THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION No.229 OF 2019

(Arising from Miscellaneous Application No.692 of 2018 &

(Arising from Miscellaneous Cause No.136 of 2011)

DR. B.B. BYARUGABA:: APPLICANT

VERSUS

ALISON KANTARAMA EMERIBE :::::::::::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BASHAIJA K. ANDREW

RULING:

Dr. Byarugaba B. Baterana *(hereinafter referred to as the "Applicant")* brought this application against Ms. Alison Kantarama Emeribe *(hereinafter referred to as the "Respondent")* under Section 82 and 98 of the Civil Procedure Act, Cap. 71 (CPA); Section 14 of the Judicature Act, Cap. 13; Order 46 Rules 1 and 2; Order 52 Rules 1 and 3 of the Civil Procedure Rules SI 71 -1 (CPR) for orders that;

1. ***The ruling/decision of this court dated 20th March, 2019, in HCMA No. 692 of 2018, be reviewed and orders therein be set aside.***
2. ***Costs of this application be provided for.***

The grounds of the application are amplified in the supporting affidavit of the Applicant but are briefly that;

(a) The Respondent lied to court on oath, that the Applicant did not comply with the court orders in HCMC No. 136 of 2011 and that she has been denied benefit and prevented from carrying out her duties, whereas not.

(b) The Respondent lied to court on oath, that the court orders in HCMC No. 136 of 2011 were not fully complied with.

(c) The Applicant could not have brought (a) and (b) above to the attention of this court before the order in HCMA No. 692 of 2018 was made, as the motion in HCMA No. 692 of 2018 was not served on him in person or brought to his attention until after the ruling had been made.

(d) The Applicant (in his official capacity as Executive Director, Mulago Referral Hospital) as well as a person, is in possession of evidence to show that;

(i) As directed by the Permanent Secretary vide letter ADM. 178/60 dated 13/06/2013, the Respondent was re-instated in her (former) position with all her benefits.

(ii) That all her benefits due, if any, have been paid as and when they accrue and are lawfully claimed in accordance with the applicable Rules and Regulations.

(iii) That there are no "mileage", telephone service benefits or institutional house renovation costs that have been lawfully claimed by the Respondent and denied.

(iv) The Respondent has not been sidelined in her functions and she has an office to operate from.

(e) That it is fair and equitable that the orders in HCMA No. 692 of 2018 be reviewed.

The application is supported by the affidavit sworn by the Applicant. He essentially states that his attention was drawn to a ruling of this court *(Annexture "A")* in *HCMA No. 692 of 2018, A. K. Emeribe versus. Dr. B.B, Byarugaba;* dated 29/03/2019, in which he was cited as the Respondent. That he was shocked by the said ruling since he was not aware of that case going on in court as he had not been served with any court process. That he also noted from the said copy of the ruling that the matter was heard in his absence and without representation in which it was claimed that his office

had been duly served, whereas not. That the stamp appearing on the copy of the affidavit of service is purported to be stamped by his office, whereas not.

Further, that the case was against him as a person in his personal capacity upon which he decided to instruct his present lawyer Mr. G.N. Kandeebe for advice and representation. That accordingly on 03/04/2019, the said lawyer availed him a copy of an affidavit of service *(Annexture "B")* in which a one Mubiru Moses, of C/o *M/s.KM Advocates & Associates,* claims to have effected service on the Applicant through his alleged secretary. That attached to the said affidavit of service was a copy of the notice of motion (with an affidavit in support) allegedly stamped by his office, whereas not. That the said affidavit of service neither states where his alleged office is found nor the name the alleged secretary who was allegedly served. That the case was against him as a person not the office or the official capacity so as to effect service on the alleged secretary.

Furthermore, that the Mulago Hospital Complex has been undergoing renovation and he has since been working in a makeshift office with no personal secretary. That the affidavit of

service did not tell how the process server came to know where the Applicant's alleged office is located. That the alleged stamp on the notice of motion does not read Executive Director, which is his official capacity, and that there is no any name or signature of the person who allegedly stamped it. The Applicant maintains that he is a law abiding citizen employed by the Government of Uganda and he has full respect for court process and that had he been served as alleged, he would have responded by instructing a lawyer and /or taken all the necessary steps to answer the allegations and defend himself before court. The remainder of the Applicant's depositions in his affidavits are largely centered on the merits of his would- be defence to the main application and hence not relevant for consideration in this application.

The Respondent opposed the application and filed an affidavit in reply sworn by herself. She basically states that the instant application bears no merit and will at the earliest opportunity pray that the same be dismissed with costs. That HCMA No.692 of 2018 was duly served on to the Applicant through his secretary which was good and effective service. As proof the Respondent attached a copy of the affidavit of service as *Annexture "A"*. That the Applicant

was on 12/06/019 served in a similar manner with taxation hearing notices and his lawyer who is the same lawyer in the instant application, surprisingly attended court. As proof the Respondent attached a copy of received taxation notice as *Annexture "B.* That the Applicant was also duly served through his secretary who stamped the application and letters from her lawyers in a similar manner, and that he cannot now plead that he was not served. The received copies of letters of intention to sue are attached as *Annextures "C" and "D"* respectively. That the Applicant failed to fully comply with the court order in HCMC No.136 of 2011 despite having been duly formally informed by her lawyers about his actions through numerous letters. That the Respondent chose to deliberately ignore court process despite having been duly served. That as such, a review of HCMA No.692 of 2018 bears no merit and amounts to abuse of court process. Similarly, like court observed above, the remainder of the depositions of the Respondent are the merits of what would be her rejoinder if any, in the main application and are not relevant for consideration in the instant application.

The Applicant was represented by Mr. Kandeebe Ntambirweki, while the Respondent was represented by Mr. Philp Kasule jointly with

Sajjabi R. Counsel for both parties filed written submissions to argue the application, which court has taken note of and considered in this ruling. The following are the issues for determination;

1. Whether the application meets the criteria for review.

2. What remedies are available to the parties?

Resolution of the issues:

Issue No.1: Whether the application meets the criteria for review.

The application is brought under Section 82 CPA and Order 46 rule 8 CPR; seeking for the orders stated above. Section 82 CPA which governs review provides as follows;

"82. Review.

Any person considering himself or herself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the

court may make such order on the decree or order as it thinks fit."

Order 46 r.1 CPR amplifies the above cited provisions with the addition of other factors to be taken into account in review as follows;

" ..... and who from the discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him or her,....."

The above provisions were considered in ***Re-Nakivubo Chemist (U) Ltd (1979) HCB 12.*** Manyindo J (as he then was) held that the three instances in which a review of a judgment or order is allowed are:

a) *Discovery of new and important matters of evidence previously overlooked by excusable misfortune.*

b) *Some mistake apparent on the face of record.*

c) *For any other sufficient reason, but the expression "sufficient reason" should be read as meaning sufficiently of a kind analogous to (a) and (b) above.*

The Applicant herein seeks for the review of this court's orders in HCMA No.692 of 2018, majorly citing lack of effective and proper service of summons upon him by the Respondent. Thus the entire contention in the application revolves around the issue as to whether there was effective and proper service of the application in HCMA No.692 of 2018. Going by the considerations in ***Re-Nakivubo Chemist (U) Ltd*** (supra) it means that this application is premised on the ground of the any other "sufficient reason".

The law does not define "sufficient reason", but often the expression is used as being analogous to "good cause". ***Black's Law Dictionary 8th Edition,*** at page 235, defines "good cause" to mean legally sufficient reason. Good cause is the legal burden place upon a litigant, usually by court, to show why a particular request should be granted or an action or omission excused. As applicable to the instant case, the Applicant has to demonstrate good reason for his

nonattendance of court when HCMA No.692 of 2018 was called and heard in his absence and a ruling and orders made against him.

The Applicant essentially faults the service of court process upon him as having been ineffective and improper and the cause for his nonappearance to defend himself in HCMA No.692 of 2018. He denies that and states that contrary to the averments of the Respondent, he was ever served as required under the law, or at all. That had he been served, he would have turned up as required in court to defend himself. The Applicant also faults as false the affidavit of service which the process server filed as proof of service, and on basis of which the ruling and orders were issued against him. He contends that the process server does not state where his alleged office is found or the name of alleged secretary who was allegedly served. That Mulago Referral Hospital Complex has been undergoing renovations and the Applicant has since been working in a makeshift office with no personal secretary who could have received the service on his behalf as falsely claimed by the Respondent. On that account the Applicant seeks for orders of review.

Service of court process is generally governed by Order 5 CPR for the service of summons. In particular, it is a requirement under Order 5 r.10 CPR, that service of summons shall be made to the defendant in person or his/her appointed agent. It provides as follows;

"10. Service to be on defendant in person or on his or her agent.

Wherever it is practicable, service shall be made on the defendant in person, unless he or she has an agent empowered to accept service, in which case service on the agent shall be sufficient." [underlined for emphasis].

"Personal service" denotes leaving a copy of the document served with a person upon whom the service is intended to be effected. In ***Erukana Omuchilo vs. Ayub Mudiiwa [1966] EA 229,*** the court held that service on the defendant's agent is effective service only if the agent is empowered to accept service. It is also the settled position that proper effort must be made to effect personal service but if it is not possible, service may be made to an agent or an Advocate. See: ***Kiggundu vs. Kasujja [1971] HCB 164.*** Similarly, service of court process may be effected on the defendant personally

or on an agent by whom the defendant carries on business and such service on an agent is effectual. See: ***Lalji vs. Devji [1962] EA 306; UTC vs. Katongole [1975] HCB 336.*** Worthy of note is that for service to be deemed proper and effective, there must be proof of service by a serving officer or process server. In that regard, Order 5 r.16 CPR provides as follows;

> ***"The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."*** [underlined for emphasis].

In ***MB Automobiles vs. Kampala Bus Service [1966] EA 400; Owani vs. Bukenya Salongo [1976] HCB 62,*** court held that failure to record the name and address of the person identifying the person to be served renders the affidavit of service incurably defective.

In the instant case, the process server, one Mubiru Moses of *C/o KM Advocates*, states in the affidavit of service as follows;

"2. That on the 15th day of November 2018, I received copies of Notice of Motion and affidavit in support attached from this Honourable Court to be served onto the Respondent herein.

3. That on the 16th day of November 2018, I went to the Respondent's office at Mulago Hospital with two copies of notice of motion and an affidavit in support for the purpose of effecting service on the Respondent.

4. That upon reaching the Respondents *(sic)* ***office at around 2:40p.m. I found his secretary to whom I introduced myself and purpose of the visit.***

5. That I handed to the Respondents *(sic)* ***secretary two copies of notice of motion with an affidavit in support thereof who took them to the Respondents*** *(sic)* ***office and shortly, came back and acknowledged receipt thereof by stamping on my copy and retained a copy. (A copy of the stamped notice of motion and an affidavit in support is hereby attached)."***

The above content of the affidavit of service is what forms the basis of the Respondent in asserting that the Applicant was properly and effectively served and he simply failed and/or refused to honour the service.

After carefully evaluating the evidence and the law pertaining to the service of court process generally and service of summons in particular, this court draws the inference that there was no proper and/or effective service by the Respondent on the Applicant.

Starting with the law, it is a requirement that as far as is practicable, service of court process shall be made in person on the person supposed to receive the summons, unless he or she has an agent duly empowered to accept and receive the service. See: ***Erukana Omuchilo vs. Ayub Machiwa*** (supra). In the instant case, there is no evidence whatsoever to suggest that the Respondent was personally served with the summons. The process server, in his affidavit of service, does not state anywhere that he served the Applicant personally. He does not show he made any effort or that it was impartible for him to serve the Applicant personally before resorting to serving the alleged secretary. The Process server only states that he served the "secretary" of the Applicant. Even then, he

does not state how he came to the knowledge that the person served was in fact the secretary of the Applicant. There is also nothing which shows that the alleged secretary was the agent of the Applicant empowered to accept and/ or receive the service. Order 3 r.2 CPR clearly spells out who a recognized agent is. It provides as follows;

"2. Recognised agents.

The recognised agents of parties by whom such appearances, applications and acts may be made or done are—

(a) <u>persons holding powers of attorney</u> authorising them to make such appearances and applications and do such acts on behalf of parties; and

(b) <u>persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the court</u> within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly

authorised to make and do such appearances, applications and acts." [underlined for emphasis].

The alleged secretary of the Applicant does not fall in any of the categories of persons under the rule as a recognized agent for purposes of accepting service.

Besides the above, it is also a mandatory requirement under Order 5 r.16 CPR, that the name of the person identifying the person to be served must be recorded in the affidavit of service. It provides as follows;

"16. Affidavit of service.

The serving officer shall, in all cases in which the summons has been served under rule 14 of this Order, make or annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which the summons was served, and the name and address of the person, if any, identifying the person served and witnessing the delivery or tender of the summons."

The process server, in the instant case, does not state that he knew the alleged secretary or the name of the person who introduced the

secretary to him. He also does not state how he came to know that the person he served was the secretary, let alone being the secretary of the Applicant. He also does not state how he knew that the place of service itself was the office of the Applicant. All that crucial information is lacking from the affidavit of service, and on the strength of Order 5 r.16 CPR and the case of ***MB Automobiles vs. Kampala Bus Service*** (supra) the affidavit of service is incurably defective. Such an affidavit cannot be relied on to prove proper and effective service on the Applicant. Needless to emphasize, that lack of proper service is a good ground for setting aside a judgment or order and for review. This is in terms of Order 9 r.12 CPR as follows;

> ***"Where judgment has been passed pursuant to any of the preceding rules of this Order, or where judgment has been entered by the registrar in cases under Order L of these Rules, the court may set aside or vary the judgment upon such terms as may be just."*** See also: ***Kutumba vs. Karibwire [1982] HCB 71.***

The Respondent averred that service of some other correspondences- *Annexture "C" and "D",* was done and received by the Applicant's secretary in a similar manner as service of the

application upon him. This is, however, not a valid argument. While it is true that the said letters also bear similar stamp as one appearing on the application attached to the affidavit of service, it has already been found that the service itself was not proper. Therefore, merely repeating of the same error by the Respondent in the service of the said letters, does not render their service proper or effective.

The Respondent advanced the contention that the same counsel, Mr. Ntambirweki Kandeebe, appeared for the Applicant in a taxation arising out the same matter after receiving the hearing notice. That argument too is beside the point. What is in issue is the service of the application in HCMA No. 692 of 2018 on the Applicant. The Respondent has not satisfactorily demonstrated that there was proper and effective service upon the Applicant.

For his part, the Applicant has demonstrated that he has a *prima facie* credible defence to the application in HCMA No. 692 of 2018, and is desirous of being heard in the matter. As was held in ***Ladak A.M. Hussein vs. Griffins Isingoma Kakiza, SCCA No. 1995 (U)*** review is not an end in itself, but it is intended to correct a mistake and enable parties settle their rights in a proper and conclusive

manner. This court is bound by that decision and only adds that as far as possible, the substance of litigation between parties ought to be inquired into and the issues in controversy heard on merit so as to conclusively and effectually determine the matters between the parties. On strength of the foregone reasons and finding, this a proper case for review. Issue No.1 is answered in the affirmative.

Issue No.2: What remedies are available to the parties?

The application is allowed. The ruling and orders in HCMA No. 692 of 2018 are reviewed and set aside. Costs will abide the outcome of the main application.

BASHAIJA K. ANDREW
JUDGE.
29/04/2020.