

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**COMMERCIAL DIVISION**  
**MISC. APPLICATION NO. 369/2020**  
**(ARISING OUT OF CIVIL SUIT NO. 296/ 2020)**

**CURTIS, MALLET-PREVOST, COLT & MOSLE LLP.....APPLICANT**  
**VERSUS**

**JACKSON WABYONA.....RESPONDENT**

**BEFORE: HON. DR. JUSTICE HENRY PETER ADONYO**

(ARISING OUT OF CIVIL SUIT NO. 296/ 2020)

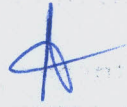
**RULING**

**a. Background:**

This application is brought by chamber summons under Order 9 rules 2, rules 3 (1) (a) (b) (c) (g) (h) and Rules 3(2) and 3(3) of the Civil Procedure Rules and section 33 of the Judicature Act Cap. 13.

It seeks the following orders;


- i. Setting aside the service of summons on the Applicant in High Court Civil Suit No. 296 of 2020
- ii. An order declaring that the summons has not been duly served upon the Applicant
- iii. The discharge of any order giving leave to serve the summons on the Applicant out of jurisdiction

  
*Hon. Justice Dr. H. P. Adonyo*

- iv. A declaration that in the circumstances of the case, the court has no jurisdiction over the Applicant
- v. High Court Civil No. 296 of 2020 be dismissed as against the Applicant
- vi. Costs of the application be provided

The grounds of the application are that;

- i. The Applicant is not resident in Uganda and is a limited liability partnership registered in England and Wales (NO. OC302168) and authorized and regulated by the Solicitors Regulation Authority, with its offices at 99 Greshem Street, London EC2V 7NG, United Kingdom
- ii. The Applicant was retained by the Attorney General of Uganda, the 4<sup>th</sup> Defendant in HCCS No. 296 of 2020 in connection with an arbitration that had been commenced in London against the Government of the Republic of Uganda under the rules of the International Centre for Settlement of Investment Dispute (ICSID Case No.ARB/13/25) to provide legal service to defend the Government of Uganda in the Arbitration and to review drafts of and witness a settlement deed arising from the Arbitration proceedings in London, England
- iii. All the legal services provided by the Applicant to the Government of Uganda were executed outside Uganda
- iv. The Respondent in serving summons in High Court Civil Suit No. 296 of 2020 upon the Applicant did not comply with the provisions of the law

  
Hon. Justice Dr. H. P. Adonyo



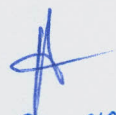
Mr. Mark Hanley, practicing the law with the Applicant law firm swore an affidavit in support of the application.

He deponed that the Applicant was retained by the Government of Uganda to advise on an arbitration that had been brought against the government by Tullow Uganda Ltd and Tullow Uganda Operations Pty Ltd. He specified that the arbitration took place in London, England; and that the Applicant assisted in reviewing and witnessing the Settlement Deed which was done in England, London at the Applicant's offices.

All legal services rendered by the Applicant were executed in London, England and as such jurisdiction relating to the legal services provided by the Applicant lies with the Court of England and not within the High Court of Uganda.

Mr. Hanley also deponed that the Respondent wrongly filed HCCS No. 296/2020 claiming that Applicant is liable for professional knowledge and malpractice. He averred the legal advice rendered by the Applicant to the government is protected by the principle of non-disclosure of advocate/client privileged communication, and that the Applicant is neither a necessary nor proper party to the suit commenced by the Respondent.

He also averred that the summons in HCCS No. 296/2020 were not duly served upon the Applicant since the Respondent did not comply with the provisions of the law.


  
Hon. Justice Dr. H. P. Adonyo

Mr. Jackson Wabyona swore an affidavit in reply. He submitted that the Applicant committed an offence since it was unqualified to prepare the impugned Settlement Deed that concerned the legal proceedings in Uganda.

He averred that the evidence in paragraphs 9, 12 and 4,5,6,7,8, 10 and 11 the affidavit of Mr. Hanley raises substantive matters that require clarity by way of cross-examination in the context of Clause 14 of the Settlement Deed. These include the law that the Applicant applied to advise their client to negotiate and execute the impugned agreements; whether the Applicant considered and applied Article 152(2) of the Constitution and section 35 of the Public Finance Management Act, 201 in advising their clients; whether the Applicant suffered any prejudice as a result of being served summons with a plaint by e-mail; whether the Applicant of David Hesse were qualified under section 66 of the Advocates Act Cap. 267.

Mr. Wabyona averred that Legal Notice No. 6 does not differentiate between service out jurisdiction and within jurisdiction or even service in a foreign country. That the Deputy Registrar in Miscellaneous Application No. 313/ 2020 found that the court has jurisdiction to entertain the matter; and deemed HCCS NO. 296/2020 as an appropriate case for the use of ICT to achieve efficiency and effectiveness on expediting proceedings.

He also deponed that the Applicant received the service of summons and are only questioning the mode of transmission ad jurisdiction of the court; that the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants recognized and validated the court order in HCMA

  
*Hon. Justice Dr. H. P. Adonyo*



NO.313/2020 through a variation of both conventional and electronic service meaning that the service was effective.

He averred that the HCMA No.313/2020 still stands since it has not been set aside, and that the Court cannot issue parallel orders that contradict the earlier order of Court; and that HCCS No. 296 of 2020 is a public interest suit that raises issues of the rule of law and management of public finances.


According to Mr. Wabyona's affidavit, the Applicant's intention is to move the court to repeal or amend Legal Notice No. 6/2019 and to have the suit dismissed yet the impugned settlement deed makes the Applicant subject to the jurisdiction of the courts of Uganda. That for being unqualified to prepare and execute the impugned Settlement Deed, giving ill-advice that contravened the laws of Uganda, the Applicant is a necessary and proper party to HCCS No. 296/2020.

Mr. Wabyona also averred that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants together with the 1<sup>st</sup>, 2<sup>nd</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants caused loss to the Consolidated Fund to the tune of USD 1,122,929,097, when they waived tax liability for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants without the approval of Parliament.

**b. Submissions:**

**i. Applicant's Submissions:**

In its submissions, the Applicant raised the following issues for determination by the Court;

  
*Hon. Justice Dr. H. P. Adonyo*


- a) Whether or not the proper procedure for service of summons outside of the jurisdiction was followed
- b) Whether the Court has jurisdiction over the Applicant under the circumstances
- c) What remedies are available to the parties

On whether or not the proper procedure for service of summons outside of the jurisdiction was followed, Counsel for the Applicants submitted that the proper procedure for service of summons outside of the jurisdiction was laid out under Order 5 rules 22 and 24 of the Civil Procedure Rules, which renders the purported service of summons irregular, null and void.

Counsel submitted that the Court will only allow for service of summons outside jurisdiction based on the criteria under Order 5 rule 22, and that such an order can only be granted under Order 5 rule 24 which provides that leave can only be granted where a party proves that the case is a proper one for service outside of jurisdiction.

Counsel submitted that no such application was filed and neither was leave sought or granted by the Court. Counsel contended that Legal Notice No. 6 does not provide for applications for service outside of jurisdiction, and that such applications are governed by Order 5 rules 22, 24, 25 and 26 of the Civil Procedure Rules.

Citing ***M.A No. 349 of 2020, Freshfields Bruckhaus Deringer LLP and Another vs Jackson Wabyona and Mbabazi vs Kampala Financial Services***


  
Hon. Justice Dr. H. P. Adonyo



**Ltd & 3 Others Miscellaneous Application No. 1656/2017** counsel submitted that the Court should find that the procedure used by the Respondents was irregular and illegal because he did not follow the prescribed procedure.

On whether the Court has jurisdiction over the Applicant under the circumstances, Counsel submitted that the Court does not have jurisdiction over Applicant since there was lack of proper service outside jurisdiction as required by law given that the Respondent did not comply with the law which requires that jurisdiction must be invoked by way of proper service. See **Misnak International (UK) Limited vs 4MB Mining Limited C/O Ministry of Mining, Juba Republic of South Sudan and 3 Others [2019] KLR** cited by Counsel. He argued that where there is no service of summons on a party outside of jurisdiction as is required by the provisions of the law, the court's jurisdiction is not invoked, and in this case the court did not have jurisdiction.

Secondly that the legal services that are the subject of the suit were provided outside of Uganda. On this point, Counsel submitted that the suit against the Applicant is founded on the tort of professional negligence but the legal services in issue were provided outside Uganda and as such, the Court would have no jurisdiction in such an instance, and that this was not denied, challenged or controverted in any way by Mr. Wabyona's affidavit in reply. Counsel argued that this case cannot possibly be classified as a tort committed within the jurisdiction to enable the court assume jurisdiction.

  
Hon. Justice Dr. H. P. Adonyo



Applicant's counsel relied on various authorities including ***International Tin Association Limited vs Kerilee Investments Limited Miscellaneous Application No. 368/2019*** which found that suits ought to be instituted where the defendant or cause of action arises; and ***Prof. Egbert De Smet vs Juliet Nakassanga HCCS No. 387/2011*** where it was held that the fact that the cause of action, based in defamation arose outside Uganda and hence the subject matter dispute is outside the jurisdiction of the Court, and submitted that the two authorities supported the Applicant's arguments that the court does not have jurisdiction as the actions behind the alleged tort were not carried out within Uganda.

Further that, the suit against the Applicant violates the principle of non-disclosure of advocate-client privileged communications which protects such communications from being disclosed.

**ii. Respondent's submissions:**

Counsel for the Respondent submitted that the order of the Deputy Registrar Her Worship Dr. Agnes Nkonge that was issued on the 25<sup>th</sup> May 2020 was never set aside by the court in its ruling in ***Miscellaneous Application No. 349/2020 Jackson Wabyona vs Freshfield Bruchaus Deringer LLP*** and others, and as such it is still binding.

Counsel argued that the long, rigorous and arduous process provided under Order 5 rules 22-28 of the Civil Procedure Rules, has been cured by Legal Notice No.6 of 2019 which allow for a more efficient and effective process of service of

  
Hon. Justice Dr. H. P. Adonyo



summons. That to apply Order 5 under the circumstances of this case would be to render Legal Notice No. 6 redundant and of no use. He urged the court to breathe life into Legal Notice No.6 of 2019 and to operationalize it in the same manner that the Registrar did. On this point, counsel relied on ***Abela and Others vs Baadarani: Trinity Term [2013] UKSC 44*** and ***Kampala Capital City Authority vs Kabandize & 20 Others; SCCA No.13/2014*** in which the courts took a proactive stand and adopted modern and new technology for communication and despised antiquated court processes and procedures in relation to service of process.

Relying on ***Kabandize***, Counsel argued that the Applicant suffered no injustice, or adverse consequences by being served summons by electronic mail, that they the service upon the Applicant was effective since it was now aware of the action against it; that the Order 5 rules 22-28 were not mandatory but merely directory and therefore failure to obtain leave did not invalidate the summons or any proceedings arising from the summons.

**c. Decision:**

I will now consider the issues raised by counsel. First, I reproduce Order 5 rules 22, 24 and 26 that are relevant to the issues raised by both Counsel for the Applicant and the Respondent.

**Order 5 rules 22, 24 and 26 of the Civil procedure Rules:**

**22. In certain cases service of the summons, etc. allowed out of jurisdiction.**

  
*Hon. Justice Dr. H. P. Adonyo*

*Service out of the jurisdiction of a summons or notice of a summons may be allowed by the court whenever—*

*(a) the whole subject matter of the suit is immovable property situated within the jurisdiction, (with or without rents and profits);*

*(b) any act, deed, will, contract, obligation or liability affecting immovable property situate within the jurisdiction is sought to be construed, rectified, set aside or enforced in the suit;*

*(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction;*

*(d) the suit is for the administration of the personal estate of any deceased person, who at the time of his or her death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person to be served is a trustee, which ought to be executed according to the law of Uganda;*

*(e) the suit is founded on any breach or alleged breach within the jurisdiction of any contract wherever made which, according to the terms of the contract, ought to be performed within the jurisdiction;*

*(f) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect thereof;*

*(g) any person out of the jurisdiction is a necessary or proper party to a suit properly brought against some other person duly served within the jurisdiction; or*

*(h) the suit is founded on a tort committed within the jurisdiction.*

  
*Hon. Justice Dr. H. P. Adonyo*



**24. Application to be supported by evidence.**

*Every application for leave to serve the summons or notice on a defendant out of the jurisdiction shall be supported by affidavit or other evidence, stating that in the belief of the deponent the plaintiff has a good cause of action, and showing in what place or country the defendant is or probably may be found, and whether the defendant is a Commonwealth citizen or British protected person or not, and the grounds on which the application is made; and no such leave shall be granted unless it is made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order.*

I begin with the Respondent Counsel's arguments that Legal Notice No.6 is a direct creature of the Chief Justice while the Civil Procedure Rules are substantive legislation which I take note of. However, I disagree with Counsel's contention because the Civil Procedure Rules also serve a particular purpose, that is to facilitate court process, provide a fair and just means of resolving disputes as well as create efficient methods for processing cases (See *Section III: Civil Law and Procedure in The Courts* available at [samples.jbpub.com](http://samples.jbpub.com)). In the circumstances, the courts cannot wish or wave them away without reason. They are after all, the handmaidens of justice.

Moreover, those particular provisions of the Civil Procedure Rules can only be repealed by a court declaration or order or subsequent amendment. Until such a process occurs, the Court would deem the Civil Procedure Rules, in particular, Order 5 rules 22-28 still applicable. I also reject Respondent Counsel's arguments that the application of the provisions under Order 5 would amount

  
*Hon. Justice Dr. H. P. Adonyo*



to repeal or amending Legal Notice No. 6/2019. My view is that the two pieces of legislation complement each other, which then facilitates efficiency and effectiveness in court proceedings and court process.

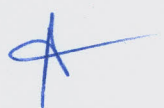
I therefore uphold and reiterate my finding in Miscellaneous Application No. 349 of 2020 that Legal Notice No.6 of 2019 supports the efficacy of the Civil Procedure Rules and guides the integration of ICT in court adjudication processes with emphasis on areas such as electronic filing and electronic service of documents. I also find, as I did in Miscellaneous Application No. 349/2020 that, after obtaining leave under Order 5 rule 22, a party may be guided by paragraph 7 (2)(c) of Legal Notice No.6 which allows parties to serve court documents through e-mail, instant messaging applications or any other widely used electronic communications service.

In the context of the Civil Procedure Rules, Legal Notice No.6 provides the parties with a quick and convenient means to serve court process after the jurisdiction of the court has been established under Order 5 Rules 22.

I refer to Order 5 rule 26 here;

**26. Service where defendant resides out of Uganda.**

*Where leave to serve a summons out of the jurisdiction has been granted under rule 22 of this Order and the defendant is a Commonwealth citizen or British protected person or resides in a Commonwealth country out of Uganda, the summons shall be served in such manner as the court may order.*


  
Hon. Justice Dr. H. P. Adonyo



Under Order 5 rule 26 where leave is granted under rule 22, service of the summons may be effected through a manner in which court deems fit.

On the meaning of 'shall' under Order 5 rules 22 and 24 and Respondent's Counsel contention that it is directory rather than mandatory I have studied the extract of **Sitenda Sebalu vs Sam K. Njuba and the Electoral Commission (Election Appeal No.26 of 2007 (unreported))** cited in **Kampala Capital City Authority vs Kabandize** by the Respondent's Counsel. It is clear to me that the Supreme Court was of the view that the word '**shall**' may be used in instances that require both mandatory and directory connotations. However, I will rely on the Supreme Court's finding in **Sitenda Sebalu** that '*prima facie*' the use of the word "shall" in a statutory provision gives the provision a mandatory character, but in some instances the word is used in a directory sense. The Court then went to state that the Court has to determine whether the word has been used in a mandatory or directory sense.

My view is that in this case, the word '**shall**' is to be interpreted in a mandatory sense. To interpret it otherwise would lead to inconsistencies and cause injustice and unfairness to parties, as well as a waste of resources, especially where jurisdiction has not been established. Where jurisdiction has not been established, it might lead to long and absurd proceedings trying to prove otherwise. I am certain these are scenarios that the Courts will want to avoid. Although the Respondent argues that the Applicant has not suffered any

  
Hon. Justice Dr. H. P. Adonyo


injustice or negative consequences, the same is taking place as the Applicant tries to prove that he is not a proper party to HCCS No. 296/2020.

As such, my finding is that it is mandatory that the Court will only allow for service of summons outside jurisdiction based on the criteria under Order 5 rule 22 and that such an order can only be granted under Order 5. rule 24 which provides that leave can only be granted where a party proves that the case is a proper one for service outside of jurisdiction.

In the case before me, the Respondent did not file any such application before the Court. No leave was sought before the Court and as such none was granted.

In the premises my finding is that because the Respondent did not follow the procedure for service of summons established under Order 5 rules 22 and 24 of the Civil Procedure Rules, this means that the said service of summons irregular within the meaning of Order 9 rule 3. In the circumstances, I set aside the service of summons on the Applicant in High Court Civil Suit No. 296 of 2020 issued by the Deputy Registrar, Dr. Agnes Nkonge in Miscellaneous Application No. 313/2020. I also find that the summons in HCCS No.296/2020 were not duly served.

On the issue of jurisdiction since the Respondent did not follow the procedure laid out under Order 5 and failed to follow the law, it follows that the Court does not have jurisdiction over Applicant. I have followed both parties' submissions on the tort of professional negligence and since the Court has already made a determination on the issue of jurisdiction, I will not dwell on it any much further.

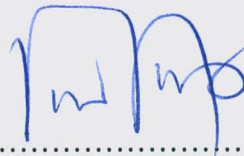
  
*Hon. Justice Dr. H. P. Adonyo*



**d. Orders:**

In light of the my findings above, I make the following orders;

- i. This application is allowed.
- ii. The service of summons on the Applicant in High Court Civil Suit No. 296 of 2020 issued by the Deputy Registrar of this court in Miscellaneous Application No. 313 of 2020 is hereby set aside.
- iii. The Applicant herein is declared as having not been duly served.
- iv. Any order in giving leave to serve summons on the Applicant out of jurisdiction is hereby discharge and vacated.
- v. This court has no jurisdiction over the Applicant in respect of the claim or the relief or remedy sought in High Court Civil No. 296 of 2020.
- vi. High Court Civil No. 296 of 2020 is dismissed as against the Applicant.
- vii. The Applicant is granted the costs of this application.



.....  
**HON.JUSTICE DR. HENRY PETER ADONYO**

**JUDGE**

**14<sup>TH</sup> JULY 2020**

*Hon. Justice Dr. H. P. Adonyo*