THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

MISC. CAUSE NO. 250 OF 2021

IN THE MATTER OF THE WHISTLEBLOWERS PROTECTION ACT, 2010

JAMES ANDATE OKANYA==========APPLICANT

-VERSUS-

NEW VISION PRINTING &

PUBLISHING COMPANY LTD==========RESPONDENT

BEFORE: HON. JUSTICE PHILLIP ODOKI

RULING ON PRELIMINARY OBJECTION

Introduction:

[1] The above-named applicant filed this application by Notice of Motion under Section 9(4) of the Whistleblowers Protection Act, 2010. The application seeks for a declaration that the applicant was victimized by the respondent in breach of Section 9(1) and 9(2) of the Whistleblowers Protection Act, 2010 which rendered his termination letter dated 23rd August 2021 illegal, null and void. The application also seeks for general, aggravated and/or punitive damages and the costs of this application.

[2] The Notice of Motion was signed by the Registrar of this Court on the 13th September 2021, fixing the application for hearing on the 2nd February 2022. On the 5th October, 2021, the applicant received from the Court copies of the Notice of Motion for the purpose of effecting service onto the respondent. On the 11th of October 2021, Hope Ayesigire, a court process server, swore an affidavit of service stating

that she effected service of the application onto the respondent on the 6th October 2021. On the 21st October 2021 the respondent filed an affidavit in reply and on the 17th November 2021 the applicant filed an affidavit in rejoinder. The hearing of the application did not take off on the 2nd February 2022. A fresh hearing notice was extracted for hearing on the19th April 2022.

[2] On the 19th April 2022 when the application came up for hearing, counsel for the respondent, Mr. Thomas Ocaya, raised a preliminary objection to the effect that service of the application was not effected within 21 days provided for under Order 5 Rule 2 of the Civil Procedure Rules. Accordingly, counsel submitted that the application is incompetent before Court and it shold be dismissed with costs. Counsel relied on the case of ***Fredrick James Jjunju and Another versus Madhivani Group Ltd and another HCMA No. 688 of 2015***, and the case of ***Bitamisi Namuddu versus Rwabuganda Geoffrey SCCA No. 016 of 2014*** for the proposition of the law that failure to effect service in accordance with the provisions of Order 5 Rule 1 of the Civil Procedure Rules renders the application defective.

[3] In reply to the preliminary objection, counsel for the respondent, Mr. Micheal Aboneka, summitted that the respondent was served on the 6th of October 2021 instead of 4th October 2021. According to counsel, given the fact that the respondent did not protest the service and that there is only 2 days between the 4th and the 6th October 2021, no substantial damage was suffered by the respondent. Counsel for the applicant

sought refuge of Article 126 of the constitution and prayed that in the interest of justice, the application should be given a chance to be heard on merits.

[4] In Rejoinder, counsel for the respondent submitted that the applicant was received without protest because the service was effected on the respondent which is a company. According to counsel, had service been effected on counsel, it would have been received in protest. Counsel further submitted that the affidavit in reply clearly states that the application is incompetent, baseless, barred in law and an abuse of the court process.

Determination of the court:

[5] Order 52 Rule 2 of the Civil procedure Rules provides that;

> *"No motion shall be made without notice to the parties affected by the motion; except that the court, if satisfied that the delay caused by proceeding in the ordinary way would or might entail irreparable or serious mischief, may make any order ex parte upon such terms as to costs or otherwise, and subject to such undertaking, if any, as to the court may seem just,* and any party affected by the order may move to set it aside." Underlined for emphasis.

[6] In ***Kanyabwera versus Tumwebwa [2005]2 EA 86 at page 94*** Oder JSC held that;

"...what the rules stipulates about service of summons, in my opinion, applies equally to service of hearing notices."

[7] Order 5 Rule 2 of the Civil Procedure Rules provides for the time limit within which summons must be served on the opposite party. It states that;

"Service of summons issued under subrule (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."

[8] Rule 3 of the same Order provides for the consequences of non-service of summons within the stipulated time. It states that;

"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 subrule (2) of this rule; or

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

[9] In ***Bitamisi Namuddu*** (supra) Tumwesigye, AG. JSC at page 15 held that;

"O.5 r. 1(3) clearly states that where summons are issued and service is not effected within 21 days from the date of issue and no application for extension of time is made "the suit shall be dismissed without notice." The consequences of failure to serve the summons withing 21 days from the date of issue and not making application for extension of time in the prescribed period are clear and straight forward -the suit stands dismissed without notice. The provisions does not give court discretion to decide whether to dismiss or not to dismiss the suit. the courts action is dictated by law and it is mandatory. The dismissal is also effected without notice to the plaintiff."

[10] In ***Fredrick James Jjunju*** (supra), Bashaija J relied on the case of ***Kanyabwera versus Tumwebwa*** (supra) and held that;

"Applications, whether by Chamber Summons or Notice of Motion, and/ or Hearing Notices, are by law required to be served following after the manner of the procedure adopted for service of summons under Order 5 r.1 (2) CPR. This position was taken in the case of Amdan Khan vs. Stanbic Bank (U) Ltd. HCMA 900 of 2013 in which this court followed the Supreme Court decision in the case of Kanyabwera vs. Tumwebwa [2005] 2 EA 86..."

[11] The consequence of non-service of summons as provided for in ***Order 5 rule 3 of the Civil procedure Rules*** also applies to non-service of applications. In ***M.M Sheikh Dawood versus Kenshwala and Sons HCCS No. 14 of 2009***, Madrama J, as he then was, held that;

> *"The motion must be served on the respondent before the date stipulated in the motion for hearing at the time of its issuance by the court. Failure to serve a summons within 21 days under order 5 rule 1 of the CPR is fatal and if time is not extended, it shall be dismissed. The general rules on service of summons under order 5 of the Civil Procedure Rules must apply."*

[12] The instant application was endorsed by the registrar of this court on the 13th September 2021. The 21 days within which the same should have been served on the respondent fell on the 4th October 2021. The applicant received the application on the 5th October 2021 when the same had expired and could not be properly served onto the respondent as it had no force of law at that stage. The applicant should have applied to the court for extension of time within which to effect service but he did not. Instead, the applicant proceeded to serve the respondent on the 6th October 2021 without the leave of the court. I therefore agree with counsel for the respondent that service of the application was not effected in accordance with the law.

[13] The Applicant cannot seek refuge under ***Article 126 (2) (e) of The Constitution of the Republic of Uganda, 1995***. It is not a magical wand in the hands of defaulting litigants. In any case the requirements of Order 5 Rule 1(2) of the Civil Procedure Rules is not a technicality. In ***Ejab Family Investment and Trading Company Limited versus Centenary Rural Development Bank Limited, HCCS No. 0001of 2004,*** my learned brother Judge Mubiru rightly, in my view, held that non-compliance of Order 5 of *The Civil Procedure Rules* is not a mere procedural technicality but a fundamental defect. He stated that;

> *"The timelines in the rules are intended to make the process of judicial adjudication and determination swift, fair, just, certain and even-handed. Indeed, public policy demands that cases be heard and determined expeditiously since delay defeats equity, and denies the parties legitimate expectations (see Fitzpatrick v. Batger & Co. Ltd [1967] 2 All ER 657).*
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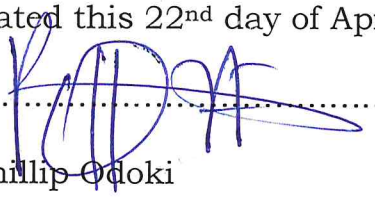
> *It is for those reasons that non-compliance with the requirements of renewal of summons to file a defence is considered a fundamental defect rather than a mere technicality and it cannot be cured by inherent powers since issuance and service of summons to file a defence goes to the jurisdiction of the court"*

[14] In the end, I find that since the Notice of Motion in this case was served outside the timelines provided for under Order 5 of the Civil

Procedure Rules, this application is incompetent before this court. It is accordingly dismissed with costs to the respondent.

I so order.

Dated this 22nd day of April, 2021



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Phillip Odoki

Judge.