**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**MISCELLANEOUS APPLICATION NO 477 OF 2012**

**[ARISING FROM MISCELLANEOUS APPLICATION NO 82 OF 2011]**

**[ARISING FROM CIVIL SUIT NO 13 OF 2010]**

**STANDARD CHARTERED BANK UGANDA LIMITED}…......................... APPLICANT**

**VERSUS**

**MWESIGWA GEOFFREY PHILIP}.................................................… RESPONDENT**

**BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA**

**RULING**

The Applicant lodged its application under article 126 (2) (e) of the Constitution of the Republic of Uganda, section 33 of the Judicature Act Cap 13, section 98 of the Civil Procedure Act Cap 71 order 8 rule 2 and order 52 rules 1 and 3 of the Civil Procedure Rules, for leave to file and serve a written statement of defence out of time in civil suit number 30 of 2010. It is also for orders that a default judgement entered in civil suit number 13 of 2010 be set aside and costs of the application are provided for. The grounds of the application are that the honourable court struck out the applicants written statement of defence in civil suit No. 13 of 2010 because it was never within the time appointed by law. Secondly the applicants counsel erroneously believed that a person from the law firm of the respondent had picked the written statement of defence from the court and therefore service thereof had been made to the plaintiff in accordance with the law. The applicant asserts that non-service of the written statement of defence was occasioned by mistake of counsel and should not be visited on the applicant. The applicant has always been anxious to defend the suit as evidenced by the timely instructions to file a written statement of defence given to the applicants counsel. That the applicant never received any funds to the credit of the respondent and the applicant has a good defence to the suit. Finally that it is the constitutional duty of court to investigate the substance of the dispute with a view to administering justice by listening to both parties to the dispute. The interest of justice would be served by allowing the respondents to file and serve its written statement of defence. Finally the Applicant asserts that it is just, fair and equitable that the orders sought in the application are granted.

The application is supported by the affidavit of Paul Kuteesa sworn at Kampala on 16 August 2012. The affidavit sets out the facts of the application as written hereunder. On 5 February 2010 the applicant instructed Kampala Associated Advocates to file a defence to the suit. On 19 February 2010 a written statement of defence was filed and the same was signed and sealed by the court. The deponent instructed the law clerk Mr William Mukasa to obtain the duly sealed written statement of defence for service upon counsel for the plaintiff/respondent but the law clerk advised him that a person from the respondents advocate law firm had picked a copy from the court, signed and acknowledged receipt thereof. Mr William Mukasa took a copy of the written statement of defence to the applicant’s advocates with the endorsed signature of someone claiming to be from Messrs Akampumuza and Company advocates. Counsel Paul Kuteesa further avers that he understood that by the respondent’s advocates picking a copy of the written statement of defence from the court, there was effective service upon the respondent.

Subsequently the respondents counsel denied service on them of the written statement of defence and filed miscellaneous application number 82 of 2011 to strike out the written statement of defence. On 9 March 2011 when the application came for hearing, it was dismissed for non-appearance of the applicants counsel. On 15 April 2011 the respondent filed another application to set aside the dismissal of miscellaneous application number 82 of 2011. When it came for hearing on the 18th of May 2011 counsel Paul Kuteesa was in Gulu handling miscellaneous application number 126 of 2008 and he briefed Counsel Jet Mwebaze to have the matter adjourned. On 29 June 2011, again Mr. Tumwebaze held his brief when submissions were made to the court on the application. Learned counsel only learnt about the striking off of the defence on 9 July 2012 when he perused the court file with the view of ascertaining the status of the suit. Consequently he asserts that failure to bring the application expeditiously was occasioned by counsel misunderstanding the orders of the court that were handed down and this should not be visited on the applicant. He avers inter alia that the applicant has a good defence on the suit as indicated in the written statement of defence filed in the court a copy of which is attached as annexure "B". Counsel goes on to confirm and reiterates the grounds in the notice of motion.

At the hearing, the applicant was represented by Counsel Joseph Matsiko while the respondent was represented by Dr James Akampumuza and Counsel Simon Tendo Kabenge. It was agreed that counsels address court through written submissions. The respondents counsel intimated that he had objections to the application and the court directed that submissions be made on the objection and the merits to save time.

In the objection, the respondent’s contended that when Court granted the applicant time to file affidavits in rejoinder, after the filing of an affidavit in rejoinder by Ouni William, the applicant filed an affidavit in rejoinder which is in fact is an affidavit in support of the application by Emily Gakiza without leave of court. The affidavit of Ms. Gakiza the company secretary does not deal with any of the contents of the respondent’s affidavits in reply but puts on record new evidence in support of the application that was not canvassed in any of the earlier pleadings. The affidavit was filed without leave of court, in bad faith, is an abuse of court process and an attempt by the applicant to cure a defect and should be struck out with costs to be borne by counsel personally.

The Respondent’s Counsel submitted that where the applicant's written statement of defence has been struck out, the only remedies open to the applicant are;

a) To appeal the decision and have it set aside or reversed by a Higher Court on Appeal;

b) To apply to for review of the decision under 0.46 r 1, 2, 3(1) (2) CPR, and S. 83 CPA.

c) To apply to the same court to have the pleading reinstated.

**Whether the court is functus officio and whether the application is barred by res judicata**.

**Functus officio**

Learned Counsel for the Respondents submitted that the procedure followed when a plaint is struck out or a suit is dismissed is clear and the only remedy available to an applicant is to first of all have the suit reinstated for sufficient cause or set aside the order of court or file a fresh suit if they are still in time. In these instances, the party cannot be allowed to act as though the order that struck out the pleading is nonexistent. They have to first set it aside. In addition, a party can only have one written statement of defence and if it is struck out by court, then the court becomes functus officio. An applicant, who fully participated in the proceedings leading to the striking out of the defence and did not appeal, cannot after the expiry of time to appeal apply to the same Court for extension of time to file another defence. A defendant or plaintiff can have only one pleading in claim or defence and the only remedy in these circumstances is to have the pleading reinstated for good cause or follows any of the remedies referred to above.

**Res Judicata**

Additionally counsels submitted that the application is barred by res judicata. In support of this ground of objection learned counsel for the respondent submitted that the matter of whether or not the written statement of defence was ever served were dealt with inter parties in HCMA No. 200 of 2010 and this court after evaluating the evidence adduced and the submissions of Counsel for both parties, made a finding of fact that the written statement of defence was never served. The Court proceeded to strike it off the record. The application and its supporting affidavits and annexure are attempting to make this court overturn, review it findings or reverse its finding without the applicant filing an application for review, revision or appealing the decision. The matter was fully litigated with finality and as provided under S.7 of the CPA and the decision of **Cheborion Barishaki vs. Attorney General Constitutional Petition No. 4 of 2006**. **In HCMA No. 200 of 2011,** the respondent was exercising its right under the law. The defendant/ applicant knowingly opposed the application and lost. Its lawyers were present at the hearing and never appealed the decision. The matters of leave could have been brought up but the applicant did not and therefore, the applicant sealed its fate since pleadings came to an end, and the matter is res judicata.

In reply the Applicants Counsel firstly prayed that the court strikes out the respondents written objections. He contended that the court ordered that on 19th September, 2012, the respondent was to file and serve his submissions on preliminary points of law by 28th September 2012, but they did not comply and evidence of breach of the court order is attached to the affidavit of Mr. Joseph Matsiko which attaches a copy of the submissions served by the respondent, which shows that they were filed and served on 3rd October 2012. This is six days after the time appointed by Court, without any order of Court enlarging time. O.51 r 6 of the CPR gives the court power to enlarge time fixed by Court. It follows, that a party cannot on its own enlarge time for doing anything for which Court itself has set the time, unless the opposite party has consented, under the provisions of O. 51 r 7 of the CPR, which is not the case here. On the basis of this breach, the submissions of the respondent on points of law should be struck out with costs, and the Court entertains submissions on the merits of the application.

In the event that the court does not strike out the respondents written submissions, the applicants counsel prayed that the preliminary objections raised by the respondent should be overruled with costs because they have no merit. They are not pure points of law but delve into the merits of the application which the court will have sufficient time to consider and decide upon.

On whether the application is barred by res judicata and whether the Court is *functus officio,* the applicant’s counsel submitted that the objection is misconceived and without basis. The court is not functus officio and has jurisdiction to entertain and determine this application. The current application seeks for an order of extension of time to file and serve a written statement of defence and to set aside default judgment. The Court has never entertained and decided upon an application seeking leave to extend the time to file a written statement of defence. What the court entertained is HCMA No 200 of 2011 which was an application to reinstate HCMA No. 82 of 2011 and in its decision the Court struck out the written statement of defence of the applicant, and therefore, the court is not functus officio.

More importantly counsel contended that the Court has jurisdiction and powers in appropriate circumstances and in exercise of discretion to extend time within which to file and serve a written statement of defence under the provisions of S.33 of the Judicature Act, S.96 and 98 of the Civil Procedure Act, O. 8 r 1(2) and O.51 r 6 of the Civil Procedure Rules. Accordingly, the Court cannot be said to be *functus officio* or to lack the power or the mandate to entertain an application which seeks to extend the time within which to file and serve the written statement of defence. The Applicant does not by the current application seek to challenge the merit of the decision of the court to strike out the written statement of defence, but is simply seeking to extend time to file and serve a defence, a matter that has never been determined by Court. The application is not barred by res judicata under the provisions of S. 7 of the Civil Procedure Act. The test for determining whether or not a suit is res judicata is laid down in several authorities **Posiyano Semakula V Susan Magala & 2 Ors** [1979] HCB 90, **Daniel Sempa Mbabali vs. Administrator General** [1992-1993] HCB 243 and Tsekooko JSC in the case of **Karia & Anor V AG & Ors** [2005] EA (SCU), to the effect that; t*here has to be* a *former suit or issue decided by* a *competent court; the matter in dispute in the former suit between the parties must also be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as* a *bar; and the parties in the former suit should be the same parties or parties under whom they or any of them claim, litigating under the same title.* The crux of this application is simply that the applicant be granted an extension of time within which to file and serve a written statement of defence. This sort of application between the current parties has not been considered and it has not been adjudicated upon. There is simply no former suit between the parties to this application that is similar to the current application. Maybe the respondent's Counsel is mistaken that the applicant intends to revive the written statement of defence that was struck off. This is simply not the case, the applicant simply seeks to file and serve a fresh written statement of defence albeit on the same terms as the previous one.

In rejoinder the respondents counsel submitted that it is incomprehensible that the applicant insists on an application to extend time within which to file a written statement of defence which was struck out by the court after hearing both parties, making the court functus officio and there is no time to enlarge. Furthermore, there is no inherent jurisdiction for the court to exercise when it already determined the matter inter parties. All orders made under O. 6 r 30(2) of the Civil Procedure Rules are appealable as of right and therefore an appeal was the only remedy available to the applicant in law once their defence was struck off the court record. This Order has not been set aside and the applicant could have applied for enlargement of time before the order striking out the defence, but chose not to do so thus rendering the suit res judicata and this goes to the jurisdiction of court.

**Whether the applicant paid court fees**

The Respondent’s Counsels contended that the application cannot stand because of non payment of court fees for the affidavit and annexure thereto. In support of Counsels relied on the decision in **Ndaula Ronald Vs Hajji Naduli Election Petition Appeal No 20 of 2006**. Without any affidavits, the application cannot stand and the same should be struck out.

In reply the Applicants Counsel submitted that the court filing fees on the application were duly paid and properly receipted by the Uganda Revenue Authority and the payment was duly noted on court file. For the Notice of Motion and Affidavit in Support thereof, court filing fees were duly paid as assessed by the officer of the Court and a Uganda Revenue Authority receipt was issued as No. 282308 dated 16/8/2012. This was indicated on the court file as is the practice of the court, and duly reflected on the Court file. Under the Judicature (Court Fees) Rules, 51 13-1, fees are paid on every interlocutory application (not particularly charged) including an affidavit in support. Once an application like the present one is filed together with an affidavit in support, the law does not require a separate payment for the affidavit. What a litigant pays is the assessed fee and that fee includes the fee for an affidavit in support. This is different from the filing of a separate affidavit filed alone, on which separate fees are paid.

In rejoinder on whether fees were paid, learned Counsel for the respondents submitted that the fee stamped on the court record is Ushs 1,500/= and not 3,000/= which is expressly provided for in specified item 117 on interlocutory matters and one affidavit in support thereof in the Judicature (Court Fees) Rules. This means that the 3 affidavits in support, each of which had to be mandatorily paid for, were not paid for. On the authority of **Ndaula Ronald** cited above, the application is incompetent as it cannot be supported by affidavits and exhibits that are illegal for non payment of court fees. The application remains without a single affidavit as none of the affidavits was paid for as mandated by the Judicature (Court Fees) Rules, 81 13-1. Further the fee for the three (3) affidavits is 1,500 x 3 = 4,500 under head 117 of the said rules. Rule 6 of the Judicature (Court Fees, Fines and Deposits) Rules 81 13-3 Rules 4 and 6 prohibits the use of a document in respect of which a fee is payable in any legal proceeding without paying fees.

**Whether the applicant seeks orders in vain and the application is filed out of time**

Respondent submitted that the application seeks the court to issue orders in vain. The second order seeks to set aside a default judgment, but no default judgment has ever been issued in this suit and the applicant has not attached any order to that effect. The only order ever issued was to strike out the written statement of defence and to set down the matter for formal proof. There was never any default judgment and therefore, the application should be struck out for being incompetent. Secondly, the application is filed out of time.

Counsel submitted that under O. 12 of the CPR, after the scheduling conference and/or arbitration, interlocutory applications can only be filed within 21 days. The main suit to date has already gone through the stage of formal proof and is now set down for submissions. The time within which to file the application lapsed. The authority of **Stop & See vs. Tropical Africa Bank Ltd** **HCMA No.333 Of 2010** lays out the effect of 0.8 r.11(3) of the CPR.

In reply the applicants counsel submitted that the provisions of O. 12 of the Civil Procedure Rules apply to circumstances where pleadings of both parties have been closed as stipulated under 0.12 r 1(1) (b) of the Civil Procedure Rules and alternative dispute resolution or scheduling conference has been conducted and completed. There is no evidence that has been adduced by the respondent that either alternative dispute resolution or scheduling conference were conducted and completed. In the absence of this evidence the respondent has no basis for arguing that this application has been brought out of time. The applicant who is the defendant in the suit has never participated in the proceedings in the head suit and hence it cannot be said that its pleadings having been closed under 0.8 r 18 (5) of the Civil Procedure Rules, therefore, no scheduling conference could have been conducted as envisaged by the provisions of 0.12 r l (l) (b) of the Civil Procedure Rules. This was part of the findings in the case of **Stop & See (U) Ltd V Tropical Africa Bank Ltd** (HCMA NO. 333 OF 2010)which was relied upon by Counsel for the respondent. Further the circumstances of this case are such that the current application could not have been filed within the 21 days since the applicant's defence was struck out on the 27th July 2011 almost a year and a half from the time the suit was filed, and therefore, the provisions of O.12 are inapplicable. In any event the rule is merely directory and court still retains jurisdiction to entertain an application.

In rejoinder the respondents counsel prayed that the court should take judicial notice of the court record. The applicant's admission that their defence was struck off on 27th July 2011 almost a year and a half from the time the suit was filed is inexcusable dilatory conduct of both the applicant and its Counsel. This is further compounded by the delay in filing the instant application for over a year.

**Whether the application is supported by defective Affidavits**

Respondent’s counsels submitted that the application is incurably defective as it has no valid affidavit in support. The affidavits in support of the application are of Paul Kuteesa, an Advocate working with Kampala Associated Advocates, William Ouni, who does not state where he is employed, and one Makoha Ojambo, a court clerk, who do not state that they are recognised agents of the applicant within the meaning of the law or that they are authorised by the applicant to swear the said affidavits. They have not attached any authority from the applicant authorising them to make such affidavits in its application. The affidavit in rejoinder of the company secretary which was filed late and does not rejoin to anything in the respondent's affidavits in reply is filed without leave of court, is incompetent and a belated illegal attempt to cure an incurable defect. For lack of authority Counsel relied on the decision in **Mugoya Construction & Engineering Ltd V. Central Electrical International Limited** **HCMA No. 699 of 2011**.

In reply to the objection on whether the affidavit in rejoinder sworn by Emily Gakiza is defective,the Applicant’s Counsel submitted that the affidavit was duly sworn in rejoinder to the affidavit in reply sworn by the respondent and is accordingly valid. There is no basis in fact or law for challenging this affidavit. On 19th September, 2012 when the application came up for hearing, counsel for the applicant was granted an adjournment to file an affidavit in rejoinder to the respondent's affidavit in reply. On this basis alone the submission of Counsel on this point should be rejected.

The above notwithstanding the applicant had a right to file an affidavit in rejoinder to rejoin to and controvert or dispute the contents of the affidavits in reply sworn by the respondent or affidavits sworn on his behalf. The affidavit of Emily Gakiza does exactly that. The affidavit of Emily Gakiza in paragraph 3, 4, 5, 6, 7, 8 and 9 states that the Applicant never received any money on behalf of the respondent which is the subject of the suit and as such it has a complete defence to suit. Secondly, paragraphs 3, 8 and 9 states the Applicant has always been interested in defending the suit, and clearly, the contents of the affidavit of Emily Gakiza, is a rejoinder to the affidavit of the respondent specifically paragraph 4 thereof. In any event, without prejudice to the foregoing submission, Ms. Gakiza's affidavit cannot be struck out because its contents are material and would assist Court in arriving at a just decision in this application.

On whether the application is incurably defective as it has no valid affidavit in support,the affidavits in support of the application are valid and were sworn by competent persons. The deponents swear to matters that are within their knowledge and which evidence they are competent to give as required by 0rder 19 rules 3 of the Civil Procedure Rules, and this is the basis upon which the affidavits in support are deposed. There is no legal basis for the respondent’s submission that the deponents ought to have obtained the written permission of the applicant before deposing to these affidavits because Mr. Paul Kuteesa deposes to the affidavit in support in his capacity as an advocate working with Kampala Associated Advocates, the advocates of the applicant and therefore, M/SKampala Associated has the mandate to appear for the applicant in court or undertake any other act on its behalf, including filing the instant application and deposing to an affidavit in support. Similarly, Ouni William and Makoha Ojambo depose as to matters within their knowledge. The case of **Mugoya Construction & Engineering Ltd vs. Central Electricals International Ltd** (HCMA No. 699 of 2011) onwhich the applicant relies is distinguishable from the facts of the current matter. The deponent of the affidavit in support of the application purported to depose to the affidavit in the capacity of a duly authorized agent of the applicant and not in the capacity of an advocate, which is completely different from the current application. This is totally different from the case of Mugoya (supra) where the Advocate purported to depose on matters of information which was unique to his client the Applicant. The objection on this point accordingly has no merit and should be overrated.

In rejoinder the respondent’s counsels contend that illegalities were committed by the applicant in the disguise of making a reply to the respondent's main submission, which were; Counsel Joseph Matsiko acting as a witness by swearing an affidavit he termed as "affidavit in opposition to service of Written Submissions" filed in Court on 5th October 2012, and therefore, having chosen to turn himself into a witness and proceeded to act as Counsel for the applicant in the same matter, this is an illegality that court cannot entertain and both Matsiko's affidavit and his submissions in reply have to be struck out because it is an offence under R.9 of the Advocates (Professional Conduct) Regulations SI 267-2. This position is also stated by Justice Irene Mulyagonja (as she then was) in the case of **Shell (U) Ltd & 9 Others V Rock Petroleum (U) Ltd & 2 Others** and in the case of **Ape Lobo & Another V Saleh Salim Dhiyebi & Others [1961] 1 EA 223.**

Secondly, the said affidavit is an illegality,is incurably defective and an abuse of court process as it was filed without the leave of court. The court directed the respondents to file their pleadings on a clear date and the court ought to take judicial notice of the respondent's compliance from the court record and service was done on the same day. The pleadings in this suit before court were closed when the applicants filed their affidavits in rejoinder with leave of court and an affidavit/pleading filed after closure of pleadings without leave of court is an illegality. Thirdly, Mr. Joseph Matsiko does not show in what capacity he swears the affidavit of the applicant. That further renders it incurably defective.

The respondent's submissions on preliminary points are proper and there is no basis or reason to strike them out or order costs. The applicant in its submissions in reply made several admissions on which the respondent’s preliminary points of law should be upheld. The applicant also contains contradictory statements which should be resolved in the respondent's favour.

On the defective affidavit of Emily Gakiza, it raised new facts not rejoinders which are not canvassed in the leave court gave the applicant to file a rejoinder to the respondent's replies. With regard to the three affidavits of Paul Kuteesa, William Ouni and Ojambo Makoha on record. All the deponents to the affidavits had no authority to swear the affidavits and the case of Mugoya cited is on all fours with the current scenario.

**Whether there is illegality on face of the record**

The respondent’s counsels contended that there is an illegality on the face of the record that overrides all matters of pleadings. The application before court is titled HCM*A No.* 477 of *2011, and t*his suit was between different parties i.e. The Government of the Republic of Rwanda and Liberty Construction Company Limited as stated in paragraph 6 of the respondent’s affidavit in reply and Annexure P3 and P4 thereof. The court should follow the decision in **Makula International Ltd Vs. His Eminence Cardinal Nsubuga & Anor** [1982] HCB 11 that a court of law cannot sanction an illegality and illegality once brought to the attention of the court overrides all questions of pleading, including any admissions made therein. In conclusion, the admitted negligence of Counsel on the face of the application and the affidavits, binds the applicant. The Applicant even attempts to support this application by filing an illegal affidavit in which they state that they did not know that their defence had been struck out for a whole year. This is the epitome of negligence and the application should be struck out with costs.

In reply the applicants counsel submitted that there is no illegality on the face of the record as the application is titled (HCMA No. 477 of 2011), the application before court is MANo. 477 of 2012 and not MA No. 477 of 2011. Whereas the typing on the heading of the Notice of motion indicates the year 2011, this was a clerical error which was crossed out and corrected by the Court officer responsible for allocating Application Numbers. The application before Court reads HCMA No. 477 of 2012, the affidavits in rejoinder reflects HCMA No. 477 of 2012 and this application was cause listed as HCMA No. 477 of 2012. There is no illegality. The respondent is absolutely in no doubt as to the application that he is dealing with and he filed an affidavit in reply to the said application on its merits and is not in doubt as to the parties to the said application or the main suit from which the application arises. The preliminary objections raised by the respondent are devoid of any merit and should be overruled and with costs.

In rejoinder on whether there is an illegality on the face of the record, the respondent’s counsel submitted that the respondent was served with pleadings without crossings that are titled MA No. 477 of 2011. The applicant now seeks to change their pleadings that bind them under O.6 r 7 of the CPR. The alleged court officer who crossed out and corrected what is presented by the applicant as a clerical error has not sworn any affidavit to that effect.

**Ruling**

I have carefully considered the several objections by the respondents Counsel contenting the competence of the applicant’s application and the response by the Applicant’s Counsel. I will consider each objection in turn. The first objection is whether I am functus officio and therefore lack jurisdiction to hear the applicant's application. This objection goes hand-in-hand with second and corollary objection which is whether the applicant's application is res judicata.

I will start with the question of whether the court is functus officio. On the first question of whether the court is *functus officio*. The respondents counsel did not address the court as to the meaning and scope of the legal doctrine of *functus officio*. **Stroud's judicial dictionary fifth edition volume 2** at page 1064 defines the doctrine of *functus officio* by reference to the case **of V.G.M Holdings limited [1941] 3 All ER 417** that: "where a judge has made an order for a stay of execution which has been passed and entered, he is functus officio, and neither he nor any other judge of equal jurisdiction has jurisdiction to vary the terms of such stay." "It further goes on to say that an arbitrator or umpire who has made his award is *functus officio*, and could not by common law alter it in any way whatsoever; he could not even correct an obvious clerical mistake." According to **Osborn's Concise Law Dictionary 5th edition, London – Sweet and Maxwell 1964 page 144**, once a magistrate has convicted a person charged with an offence before him, he is *functus officio* and cannot rescind the sentence and retry the case. The doctrine is to the effect that once a judicial officer such as in this case, has made a decision, he or she is deemed to have exhausted his or her powers and he or she cannot act again on the same matter.

It is apparent that the action of the judicial officer has to be on the merits of the matter before him or her. In this case the order was to strike out the written statement of defence. The order to strike out the written statement of defence did not consider the merits of the defence but was based on want of service. The background of this case is the plaintiff objected to the defence being on record on the ground that it had not been served. This is based on the wording of order 8 rule 9 of the Civil Procedure Rules. Order 8 rule 9 deals with the filing of a defence and provides that the filing of the defence is done by delivering the defence or other pleading to the court for placing upon the record and by delivering a duplicate of the defence or other pleading at the address for service of the opposite party. In other words the respondents emphasised that filing of the defence is completed by delivering a duplicate thereof at the address for service of the opposite party. When the defence was struck out upon the application of the respondents counsel, it was as if the defence had never been filed. The applicant’s application is a fresh application for extension of time to file a written statement of defence because there is none on record and none according to the doctrine relied on by the respondents. In their contention no defence is deemed to have been filed in terms of order 8 rules 19 of the Civil Procedure Rules, however I do not share this view as I will show later on. Finally the application does not revisit the application to strike out but is a new matter since it seeks extension of time to file a defence. The application itself assumes that there is nothing on record and is seeking the discretion of court to extend time within which to file it. Finally by analogy, a plaint which is struck out for failure to serve or a suit that is dismissed for failure to serve the summons on the defendant does not make the dismissal operate as a bar to the filing of a fresh suit. We shall examine this later on in this ruling.

A submission that the court is functus officio is a submission that the court has no discretion to extend time within which to file a written statement of defence in the circumstances of the case. Consequently this issue can only be finally resolved after dealing with the question of whether the application is barred by res judicata. Res judicata and the doctrine of functus officio are different sides of the same coin. I would therefore deal with the issue of whether the applicant's application is res judicata, before winding up the issue of whether it is also functus officio.

Res judicata

On points of law, res judicata operates as a bar to hearing the application on the merits. The defence of res judicata is provided for by section 7 of the Civil Procedure Act which provides as follows:

***"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 substantially raised, and has been heard and finally decided by that court.***

Explanation number 1 defines the expression "former suit" to denote a suit which has been decided prior to the suit in question whether or not it was instituted prior to it. Additionally explanation 3 provides that the matter must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other party. Under order 15 rules 1 of the Civil Procedure Rules issues are framed from the pleadings and therefore arise from the pleadings. Additionally order 15 rule 1 (6) of the Civil Procedure Rules provides that nothing in the rule requires the court to frame and record issues where the defendant at the hearing of the suit makes no defence, or where the issue has been joined upon the pleadings. The most crucial point is that the matter in issue must have been a material proposition of fact or law affirmed by one party and denied by the other in terms of order 15 rule 1 (1) of the Civil Procedure Rules. Material propositions are further defined as propositions of law or fact which the plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute a defence. Whereas issues may arise from the plaint alone, in general, a suit is decided between the parties and issues arise from their pleadings. The apparent exception to the framing of issues from the pleadings of both parties, is the determination of whether a plaint discloses a cause of action or a reasonable cause of action in terms of order 7 rule 11 and whether a defence discloses a reasonable answer or defence or whether it is frivolous, or vexatious or an abuse of the process of the court under order 6 rule 30 of the Civil Procedure Rules. In such cases the pleadings of the party whose pleadings sought to be struck out or dismissed will be examined without reference to the pleading of the opposite side. A strict interpretation of section 7 of the Civil Procedure Act is that issues arise where one party asserts something and the opposite party denies it. Where such an issue is adjudicated by the court, then it is a decision on the merits.

The question to be determined is whether where a plaint is not admitted or struck out by a decision of the court, the matter becomes res judicata. There is no clear authority on this point. In the case of **Isaac Bob Busulwa v. Ibrahim Kakinda [1979] HCB 179**, Justice Kantinti held on a preliminary point of law on whether the suit was barred by res judicata, that the dismissal of a suit on a preliminary point, not based on the merits of the case, does not bar a subsequent suit on the same facts and issues between the same parties. In the case of **Frederick Sekyaya Sebugulu vs. Daniel Katunda [1979] HCB 46** the plaintiff's counsel applied for adjournment on the ground that the plaintiff was sick and in Nairobi. The learned judge rejected the application and dismissed the suit. Thereafter the plaintiff's counsel filed an application by notice of motion under order 9 rules 24 and orders 9 rules 26 of the Civil Procedure Rules for setting aside the order of dismissal. It was held that an order of dismissal would be treated under order 9 rule 19 only if the plaintiff was not represented on the hearing date. The order of dismissal of the suit could not be treated as res judicata because it was an order in the same case and not an order in a former suit, a necessary condition for application of the principle of res judicata.

Order 9 rule 19 (2) permits a plaintiff whose plaint has been dismissed for failure to serve summons and who fails to apply for a fresh summons within a year, to file a fresh suit subject to the law of limitation. In such a case, it is obvious that the defendant would not be on board. In other words where a plaint has been dismissed for failure to serve the summons, the dismissal does not operate as a bar to the bringing of a fresh suit. There is no equivalent provision with regard to a written statement of defence which has been struck out. Order 6 rules 30 of the Civil Procedure Rules permits the court to strike out the defence on the ground that it does not disclose a reasonable answer or that it is shown to be frivolous and vexatious. However order 6 rule 30 deals with a defence which has been considered on its merits. At this stage it is necessary to establish what the Court decided when striking out the written statement of defence. The ruling of the court was delivered on 27 July 2011 and reads in part:

***"In the circumstances, there was no service of the written statement of defence on the plaintiff as required by order 8 rule 19 of the Civil Procedure Rules. Following the two authorities cited above the written statement of defence is struck out and the plaintiff may proceed to have the suit tried in the manner provided for under order 9 rule 10 of the Civil Procedure Rules."***

The precedents for striking out a defence were the judgments of the High Court per honourable Justice Lameck Mukasa in the case of **Mark Graves versus Bolton Uganda Ltd High Court miscellaneous application number 0158 of 2008**. The second decision is **Nile Breweries versus Bruno Onzunga t/a Nebbi Boss Stores High Court civil suit number 0580 of 2006**. It was established by those authorities that a written statement of defence is filed by tendering a copy or other pleadings to the court and placing it upon the court record and by delivering a duplicate of the defence or other pleadings at the address of service of the opposite party in terms of order 8 rule 19 of the Civil Procedure Rules. In my ruling quoted above, which ruling is the subject of an application to file a fresh defence, I did not consider and I was not addressed on any grounds to depart from the rulings of honourable Justice Lameck Mukasa. In a subsequent decision however, the court was faced with a similar situation in which an application was made to strike out a written statement of defence under order 8 rules 19 of the Civil Procedure Rules and the same was struck out. This was in **Protection Security Services versus Eastern Builders and Engineers Ltd miscellaneous application number 566 of 2011 arising from High Court civil suit number 101 of 2011**. In an application for extension of time to file and serve the written statement of defence out of time, I extensively considered the implications of order 8 rule 19 of the Civil Procedure Rules. I departed from the previous rulings of the court to a certain extent by holding that the written statement of defence has to be filed and served within 30 days from the date of service of summons. That ruling is quoted for ease of reference:

***“I have further considered the wording of order 8 rule 19 of the Civil Procedure Rules as far as the conclusion in the previous cases cited to the effect that filing is completed by delivering the written statement of defence at address for service of the plaintiff is concerned. My conclusion is therefore for there to be harmony in the construction of these provisions and to avoid doing damage to the language of the rule maker a strict construction of the rules is called for. This means that a defendant may file a written statement of defence on the last day and still be compliant with the rules. Thereafter, the defendant may apply under order 9 rules 3 objecting to jurisdiction. Secondly, a defendant may serve its written statement of defence on the plaintiff within a further indeterminate period. Such a period has to be reasonable and consequently it is proper to infer that it would be period of not more than 15 days. In my ruling in the case of Mwesigwa Geoffrey Philip versus Standard Chartered Bank (supra) I did not rule that service had to be made within 15 days prescribed for the filing of a Written Statement of Defence. In that case I found that no service had been effected at all. My ruling in this matter does not detract from the holding that under order 8 rule 19 of the Civil Procedure Rules a filing of the written statement of defence is completed by delivery of the defence on the address for service of the plaintiff as prescribed therein. The period for the placing of the written statement of defence on the address for service of the plaintiff has not been prescribed in that rule. As noted above, the revocation of the rule for entry of appearance took out 15 days from the Civil Procedure Rules if the interpretation of the previous cases is to be upheld. Reading the rule in harmony with the other rules, it is only the period for the filing of the defence on the court record which has been prescribed. It is my conclusions that the Rules Committee did not adequately harmonise the rules after they repealed provisions relating to entry of appearance on service of summons and this has left a lacunae in the law since 1998 when the amendments were made. I would therefore respectfully disagree with the holding of my learned brother Honourable Justice Lameck Mukasa in the case of Mark Graves versus Bolton (U) Ltd (supra) only to the limited extent that delivering a duplicate of the defence or other pleading at the address of service of the opposite party has to be made within the same time prescribed for the placing of the defence upon the court record (that is 15 days). This is because previously when order 8 rules 19 of the Civil Procedure Rules was promulgated the total period from the time of service of summons to the time of filing a defence was 30 days. The impact of the rule has since changed as noted above."***

In the above case the applicants defence had been struck out and the applicants subsequently applied for extension of time to file and serve a written statement of defence. The respondents counsel objected to the application on the grounds of res judicata and the objection was overruled. The applicant was granted leave to file a written statement of defence and serve the respondent. The respondent was aggrieved and appealed to the Court of Appeal and the matter is pending.

The submissions of learned counsel for the respondent before the ruling were that a defence had never been filed. They base their submissions on order 8 rule 19 which is to the effect that the filing of a defence is completed by tendering a copy to the opposite side. That is the basis of the decisions I was referred to and which I followed for striking out the defence. The order striking out can be considered afresh. In the case of **Silvanus Bob Turyamwijuka versus Compassion International and Dr. Mbanda Laurent HCCS NO 0115 of 2010** and the case of **Simon Tendo Kabenge vs. Barclays Bank (U) Ltd and Phillip Dandee MA 0623 of 2010 arising from HCCS 0281 of 2010** Hon. Justice V.T. Zehurikize considered the implications of order 8 rule 19 in rulings delivered on the 3rd of July 2012. His Lordship held after reviewing the previous authorities including the case of **Philip Mwesigwa versus Standard Chartered Bank** that order 8 rules 19 does not prescribe a time within which a defence shall be served on the opposite side and that it should not be imported into the rule. He also held that the filing of a defence is complete upon endorsement by the officer of the court of the written statement of defence.

If the defence was not filed, then what would be the basis for saying that striking out the defence rendered the court functus officio or the decision rendered the matter res judicata? The absurdity is that if a defence was never filed as submitted in those cases, then it could not be struck out. The decision to strike out the defence would be superfluous. What would be necessary was the court to pronounce that there was noncompliance with order 8 rules 19 and hold that there was no defence. However, all written statements of defence are filed on court record and endorsed by the registrar of the court. Consequently, a defence is indeed filed though it may not have been served. This is what I held in the case of **Protection Security Services** (supra). I also held that service was an independent act from filing which is completed by endorsement of the defence by the officer of the court/deputy registrar. This is the same conclusion reached by Hon. Justice Zehurikize in **Silvanus Bob Turyamwijuka versus Compassion International and Dr. Mbanda Laurent HCCS NO 0115 of 2010** and the case of **Simon Tendo Kabenge vs. Barclays Bank (U) Ltd and Phillip Dandee MA 0623 of 2010 arising from HCCS 0281 of 2010.**

Whatever the case may be, there was no consideration of the defence on the merits in terms of order 6 rule 30 of the Civil Procedure Rules which deals with striking out pleadings. Furthermore the defence was not dismissed. Learned counsel submitted that the proper procedure for the applicants to follow should have been an appeal or an application for reinstatement of the written statement of defence, or an application for review of the decision.

There is a judicial authority in the case of **Protection Security Services vs. Eastern Builders and Engineers Ltd miscellaneous application number 566 of 2011** where I allowed an application to enlarge time to file a defence and serve the same after striking out the previous defence for failure to serve, the striking out of the defence which was superfluous to a declaration of non compliance with rules. In the case of **Young v Bristol Aeroplane Co Ltd [1944] 2 All ER 293** it was held by the English Court of Appeal that a court is bound to follow its own previous decisions and that of courts of same jurisdiction with three exceptions namely: (a) the court may choose between two conflicting decisions of its own; (b) it must refuse to follow a decision of its own which, though not expressly overruled, is inconsistent with a decision of a Higher Court/Appellate Court and; (c) it is not bound to follow a decision of its own given per incuriam. The High Court of Uganda is a court of record and the principles enunciated by the Court of Appeal in **Young versus Bristol Aeroplane Co Ltd [1944**] (supra) are not only persuasive but applicable as the common law of Uganda by virtue of the definition of common law. The Interpretation Act cap 3 defines “common Law” to mean: “the common law of England”. The Judicature Act cap 13 section 14 (2) (b) provides that subject to the Constitution and the Judicature Act the High Court exercises jurisdiction in conformity with the common law and doctrines of equity subject to the written law. Furthermore section 14 (5) of the Judicature Act defines the expression "common law" to mean those parts of the laws of Uganda other than the written law, the applied law or the customary law observed and administered by the High Court as the common law. Consequently there are no grounds for me to depart from my earlier ruling in Protection Security Services (supra). Unless the precedent is overturned by a higher court, the authority is binding. Secondly there are later conflicting decisions refusing to strike out a written statement of defence on the grounds advanced by the respondents under order 8 rule 19 of the Civil Procedure Rules using the precedents in **Mark Graves versus Bolton Uganda Ltd High Court miscellaneous application number 0158 of 2008 and Nile Breweries versus Bruno Onzunga t/a Nebbi Boss Stores High Court civil suit number 0580 of 2006**. The conflicting later decisions are **Protection Security Services vs. Eastern Builders and Engineers Ltd miscellaneous application number 566 of 2011, Silvanus Bob Turyamwijuka versus Compassion International and Dr. Mbanda Laurent HCCS NO 0115 of 2010** and the case of **Simon Tendo Kabenge vs. Barclays Bank (U) Ltd and Phillip Dandee MA 0623 of 2010 arising from HCCS 0281 of 2010.**

In addition to the binding nature of the authority and there being no grounds or basis for me to depart from the later decisions, I am still of the firm view that where a defence is not struck out under order 6 rule 30 of the Civil Procedure Rules, and it is struck out where it is contended that there is no defence, there is no need to appeal. This can be seen analogously from order 9 rules 19 which permit a plaintiff whose suit is dismissed for failure to serve, to file a fresh suit subject to the law of limitation. Why should it be different with a written statement of defence struck out not on the merits of the defence itself? Would this not amount to treating different people differently in contravention of article 21 of the constitution of the Republic of Uganda? In this case, the defence was struck out for failure to serve. The law recognises that failure to serve a plaint would lead to a dismissal of the suit but to a bar to a subsequent suit. However in the case of a written statement of defence, it leads to be striking out of the defence. Such a decision is not on the merits of the defence and the defendant is entitled to apply afresh to the court to exercise its inherent jurisdiction to allow it/him or her to file and serve a defence out of time.

I must add that the remedy of striking out is contrary to the submissions of the respondents that the filing of the defence is completed by service. I held that filing of the defence is complete by endorsement by the officer appointed to receive the defence i.e. the registrar. The same view is shared by honourable justice Zehurikize in the rulings referred to above. However, failure to serve does not have to end up in the striking out in the case of the defence. According to honourable justice Zehurikize, a diligent plaintiff cannot be frustrated by the defendant’s failure to serve a copy of the defence to him or her. Secondly he held that a party who had submitted to the jurisdiction of the court in order to contest the claim against him or her should not be shut out as this would violate the right to a fair hearing under article 28 (1) of the Constitution of the Republic of Uganda (see Silvanus Bob Turyamwijuka supra). In the case of **Simon Tendo Kabenge** (supra) that the learned judge further held that the officer of the court who receives and seals the defence under order 9 rule 1 can further direct the time within which the defence or counterclaim should be served upon the plaintiff.

I agree with learned counsel for the applicant that the court retains its inherent jurisdiction under section 33 of the Judicature Act, section 98 of the Civil Procedure Act and article 126 of the Constitution of the Republic of Uganda to ensure that justice is done without protracting the process. Article 126 of the constitution provides that justice shall not be delayed. It is not in the interest of litigants to appeal such a procedural question as it may take several years before the appeal is heard in the circumstances of Uganda. Rule 2 (2) of the Constitution (Commercial Court) (Practice) Directions gives one of the objectives of creating the commercial court division of the High Court as the ability to deliver to the commercial community an efficient, expeditious and cost-effective mode of adjudicating disputes that affect directly and significantly the economic, commercial and financial life of Uganda. It does not augur well for the speedy adjudication of commercial disputes to interpret the rules in such a way as to shut out the defendant as held by honourable justice Zehurikize in the case of **Simon Tendo Kabenge** (supra). In such cases, the plaintiff is best compensated by an award of costs rather than have the written statement of defence be struck out as I did following two earlier precedents. As I have noted above the action of the court to strike out the written statement of defence was not necessary and introduced a unique situation which should be addressed on the merits. In such cases an award of costs should have been sufficient to compensate the plaintiff.

In conclusion the High Court is not *functus officio* neither is the application *res judicata*. The objections of the respondents on the ground that the High Court is *functus officio* or that the applicant’s application is *res judicata* are overruled.

**Whether the applicant paid court fees**

Learned Counsel for the respondent further contended that the applicant’s application cannot stand for failure to pay court fees for the application. I have carefully considered the submissions on this objection. Payment of court fees is provided for by the Judicature (Court Fees) Rules. Rule 4 thereof provides that the fees specified in the schedule to the rules will be chargeable in respect of several matters and proceedings mentioned in the schedule. Item 131 which is the applicable rule in the schedule provides that on every interlocutory applications (not particularly charged) including the filing of an affidavit in support, the fees chargeable is Uganda shillings 3000/=. The court file shows that the applicant paid under receipt number 282308 a sum of Uganda shillings 1800/= on 16 August 2012. The application was filed on 16 August 2012. I have carefully perused the schedule to the rules referred to above. Items 1 to 5 deal with civil matters and particularly with appeals. Fees payable on an application for an order is Uganda shillings 1500/=. The fees payable on appeal is 1800/=.

It would therefore appear that the appropriate fees prescribed by item 131 where not applied. The question is whether this is fatal to the applicant's application. Fees are assessed by the Court Staff. Section 97 of the Civil Procedure Act gives the court discretion to allow any person who has paid the fees partially, to pay the rest of the fees. In this case there was partial payment of filing fees by definition but the fees were wrongly assessed by the registry staff. This is not fatal to the applicant’s application. Section 97 of the Civil Procedure Act provides as follows:

***"Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person by whom the fees payable to pay the whole or part, as the case may be, of that court fee; and upon the payment the document, in respect of which the fee is payable, shall have the same force and effect as if the fee had been paid in full in the first instance."***

Firstly the provision gives the court discretion to allow the person at any stage to pay the fees or part of the fees not fully paid. In such cases, the proceedings are not a nullity. The provision supposes that it is a curable defect. In such cases, proceedings would be stayed pending the payment of the fees. In this particular case, the court will allow the applicant to have the fees reassessed and the applicant shall pay the fees so assessed on the documents filed on the court record after this ruling. Because failure to pay the full fees does not render the applicants application a nullity, the objection on the ground or failure to pay full fees is overruled.

**Whether the applicant filed this application in vain**

I have carefully considered the objection that there is no default judgement entered in civil suit No. 30 of 2010. It is a point of fact that the applicant seeks two main orders namely; leave to file and serve the written statement of defence out of time in civil suit No. 30 of 2010, and that the default judgement entered in civil suit number 30 of 2010 is set aside. It is further question of fact that no default judgement was entered in civil suit number 30 of 2010. A quick review of the law is necessary. Default judgments are entered under order 9 rules 6 of the Civil Procedure Rules. Under order 9 rules 6, in default judgement is entered upon a liquidated amount being claimed in the plaint. In this case, no default judgement was entered. Secondly, an interlocutory judgement may be entered under order 9 rule 8 of the CPR. Rule 8 is applicable to a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages and where the defendant has failed to file a defence. In such cases the court would enter an interlocutory judgement against the defendant or defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only as the case may be in respect of the amount found to be due in the course of the assessment.

In this case there was no interlocutory judgement entered by the court. The respondent’s application miscellaneous application number 82 of 2011 was for orders that a default judgement be entered against the defendant in High Court civil suit number 30 of 2010. Secondly it was for orders that High Court civil suit number 30 of 2010 proceeds as if the defendant had filed a defence. As can be seen from order 9 rules 6 and 7, a default judgement is entered where there is a liquidated demand. Where a default judgement is passed under those rules, a decree shall issue and execution may proceed against the defendant or defendants against whom judgement has been entered. This is clearly distinguishable from order 9 rules 8 where an interlocutory judgement is entered. Interlocutory judgement presupposes that further proceedings would be taken to prove the damages. It may be argued that both judgments and orders 9 rules 6, 7 and 8 of the Civil Procedure Rules deal with any judgement made upon the default of the defendant to file a defence. Even if such was the interpretation of the rules, no default judgement was entered upon the record. This leaves order 9 rules 10 of the Civil Procedure Rules. Order 9 rules 10 is the general rule where defence has not been filed. It reads as follows:

**"In all suits not by the rules of this order otherwise specifically provided for, in case the party does not file a defence on or before the day fixed therein and upon a compliance with rule 5 of this order, the suit may proceed as if the party had filed a defence."**

The ruling of the court dated 27th of July 2011 at page 9 thereof last paragraph is explicit and I quote:

***"Following the two authorities cited above the written statement of defence is struck out and the plaintiff may proceed to have this suit tried in the manner provided for under order 9 rule 10 of the Civil Procedure Rules."***

The conclusion is that there was no default judgement. However the applicant seeks another order for extension of time to file and serve a written statement of defence on the plaintiff. In those far as there is a prayer to set aside the default judgement, that part of the application seeking the remedy of setting aside a default judgement is incompetent and struck out.

**Whether the applicant's application was filed out of time**

The respondent’s objection is that the application should have been filed within 21 days under order 12 rules 3 of the Civil Procedure Rules.

I have carefully considered this objection. Order 12 rule 3 (1) of the Civil Procedure Rules provides that all remaining interlocutory applications shall be filed within 21 days from the date of completion of the alternative dispute resolution and where there has been no alternative dispute resolution, within 15 days after the completion of the scheduling conference. This rule was fully considered in the case of **Bokomo Uganda Ltd and Michael Richardson versus Rand Blair Civil Appeal No. 22 of 2011**, arising from miscellaneous application number 330 of 2011 and arising from civil suit number 13 of 2010. The conclusion of the court on the timelines provided for under order 12 rules 3 (1) of the CPR is as follows:

***“Order 12 rule 3 (1) of the Civil Procedure Rules provides for two timelines. The first timeline is 21 days from the date of completion of the alternative dispute resolution. The second time line specifies that where there has been no alternative dispute resolution, all remaining interlocutory applications shall be filed within 15 days after completion of the scheduling conference. On the basis of the first timeline, it is not in dispute that there has been mandatory mediation. In other words there has been an alternative dispute resolution attempt to resolve this suit. The second aspect of the rule is in the alternative in that it provides where there has been no alternative dispute resolution then time is reckoned from the date of completion of the scheduling conference. For emphasis there has been no scheduling conference in this case. Last but not least, the timelines provided for in the above quoted rule only give a framework for the filing of interlocutory applications and must be read in conformity with order 12 rule 1 (1) which gives timelines within which a scheduling conference is supposed to be held. The timelines in order 12 rule 3 (1) read together with the rest of the rules gives a predictable timescale within which interlocutory applications are expected to be filed. The only unpredictable part is how long an alternative dispute resolution would take if it has been ordered by the court under order 12 rules 2 of the CPR. Last but not least the rule assumes two things, namely an order of the court to hold an alternative dispute resolution effort in the absence of which, the holding of a scheduling conference. These are events which are presumed to have taken place under order 12 rule 3 (1) for purposes of applying the timescale provided for in the rule. Looking beyond that presumption is the fact that the scheduling conference would have taken place within a predictable time provided for by rule 1 of order 12 of the Civil Procedure Rules. To conclude the point, the intention of the rule-making authority is fulfilled if any alternative dispute resolution is carried out within the timescale as envisaged by order 12 rules 1 and 2 of the CPR. By carrying out mandatory mediation under the Mediation Rules 2007 the event envisaged by rule 3 of order 12 of the Civil Procedure Rules is deemed to have occurred. For the timelines to come into operation would fulfil the intention of the rule-making authority for setting time limits within which to file all remaining interlocutory applications after the completion of an alternative dispute resolution effort. The remaining part of the rule dealing with scheduling conference would not apply for purposes of timelines. Unless a party is exempted from mandatory mediation under the Mediation Rules 2007, all interlocutory applications in any matter other than those which arise after the suit has been filed have to be filed within 21 days from the date of completion of mandatory mediation under the Mediation Rules 2007 as far as the Commercial Court Division is concerned."***

The quoted rule comes into play where there has been an alternative dispute resolution effort. There must be a minimum of two parties namely the plaintiff and the defendant. Where the defence has been struck out, the rule cannot be applied because there would be no mediation. It is order 9 rules 5 up to rule 10 which deal with situations where no defence has been filed that would be applicable. Provisions relating to alternative dispute resolution, scheduling conference and the subsequent rules for filing the remainder of the interlocutory applications presuppose a plaintiff and a defendant in the very least. In those circumstances, the respondents objection in as far as it relates to the contention that the applicant ought to have filed an application within 21 days has no merit as 21 days ran from the time alternative dispute resolution effort has been completed. In any case, the application also presupposes the holding of a scheduling conference inter parties. A scheduling conference cannot be held where there is only a plaintiff on record and no defendant.

In addition learned counsel for the respondent contended that there was dilatory conduct on the part of the applicant. The question of whether there was dilatory conduct depends on the evidence. It is therefore a question on the merits of the application and cannot be considered as a preliminary point of law. The question of whether there should be an enlargement of time to do any act prescribed were allowed by the Civil Procedure Act, engages the courts discretion under section 96 of the Civil Procedure Act and it is on the merits. Section 96 of the CPA provides as follows:

***"Where any period fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge that period, even though the period originally fixed or granted may have expired."***

**Whether the application is supported by defective affidavits**

The first ground of objection to the affidavits is that the deponents do not state that they are recognised agents of the applicant within the meaning of the law. Secondly they do not indicate that the authorised by the applicant's where the affidavits. Thirdly no authority from the applicant authorising the deponents to swear affidavits has been attached to the application. Learned counsel relied on the case of **Mugoya Construction and Engineering Ltd versus Central Electrical International Ltd** High Court, Commercial Court, and Miscellaneous Application No. 699 of 2011. The applicant's position on the other hand is that the case of Mugoya Construction and Engineering Ltd versus Central Electrical International Ltd (supra) dealt with affidavits made in the capacity as agents. I totally agree with the applicants submissions on this point. The ruling of the court at page 4 in that case is to the effect:

***"The words "duly appointed to act" are clearly distinguishable from an advocate who has been duly instructed. An appointment to act on behalf of the client must be in writing. This requirement would be consistent with order 7 rule 4 of the Civil Procedure Rules. This rule requires evidence that a person pleading in a representative capacity should demonstrate that the necessary steps have been taken to enable the representative to institute a suit in a representative character. This also applies to making an affidavit in the capacity of a party to the action. In this particular case, the applicant is a limited liability company and a written authority for learned counsel Ivan Kyateka to make an affidavit in the capacity of a party and not that of an advocate should be attached to the affidavit in support."***

The ruling is explicit about the point that it refers to the capacity of an advocate to make good the position in a representative capacity of the party to the suit. It clearly distinguishes between an advocate duly instructed and an advocate instructed to represent the party in the action. Where an advocate is duly instructed, the restrictions to any affidavit to which he or she deposes, is governed by order 19 rule 3 of the Civil Procedure Rules. The question of whether the deponent makes a deposition in the capacity of a party or as a witness is the only distinction that is relevant. In the case of **Mugoya Construction Company Ltd** (supra) the court was concerned with the representative character of the advocate in that case as he specially pleaded that the affidavit was made as an authorised agent duly appointed. The court considered order 3 rule 1 of the Civil Procedure Rules which provides that any application to or appearance or act in any court required or authorised by the law to be made or done by a party such court, may be done by his or her recognised agent. Leave to appeal was granted from the decision and the matter may well be on appeal.

An advocate consequently is entitled to make an affidavit in support of an application as may be enabled by order 19 rule 3 of the Civil Procedure Rules. All the advocate needs to indicate is that he has instructions or that he or she is handling the matter as an advocate having conduct. Objection is normally taken for an advocate making depositions on contested matters and appearing as a witness as well as advocate in the case. The affidavit of Paul Kuteesa in support of the application is made in the capacity of an advocate who had conduct of the defendants defence and particularly the filing of a written statement of defence. His affidavit was therefore made in the capacity of an advocate having conduct of his clients matter in court.

As far as the other affidavits filed subsequent to the filing of the application is concerned, it is made by persons with knowledge of the facts in support of the application and they may be called the applicants witnesses. These are the affidavits of William Ouni and Ojambo Makoha which affidavits were filed subsequent to the filing of the application. They make depositions on facts and matters within their knowledge regarding the written statement of defence the subject matter of the application. They are material witnesses who may be cross examined by the respondents counsel if he so applies. As witnesses they do not need any written authority of the Applicant to make depositions on questions of fact relevant to the applicant's application subject to rules of evidence on admissibility. It is upon the applicant to seek their consent to appear as witnesses or to make depositions in support of the applicant's application. Their depositions would be assessed on the basis of whether the information they have is admissible in terms of order 19 rules 3 of the Civil Procedure Rules. Last but not least order 19 rule 1 provides that that any particular fact may be proved by affidavit and that the affidavit of any witness may be read at the hearing. There is no restriction on who may be a witness and therefore, making deposition on any matter which he or she has knowledge of that may be relevant to an application in any court. Affidavits merely give evidence in support of the application or in opposition of the same. The deponents of the affidavits are liable to be cross examined on any point on which they made representations on oath.

**Whether there is illegality on the face of the record**

The illegality referred to is the entitlement of the application as miscellaneous application number 477 of 2011. Miscellaneous application number 477 of 2011 refers to a suit between the government of the Republic of Rwanda and Liberty Construction Company Ltd. As far as the application on the court record is concerned, it has the handwritten cancellation of the year 2011 and substituted by 2012. The respondent was not misled about the wrong numbering of the applicant's application and filed affidavits in reply. In other words sufficient notice was given to the respondent of the institution of the application, the respondent was served with the application with the names of the proper parties and the respondent chose to reply to the application. Nowhere is any reference made to the **Government of the Republic of Rwanda or Liberty Construction Company Ltd.** No one can be misled as to the proper parties to the application. Last but not least applications are allocated numbers by the registry. As can be seen from the notice of motion space was left for the application number. The applicant made a mistake and typed the year 2011 by the time the application was brought for filing. However the notice of motion is signed by the applicant on 16 August 2012 and could therefore not have been filed in the year 2011. There is therefore an apparent error made by the applicant in typing the year 2011 in the title of the application. The affidavit in support is also sworn in the year 2012. No prejudice was occasioned to the respondent and there is no illegality as submitted by counsel for the respondent.

Objection to the affidavit of Joseph Matsiko was made in rejoinder by the respondent. I have not considered it because it was not made in rejoinder to the reply of the applicant. Consequently the rejoinder of the applicant to the objection made in rejoinder will not be considered. For purposes of this ruling I will not consider the issue arising from the affidavit of Joseph Matsiko.

In the premises, the respondent’s objections are overruled with costs. The applicant will be permitted to argue its application on the merits. Proceedings in the main suit are stayed pending the determination of the application on merits.

Ruling delivered in open court this 9th day of November 2012.

Hon. Justice Christopher Madrama

Judge

Ruling delivered in the presence of:

Jet Tumwebaze holding brief for Joseph Matsiko counsel for applicant

Respondent and advocate absent.

Charles Okuni, Court Clerk

Sheila Catherine Abamu, Research Assistant

Hon. Justice Christopher Madrama

Judge

9th November 2012