THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 190 OF 2013

ALEX MULYABINTU ..... APPELLANT

VERSUS

1. **CASE WESTERN RESERVE UNIVERSITY(OHIO)**
2. **MAKERERE UNIVERSITY ..... RESPONDENTS**

CORAM: Hon. Mr. Justice Kenneth Kakuru, JA
Hon. Mr. Justice Geoffrey Kiryabwire, JA
Hon. Mr. Justice Christopher Madrama, JA

JUDGMENT OF JUSTICE KENNETH KAKURU, JA

I have had the benefit of reading in draft the Judgment of my learned brother Madrama, JA.

I agree with him that this appeal has no merit whatsoever and ought to fail for the reasons he has ably set out in his Judgment. I have nothing useful to add.

As Kiryabwire, JA also agrees with the decision of Madrama, JA this appeal stands struck out with no order as to costs.

Dated at **Kampala** this 25th day of June 2020.

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Kenneth Kakuru
JUSTICE OF APPEAL

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(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

ALEX MULYABINTU} .....APPELLANTS

VERSUS

1. CASE WESTERN RESERVE UNIVERSITY (OHIO)
2. MAKERERE UNIVERSITY

Respondents

(Appeal from the Ruling of Hon. Mr. Justice Eldad Mwagusya in Miscellaneous Application No 498 of 2012 (arising from Miscellaneous Application No 237 of 2012 and High Court Civil Suit No 790 of 2002) delivered on 15th March, 2013)

JUDGMENT OF JUSTICE GEOFFREY KIRYABWIRE J.A.

I have had the opportunity of reading the Judgment of Brother the Hon Justice Christopher Madrama in draft and I agree with the findings and final decisions and Orders and have nothing more useful to add.

Dated at Kampala this.....25th.....day of .....June..... 2020

Justice Geoffrey Kiryabwire J.A.

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(CORAM: KAKURU, KIRYABWIRE, MADRAMA JJA)

ALEX MULYABINTU} .....APPELLANTS

VERSUS

1. **CASE WESTERN RESERVE UNIVERSITY (OHIO)}**
2. **MAKERERE UNIVERSITY} .....RESPONDENTS**

(Appeal from the Ruling of Hon. Mr. Justice Eldad Mwagusya in Miscellaneous Application No 498 of 2012 (arising from Miscellaneous Application No 237 of 2012 and High Court Civil Suit No 790 of 2002) delivered on 15th March, 2013)

JUDGMENT OF CHRISTOPHER MADRAMA IZAMA

This appeal arises from the ruling of Mwagusya J, judge of the High Court as he then was in a ruling delivered at the High Court of Uganda at Kampala on 15th March 2013 in the High Court Miscellaneous Application No 498 of 2012.

The applicant had moved the High Court by way of a Notice of Motion for orders that the order issued by the court on 1st October, 2012 dismissing Miscellaneous Application No 237 of 2012 for want of prosecution (nonappearance) be set aside and the application be reinstated for hearing. In that application, the applicant averred that he was at court at the stipulated time but did not hear his case file being mentioned for hearing. Secondly, he averred that the application is for amendment of the plaint in High Court Civil Suit No 719 of 2002 and hearing the application would avoid a

multiplicity of suits. Thirdly, the appellant averred that it was in the interest of justice that the order of dismissal is set aside.

The learned trial judge in the brief background found that the original Civil Suit No 790 of 2002 was filed on 20th February, 2002 against 3 defendants namely, Makerere University Kampala, Case Western Reserve University Cleveland Ohio and the Attorney General of Uganda. The action against the three defendants was for compensation of the Appellant for injury while at work under the Workers Compensation Act 2000. The plaintiff who is the appellant in this appeal averred that he contracted tuberculosis as a result of exposure to tuberculosis patients in the course of his work. Only the 1st and 3rd defendants were served with summons to file a defence and they duly complied with the summons to do so. For some reason, by a decree dated 4th July, 2007 the suit was withdrawn against the 1st and 3rd defendants.

The learned trial judge noted that the suit had been withdrawn against the said defendants who had been served with summons to file a defense leaving the party who had not been served. Following the withdrawal of the suit against the 1st and 3rd defendants an amended plaint was filed on 10th July, 2007 against Case Western Reserve University Ohio. Further, the learned trial judge held that on 24th February, 2011 the court noted that the plaintiff admitted facing challenges to serve the surviving defendant summons to file a defense and the Deputy Registrar had dismissed his application for leave to extend the time within which to serve summons and there was no basis for court to issue fresh summons.

The learned trial judge, noted that the summons had not been served for over 11 years. There had been an application for extension of time which was dismissed for want of prosecution. Secondly, the dismissal of the application spelt the end of the suit which was indeed dismissed by Hon. Mr. Justice

Benjamin Kabito on 24th February, 2011. The reinstatement of the suit on 14th March, 2012 by the same court could not provide any remedy for the plaintiff's non-compliance with Order 5 rule 1 (2) and (3) of the Civil Procedure Rules. The learned trial judge further held that upon reinstatement of the suit, the plaintiff still had to serve the defendant with summons before any application to amend the suit to substitute the defendant can be entertained. Failure to serve the defendant with summons to file a defense imply that there was no suit before the court to merit an application for amendment as prayed for in the dismissed application. The learned trial judge held that there was no suit before the court that can be amended and on the basis of that the application for reinstatement cannot be sustained and was dismissed.

The appellant was aggrieved by the ruling and appealed to this court on 2 grounds of appeal namely:

1. The learned judge erred in law and fact when he dismissed Miscellaneous Application No 498 of 2012 under the consideration alone that there is no suit before the court to merit an application for amendment of Civil Suit No 790 of 2002 as prayed for in Miscellaneous Application No 237 of 2013.
2. The learned judge erred in law and fact when he failed to properly evaluate the evidence on record and therefore came to the wrong decision.

At the hearing of this application, the appellant was represented by learned counsel Ms. Kahunde Clare while the respondent was represented by Learned Counsel Ms. Jacqueline Lule appearing together with Learned Counsel Mr. Gantungo Daniel and learned counsel Muwonge also holding brief for learned Counsel Mr. Isaac Walukagga.

We heard representations from the respondent's counsel on the issue of whether they had standing in this court on the ground that the respondent Messieurs Case Western University (Ohio) had not been served in the lower court with summons to file a defence. The above notwithstanding learned counsel Ms. Jacqueline Lule submitted that the appeal was incompetent and they had appeared pursuant to a hearing notice which had been served on their client for the hearing at the Court of Appeal.

In brief the respondent's counsel submitted that if they had *locus standi*, they would contend that the appeal is incompetent because it was filed without obtaining leave of court and contravenes sections 76 and 77 (1) of the Civil Procedure Act as well as Order 44 rule 1 of the Civil Procedure Rules and ought to be struck out with costs. The appellant had not applied for leave to appeal in the High Court and no genuine steps had been taken by the appellant to apply for leave to appeal in the Court of Appeal either. She submitted that an appeal is a creature of law and not a matter of inherent right. Further, that the decision of the High Court appealed against was not appealable as of right.

I have duly considered the facts and particularly as summarised at the beginning of this judgment. The learned trial judge clearly found that the appellant had not served summons on the respondent. Though Makerere University was cited in the appeal documents, the surviving respondent in this matter is Case Western Reserve University (Ohio). The facts are clear that the suit had been dismissed pursuant to Order 5 rule 1 (3) of the Civil Procedure Rules for want of service of summons within the prescribed period. Rule 5 (1) of the CPR provides that:

1. Summons.

(1) When a suit has been duly instituted a summons may be issued to the defendant—

(a) ordering him or her to file a defence within a time to be specified in the summons; or

(b) ordering him or her to appear and answer the claim on a day to be specified in the summons.

(2) Service of summons issued under sub rule (1) of this rule shall be effected within twenty-one days from the date of issue; except that the time may be extended on application to the court, made within fifteen days after the expiration of the twenty-one days, showing sufficient reasons for the extension.

(3) Where summons have been issued under this rule, and—

(a) service has not been effected within twenty-one days from the date of issue; and

(b) there is no application for an extension of time under sub rule (2) of this rule; or

(c) the application for extension of time has been dismissed, the suit shall be dismissed without notice.

The facts had been clearly summarised and set out by the learned trial judge in his ruling which facts are not in dispute. The question is whether an amendment could be made to a plaint where summons have not been served. The rule for dismissal of the suit is mandatory. The provisions of Order 5 (1) (3) of the Civil Procedure Rules are clear that where summons have not been served within 21 days and no application for extension of time has been made or the application for extension of time has been dismissed, the suit shall be dismissed without notice.

We have already noted that the learned trial judge clearly set out the facts which show that the original suit had been filed on 20th February, 2002

against three defendants. The two defendants who had been served with summons had the suit against them withdrawn. The surviving defendant was never served with summons to file a defence. Following the withdrawal, an amended plaint was filed on 10th July, 2007. That is about 5 years later. The plaint disclosed that the suit was against Case Western Reserve University Ohio. The learned trial judge noted that on 24th February, 2011 about 9 years after the suit had been filed, the Deputy Registrar dismissed an application for leave to extend time within which to serve the summons on the surviving defendant. On 14th March, 2012 an application to reinstate the suit against the surviving defendant was granted. The appellant subsequently applied to amend the plaint and application was dismissed for nonappearance. The current appeal emanates from the ruling in an application to set aside the dismissal of the suit so that the application itself is reinstated for hearing.

The learned trial judge applied the provisions of Order 5 rule 1 (2) and (3) rule 1 (3) of the Civil Procedure Rules and held that there was no suit before the court to merit an application for amendment as prayed for in the dismissed application.

I find nothing to fault the learned trial judge for holding that summons to file a defence which has not been served for over 11 years is a nullity and the suit is supposed to be dismissed under the mandatory rules of procedure. Such statutory dismissal is not on the merits and so a fresh suit could have been filed subject to the law of limitation. Obviously, the suit is now barred by the law of limitation having been filed over 15 years ago. The cause of action pleaded show that the plaintiff was affected by the circumstances of his work when he contracted an infection of tuberculosis in 1998. It follows that the cause of action arose in 1998 which is over 20 years ago.

The appellant never filed a fresh suit and a suit dismissed for want of service of summons under Order 5 rule 1 (3) of the Civil Procedure Rules is not dismissed at the discretion of the judicial officer and the judicial officer dismisses the suit as directed by the mandatory stipulation of the rules. It follows that such a suit cannot be reinstated and the remedy of the plaintiff who fails to serve summons on a defendant to file a defence within the prescribed period and whose suit is dismissed under the mandatory provisions of Order 5 rule 1 (3) of the Civil Procedure Rules, is to file a fresh suit subject to the law of limitation.

In the premises, the appellant's appeal has no merit and is hereby dismissed.

I further need to state that the respondent's lawyers were erroneously served by the clerical staff of the court with a hearing notice for the appeal and appeared at the hearing. They also wrote skeleton arguments for consideration of the Court though the Respondent is not a party. The respondent's lawyers were served with the hearing notice by the court presumably because the respondent had been cited as a party. In the circumstances, it was not the Appellant who caused service on the Respondent's lawyers. Secondly, considering the circumstances where the suit against the Respondent does not exist and in the peculiar circumstances of the Appellant, the cause of justice would be served better if he does not bear the costs of this appeal. I would order that each party bears his/its own costs of the appeal.

Dated at Kampala the 25th day of June, 2020

Christopher Madrama Izama

Justice of Appeal