THE REPUBLIC OF UGANDA

 IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL APPLICATION NO. **26** OF **2014**

(Arising out of Constitutional Petition No. 22 of 2014)

N. SHAH AND CO. LTD APPLICANT/ RESPONDENT

VERSUS

MK FINANCIERS LTD RESPONDENT/ PETITIONER.

CORAM: JUSTICE RICHARD BUTEERA AS A SINGLE JUSTICE OF APPEAL

THE RULING OF COURT

This is an application brought by notice of motion under. Rule 6 and Rule 23(1) of the Constitutional Court (petitions and References) Rules, 2005 and Rule 5 an of the judicature (Court of Appeal Rules) Directions [s.i. 13-10], section 96 of the Civil Procedure Act [Cap71] and Order 51 Rule 6 of the Civil Procedure Rules [\*...

!he application is for an order for extension of time within which the applicant should file an answer to Constitutional Petition No.22 of 2014.

The grounds for the application, according to the notice of motion, are the following:

1.The petition was served on the applicants advocate when the country director of the applicant was out of the country.

2.The advocates had not received instructions to receive the petition or to represent the applicant in the said petition.

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3.The applicant intends to oppose the petition and to be heard on the matter.

4. That it is just and equitable that this application be allowed.

The application is supported by an affidavit sworn by Hetal Parikh, the country director of the applicant company, which affidavit in substance confirms that the sole director of the company was not in the country at the time the petition was served on the advocates and that he had not instructed the advocates to receive service or file an answer to the petition,

The application was opposed by the respondent.

Legal representation.

At the hearing of the application learned counsel, Mr.Ekirapa Isaac, represented the applicant. The respondent was represented by learned counsel, Mr. Male Mabirizi Kiwanuka, who is also the managing director of the respondent company.

The preliminary objection.

At the commencement of the proceedings, Mr. Mabirizi for the respondent raised three preliminary points of law, which according to counsel would dispose of the matter without going to the merits.

Counsel's first objection was that the application contravenes order 6 rule 2 of the Civil Procedure Rules. According to counsel, under the rule , every pleading has to be accompanied by a brief summary of evidence to be adduced, a list of witnesses, a list of documents and a list of authorities with the one exception that an additional list may be adduced later.

Counsel's second objection was that there was no law under which the application was brought as the Constitutional Court Rules do not provide for a party to apply for extension of time to file an answer for a Constitutional Petition. Counsel contended that the absence of any such a rule originates from article 137(7) of the Constitution that requires petitions to be heard expeditiously and that is imported under rule 10 of the Constitutional Court Rules. According to counsel the court of appeal rules can only apply on matters of practice and procedure and not on matters of substance as is the case in the instant application which is on time limits, a matter of substance.

The third objection is that the affidavit in support of the application is full of falsehoods. According to counsel, Hetal Parikh, in the affidavit accompanying the application in paragraph 3, stated that he returned to Uganda on 16th august 2014

which is false since the page indicating the said return is on a page earlier in the

passport than the page indicating the departure date. Counsel contended that for

that reason the deponent lied to court when he said that he went out of the

country on 10th July 2014 and came back on 18th July 2014. This according to

counsel, was a falsehood for which the affidavit should be struck out for being false.

In response to the submissions on the preliminary points of law, counsel for the applicant submitted that the objections raised were all without merit.

In response Counsel for the Respondent/ applicant submitted that the application is based on laws that have been cited in the notice of motion and it is supported by an affidavit and the list of documents that the applicant intends to rely upon and therefore the first objection was without merit.

On the second objection, counsel submitted that the instant application is brought under rule 23 of the rules of this court. According to counsel, the rule allows for application of the Civil Procedure Act and the Civil Procedure Rules. Counsel submitted that the application is for extension of time which is a procedural issue and this court should allow the extension of time as the rules provide for extension of time where there is sufficient reason and there is sufficient reason in the instant application.

On the third preliminary point of objection, counsel submitted that the stamping of passports normally does not follow any chronological order of the pages. Counsel submitted that an entry stamp appearing on a page in a passport before the page on which an exist stamp appears in the same passport is not evidence of any falsehood as alleged by the respondent and that there was no evidence of any falsehood in the affidavit.

I find the first preliminary point of objection to be interconnected with the second preliminary point of objection. They are both on the Rules of procedure under which the application was brought. I will handle them together.

Counsel for the respondent's first objection is that the application offends Order 6 Rule 2 of the Civil Procedure Rules. The provisions of this Rule were considered by Hon. Justice Egonda—Ntede, a Judge of the High Court (as he then was), in The

Hon. Minister of Internal Affairs V Kagwa Andrew and 5 Others Hct- 00- cv- 0660) where he held:

Order VI Rule (1) (a) of the Civil procedure Rules as amended by The Civil

Procedure Amendment Rules, 1998 (S.l. 26 of 1998), "Every pleading shall be

accompanied by a brief summary of evidence to be adduced, a list of documents

and a list of authorities to be relied on: except that an additional list may be

provided later with the leave of Court" I accept the submission of Mr.

Badagawa that a notice of motion is a pleading, which is therefore covered by this Rule.

This Rule or provision appears to me to be couched in mandatory terms with the only exception made for an additional list of authorities. The Rule, however, does not state the consequences of non-compliance with the Rule. It appears left to Court to determine the consequences of non-compliance as the legislature in its wisdom, left the question open. I have not had the benefit of a decision of this Court or the appellate Courts on the Point."

I find the above persuasive. This Court has discretion on the matter and rejection of the pleading is not the inevitable consequence of non-compliance with the Rule. The nature of the application, the applicable Rules and the purpose of the applications are, in my view, matters that may have to be considered. I shall proceed to consider them.

I do find the application is brought under the laws cited in the notice of motion. This basically is an application for extension of time within which the applicant should file an answer to the Constitutional Petition filed by the Applicant /respondent. The application is by notice of motion. Under Rule 43 of the Rules of this court a notice of motion has to state the grounds of the application. It has to comply to form A in the schedule to the Rules. Under Rule 44 of the same Rules it has to be accompanied by an affidavit or affidavits. The instant application thus far complies with Rules 43 and 44 in respect of requirements for an application by notice of motion.

The application is also brought under Rule 23 of The Constitutional Court (Petitions and References) Rules, 2005 and Section 96 of the Civil procedure Act [Cap 71] and Order 51 Rule 6 of the Civil Procedure Rules [s. 71—1]. The application is for extension of time. Rule 23 of the Constitutional (petitions and

References) Rules states that the Civil Procedure Act and Rules apply with necessary modification. Extension of time in my view is a procedural matter as it does not determine the substance of the main application. I find, therefore, that the Civil Procedure Act and Rules are applicable with necessary modifications to this application under Rule 23 of the Rules as above quoted. The application therefore is properly brought before the Court. The first and the second preliminary objections are for the reasons stated above overruled.

The third preliminary point of objection was on the ground that the affidavit in support of the notice of motion was full of falsehoods as the stamp of entry in the passport appeared before the stamp of exit in the same passport. I have considered the submissions of both Counsel on this point. I do not find that merely because a stamp of entry appears before the one of exit in a passport then it is forged. The official placing an exit stamp in a passport may place the stamp on any page and give it the relevant date. The same official or a different one upon return of the traveler may place an entry stamp in the same passport on a different page which could be prior to the page on which the exit stamp was placed and the official would then put the relevant date of entry. Both the exit stamp and the entry stamp would thus indicate the dates of entry and exit respectively and neither would be forged just because the entry stamp date appeared on a page in the passport which page is prior to the date of the exit date stamp. I find the third preliminary point of objection therefore without merit.

For those reasons I found it proper to dismiss the three preliminary objections and proceed to hear the main application.

The instant application is for extension of time in which the applicant could file an answer to the Constitutional Petition filed by the Petitioner / respondent.

The application is mainly based on the ground that the petition was served on the applicants' advocates when the applicants' Country Director was out of the Country. It is alleged by the applicant that the Country Director was informed on return that the petition was served when he was out of the Country. It was submitted that when the Director left the Country, he did not instruct anybody to receive summons or to act on behalf of the applicant company. The applicant submitted that there was no proper service effected in this case since the person

who was served was a clerk and not an advocate and that person was without

authority to represent the applicant Company. It was alleged that the lawyers

who had represented the respondent Company in previous cases had no

instructions to represent the applicant in the instant case. The applicant there

applies for extension of time to enable them respond to the Constitutional Petition.

The application was opposed by Counsel for the respondent He submitted that in the absence of the applicant the respondent company had many other competent people like the corporation secretary and other Company officials who could have received summons. He prayed this Court to dismiss the application with costs.

The Supreme Court in Kirya Versus Migereko and another Election Petition No. 39 of 2012 stated the law governing extension of time and held:

"The law governing extension of time is well settled. It is in the discretion of the Judge. It being a Judicial discretion, it must be exercised on sound principle. It was stated in Shonti Vs Hindocha and another [1973] E.A. 207 at 209 that:

"The position of the applicant for extension of time is entirely different from that of an applicant for leave to appeal. He is concerned with showing "sufficient reason" why he should be given more time and the most persuasive reason he can show, as in Bhatt's case, is that the delay has not been caused or contributed to by dilatory conduct on his part. But there may be other reasons and these are all matters of degree."

In this application the applicant is seeking for extension of time so as to be heard in a matter ( a Constitutional Petition) that will affect their interests. I find that there is evidence that the Director of the company was out of the Country and that service was effected upon a person without authority to receive service. The Service was therefore not properly effected. I find the fact of improper service or ineffective service to be sufficient reason for extension of time to enable the applicant to file an answer to Constitutional petition No. 22 of 2014. The right to be heard should be promoted rather than curtailed in all appropriate cases and circumstances such as the ones of the instant application. The applicant is granted the extension of time in which to file an answer to the petition. The extension of time granted is 15 days from the date of delivery of this ruling. I so order.

Costs for this application shall be in the cause.

Dated 14th day of April 2016 .

Richard Buteera

Justice Of Appeal