**THE REPUBLIC OF UGANDA**

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

**LABOUR DISPUTE MISC. APPLN. NO. 48 OF 2019**

**ARISING FROM LDR NO.22/2018**

 **OMBADDE MOSES ………………………….. APPLICANT**

**VERSUS**

 **V.G KESHWALA&SONS LTD …………………. RESPONDENT**

**BEFORE:**

1. **THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE**
2. **THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA**

**PANELISTS**

**1.MR. ABRAHAM BWIRE**

**2.MS. JULIAN NYACHWO**

**3. MR. MICHEAL MAVUNWA**

**RULING**

**BACKGROUND**

This application is brought under Order 46 rules 1 and 2 of the Civil procedure Rules seeking review of the award of this Court made on 13/12/2018 on the following grounds:

1. That the applicant was earning a monthly salary of Ugx. 1,003,000/- and not Ugx. 150,000/-.
2. It is just and equitable that the applicant’s award is reviewed to align it to the actual salary he was earning.

The application was supported by an affidavit deponed by Ombadde Moses the Applicant and is summarised as follows:

That between May 2013 and April 2017, he was employed by the Respondent as a truck driver, earning Ugx.1,003,000/- as evidenced in Annexure “A”(NSSF statement . That in 2017, he signed an appointment letter, but he was not given a personal copy. That he was terminated while he was on his annual leave and He reported a case of unfair termination to this court. The Court decided in his favour, however the award was based on a wrong salary of Ugx.150,000/- instead of Ugx. 1,003,000/- which he was earning at the time of his termination. That it is in the interest of Justice that Court reviews its award based on the correct salary.

The Respondents on the other had filed no reply to the Application.

**REPRESENTATIONS**

The Applicant was represented by Ms. Naima Bukenya of Platform for Labour Action, Kampala and the Respondent by Mr. Asingwire Martin of Asingwire & Partners Associates and Legal Consultants, Jinja.

**SUBMISSIONS**

Before the application was heard, Counsel for the Respondent raised an oral Preliminary objection, and stated that, the application was issued on 29/04/2019, and served onto the Respondent on 12/06/2019, more than 40 days later, yet according to Order 5 r1(3) of the Civil Procedure Rules, S.I 71-1 (CPR), it ought to have been served within 21 days. He argued that, where a party failed to effect service within the 21 days from the date of issue, he or she must apply for extension of time within 15 days after the expiry of the 21 days. He cited **Bitamisi Namuddu vs Rwabuganda Godfrey, CA. No.016 of 2014,** for the legal proposition that when these timelines are not followed, the case stands dismissed. He laid emphasis on the fact that the Order does not give Court discretion to decide whether to dismiss or not dismiss the suit and the Court’s actions are dictated by the law which is mandatory and it applies to the service of hearing notices as well as Applications.He relied on **Junjju and Anor vs Madhivani Group Ltd and Anor, Misc App No 688/2015,** which was to the effect that, Applications are served the same way as hearing notices. He prayed that, in the circumstances, the application is dismissed with costs.

Ms. Bukenya Counsel for the Applicant, made her submissions in writing and stated that, the Application was served in time and the objection was only intended to delay justice for the Respondent. According to her, the Notices of Motion were issued on the 25/02/2019, they were endorsed and sealed by the Registrar on the 29/04/2019, the Applicant’s Court process server received them on 24/05/2019 and served them onto the Respondent within 21 days on 12/06/2019. It was her submission that, the delay was occasioned by misplacement of the Notices in the Court registry. She however conceded that, Order of the CPR (supra) made it a requirement for service to be effected within 21 days from the date of issue.

She argued that although the application in the instant case is dated 25/02/2019 and it was sealed on 29/04/2019, the Respondent was only able to serve the application on 12/06/2019, which was within the 21 days after it was received on 24/05/2019. She insisted that an Application which was not sealed is not an application and therefore, serving it on to the Respondent in June was not the Applicant’s fault.

According to her in **Mulagussi Vs Katabalo Misc. Appln. No.006/2016**  Order 5 rule 1 sub rule 5, was interpreted to mean that the computation of service begins to run on the date the Notices of Motion are endorsed by the Registrar, but in the instant case, the Application was served on the 12/06/2019 because it was received from the Court registry in May 2019 due to misplacement of the notices and It was duly served on the Respondent on, 12/06/2019, which was within the 21 days as seen on annexure “A”, the receipt of service.

She strongly argued that in resolving this application, Court should take into consideration Article 126(2)(e), which provides that:

*“ In adjudicating cases of both criminal and civil nature, the courts shall subject to the law apply the following principles …(e ) substantive justice to be administered without undue technicalities….”* She also cited several authorities including **Ojara vs Okwera Misc. Appln. No.0023 of 2017,**  and  **Kasirye Byaruhanga & Co. Advocates Vs Uganda Development Bank, SCCA No. 02/1997,** and **Horizon Coaches vs Edward Rurangaranga and Mbarara Municipal Council, SCCA No. 18/2009** whose holdings are to the same effect, and in addition stated that, where the adherence to technicalities may have the effect of denying a party substantive justice, the court should endeavour to invoke this provision of the Constitution.

She reiterated her earlier submission that, the Applicant in this case, exercised diligence in filing the Application for review in time, he followed up with the Court registry for the endorsed Notices so that they could be served on the Respondent in time but they were only received from the registry in May 2019 because they had been misplaced. They were served on to the Respondent on 12/06/2019, within 21 days from the date they were received from the registry. She contended that the Respondent had ample time within which to reply to the Application before 31/07/2019 the date scheduled for it to be heard by this Court.

It was her humble prayer therefore, that the application is granted and, in the alternative, if Court is inclined to find that the service was issued out of time, to allow the Respondent to file a response to the application because of the late service.

In rejoinder Mr. Asingwire reiterated his earlier submissions and refuted the Applicant’s reliance on **Micheal Mulo Mulagassi** (supra), because in that Case Kaweesa J, dismissed the application on the grounds that an Application was only valid when it was signed and sealed and the rule on non- service within the stipulated time was mandatory. His Lordship also found that the Applicant’s imputation of wrong doing on the part of the registrar was baseless.

**RESOLUTION OF PRELIMINARY OBJECTION.**

Order 5 rule 1 (2) of the Civil Procedure Rules provides that:

1. ***When a suit has been instituted a summons may be issued to the defendant-***
2. ***ordering him or her to file a defence within a time specified in the summons***
3. ***ordering him or her to appear and answer the claim on a day to be specified in the summons.***

**2) *“Service of summons issued under sub rule (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 court, made within fifteen days after the expiration of the twenty-one days showing sufficient reasons for the extension.”***

**JJunju & Anor va Madhvan Group Ltd( Misc. Applc. No 6880f 2015,** settled the position of the law regarding service of Applications, whether by Chamber Summons, Notices of motion or Hearing Notices as follows:

**“… *the position of the law is that Applications, whether by Chamber Summons or Notices 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 CPR…” This position was taken in the case of Amdan Khan vs Stanbic Bank (U) ltd HCMA 900/2013, in which this court followed the supreme Court decision in Kanyabwera vs Tumwebwa[2005] 2 EA 86 where, at page 94 of the Judgment, Oder JSC(R.I.P) held as follows:“What the rule stipulates about service of summons in my opinion applies equally to service of hearing notices.” [underlined for emphasis.***

It is trite that an Application is only valid when it is signed and sealed by the Registrar (see **Micheal Mulo Mulagassi** (supra) and It must be served onto the Respondent within 21 days from the date of issue. The computation of time therefore, begins on the date of issue and for avoidance of doubt that is on the date it is signed and sealed by the Registrar.

It is not disputed that in the instant case, the Notices of Motion were filed on the 25/02/2019, they were signed and sealed by the Registrar on the 29/04/2019 and according to Counsel for the Applicant, the Court process server received them from the registry on 24/05/2019 and served them onto the Respondent 12/06/2019 which in her view was within 21 days.

It is clear that service of the Notices on 12/04/2019 after they were signed and sealed by the Registrar on 24/04/2019, was rendered more than 21 days from after the date of issue.

We do not agree with the contention of Counsel that, the Application having been filed on the 25/02/2019, the Applicant diligently followed it up and failed to serve until 24/05/2019 when he received them from the registry, because they had been misplaced in the registry, given that no evidence was adduced to show that the Applicant actually took any steps which proved that the Notices were misplaced or that he protested the delayed endorsement on account of the purported misplacement in the registry.

Order 5 r1(3) provides that***:***

***“where summons have been issued under this rule and***

***a) Service has not been affected within twenty-one days from the date of issue; and***

***b) There is no application for an extension of time under sub- rule (2) of this rule ; or***

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

In **Bitamisi Namuddu vs Rwabuganda Godfrey, (supra),** Mewsigye JSC(as he then was) in his lead Judgement held that:

 ***“O5 r 1 (3) clearly states that where the 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 stands dismissed without notice. …The provision does not give court discretion to decide whether to dismiss or not to dismiss the suit. The Court’s action is dictated by the law and it is mandatory …”***

There wasno evidence that the Applicant had invoked the Order 5 rule 1(3) to apply to extend time within which to serve the notices within 15 days after the expiration of the 21 days. Given the mandatory wording of Order 5 r1(3)(supra), the argument by Counsel for the Applicant that Court should apply Article 126(2)(e) of the Constitution of Uganda (ss Amended), to this Application cannot stand. For emphasis , Article 126(2) (e) provides that:

*“ In adjudicating cases of both criminal and civil nature, the courts* ***shall subject to the law*** *(emphasis ours) apply the following principles …(e ) substantive justice to be administered without undue technicalities…”*

 The timelines as stipulated under Order 5 are mandatory. In the circumstances, the Applicant’s failure to apply for an extension to serve the Application on to the Respondent out of time as prescribed under Order 5 r (1) (3),(supra),renders the Application incompetent before this court. It is therefore dismissed, with no orders as to costs.

Delivered and signed by:

**1.THE HON. CHIEF JUDGE, ASAPH RUHINDA NTENGYE …………….**

**2.THE HON. JUDGE, LINDA LILLIAN TUMUSIIME MUGISHA ……………..**

**PANELISTS**

**1.MR. ABRAHAM BWIRE ……………..**

**2.MS. JULIAN NYACHWO ……………….**

**3. MR. MICHEAL MAVUNWA ……………….**

**DATE: 21/AUGUST/2020**