THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

MISCELLEANOUS APPLICATION NO. 910 OF 2019

(FROM CIVIL SUIT NO. 422 OF 2019)

AUGUSTINE KASOZI :: APPLICANT

VERSUS

ARVIND PATEL :: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Chamber Summons under *Section 98 of the Civil Procedure Act (CPA), Order 9 Rules 2 & 3(1) (a), (b), (d), (g) & (2), Order 19 and Order 52 Rules 1 & 3 of the Civil Procedure Rules (CPR)* seeking orders that:

1. The Respondent's Civil Suit No. 422 of 2019 be dismissed for being res judicata and abuse of court process.
2. The suit be set aside for failure to effect service on the Applicant.
3. The discharge of any order extending the validity of the summons for purposes of service.
4. A declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject of the claim or the reliefs sought in the action.
5. Costs of the application be provided for.

The grounds of the application as set out in the Notice of Motion are that:

a) There is an illegality apparent on the face of the record.

b) Civil Suit No. 422 of 2018 preceding Civil Suit No. 422 of 2019 was dismissed by this Court based on the application by the Applicant for non-service of summons and, as a consequence, no fresh suit could be commenced after the dismissal.

c) The Court heard and dismissed the said suit and the same being freshly brought in another way is barred by law for being res judicata and abuse of court process.

d) Summons in Civil Suit No. 422 of 2019 was issued but was never served onto the Applicant within the required 21 days.

e) The Respondent engaged in bad faith when he filed a false affidavit of service alleging service that has never happened.

f) The law prescribes a mandatory sanction of setting aside summons for failure to serve the same within time or for improper service.

g) It is in the interest of justice that Civil Suit No. 422 of 2019 be dismissed to stop the fragrant abuse of court process.

The application is supported by an affidavit deposed by **Augustine Kasozi**, the Applicant, in which he stated inter alia that:

(i) The Applicant came to learn that the Respondent had on 13/6/2019 received from the Court a summons to file a defence for service upon the Applicant.

(ii) The Respondent never served the summons upon the Applicant but engaged in swearing a false affidavit of service alleging that the Applicant was served in presence of his lawyer and had refused to acknowledge service; which was not true. The Applicant has since deponed to and filed an affidavit in opposition of the said falsehoods dated 23/9/2019.

(iii) The Applicant was advised by his lawyer that the Respondent's Civil Suit No. 422 of 2018 (sic) is incompetent for being res judicata and an abuse of the court process; and should be dismissed with costs.

(iv) It is in the interest of justice that this application is granted.

The Respondent opposed the application through an affidavit deponed to by **Arvind Patel**, the Respondent, in which he stated that he had been informed by his lawyers that the application is frivolous, lacks merit, is barred in law and ought to be dismissed with costs. The Respondent was further advised by his lawyers that Civil Suit No. 422 of 2019 is not res judicata as alleged by the Applicant since the previous suit (No. 422 of 2018) was dismissed for want of service of court process and as such the court did not delve into the substance and merit of the suit. The Court indeed possesses the jurisdiction to entertain Civil Suit No. 422 of 2019. The Applicant was duly served with the court process by a process server attached to the Court. The application is devoid of merit and the same ought to be dismissed with costs.

The Applicant filed an affidavit in rejoinder whose contents I have taken into consideration.

At the hearing, the Applicant was represented by Mr. Derrick Tukwasibwe while the Respondent was represented by Ms Ann Karungi. The hearing proceeded by way of written submissions. Counsel for the Applicant however did not file their submissions in time. As such, both the submissions of the Applicant and those of the Respondent were filed on the same day (02/10/2020). No reply or rejoinder was filed. I will consider the submissions in the course of resolution of the issues before Court.

Issues for Determination by the Court

The following issues arise from the pleadings and submissions of both Counsel for determination by the Court:

1) Whether the Applicant has locus before this Court to bring this application.

2) Whether the application is barred by law for having been brought out of time.
3) Whether the Respondent's affidavit in reply is incurably defective.
4) Whether Civil Suit No. 422 of 2010 (the main suit) is res judicata.
5) Whether the main suit is an abuse of the process of court.
6) Whether the suit is incompetent for non-service of summons.
7) What remedies are available to the parties?

Resolution of the issues by the Court

Issues 1 & 2: Whether the Applicant has locus before this Court to bring this application and **Whether the application is barred by law for having been brought out of time.**

It was submitted by Counsel for the Respondent that the Applicant has no audience before this Court having failed to file a defence within time as required by the law under Order 8 Rule 1 (2) of the CPR. Counsel submitted that even where a defendant is challenging jurisdiction, he ought to file a defence first and indicate therein that he does not submit to the jurisdiction of the Court in line with Order 9 Rule 2 and Rule 3 (5) of the CPR.

As already indicated, there was no reply to this submission.

Order 8 Rule 1 (2) of the CPR provides –

> *Where a defendant has been served with a summons in the form provided by rule 1(1)(a) of Order V of these Rules, he or she shall, unless some other or further order is made by the court, file his or her defence within fifteen days after service of the summons.*

Order 9 Rule 2 of the CPR provides –

> *The filing of a defence by the defendant shall not be treated as a waiver by him or her of any irregularity in the summons or service of the summons or in any order giving leave to serve the summons out of the jurisdiction or extending the validity of the summons for the purpose of service.*

Order 9 Rule 3 (1) (a), (b), (c), (d) and (g) of the CPR provides as follows:

> *A defendant who wishes to dispute the jurisdiction of the court in the proceedings by reason of any such irregularity as is mentioned in rule 2 of this Order or on any other ground, shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the court for—*
>
> *(a) an order setting aside the summons or service of the summons on him or her;*
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> *(b) an order declaring that the summons has not been duly served on him or her;*
>
> *(c) the discharge of any order giving leave to serve the summons on him or her out of the jurisdiction;*
>
> *(d) the discharge of any order extending the validity of the summons for the purpose of service.*
>
> *(e) …*
>
> *(f) …*
>
> *(g) a declaration that in the circumstances of the case the court has no jurisdiction over the defendant in respect of the subject matter of the claim or the relief or remedy sought in the action.*

From the foregoing provisions, it is clear that a defendant who disputes the jurisdiction of the Court on account of any irregularity in the summons or in the service of the summons may file a defence as directed in the summons and reserve his right to challenge the summons or the service thereof as provided

for under Rule 2 of Order 9 CPR. Where the defendant does not file a defence as indicated above, he shall give notice of intention to defend the proceedings and shall, within the time limited for service of a defence, apply to the court for any or such orders as listed under paragraphs (a) to (d) and (g) of Rule 3 (1) of Order 9 CPR.

According to Order 8 Rule 1 (2) CPR, the defence is supposed to be filed within 15 days from the date of service of summons. Similarly, under Order 9 Rule 3 (1) CPR, the application to challenge service or non-service is supposed to be filed within the same timeline. This application by the Applicant is apparently intended to be such an application. The question is whether the same was filed within the required time.

According to the record in the main suit, the summons was issued by the Court on 13th June 2019. According to an affidavit of service by one Kakeeto Allan, a process server attached to the Commercial Division of the High Court, sworn and filed on 21/06/2019, the summons was served on 21/06/2019. On 26/09/2019, the present Applicant filed an affidavit in opposition to the affidavit of service by Kakeeto Allan, the Court process server. The said affidavit in opposition was deposed by the Applicant on 23/09/2019 through his lawyers, M/S Akampumuza & Co. Advocates. Later on 08/10/2019, the Applicant filed the present application.

As already stated, this application ought to have been filed within 15 days from the 21st day of June 2019 but it was filed on the 8th day of October 2019. The affidavit in opposition, which I find superfluous and with no legal consequence, was filed on the 26th day of September 2019, also way out of time. Therefore, this application was filed out of time.

But according to the Applicant, the very basis of bringing this application and doing so at the time he did is because he was never served and he only came to learn of the proceedings later. So according to the Applicant, he could not have filed this application earlier than the 23rd day of September 2019 when he learnt of the suit and made the affidavit in opposition.

This therefore leads me into an examination as to whether there is, before Court, affirmative evidence of service of summons upon the Applicant/Defendant as alleged in the affidavit of service. I have looked at the impugned affidavit sworn by Kakeeto Allan (the court process server). I have considered the averments in the affidavit by the Applicant in support of this application and the earlier affidavit in opposition of the service of process. I have not found anything credible that is capable of impeaching the affidavit of service by the court process server. The questions raised by the Applicant towards the affidavit of service are basically speculative and imaginary. The Applicant's Counsel did not seek to cross examine the deponent of the affidavit of service even when it was clear that the particular affidavit was the one upon which this matter revolved. That affidavit is part of these proceedings since it was annexed to the affidavit in support of the application. It would have been possible for the Applicant to seek the leave of Court to cross examine the said process server which was necessary if they were to impeach his credibility and the contents of the impugned affidavit of service. That procedure is available under Order 19 Rule 1 of the CPR. Left unimpeached, I find no reason not to believe the process server that he indeed effected service of process upon the Applicant/Defendant.

That being the case, the Applicant ought to have filed either a defence or this application by the 8th day of July 2019; which he did not. The provisions of Order 8 Rule 1 (2), and Order 9 Rules 2 and 3 of the CPR cited above are mandatory. The Applicant therefore brought this application out of time and,

as such, it is barred by law and ought to be struck out. Consequently, without this application, the Applicant has no locus before this Court to raise any other objection that is not related to the irregularity in the service of summons.

I would therefore uphold the objections by the Respondent contained in the first and second issues.

However, for completeness and to achieve finality in these proceedings that are threatening to lead to multiplicity of actions, I will pronounce myself on the other issues raised by the Applicant. Thus, assuming that this application was properly before this Court, I will proceed to examine the other issues as raised.

Issue 3: Whether the Respondent's affidavit in reply is incurably defective.

It was averred by the Applicant and submitted by Counsel for the Applicant that in his affidavit in reply, the Respondent did not tell the court his status and capacity to swear the affidavit, which was fatal. The Applicant also averred that paragraphs 1 – 9 of the Respondent's affidavit were unfounded beliefs and hearsay from undisclosed lawyers and a process server who never swore affidavits to corroborate the clear outrageous lies in the affidavit. Counsel for the Applicant prayed that the affidavit in reply be struck out for offending the law. There was no reply to this submission for reasons already stated.

I do not find any provision under Order 19 of the CPR or any other law that was offended by the affidavit in reply deponed to by the Respondent. The affidavit is clearly headed "Respondent's affidavit in reply". It is therefore clear in which capacity the Respondent was making the affidavit. The affidavit also indicates the Respondent's lawyers and their address. So when the Respondent made averments on advice of his lawyers, he did not need to name the lawyers in each and every paragraph. I do not find the Respondent's averments

unfounded or based on hearsay. The evidence of the process server was already before the Court by way of an affidavit of service. The Respondent did not need to produce the process server in order to rely on the said averments.

In all therefore, I have found no defect in the affidavit in reply. Issue 3 is answered in the negative.

Issues 4 & 5: Whether Civil Suit No. 422 of 2019 (the main suit) is res judicata and whether the suit is an abuse of the process of court.

It was argued by Counsel for the Applicant that on basis of the order of court dismissing Civil Suit No. 422 of 2018 for non-service of summons within time and failure to apply for extension of time within which to serve the summons, a decree was entered in the suit and a fresh suit cannot be brought upon the same facts as the suit was rendered res judicata. Counsel relied on a number of court decisions, namely; ***Sam Akankwasa Vs. United Bank of Africa, HCMA No. 40 of 2019; Tukamuhebwa George & Others Vs AG & Another, Constitutional Petition No. 59 of 2011; M & D Timber Merchants Vs Hwan Sung Ltd SCCA No. 02 of 2018; and Sunday Edward Mukooli Vs Administrator General SCCA No. 6 of 2016***; among others.

In reply, Counsel for the Respondent submitted that Civil Suit No. 422 of 2018 was dismissed by the court on a preliminary point of law to the effect that service of process was never effected onto the defendant. The suit was never heard on its merits. Counsel relied on the decision in ***Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015*** which relied on ***Ganatra v. Ganatra [2007] 1 EA 76*** and ***Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93 -994***.

The doctrine of res judicata is based upon *Section 7 of the CPA* which provides –

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try the subsequent suit or the suit in which the issue has been subsequently raised, and has been heard and finally decided by that court.

The essential elements of the doctrine therefore are that:

a) There was a former suit between the same parties or their privies;
b) A final decision on the merits was made in that suit;
c) The matter was heard and determined by a court of competent jurisdiction; and
d) The fresh suit concerns the same subject matter and the parties or their privies.

See: ***Bithum Charles Vs Adoge Sally, HCCS No. 20 of 2015*** which relied on ***Ganatra v. Ganatra [2007] 1 EA 76*** and ***Karia & Another v. Attorney General & Others [2005] 1 EA 83 at 93 -994***.

On the aspect of a final decision on the merits having been made in the suit, the decision must have been reached after full contest or after affording fair opportunity to the parties to prove their case. See: ***Bithum Charles Vs Adoge Sally (supra).***

In the instant case, it is not disputed that the suit was dismissed for failure to serve summons and to seek extension of time within the required timelines. Upon the clear provisions of Section 7 of the CPA and on decided cases, such cannot amount to a final decision having been made in the former suit.

I have looked at the authorities relied upon by the Applicant's Counsel to propound this argument. I find that the decisions in those authorities are distinguishable from the circumstances before this Court and some of the authorities were cited out of context. The decision in ***Sam Akankwasa Vs. United Bank of Africa (supra)*** is not binding on this Court and, with due respect, I am unable to be persuaded by the same. I am not in agreement with its contextualization of the decision of the Constitutional Court in ***Tukamuhebwa George & Others Vs AG & Another (supra).*** I believe the Constitutional Court decision was cited out of context. When the Court held that "a dismissal on a point of law is fundamental and in the eyes of the law resolves the dispute unless there is an appeal and the dismissal is set aside", it did not mean or intend to hold that such applies to all kinds of points of law. That decision was reached in light of the facts that were before the Court. In that case, the High Court matter had been dismissed on account of limitation. The law is that a dismissal of a suit on account of the statute of limitation extinguishes the cause of action. That is the reason the Constitutional Court held that dismissal on the point of law was fundamental and had resolved the dispute. That cannot be said of many or of all points of law. Where a point of law does not extinguish a cause of action or does not finally determine the matter, dismissal of a suit on account of such a point of law cannot make the subsequent suit res judicata.

In the instant case, the suit was dismissed under Order 5 Rule 1 (2) and (3) of the CPR for failure to serve summons within 21 days from the date of issue and failure to apply for extension of time within 15 days from the expiry of the first 21 days. The suit was neither heard nor determined on merits. Under the provisions of the law pursuant to which the suit was dismissed, there is no bar to institution of a fresh suit. The only bar recognized in law would be time limitation. Where there is no such legal bar, the plaintiff is entitled to bring a

fresh suit. This is what the present Plaintiff did and I find no fault in the approach adopted.

Counsel for the Applicant sought to rely on the claim that a decree was extracted and was never appealed against or set aside. I must point out that a decree cannot lawfully arise from the nature of dismissal that occurred in respect of Civil Suit No. 422 of 2018. According to the Ruling and decision of the Learned Judge, an Order was supposed to be extracted and not a decree. There was nothing in the said Ruling that could lead to a court decree. A decree has to be in the terms of a judgment or a final decision. Where a matter is determined without finally disposing of a suit, an Order is supposed to be extracted. The decree herein was therefore erroneously extracted and the Registrar endorsed it in error. This is contrary to the law, therefore illegal and void ab initio. The Court is empowered to set aside such an illegality *ex debito justitiae*. Such a decree cannot therefore be the basis of making the matter res judicata.

My finding therefore is that Civil Suit No. 422 of 2019 is not res judicata.

I notice that the above was also the major basis for the Applicant's submission that the suit was an abuse of the process of Court. There is no basis for this claim as well. The Respondent was entitled to bring a fresh suit after the dismissal of the earlier suit.

Therefore, issues 4 and 5 are determined in the negative. The main suit is neither res judicata nor an abuse of the court process.

Issue 6 is already considered and determined under issue 1 and 2. There is before Court sufficient evidence of service of process upon the Applicant/Defendant. The main suit is therefore competently before this Court.

Issue 7: What remedies are available to the parties?

In light of the above findings, the application by the Applicant has failed and is accordingly dismissed with costs.

The Respondent/Plaintiff has satisfied the Court that service of process was duly effected upon the Defendant who did not file a written statement of defence within time. Since the claim by the Plaintiff was based upon a liquidated demand, the Plaintiff is entitled to default judgment under Order 9 Rule 6 of the CPR and the same is entered for:

a) Payment of UGX 947,000,000/= being the principal sum claimed.
b) Interest at the rate of 24% p.a. from the date of default till full payment.
c) Costs of the suit and of this application.

It is so ordered.

Boniface Wamala
JUDGE
06/11/2020