

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(LAND DIVISION)**

**MISCELLANEOUS APPLICATION NO.1046 OF 2020**

**(ARISING FROM HIGH COURT CIVIL SUIT NO.487 OF 2015)**

**MICROPOWER GROUP LIMITED:.....APPLICANT**

**VERSUS**

**RE UNION ESTATES LIMITED:.....RESPONDENT**

**BEFORE HON. JUSTICE ALEXANDRA NKONGE RUGADYA**

**RULING**

This application was brought under the provisions of **Articles 28 and 44 of the 1995 Constitution of the Republic of Uganda (as amended), Section 98 of the Civil Procedure Act Cap. 71 and Order 9 rules 12, 27 & 28 of the Civil Procedure Rules S.I 71-1** seeking orders that the substituted service effected on 18<sup>th</sup> June, 2020 in the Monitor Newspaper was not effective, any order or judgement passes in the absence of the applicant be set aside and costs of the application be borne by the respondent.

**Grounds of the application.**

The grounds of the application are contained in the affidavit of Mr. Mweru Michael, the applicant's managing director who, *inter alia* stated that the applicant has not been previously served any summons or other pleadings related to the case.

That Mr. Mweru came to learn of the Daily Monitor 18<sup>th</sup> June, 2020 substituted service in the morning of 19<sup>th</sup> August, 2020 from his colleague one Alex Sajjabi whom he had visited at the Ministry of Justice and Constitutional Affairs where he recalled that he had seen the advert in the newspaper.



That Alex Sajjabi traced the newspaper and prepared a photocopy for the applicant. That Mr. Mweru immediately contacted his counsel, Mr. Jimmy Muyanja, whom he instructed to obtain copies of the pleadings from the casefile.

- 5 That the applicant's lawyer was verbally notified by the court registry staff that the case file was with the trial judge in Jinja for writing judgement and were therefore unable to make copies of the pleadings on file.

Further that if the applicant is permitted to file a written statement of defence and be heard, then the matter will be fully and finally determined by the court  
10 as envisaged by the constitutional guarantee of a fair hearing and trial that it is just and equitable that the applicant be heard.

**Reply by the respondent:**

The respondent opposed the application through the affidavit of Miss Lillian M. Khalayi, an advocate of the High Court and a partner at **M/s Kahuma,**  
15 **Khalayi & Kaheeru Advocates.**

According to her, the firm received instructions to file a suit against the Uganda Land Commission, Attorney General and the applicant herein in 2015. That the Uganda Land Commission and the Attorney General were served ordinarily and that they acknowledged service of summons and went  
20 ahead to file their defence.

However that the several efforts to serve the applicant were made in vain since it had no physical address or known business premises where it could be served and no one knew where to find the applicant.

That upon conducting a search at the company registry, it was established  
25 that **Enoth Mugabi Advocates & Solicitors** were the company secretaries but attempts to serve them were futile as they declined to acknowledge service.

That the process server was informed that the company secretary was consulting with the applicant over the matter which was an indication that  
30 the applicant and the company secretary knew about the suit.



The respondent then filed an affidavit of service and applied for leave of court to serve the applicant by way of substituted service, and the application was granted. The applicant who was then served by substituted service failed to file a written statement of defence and subsequent hearing notices were also served by substituted service, with leave of court. That it is false for the applicant to claim therefore that it was never served and that this application is a waste of court's time.

In rejoinder, it was deponed that stated that the deponent of the affidavit in reply does not indicate the source of her authority to depose the same. That the deponent of the affidavit in reply confirmed that the summons was not received by **M/S Enoth Mugabi Advocates & Solicitors** and that according to the affidavit of service of Mr. Felix Ssesanga, deposed on 7<sup>th</sup> October 2015, he returned the summons to the respondent rather than affix them in compliance with **Order 5 rule 15 of the CPR**.

That the affidavit of service of Busulwa Joseph deposed on the same date indicates that he did not serve **M.A No.892 of 2015** on the known postal address. Further that the applicant never received any communication or consultation from **Enoth Mugabi Advocates & Solicitors** about the summons.

That the substituted service of summons was not only defective for non-compliance with the law but also not effective as it did not come to the attention of the applicant.

### **Representation.**

The applicant was represented by **M/s Muyanja & Associates Advocates Solicitors & Legal consultants** while the respondent was represented by **M/s Kahuma Khalayi & Kaheru Advocates**. Both counsel filed written submissions as directed by this court.

### **Consideration of the issue:**

I have carefully read and considered the pleadings, evidence and submissions of both parties which are on the court record. I do find that the key issue in



this application is whether there was effective service of summons by way of substituted service on the applicant/3<sup>rd</sup> defendant to merit the prayer sought.

Under **Order 29 rule 2 of the Civil Procedure Rules** such service is effective if made to a secretary, or on any director or other principal officer of the corporation; or by leaving it or sending it by post address or the registered office. If there is no registered office, then at the place where the corporation or company carries on business.

**Justice Christopher Madrama Izama** in the case of **Kyambogo University vs The Heights Limited Miscellaneous Application No.954 of 2015** observed that the rule makes it permissible to serve summons on a secretary, any director or other principal officer of that body.

He further stated that:

***The provision is clear that it has to be either a secretary or a director or other principal officer. It follows that the word "Secretary" used here is akin to Corporation Secretary or Company Secretary. By using the disjunctive "or" under Order 29 rule 2 (a) of the Civil Procedure Rules, the categories mentioned there under of a secretary, or on any director or other principal officer of the Corporation are alternatives to one other. If it is not served on a secretary, it may be served on any director of the Company/Corporation. If it is not served on a secretary or any director, then summons may be served on any other principal officer. The second leg of the rule is that summons may be served by sending it by post addressed to the Corporation at the registered office .....***

In the present case, the respondent in its affidavit in reply, deponed that the applicant has no physical address or known business premises where it could be served and that neither counsel nor the respondent knew where to find the applicant.



That attempts to trace the applicant led to a search at the company registry which revealed that the company secretary was **M/S Enoth Mugabi Advocates & Solicitors**.

5 When the process server Mr. Felix Ssesanga, went to the said law firm, he handed the summons to file a defence to the secretary who took them to counsel Enoth Mugabi.

The secretary informed him that Mr. Mugabi had advised him to return the next day for a received copy. However when he went back on 6<sup>th</sup> October 2015, he received all the documents without any acknowledgment by the firm.

10 The process server was advised to look for the 3<sup>rd</sup> defendant/applicant personally and he returned to Mr. Kahuma who also did not know where to find the applicant company.

In its rejoinder, the applicant deponed that the applicant never received any communication or consultation from **Enoth Mugabi Advocates & Solicitors**.

15 This court however notes that on the annual return form filed by the company, Mr. Enoth Mugabi's firm was not only listed as the Secretary of the company, but also that he himself was on that list as one of the three directors, and held some shares, as at 9<sup>th</sup> April, 2010. **(Annexure A to the affidavit in**  
20 **reply).**

In absence of other information to think otherwise, that still remained the position as at the time the suit was filed in 2015. Mr. Mweru Michael's name (the deponent to the applicant's affidavit) who claimed to be the Managing Director of the applicant's company did not feature anywhere on that form.

25 He was not even known as a shareholder in that company. One therefore wonders the capacity under which he filed the supporting affidavit and whether therefore he had any authority to represent the company in any of the transactions.

Mr. Mugabi on the other hand had definite interest in the applicant company,  
30 being one of the directors in the company, to whom **Order 29 rule 2 of the**

**Civil Procedure Rules** was applicable. He was duly served but for reasons which he kept for himself, he had rejected the summons.

He is presumed to have known not only the likely consequences of failure to respond to the court summons, was also fully aware that he could seek leave  
5 of court to file the defence out of time.

He absolved himself of the responsibility bestowed on him by the company to inform other directors about the suit. In the unlikely event that the rest of the members of that company had no knowledge about the case, it was him as the director to blame.

10 Mugabi did not file any affidavit in support of this application nor did he deny the authenticity of the information in the annual return form, or discredit any of the contents of the affidavit of service deposed by Felix Ssesanga, under **Annexure B1**.

15 Service to him was therefore was as effectual as it would have been to any of the other directors as listed. Mr. Mweru, the purported MD of the applicant company in his rejoinder did not deny the authenticity of the entries made on the annual return, which excluded his name.

Service of summons means service that produces the desired or intended effect which is to make the defendant aware of this suit as was held in the  
20 case of **Geoffrey Gatete and Angela Maria Nakigonya versus William Kyobe SCCA No 7 of 2005**, this is what court had to say:

25 ***“the courts below took the expression “deemed good service” referred to in order 30 rule 3 and the expression “effective service” referred to in order 36 rule 11 to mean the same thing and actually use them interchangeably. In my view, the two expressions are significantly different.***

***The Oxford Advanced Learner’s Dictionary defines the word “effective” to mean “having the desired effect; producing the intended result”. In that context, effective service of summons means service of summons  
30 that produces the desired or intended result. Conversely, in ineffective***



service of summons means service that does not produce such result.  
There can be no doubt that the desired and intended result of serving  
summons on the defendant in the civil suit is to make the defendant  
aware of the suit brought against him so that he has the opportunity  
to respond to it by either defending the suit or admitting liability and  
submitting to judgment. The surest mode of achieving that result is  
serving the defendant in person. Rules of procedure, however, provide  
for such diverse modes for serving summons that the possibility of  
service failing to produce the intended result cannot be ruled out in  
every case.

For example, in appropriate circumstances service may be lawfully  
made on the defendant's agent. If the agent omits to make the  
defendant aware of the summons, the intended result cannot be  
achieved. ....'

In line with the above decision, this court finds that service effected on a  
director was personal service to the company itself and accordingly effective,  
his refusal to acknowledge receipt notwithstanding.

This left the respondent with no option but to seek court intervention, apply  
for substituted service in respect of the summons to file a defence;

**Miscellaneous Applications No. 891 and 892, both of 2015.**

These were published in the Daily Monitor Newspaper on 15<sup>th</sup> October 2015,  
upon the orders of court, having satisfied itself that the applicant company  
could not be served in the ordinary way.

This court takes careful note of the fact that the applicant company made no  
attempt to question or challenge the existence of the orders under **MA No.  
965 of 2015; or** an interim order issued vide **MA No. 892 of 2015**, both  
arising from the head suit, and published on the same day.

According to **O.5 r. 18 (2) of the Civil Procedure Rules** substituted service  
is as effectual as if it has been made on the defendant personally. Substituted  
service under **O.5 r.18 (1) of the Civil Procedure Rules** is only resorted to

where court is satisfied that *"for any reason the summons cannot be served in the ordinary way....."*

In this present case, it was made in respect of the summons to file the defence in addition to the personal service made to Mugabi, one of the directors who  
5 had however had refused to acknowledge the summons.

It is a settled principle of the law that whenever Court directs that a party be served with summons by way of substituted service, that service is 'deemed' to be proper and effective if the party does not file a defence and it remains effective as long as it is not challenged.

10 That order and two others filed in the same year against the applicant respectively on 18<sup>th</sup> July, 2016 (**Annexure C1;**) and 16<sup>th</sup> November, 2016 (**Annexure C2**, remained on record unchallenged by the applicant who, more than two years after the suit was filed, still had not filed any defence.

The applicant further depones in *paragraph 2* that he came to learn of the  
15 18<sup>th</sup> June, 2020 substituted service in the morning of 19<sup>th</sup> August, 2020 from his colleague at the Ministry of Justice & Constitutional affairs who informed him that he had seen an advert pertaining the applicant.

Upon obtaining a copy of the daily monitor newspaper the deponent contacted counsel Jimmy Muyanja whom he instructed to obtain copies of the  
20 pleadings.

That when Counsel Muyanja attempted to look for the file, he was informed that it had been taken by the trial judge in Jinja to write a judgement and he therefore could not make copies of the pleadings.

According to the applicant the said service did not meet the criteria set out  
25 under **Order 5 rule 2 of the Civil Procedure Rules**. The rule provides that summons must include the plaint, brief summary of evidence to be adduced, list of witnesses, list of documents and list of authorities.

Under **Order 49 rule 2 of the Civil Procedure Rules**, all orders, notices and documents required to be served upon the opposite party must be served in  
30 a manner provided for service of summons.



Counsel for the applicant citing the case of **Valery Alia v Allionzi John [2012] UGCOMMC 20 (25 March 2012)** further argued that the impugned substituted service did not include the above documents.

As such therefore, there was non-compliance with the mandatory requirements as spelt out under **Order 5 rule 2**, thus rendering the proceedings irregular.

That rule however should not be read in isolation of **order 5 rule 1 of the CPR**, which provides:

10 **1 . When a suit has been duly instituted summons may be issued to the defendant-**

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

**(b) ordering him /her to appear and answer the claim on the date to be specified in the summons.**

15

Service to the defendant therefore falls under the above two specific categories. The service of documents required as provided under **Order 5 rule 2** would not apply in relation to a party as in the present case, who having already been served with summons to file a defence, refuses to comply, and in so doing ousts himself of the jurisdiction of court.

Similarly **Order 5 rule 2** cannot apply to the scenario under **Order 5 rule 1 (b)** where court summons a party to attend a hearing, the presumption being that he/she has already been served with the necessary documents.

Contrary to the applicant's view therefore, the substituted service put the applicant on notice that he had a case to defend before this court and to that extent had the necessary effect, never mind that the applicant got to know about the hearing much later.

The law presumes that the moment the notice is put out the party for whom it is intended is effectively served regardless of when or whether or not the

affected party became aware of the date after the matter has been heard and concluded. In short therefore, the time when the served party gets to learn about the date becomes inconsequential.

5 I therefore could not agree more. Counsel for the respondent had indeed opted not to apply for an interlocutory judgement against the applicant but applied to serve the applicant with hearing notices every time the case would come up, which requests court would always grant.

10 This was demonstration that all that was possible in the circumstances had been done to make the applicant aware of the proceedings and that it was its choice to stay away from the proceedings of court.

15 It therefore goes without saying that failure by the defendant to file a defence after duly receiving summons, whether or not directly issued to him/her, through an advocate, recognized agent or advocate, raises the presumption of constructive admission of the claim in the plaint. **(See also: Didi vs Namakajjo 1989 1 KALR 180).**

For the reasons I have given above, I accordingly dismiss this application, with costs.


20

  
**Alexandra Nkonge Rugadya**

**Judge**

**8<sup>th</sup> April, 2021**

25

*Delivered by email on  
12/4/2021  
  
J*