THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 150 OF 2020
(Arising from Civil Suit No. 25 of 2020)
CARLTON DOUGLAS KASIRYE :::::::::::::::::::::::::::::::::::: APPLICANT
VERSUS
SHEENA AHUMUZA BAGEINE a.k.a TASHA :::::::::::::::: RESPONDENT

BEFORE: HON. MR. JUSTICE BONIFACE WAMALA

RULING

Introduction

This application was brought by Notice of Motion seeking orders that:

1. A default judgment be entered against the Respondent in High Court Civil Suit No. 25 of 2020 (hereinafter referred to as **"the main suit"**).
2. The main suit proceeds as if the Respondent had filed a defence.
3. The main suit be heard in the Respondent's absence.
4. Costs of the application be provided for.

The grounds of the application are set out in the Notice of Motion and are also contained in the affidavit in support deponed to by **Carlton Douglas Kasirye**, the Applicant. Briefly, the grounds are that:

a) The Court issued the Respondent with summons to file a defence to the Applicant's claim in the main suit within 15 days.
b) The summons was duly and effectively served on the Respondent on the 23rd January 2020.
c) The 15 days that were allowed by the Court for the filing of the defence expired on the 7th February 2020 but the Respondent has to date failed to file and serve the Applicant with a Written Statement of Defence (WSD) within the time limited by the law.
d) The Respondent has deliberately defied the summons and the suit ought to proceed in the Respondent's absence and as if she had filed a defence.

e) The Respondent was well aware of the time within which to file and serve her WSD but opted not to do so. As such she put herself outside the jurisdiction of this Court.
f) Given the Respondent's dilatory conduct, the law entitles the Applicant to enjoy the fruits of litigation.
g) It is in the interest of substantive justice that a default judgment is entered against the Respondent and the suit proceeds as if she had filed a defence and in her absence.

The Respondent opposed the application vide an affidavit in reply deponed to by **Sheena Ahumuza Bageine**, the Respondent, in which she stated as follows:

a) The contents of the application and the supporting affidavit are baseless and insufficient to support the grant of the orders sought. The application has no merit and does not fulfil the conditions required to enter a default judgment in the main suit.
b) The Respondent was served with the plaint and summons in the suit on the 23rd day of January 2020 and her lawyers filed a defence on her behalf on the 4th day of February 2020 which was within the prescribed time of 15 days.
c) The said WSD was served on the Applicant's lawyers who acknowledged receipt and further went ahead to file a reply to the WSD on 26th February 2020.
d) It is in the interest of both parties that the case is duly heard and determined by the Court based on the evidence. The Respondent prayed that the application be dismissed with costs.

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

Hearing and Submissions

At the hearing, the Applicant was represented by Mr. Simon Tendo Kabenge and Mr. Tendo Deogratius while the Respondent was represented by Ms. Mercy Kamugisha. It was agreed that the hearing proceeds by way of written submissions, which were filed by both Counsel. I will review and consider the submissions in the course of resolution of the issues.

I need to point out, however, that in their submissions, Counsel for the Respondent raised a preliminary point of objection to the main suit, which became one of the issues for determination by the Court. I will therefore consider the said matter as one of the issues before the Court and I will adopt the issues as framed by Counsel for the Respondent.

Issues for determination by the Court

The issues for determination by the Court, therefore, are:

1. Whether the present application is properly before the Court.
2. Whether the Respondent filed a Written Statement of Defence.
3. Whether the Applicant is entitled to the remedies sought in the application.

Resolution of the Court

Issue 1: Whether the present application is properly before the Court.

It was submitted by Counsel for the Respondent that this application is not properly before the Court because the suit on which it is premised already abated by operation of the law. Counsel cited the provisions of Order 11A Rule 1 (2) of the Civil Procedure Rules (CPR) as amended (2019) which provides that *"where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for directions within 28 days from the date of the last reply or rejoinder*

…". Counsel further submitted that under sub-rule (6) thereof, if the plaintiff does not take out a summons for directions in accordance with sub-rule (2) above, the suit shall abate. Counsel submitted that the Plaintiff filed a reply to the WSD on the 26th February 2020 and has never filed any summons for directions before this Court as instructed under the rules. The main suit therefore abated and should be considered as no more.

In the reply by the Applicant's Counsel which is contained in the submissions in rejoinder, Counsel submitted that *Order 11A Rule 1 (4) (e) of the CPR as amended* creates an exception to the requirement under sub-rule (6) to the effect that the *"rule applies to all actions instituted by way of a plaint except an action in which a matter has been referred for trial to an official referee or arbitrator"*.

Counsel for the Applicant submitted that the main suit was officially referred to a referee of the court in the form of a Mediator under Mediation Cause No. 26 of 2020 on the 24th day of February 2020 and there are correspondences on record which show that the case was undergoing mediation until the 27th July 2020 when the report of mediation was made returning the file for scheduling conference after failure of the mediation process. Counsel therefore concluded that the objection raised by the Respondent's Counsel does not apply to the main suit herein and the same ought to be rejected.

The first question is whether a court accredited Mediator is an "official referee" within the meaning of Order 11A Rule 1 (4) (e) of the CPR as amended. Neither the Civil Procedure Act (CPA) nor the CPR define the term "official referee. According to the **Black's Law Dictionary, 5th Edition, p. 1151**, a "Referee" is defined as:

"A person to whom a cause pending in a court is referred by the court, to take testimony, hear the parties, and report thereon to the court. Person

who is appointed to exercise judicial powers, to take testimony, to hear parties, and report his findings ... He is an officer exercising judicial powers, and is an arm of the court for a specific purpose ..."

Under the *Judicature (Mediation) Rules, No. 10 of 2013*, "mediation" is defined as *"the process by which a neutral third person facilitates communication between parties to a dispute and assists them in reaching a mutually agreed resolution of the dispute"*. A "Mediator" is defined as *"a person eligible to conduct mediation under these Rules"*.

It is clear to me that by virtue of the role played by a Mediator, he/she performs the function of an official referee of the Court. The Court refers a pending cause to him/her to, among others, hear parties and report to court depending on whether or not an agreement is reached towards an amicable resolution of the dispute that is the subject of the cause pending before the court. The person is exercising judicial powers for a specific purpose. A court accredited mediator therefore fits well within the meaning of an official referee as used under *Order 11A Rule 1 (4) (e) of the CPR* as amended.

It follows therefore that where a matter is referred by the Court to mediation, the plaintiff would not be expected to take out summons for directions within the 28 days provided for under sub-rule (2) of Rule 1 of Order 11A. The suit would therefore fall under the exceptions provided for under sub-rule (4).

There is, however, a further question regarding reference of matters to mediation. It was argued by Counsel for the Applicant that under Rule 4 (1) of the Mediation Rules (supra), it is mandatory for every civil action to be referred by the court for mediation before proceeding for trial. I need to point out, however, that this was the legal position until the 25th day of January 2019 when the *Civil Procedure (Amendment) Rules, S.I No. 33 of 2019* were passed.

After the coming into force of the CPR as amended, the requirement for mandatory mediation ceased to apply. This is because the Amendment Rules set specific timelines from closure of pleadings up to the time of scheduling before a Judicial Officer. Reference to mediation is therefore an option that can be explored either during hearing the summons for directions or when the case is placed before a Judicial Officer for scheduling or hearing. This is clear from the provisions of Order 11A Rule 7 (2) of the CPR as amended and under the Guidelines for Scheduling Conference provided for under Form 14B, Schedule 2, Part IV, item 2 (m) and 4 (o) of Appendix A as amended.

In the instant case, the timelines under the Amendment Rules were not followed and the matter was referred to mediation in accordance with the old position under the Mediation Rules. The reference was by the Court and, as such, it cannot be blamed on the party. According to available evidence on record, the mediation took place. Such was a lawful process which cannot be invalidated simply because it was directed to be done at a different time than it should have been. I have also taken cognizance of the fact that the Amendment Rules are still new and they introduced radical positions that would require a transition. Where a breach or an omission based on their application is not of utmost substance, the court should be hesitant to apply them with full force.

In the circumstances therefore, it has not been proved that the main suit abated on account of the application of the provisions of Order 11A Rule 1 (2) & (6) of the CPR as amended. It follows therefore that the present application is properly before the Court. The objection by the Respondent's Counsel in this regard is accordingly disallowed. The first issue is answered in the affirmative.

Issue 2: Whether the Respondent filed a Written Statement of Defence.

It was submitted by Counsel for the Applicant that the Respondent did not duly file a WSD because under Order 8 Rule 1 (2) and 19 of the CPR, a WSD is

only duly filed when the defendant delivers a copy on the court record, which is signed and sealed by the Registrar and a duplicate copy is delivered at the address of the opposite party within 15 days. Counsel relied on the decisions in ***Simon Tendo Kabenge Vs Barclays Bank (U) Ltd & Another, SCCA No. 17 of 2015*** and ***Mwesigwa Godfrey Phillip Vs Standard Chartered Bank, HCMA No. 200 of 2011***. Counsel therefore concluded that the Respondent never filed a WSD as prescribed by the law and the purported WSD be struck off the record and the Court should order the suit to proceed ex parte.

In reply, Counsel for the Respondent submitted that the Respondent was served with the summons on 23rd January 2020 and filed her WSD on 4th February 2020 which was within the 15 days prescribed by the law. Counsel submitted that after the WSD being endorsed by the Court, the same was served upon the Applicant's Counsel to which the Applicant filed a reply on 26th February 2020. Counsel submitted that the Respondent perfectly obliged with the provision under Order 8 Rule 1 (2) of the CPR. Counsel submitted that on the other hand, Order 8 Rule 19 and Order 9 Rule 1 (1) of the CPR provides for the mode of filing a defence and merely visits the responsibility of filing the defence and serving the opposite party. Counsel argued that the said provisions do not in any way direct that service to the opposite party ought to be done in 15 days as suggested by Counsel for the Applicant. Counsel reasoned that such was impractical as most of the time it depends on as and when the Registrar endorses the WSD.

Counsel for the Respondent further submitted that in the present case, the Applicant had suffered no injustice and there was no defect he was trying to cure. Counsel submitted that the decisions in ***Simon Tendo Kabenge Vs Barclays Bank (U) Ltd & Another (supra)*** and ***Mwesigwa Godfrey Phillip Vs Standard Chartered Bank (supra)*** are distinguishable from the present circumstances.

In rejoinder, Counsel for the Applicant submitted that in this case, the Registrar endorsed the WSD in time and there was no excuse on the Respondent's part not to have served the same within the prescribed time. Counsel further submitted that the argument by the Respondent's Counsel that the rules do not in any way direct that service to the opposite party be done within 15 days is a misconception of the law as clearly seen from the Supreme Court decision in ***Simon Tendo Kabenge Vs Barclays Bank (U) Ltd & Another (supra)***.

The relevant provisions of the CPR for purpose of this issue are Order 8 Rule 1 (2), Order 8 Rule 19 and Order 9 Rule 1 (1) thereof. I will set them out here below.

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

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

Order 8 Rule 19 of the CPR provides –

> *Filing of defence*
>
> *Subject to rule 8 of this Order, a defendant shall file his or her defence and either party shall file any pleading subsequent to the filing of the defence 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.*

Order 9 Rule 1 (1) of the CPR provides –

> *Mode of filing deence*

A defendant on or before the day fixed in the summons for him or her to file a defence shall file the defence by delivering to the proper officer a defence in writing dated on the day of its filing, and containing the name of the defendant's advocate, or stating that the defendant defends in person and also the defendant's address for service. In such case he or she shall at the same time deliver to the officer a copy of the defence, which the officer shall seal with the official seal, showing the date on which it is sealed, and then return it to the person filing the defence, and the copy of the defence so sealed shall be a certificate that the defence was filed on the day indicated by the seal.

The above provisions have been subject of interpretation by the Supreme Court in the case of ***Simon Tendo Kabenge Vs Barclays Bank (U) Ltd & Another (supra)***. The Court, after reviewing the above stated provisions had this to say:

> ***"... the law requires that a defendant files his/her defence within 15 days from the date of receipt of summons by delivering copies of the WSD to a proper officer of court who shall then sign and affix an official seal on the documents. After the seal is fixed, a copy of the WSD shall be served onto the opposite party. It therefore follows that filing involves two steps which are placing the WSD on court record and further serving the same to the opposite party."***

On this finding, the Supreme Court agreed with the decision of the Court of Appeal which had returned the same interpretation of the relevant provisions. The Courts only differed on questions of fact leading to whether it was right in the prevailing circumstances to strike out the WSD and enter a default judgment. The Courts came to the same conclusion but upon different findings of fact.

In principle therefore, the law is that filing of a WSD is complete after the defence is placed on the court record, signed by the Registrar, affixed with the official seal and a copy served onto the opposite party. This process is supposed to be done within 15 days from the date of receipt of summons by the defendant.

In the instant case, the Respondent was served with the summons on 23rd January 2020. The Respondent delivered the WSD to the court on 4th February 2020. The Registrar signed and affixed the official seal on the WSD on the 5th February 2020. A copy of the WSD was served onto the Applicant on 11th February 2020. It is clear from the above facts that the delivery to court of the WSD, the signature by the Registrar and the affixing of the official seal were done within the prescribed time. However, service of a copy to the opposite party was done outside the prescribed time. There is no explanation from the Respondent as to why the WSD which was ready for picking as early as 6th February 2020 were not served onto the Applicant by 7th February 2020 which was the last day for such action. In principle therefore, the filing of the WSD by the Respondent was not complete and, in law, the WSD was not validly filed by the Respondent.

The next question therefore is whether the Applicant is entitled to a default judgment in such circumstances. I must say, I am uncomfortable with the use of the term default judgment in the present circumstances. I am aware that the term default judgment is in practice used in relation to judgments entered in a suit claiming a liquidated demand where the defendant defaults on filing a WSD. This happens under Order 9 Rules 6 and 7 of the CPR. The term is also applied under Order 36 Rule 3 (2) of the CPR where, upon default of the defendant to apply for leave to defend a summary suit, judgment and decree is entered for the liquidated claim.

I however do not agree that the use of the term default judgment extends to other instances where a defendant defaults in filing a WSD. For instance, under Order 9 Rules 8 and 9 CPR, where the claim is for pecuniary damages only or detention of goods, where the defendant defaults in filing a WSD, an interlocutory judgment is entered and the matter is set down for assessment of damages. It should be noted that the term 'interlocutory judgment' is not used interchangeably with 'default judgment'.

Regarding Order 9 Rule 10 of the CPR, which is the relevant rule in the present case, the rule clearly makes no mention of entry of any judgment. It connotes that where the claim is neither based on a liquidated demand nor upon pecuniary damages or detention of goods only, the suit shall proceed as if the defendant has filed a WSD. This means that the plaintiff will prosecute the suit as if it is defended. In such a situation, all issues in the suit are considered as if they are in dispute and subject to proof by the plaintiff. There is therefore no judgment to talk about. All the plaintiff expects from the court, upon proof that no WSD was filed, is an order to proceed with the hearing of the suit ex parte as directed under Order 9 Rule 11 (2) of the CPR.

I am further strengthened in the above view by the legal requirement that when the suit is ordered to proceed ex parte under Order 9 Rules 10 and 11 (2) of the CPR, a hearing notice should be served onto the defendant despite the fact that he/she did not file a WSD. This is because the suit is proceeding as if he/she had filed a WSD. Secondly, my further understanding of this requirement is that in case the defendant receives the hearing notice when he/she either had no notice of the suit or was prevented from filing a defence, they can come up and take steps to obtain leave of the court to file a defence out of time. This would save the court from going through a full trial and later be asked to set aside the same.

I have found it necessary to dwell on the above point in some detail because I believe it has a bearing on my finding in this matter. My view is that the proper order the Applicant ought to have sought herein when the defendant defaulted in filing a WSD in time is an order to proceed with the suit ex parte; not a default judgment. This is because the claim in the main suit is neither based upon a liquidated claim nor on pecuniary damages only or detention of goods. Assuming that the court allowed to grant the order to proceed ex parte, the suit would have been fixed for hearing and the plaintiff would be directed to serve a hearing notice upon the defaulting defendant. If the defendant by any chance showed up after the order to proceed ex parte, she would have an opportunity under the law to apply to the court for leave to file a WSD out of time.

The situation in the instant case is that the defendant actually filed a WSD on record only that she did not complete the process. If the WSD is truck out, she would have an opportunity to explain why the same was filed out of time. Since she is already before the court, it would be in the most extreme of circumstances that she is denied opportunity to defend. This therefore leads me to the conclusion that striking out the WSD in the present circumstances would only serve a matter of form. There would be no substance in such a strict application of the relevant rule.

I am alive to the position that provisions on timelines are substantive provisions of the law and should be treated as such. But I also find that there is a danger of applying substantive provisions of the law with undue regard to technicalities. The law is that substantive justice should be administered without undue regard to technicalities. Where the court is being called to place undue regard to technicalities in applying a substantive provision of the law, the court ought to decline in obedience to the dictate under Article 126 (2) (e) of the Constitution.

In the circumstances therefore, although I have come to the conclusion that the Respondent's WSD was not validly filed within the prescribed time, I have found it pertinent and in the interest of justice to validate the said WSD and allow the hearing of the suit to proceed inter partes on the merits. I have not found lawful justification to strike out the WSD and to order the hearing of the main suit to proceed ex parte when the Defendant is right before the Court. That is my finding on the second issue.

Issue 3: Whether the Applicant is entitled to the remedies sought in the application.

The Applicant prayed that the WSD filed by the Respondent be struck out, default judgment be entered and the Applicant is allowed to proceed with the hearing of the suit ex parte. From the foregoing, the Applicant's claim has not been made out and these reliefs cannot be granted. The application has failed and is accordingly dismissed with an order that the costs of the application be in the cause.

It is so ordered.

Dated, signed and delivered by email this 11th day of December, 2020.

Boniface Wamala

JUDGE