

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA**  
**COMMERCIAL COURT DIVISION**

**Misc. Cause No. 62 of 2018**

5           **RAJESH KUMAR** .....           **APPLICANT**

**VERSUS**

**MAHMOOD SOMANI** .....           **RESPONDENT**

**BEFORE: THE HON. MR. JUSTICE RICHARD WEJULI WABWIRE**

**RULING**

10   The Applicant brought this Application by chamber Summons under Order 41 rules  
2 and 9 of the Civil Procedure Rules seeking for orders that a temporary injunction  
be issued against the Respondent restraining him from interfering in the affairs for  
the first Defendant Company that costs for this Application be provided for. The  
Application was supported by the Affidavit of Rajesh Kumar in which the grounds  
15 of the Application are spelt out but briefly are that:

- i.   The Application arises from the main suit HCCs 869 of 2018 which is pending determination before this Court.
- ii. this suit has very high likelihood of success which would be rendered nugatory if the Application is denied

- 20    iii.    The Applicant will suffer irreparable damage.
- iv.    the balance of convenience is in favor of the Applicant
- v.    It is in the interest of justice.

The brief background to the Application is that the Plaintiff/Applicant is the Operations manager and minority shareholder with 5% shareholding in the 1st Defendant Company in CS 867/2018 from which the Application arises. The Respondent/3<sup>rd</sup> Defendant had been a shareholder and director of the Defendant Company until 27/6/2018n when he sold off his shares to Ahmed Parjwani the 2<sup>nd</sup> Defendant in CS 867/2018. The Respondent since then ceased being a director. Mr. Ahmed Parjwani the 2<sup>nd</sup> Defendant is now the majority shareholder and Managing Director holding 95% of the shares.

In the suit, the Plaintiff/Applicant seeks to be paid his salary as an employee, an order appointing a manager of the company to manage the affairs under the supervision of Court or any other appropriate order in the circumstances and for a temporary injunction restraining the Respondent/3<sup>rd</sup> Defendant from interfering with the affairs of the company and the Plaintiffs contract of employment.

When the Application came up for hearing, the Applicant was represented by Counsel Nestor Byamugisha and the Respondent by Counsel Opio Moses.

Mr Nestor Byamugisha for the Applicant submitted that whereas the Respondent were served on the 2/11/210, they filed their Affidavit in reply out of time on the 11/1/2019 contrary to order 12 of the CPR and that the Affidavit was therefore incompetent and should be struck out. He cited the case of **Stop and See (U) Limited Vs Tropical Africa Bank MA 333/2010.**

The Respondents Counsel conceded that the Affidavit was filed out of time but that this does not prejudice the Applicant's case. He argued that it would be an injustice  
45 to deny the Respondent an opportunity to be heard. He cited Article 126 (2) of the constitution of the republic Uganda and also submitted that the delay was the fault of Counsel for which the Respondent should not be punished. He prayed that Court exercises its discretion to allow the Respondent to file the Affidavit out of time.

### **Ruling**

50 Respondent Counsel implored Court to invoke Article 126(2) of the Constitution of the republic Uganda which enjoins Courts to apply the law without undue regard to technicalities. This provision of the Constitution is frequently invoked by practitioners when they are caught flat-footed by provisions of the law. The notion has however been long dispelled and in **Utex Industries Ltd V AG SCCA 52/1995**  
55 Court held that the provisions of Article 126 of the Constitution were not meant to do away with the rules of procedure. To apply the rule of procedure in regard to time limit is not to exercise legal technical semantics. I therefore do not buy into argument by Counsel that observation of timelines amounts to undue regard to technicality.

60 Counsel prayed that Court uses its discretion and grant leave to file out of time. The exercise if this discretion is not a given. In exercising its dicretion, court must do so judicially to ensure that there is no prejudice or miscarriage of justice occasioned upon the parties and importantly also that there is accountability for decisions taken by court. These safeguards were well stated in **Nelson Sandy Ndugu versus**  
65 **Electoral Commission, EP 4/2006**, that before exercising the discretion Court

considers inter alia, the extent of the delay, the reason for the failure to comply with the time limit and the likely injustice or prejudice to the other party.

Order 12 rule 3(2) of the CPR provides that service of an interlocutory Application to opposite party will be made within 15 days from the filing of the Application, and  
70 a reply to the Application by opposite party should be filed within 15 days from the date of service of the Application and be served on the Applicant within 15 days from the date of filing.

In the instant case the Affidavit in reply was filed two months after the service of summons to file a defence. No reasons were advanced by Respondent's Counsel to  
75 explain the delay, except for the submission that it would not prejudice the Applicant's case that it would be unjust to deny the Respondent an opportunity to be heard. The delay was clearly unreasonable and no plausible reason was proffered for the delay.

Counsel conceded the failure to file in time and owned up that it was a mistake of  
80 Counsel the consequences of which should not be visited upon the litigant. However, a close scrutiny of the Affidavit reveals that the statement of evidence from the bar was a dishonest one. The Affidavit was sworn and signed on 11<sup>th</sup> January 2019 and this is the same day on which it was filed. The litigant had therefore not been vigilant about replying to the Application and did nothing until  
85 two months had elapsed. Clearly the Respondent slept on his right even if Respondent's Counsel is so zealous as to want to take blame for the late filing.

As an officer of Court, Counsel should not have attempted to cover-up for the late filing, he should have instead sought leave of Court to file out of time.

In the case of **Stop and See** (supra) which was cited by the Applicant's Counsel, my  
90 senior brother Justice Madrama extensively dealt with the issue of late filing of  
pleadings. He condemned, as I do, the practice of filing Affidavits in Reply at  
pleasure and said that this must be discouraged and that the correct course for  
Counsel in circumstances of late submission should be to apply for leave to file out  
of time. In that case of **Stop and See** (supra), court nonetheless allowed the  
95 Respondent whose Affidavit had been filed out of time, to participate in the  
proceedings.

In the more recent case of **Dr Lam – Lagoro James V Muni University Misc. Cause  
7/2016** my learned brother Justice Mubiru, faced with similar circumstances of late  
filing, discussed the matter at length when allowing the Affidavit in Reply which had  
100 been filed late and contested by opposite Counsel. At the relevant part of his  
discussion and ruling, he stated as follows;

*“Unlike a written statement of defence which serves only one purpose of disclosing  
the case a Defendant proposes to put forward or serving as a means of disclosing  
the facts which support particular issues raised by each party, an Affidavit can be  
105 used in a number of important ways, most often as containing evidence to support  
or oppose an Application. The Affidavit becomes evidence in the case. This is  
illustrated by **Order 52 rules 3 and 7 of The Civil Procedure Rules** which indicate  
that the filing an Affidavit alongside a motion or chamber summons is optional, only  
when evidence is required in support of the Application. Whereas a written  
110 statement of defence presents allegations of facts the Defendant will rely on, an  
Affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence  
to the Court other than by giving oral evidence. They are intended to allow a case  
to run more quickly and efficiently as all parties know what evidence is before the*

115 Court. Consequently, time constraints applied to defences may be misplaced when applied to Affidavits.

An Affidavit in reply, being evidence rather than a pleading in stricto sensu, should be filed and served on the adverse party, within a reasonable time before the date fixed for hearing, time sufficient to allow that adverse party a fair opportunity to respond. For that reason, an Affidavit in reply filed and served in circumstances  
120 which necessitate an adjournment to enable the adverse party a fair opportunity to respond, should not be disregarded or struck off but rather the guilty party ought to be penalized in costs for the consequential adjournment.

General rules should not be rigidly applied in all instances; some flexibility, controlled by the presiding Judge exercising his or her discretion in relation to the  
125 facts of the case before him or her, must necessarily also be permitted, especially where no prejudice is caused to the opposite party that cannot be remedied by an appropriate order as to costs”.

Whereas therefore, I find that the Affidavit in reply was filed out of time, I am inclined to follow the position taken by my learned brothers in the two cases cited  
130 of **Stop ad See** (supra) and **Dr Lam-Lagoro** (supra).

In the instant case, the Respondent has shown interest to defend the matter. I am not convinced that the Applicant’s case would suffer any injustice or prejudice if the Affidavit in reply is allowed on record nor did Counsel for the Applicant intimate as such in rejoinder after the Respondent sought to rely on this ground as a part of  
135 the other grounds he raised in prayer for admission of the Affidavit.

To avoid a multiplicity of suits and prolonged litigation of this matter and to ensure that the dispute between the Applicant and the Respondent is resolved with

finality, completeness and properly, I order that the period within which the Affidavit in reply was filed is validated as extended and the Affidavit is therefore  
140 properly admitted on record.

The Respondent shall bear and pay all the costs associated with the adjournment on the 16<sup>th</sup> January 2019 and extension of time before the date set for the hearing of the merits of this Application.

The Application should be fixed for hearing on its merits once the Applicant has  
145 filed his rejoinder if he so wishes to do so.

I so order.

Delivered this 25<sup>th</sup> day of January, 2019.

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Richard Wejuli Wabwire

**JUDGE**