

UGANDA / JUDGMENT

Simba v Akuku (Miscellaneous Application No. 17 of 2021) [2023] UGHCCD 81 (31 March 2023)

[2023] UGHCCD 81

COURT

HC: Civil Division (Uganda)

BEFORE

Serunkuma, J

CASE / FILE NUMBER

Miscellaneous Application No. 17 of 2021

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**THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA HOLDEN AT ARUA
MISCELLANEOUS APPLICATION NO. 0017 OF 2021 ARISING FROM CIVIL SUIT NO.
0007 OF 2019**

AUGUSTINE SIMBA ::::::::::::::::::::::::::::::

VERSUS

AKUKU RICHARD ::::::::::::::::::::::::::::::

BEFORE: Hon Justice Isah Serunkuma.**RULING**

This application is brought under Order XIA rule 1(6) of the Civil Procedure (Amendment) Rules, 2019, Section 98 of the Civil Procedure Act and Order 52 rule 1 of the Civil Procedure Rules for an order to strike out the respondent's plaint in Civil Suit No. 007 of 2019 as the said suit has abated and provide for costs.

Background of this application

The respondent filed Civil Suit No.0007 of 2019 in this court against the applicant and another (Pakelle Sub county) for orders and declaration that;

- 1) The respondent/plaintiff is the rightful owner of the suit land.
- 2) That the 1st and 2nd defendants fraudulently connived to transfer the suit land to the 1st defendant.

- 3) A declaration that \$2nd defendant is a trespasser on the said land.
- 4) An order of eviction and permanent injunction against the 2nd defendant refraining him and all those who claim title from him from trespassing on the said land.
- 30 Summons to file a defence were extracted and served to the applicant/defendant. On the 19th day of January, 2020 counsel for the plaintiff (now respondent) applied to this honorable court under Order 9 rule 10 & 11(2) of the Civil Procedure Rules for interlocutory judgment

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and setting down the suit for ex parte hearing and the same was entered. The applicant then applied vide Miscellaneous Application No. 030 of 2020 for orders that;

- 1) The interlocutory judgment entered against the applicant /1st defendant be set aside.
- 2) The applicant/1st defendant be granted leave and allowed to defend himself in civil suit.

The same was granted and the applicant/1st defendant filed his written statement of defence.

On the 4th day of March 2020, the applicant Augustine Simba made this current application in which the main ground is premised on the fact that it is more than 30 days now since the respondents last made a reply on the 7th day of December 2020, to the applicant's written statement of defence in the main suit. That the respondent has not complied with the Civil Procedure (Amendment) Rules 2019 that require the plaintiff/ respondent in this application to take out summons for directions within 28 days from the date of the last reply before the suit is taken down for hearing.

In his reply, the respondent opposed this application through his affidavit in reply and based on the advice of his lawyers. He stated that the main suit falls within the legal exceptions where the main suit should not abate including; That the main suit has ever been fixed for mediation for the 9th day of December 2020 before the registrar as per notice of commencement of mediation marked Annexure "B" and that this honorable court had ever entered an interlocutory judgement pending formal proof. 20

Representation

The firm of M/s Matovu N. J & Co. Advocates represented the applicant whereas the firm of M/s Okurut-Magara Associated Advocates represented the respondents. Both parties filed their written submissions, which shall be considered in determination of this application as hereunder;

25 Submissions on behalf of the applicant

Counsel submitted that the main ground of the application is that it was over 30 days since the respondent filed his last reply to the applicant's written statement of defence in Civil Suit No.

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007 of 2019 and that he has since then not taken out summons for directions as required under the Civil Procedure (Amendment) Rules 2019. Counsel added that the plaintiff/respondent and the 1st defendant/applicant in the main suit closed filing of their pleadings on the 7th day of December 2020.

- Furthermore, counsel relied on Order 9 rule 1(2) of civil procedure (Amendment) rules that S requires a plaintiff where a suit is instituted by way of a plaint to take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order 8 of these rules. O.9 rule 1(6) of the Civil Procedure (Amendment) Rules 2019 provides that; "if the plaintiff does not take out summons for directions in accordance with sub rule 2, the suit
- shall abate". Counsel concluded that the respondent has failed to take out summons for 10 directions within the prescribed time and hence prayed that the plaint in Civil Suit No. 007 of 2019 be struck out with costs and the suit be consequently dismissed with costs against the plaintiff.

Submissions on behalf of the respondent 15

In their reply, counsel relied on a central issue of whether the applicant is entitled to the order of abatement of the main suit to which his submission was premised on two reasons including; that the respondent has previously applied and was granted a default judgement. Counsel relied on paragraph 4 of the respondent's affidavit in reply and annexure "A" to the respondent's affidavit, which indicate that an application for interlocutory judgement and setting down the suit for hearing ex-parte dated 19th January 2020, was made. Counsel added that the application was then granted on the 24th January 2020 by the learned deputy registrar. Counsel submitted that the law is clear under Order 11A (1) (4) (a) of the Civil Procedure Rules as amended as it exempts the plaintiff/respondent from taking out summons for direction where they have applied for default judgement to be entered and the suit to proceed ex-parte. Counsel stated that the application was both made and granted and as such pointless that the applicant actually set that order aside and was allowed to file his defence out of time hence the respondent should be allowed to take benefit of the exception in accordance with the dictates of substantive justice.

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Secondly, counsel submitted that mediation in this matter has already commenced and there is no report on the status of the same. Counsel relied on annexure B as attached to the respondent's affidavit in reply and paragraph 4 of the same, which is proof of the matter having been referred for mediation. Counsel further relied on several authorities including; Carlton Douglas Kasirye Vs Sheena Ahumuza Bageine aka Tash; MA No. 0150 of 2020 and Geoffrey Wasswa Vs Amy for Africa Ltd & Others; Civil Suit No. 0127 of 2020 where the learned justices held that referring a case for mediation amounts to referring the case to an official referee of the court and falls within the exception envisaged under Order 11A rule 4 (a) of the Civil Procedure rules as amended under which a suit must not abate for failure of the plaintiff to take out summons for directions.

In conclusion, counsel invited this court to disallow the instant application under its inherent powers to ensure that justice is done as required by Article 126(2)(e) of the constitution, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act. Counsel added that the main suit is a land matter wherein the respondent has raised serious complaints of fraud on the part of the applicant.

Court's analysis

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Order XIA rule 1(2) of the Civil Procedure Amendment Rules provides for taking out of summons for directions where a suit has been instituted by way of plaint as follows;

"Where a suit has been instituted by way of plaint, the plaintiff shall take out summons for directions within 28 days from the date of last reply or rejoinder referred to in Rule 18(5) of order VIII of these rules".

Order XIA rule 1(4) further provides for exceptions to this rule of taking out summons for direction as follows;

"(a) an action in which the plaintiff or counterclaimant has applied for a default judgment under Order IX rules 6 and 7, summary judgment under Order XXXVI or where application for leave to file a defence under Order XXXVI is refused;

(b) an action in which the plaintiff or defendant has applied under Order VI rules 29 or 30 or Order XV rule 2 for determination of the suit on a point or points of law;

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(c) An action in which an order for the taking of an account has been made under Order XX;

That as it is even if the respondent is to rely on the last exception of the matter having been referred for mediation, then there ought to be evidence of the same that is to say subsequent mediation notices or a mediation report if mediation was completed or failed.

Rule 8 of the Judicature (Mediation) Rules, 2013 provides for time within which mediation should be concluded as thus;

- 1) A civil action referred to mediation under these rules shall be concluded within sixty days after the mediator commences mediation.
- 2) Notwithstanding sub rule (1) the parties may where there is a likelihood of settlement of the civil action agree to an extension of time not exceeding ten days.

By the time, the applicant made an application the 60 days had elapsed. In the circumstances, I therefore find that the respondent is trying to use the provisions of the law to delay justice. Therefore, since the respondent failed to take out summons after the last reply to the written statement of defence and also failed to pursue the mediation or have the same fixed by court then save for his intention to delay justice I find no justifiable reason why Civil Suit No. 007 of 2019 should not abate. This application is therefore allowed. Costs follow the event. 15

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I so order.

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Dated and Delivered on this 31st Day of March 2023.

Isah Serunkuma JUDGE

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Prepared on 11 October 2026 · Esheria