

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISC. APPLICATION NO.1445 OF 2022
(ARISING FROM CIVIL SUIT NO. 678 OF 2022)

ASSOC. PROF. AKAKUNDA BWESIGYE DENNIS ::::::::::::::::::::::::::: APPLICANT

VERSUS

HOUSING FINANCE BANK LTD ::::::::::::::::::::::::::::::::::: RESPONDENT

BEFORE: HON. LADY JUSTICE ANNA .B. MUGENYI

RULING

I have read the pleadings and submissions of both parties in this matter.

The main issue for determination before this Court is: whether there is a valid defence on Court record.

Counsel for the Applicant submitted that the Respondent did not file an affidavit in reply and therefore the application is not challenged and has been admitted by the Respondent.

However, a close look at ECCMIS reveals that an affidavit in reply was filed by the Respondent on 5/4/2023. The submission therefore that this application and the reliefs sought are unchallenged and the evidence adduced by the Applicant is admitted by the Respondent does not hold water and does not succeed.

Further as held in **Lam-Lagoro v Muni University Misc. Cause No. 7 OF 2016;** Justice Stephen Mubiru opined that

" An affidavit in reply, being evidence rather than a pleading in stricto sensu, should be filed and served on the adverse party within a reasonable time before the date fixed for hearing; time sufficient to allow that adverse party a fair opportunity to respond."

The Hon. Judge had earlier stated that:

"...whereas a Written Statement of Defence presents allegations of facts the defendant will rely on, an affidavit in reply presents evidence on oath. Affidavits are a way of giving evidence to the court other than by giving oral evidence. They are intended to allow a case to run more quickly and efficiently as all parties know what evidence is before the court. Consequently, time constraints applied to defences may be misplaced when applied to affidavits..."

From the foregoing, the filing of affidavits in reply is not limited by timelines applicable to pleadings and the Respondent having filed an affidavit in reply before the hearing date cannot be denied its right to rely on the same in this matter.

The preliminary point of law raised by the Applicant in this regard is accordingly overruled.

With regard to the main issue mentioned earlier, Order 8 rule 1 & 2 of the Civil Procedure Rules are instructive on the timelines within which a written statement of defence should be filed. Order 8 rule 1(2) states that:

" Where a defendant has been served with summons in the form provided by rule 1(i)(a) of Order v of these Rules, he or she, shall unless some other on further order is made by Court, file his or her defence within 15 days after service of the summons."

The Applicant's counsel submitted to the effect that the Applicant served summons on 23/8/2022 on the Respondent's advocates and that the Respondent completed filing of its defence by serving the same on 22/9/2022 almost a month later; and that the defendants having failed to file and serve its defence within 15 days and having

obtained no leave or enlargement of time within which to do so, the defendants defaulted in filing a defence and the same should be expunged from the record.

The Respondent, in its affidavit in reply which was not responded to by the Applicant, stated to the effect that on 1st September 2022 the Respondent by way of email instructed its lawyers through the deponent of the affidavit in reply to file defence in Civil Suit 678 of 2022 and attached the plaint and its annextures thereto. The plaint did not indicate when the same was served and neither did the instruction letter; and neither was the summons to file a defence on which the Respondent acknowledged receipt attached to the said email. Nonetheless, the lawyers of the Respondent went ahead and filed a defence on 13th September 2022 which they believed was within 15 days from date of service because they had not been made aware of summons that had been served on the Respondent on 23/8/2022.

While it is not in dispute that the Respondent bank was served with summons to file a defence on 23/8/2022, it is not evident that their counsel was served with the said summons on the said date as claimed by the Applicant. The summons itself is addressed to the Respondent bank only and the 'received' stamp is that of the said bank.

Although counsel for the Applicant submitted that counsel for the Respondent ought to have checked ECCMIS and seen the summons in issue, there is no evidence to show that the Applicant addressed and sent the said summons to counsel for the Respondent in the system especially since they are not indicated as recipients of the said summons therein.

Clearly counsel for the Respondent was not aware of the summons received by the Respondent bank on 23/8/2022. However, on receipt of the plaint and its annextures, counsel for the Respondent proceeded to file a Written Statement of Defence on 13th September 2022 within 15 days from the date they received instructions; but 7 days

from the date the defence should have been filed if they had been made aware of the date of service of summons.

This Court is inclined to believe counsel for the Respondent that the omission to attach the summons in the email that instructed them to file a defence on behalf of the Respondent bank was an error and constitutes sufficient cause for failure to file a defence in time. The Applicant has also failed to demonstrate that they served counsel for the Respondent physically or in ECCMIS with the summons as claimed in paragraph 27 of the Applicant's submissions. I agree with counsel for the Respondent that this said error should not be visited on the Respondent who still went ahead and filed its defence albeit seven days late but still within 15 days from when it instructed its lawyers to do so. I do not find any inordinate delay and negligence in the mistake of counsel to warrant visiting the said mistake on its client who diligently filed their defence upon counsel receiving instructions to do so although outside timelines set by law.

It has been brought to the attention of Court that counsel for the Respondent has filed an application for extension of time within which to file a Written Statement of Defence. Upon close scrutiny of ECCMIS, this Court has established that Misc. Application No. 0588/2023 in this regard was filed on 11/4/2023.

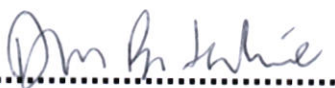
In the circumstances and by virtue of Section 33 of the Judicature Act Cap 13 and Section 98 of the Civil Procedure Act Cap 71; this Court is constrained to stay the present application pending determination of Misc. Application No. 0588 of 2023. The final determination of this application is stayed to enable all matters in controversy between the parties to be completely and finally determined and to avoid multiplicity of legal proceedings concerning the said matters.

Before I take leave of this matter, counsel for the Applicant submitted that counsel for the Respondent delayed to file the application for extension of time to file a defence i.e. from August 2022 to April 2023. In their affidavit in reply, the Respondent's counsel

contends that they at the time of filing their defence, were not aware that the summons had been extracted and served on the Respondent on 23/8/2022 but only discovered this belatedly when this application to strike out the defence was served on them. This averment was not rebutted by any rejoinder by the Applicant and can only be construed to mean that the Respondent all along knew they had a valid defence until the present application was filed in January 2023, hence explaining the time frame referred to by counsel for the Applicant. In other words, the Respondent could not have filed Misc. Application No. 0588/2023 earlier because it was under the mistaken belief that its defence had been filed within time whereas not; and acted as it did upon being served with Misc. Application 1445/2022.

This Court therefore reiterates its earlier decision to stay the present application pending resolution of Misc. Application 0588/2023 in the interest of justice.

Misc. Application 0588/2023 shall be heard on 6th June 2023 at 9:00 am.

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HON. LADY JUSTICE ANNA .B. MUGENYI

DATED:.....15/5/23.....

