in disregard of Civil Appeal No.12 of 2020 pending in the Court of Appeal 20 over the same property now ordered for retrial. That the appeal involves another party in respect to the same subject matter and therefore this matter cannot proceed while the appeal is still pending in the court of appeal.

That by this court proceeding with this matter in disregard of the 25 subsisting appeal in the Court of Appeal is creating multiplicity of cases. That the paragraph 14 is denied as the applicant filed his written statement of defence and served them.

That the respondent be allowed to amend the plaint to add Stephen Naigo as a party to the suit.

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In rejoinder the applicant stated that he is not a party to the alleged appeal $\$S$ lodged in the court of appeal.

That he is interested in having Civil Suit No. 5 of 2012 determined on its merits. That seeking leave to file a defence out of time does not amount to multiplicity of cases.

That the alleged written statement of defence attached to the affidavit in 10 reply has never been filed in court and that the only written statement of defence filed in court on the 16th day of July 2012 is that of Etengu Joham.

That the only proper way for the respondent to amend her plaint is by filing a written application or seeking leave of court orally at the time of hearing the civil suit.

Submissions:

Only the applicant filed submissions.

Counsel for the appellant submitted that the respondent failed to serve the amended plaint on the applicant. That failure to file a written statement of defence by former counsel was a mistake of counsel and it should not be visited on the applicant. Counsel cited *Julius Rwabinumi Vs Hope* Bahimbisomwe Supreme Court Civil Application No. 14 of 2009 to support his argument. Counsel further submitted that the order by Hon. Justice Tadeo Asimwe directing a retrial interparties can only be effected if the applicant is permitted to file his written statement of 25 defence.

That no defence was ever filed by the former lawyers and the written statement of defence annexed to the respondent's affidavit in reply has never been filed in court as it has no received stamp from court.

Decision of Court. S

This application is for extension of time within which to file a written statement of defence under section 98 of the Civil Procedure Rules which provides for the inherent powers of this court and Order 51 rule 6 of the Civil Procedure Rules which provides for enlargement of time.

- This application is one of the many that have arisen from Civil Suit No. 10 005 of 2012. The main applications arising from Civil Suit No. 005 of 2012 are the application to appoint some guardian ad litem to the applicant and the application by the applicant for review of the judgment in Civil Suit No. 005 2012.
- Trial in Civil Suit No. 005 of 2012 has never taken off and I note that His 15 Lordship Batema entered a judgment from Alternative Dispute Resolution wherein he directed that the respondent retain half of the suit land the 1st defendant takes over the other half. This judgment resulted into an appeal to the Court of Appeal vide Civil Appeal No. 12 of 2020 by the Etengu Joham the 1st defendant and an application for review by the 20 applicant vide Misc. Application No. 29 of 2021. That decision is disputed as having been arrived at without any written statement of defence filed by the applicant.

Misc. Application No. 29 of 2021 wherein the applicant sought review of the decision made by the judge in Alternative Dispute Resolution resulted S into orders given on the 26.11.2021 by His Lordship Tadeo Asimwe that the judgment and orders in Civil Suit No. 005 of 2012 be set aside and the suit referred to be heard interparty.

In my view, given that the basis for which an appeal to the Court of Appeal had been rendered nugatory with the result that no appeal can be 30 sustained when a review referred the matter complained of in Civil Appeal

No. 12 of 2020 arising from the judgment in Civil Suit No. 12 of 2012 was S had been set aside.

therefore, the respondent's claim that the civil suit cannot proceed because there is a subsisting appeal would in my view be seen as inconsequential as I find that this court would be within its right to rectify a fault in proceedings by ensuring that parties are given opportunity to be heard rather than the court previously having forced a settlement on them when they were not in the right mind and position to do so.

Accordingly, I would find it as not based on any reasonableness the respondent's claim that if this court proceeded with this matter in disregard of a subsisting appeal then it is creating multiplicity of cases. As far as I am concerned, the said intended appeal is overtaken by events when this Honourable Court rectified faults which led to this matter being heard via ADR without pleadings being concluded.

- Additionally, I note that when the suit was referred back to be heard interparty, it was discovered that the applicant's former counsel had not filed a written statement of defence and this application was then filed for an extension of time within which to file the defence. The perusal of records in Civil Suit No. 005 of 2012 show indeed that no written statement of defence was filed with regard to the applicant.
- Therefore, for Civil Suit No. 005 of 2012 to be properly before this court heard and subsequently determined legally, it is imperative that the applicant's defence ought to be on record so that the issues between the parties herein and for matters in Civil Suit No. 005 of 2012 are properly and finally resolved as the justice of the matter would require.
- Accordingly, this application is found to have merits and is thus allowed.

Orders: S

> This application is allowed. $\overline{}$

The costs in regards to this application shall be in the cause. $\overline{}$

I so order.

Hon. Justice Dr Henry Peter Adonyo

\$18^{th}\$ August 2022

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