

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT MBALE
MISCELLANEOUS APPLICATION NO. 148 OF 2022.
ARISING FROM HCCS NO. 001 OF 2020**

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1. **ALI OWOR**
2. **OPUWA GEORGE** **APPLICANTS/APPELLANTS**
*(The Administrators of the Estate
of the late Iddi Ogango Ali)*

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VERSUS

**THE REGISTERED TRUSTEES
OF TORORO DIOCESE** **RESPONDENT**

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BEFORE: HON. LADY JUSTICE MARGARET APINY

RULING

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This is a ruling on an application brought by motion under the provisions of Order 50 rule 7 of the Civil Procedure Rules for orders that the dismissal of HCCS No. 01 of 2020 by the deputy registrar of the court on 13th April 2022 be set aside, the summons for directions filed and served on the respondent be heard and the main suit be fixed for the hearing and that costs of this application be provided for.

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The grounds of this application are contained in the affidavit of Mr. Opuwa George, the 2nd applicant/appellant deponed on his and on behalf of the 1st applicant / appellant and filed in support of the application and are briefly that on 15th February 2022, the main suit came up for hearing of the summons for directions as had been taken out by their new lawyers' M/S Alliance Advocates, but counsel for the respondent stated that he could not proceed since he had written a letter of objection to the continuance of the suit.

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He further averred that the deputy registrar said he was going to refer the matter to the judge to decide on the way forward and since then they have been waiting for the way forward and that no hearing was conducted in the matter whether before the deputy registrar or the judge.

That they instead received a ruling Notice on the matter that had been fixed for hearing on 13th April 2022 at 11.00am and that on that day and without giving them a hearing, the deputy

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registrar told them that according to the letter written by the respondent's lawyers, the suit had abated and went ahead to decide so and awarded the respondent costs. Copy of the order marked 'B' was attached. He averred that they were not given opportunity to give their side of the story before the decision by the deputy registrar.

5 He averred further that after the pleadings were closed in the main suit, they were given time to file an application for a temporary injunction and proceedings were conducted and concluded and a ruling made in favour of the applicants. A copy of the said order was attached marked annexure 'C'.

10 That immediately after conclusion of the injunction hearing, the matter went for mediation hearing before His Worship Kunikina and parties failed to agree. That the requirement to take out summons for directions was within the knowledge of their counsel Wegoye then and his mistake of not taking out summons should not be visited on them.

15 He contended that his suit has never been redundant and the only time of redundancy was during the covid lockdown. That immediately after the lifting of the lockdown and after handling the interlocutory applications in the matter, their new lawyers, M/S Alliance Advocates took out the summons for directions which were issued by the deputy registrar of this court for hearing on 15th February 2022 with the purpose of kick starting the hearing process in the matter.

20 He contended that the respondents did not show how they would be prejudiced by the summons for directions that was fixed for hearing and further that the applicants are interested in pursuing their claim since as the suit has not been redundant in any way to warrant its dismissal on the grounds that summons were not taken out within 28 days.

25 The respondent opposed the application through an affidavit in reply deponed by Rev. FR. Centurio Olaboro, the Secretary for the Land Board of the respondent who averred and contended that he was informed by his lawyers of M/S Ssemwanga, Muwazi & Co. Advocates that having filed this suit two years ago, the applicants left the suit unattended to and they filed the letter to seek this Honorable court's orders that this suit abated.

30 That on 15th February 2022 their lawyers intimated to court that they had a preliminary objection which was made in the letter addressed to this court and that he was informed by their lawyers that there was a hearing on the objection raised by the respondent and both counsel made oral submissions and it is not true therefore that there was no hearing.

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That after both counsel made submissions the file was returned to the learned judge for a ruling and the trial judge returned the file back to the registrar who issued ruling notices and delivered the said ruling based on the oral submissions of counsel made on 15th February 2022.

5 That he was further informed by their lawyers that the actions of counsel Wegoye are the direct actions of the applicants and as such they cannot distance themselves from any procedural flout.

10 He contended that when this suit was filed in 2020, the same remained redundant up to 15th February 2022 when it was hurriedly fixed after their advocates had filed a letter seeking this honorable court to declare the suit abated and that he has been advised by their lawyers that this application is misadvised, a wastage of this court's valuable time and an abuse of court process since the applicants omitted a vital statutory procedural requirement which consequentially led to the suit abating.

15 That he was further informed by their lawyers that the orders sought in this application cannot be granted in an application such as this one and that there is no valid summons for directions on record.

20 The applicants filed their rejoinder in which they reiterated their earlier averments save for averments that the summons for directions issued on 1st December 2021 attached as annexure R4 is an act showing that the suit was not left unattended to for a period of 2 years and the introduction of the mediation report arising from Mediation Cause No. 4 of 2020 marked R5.

Representation

At the hearing of this application, the applicants were represented by Mr. Brian Othieno. Counsel for the respondent was absent.

25 Since there was evidence of service by way of an affidavit of service filed on record and counsel for the applicants having undertaken to effect service on the respondents of this court's directions to parties, parties were directed to file written submissions.

Both parties complied and I have had the opportunity to read and consider them in the determination of this application.

30 In his submissions, counsel for the applicants/ appellants based his submissions on three areas;

1. The Applicants were not given a hearing before dismissal/ abatement of their suit.
2. The requirement to extract Summons for Directions within 28 days after filing of the written statement of Defence was no longer applicable in the circumstances.
- 5 3. The suit has from the onset not been redundant or dormant to warrant the abatement / dismissal of the same.

10 In his reply to the applicants' submissions, counsel for the respondent raised two issues in his submissions, i.e., whether the dismissal of HCCS No. 01 of 2020 by the deputy registrar of the court on 13th April 2022 should be set aside and whether the summons for directions filed and served on the respondent be heard and the main suit fixed for hearing.

Suffices to note that though counsel for the respondent raised the two issues in their submissions, counsel observed that the applicants had highlighted each ground and discussed the same and adopted to reply in the same manner.

15 This court will therefore determine the issues which have been summarized as follows:

- 1 Whether the Applicants were given a fair hearing.
- 2 Whether the suit was redundant.
- 3 Whether the suit abated.

Submissions

20 Issue 1 Whether the Applicants were given a fair hearing.

Applicants' submissions

25 Counsel for the applicant contended that as detailed under paragraphs 2 to 7 of the affidavit in support of the application, at the hearing of 15th February 2022, counsel for the respondent instead referred to a letter they had written to the trial Judge (attached as Annexure "A" to the affidavit in support) seeking orders that the suit is struck out on the grounds that the suit had abated.

30 That the said letter was written to the trial Judge, the Hon Lady Justice Margaret Apiny and the deputy registrar informed parties that he was referring the matter to the trial Judge, which he did. He therefore contended that no hearing was conducted since it was a matter to be handled by the trial Judge.

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It was further submitted that while the applicants waited for the court's decision, they received a Ruling Notice in the matter fixed for 13th of April 2022 at 11:00 am and on that date, the deputy registrar simply read the letter, agreed with it and ordered that the suit had abated.

5 Counsel stated that it has been held severally that a decision made without allowing a party affected by it to be heard is no decision at all. He relied on articles 28 and 48 of the Constitution of Uganda and argued that the applicants were not granted a fair hearing.

Respondent's submissions

10 For the respondent it was submitted that the summons for directions was extracted by the applicants and fixed for the 14th December 2021. Counsel further submitted that on that day, the learned registrar was indisposed and the same was adjourned twice until both parties attended court on the 15th February 2022.

15 Counsel averred that on the 15th of February 2022, he informed the court that the respondent had a preliminary objection to make regarding the abatement of this suit. He made reference to the letter dated 6th December 2021 that had been filed in the registry of this court on 7th December 2021, which sought orders of abatement since the applicants had left this suit unattended for a period of over a year.

Applicants' Submissions in rejoinder.

20 Counsel for the applicants contended that the matter was before the deputy registrar for hearing of the summons for directions. That the registrar agreed with the respondent and forwarded the file to the trial Judge without any hearing.

According to counsel, the file was forwarded to the trial Judge for directions in the matter following counsel for the respondent's request and not to deliver a ruling following a hearing before the registrar. He therefore concluded that no such hearing took place.

Issue 2 Whether the suit was redundant.

25 Applicants' submissions

30 Counsel for the applicants argued that the applicants filed an application for a temporary injunction vide Misc. Application No. 007 of 2020 which was dismissed on a technicality on 19th February 2020 and Misc. Application No. 043 of 2020 was subsequently filed and the application was granted on 14th July 2020. He submitted that these applications were conducted inter-parties and contested by the respondent.



Counsel maintained that the matter went up for mediation and was registered as mediation Cause File No. 04 of 2020 between the parties. He stated further that mediation was done before His Worship Kunikiina David who conducted a hearing on 25th September 2020 and mediation failed and that the Mediation Report to that effect is attached as annexure R5 to the affidavit in rejoinder.

That the applicants even fixed the suit for hearing on the 18th March 2021 as shown by the hearing notice marked 'D' which in his view is evidence showing that the suit was not dormant or abandoned by the Plaintiff.

Respondent's Submissions

For the respondent it was argued that the application for a temporary injunction was filed vide Misc. Application No. 007 of 2020 without a valid supporting affidavit which by itself rendered it fictitious and no application was filed on record. He further contended that the mediation referred to by the applicants is one that was done without a reference by the trial judge but one made pursuant to the requirement under *Rule 4(1) & (5) of the Judicature (Mediation) Rules, S.I No. 10 of 2013*.

Issue 3. Whether the suit abated.

Applicants' submission.

Counsel for the applicants contended that under Order X1A rule 1(a), an opportunity may be given to parties to have all interlocutory matters in the suit to be heard before the main hearing and according to him all this happened in this matter. Counsel argued that the Honourable court gave the said opportunity and the application for the temporary injunction was heard and granted and that by this time, the 28 days' requirement was no longer applicable since the proceedings were being handled by the court.

Counsel submitted that the matter went up for mediation and was registered as Mediation Cause File No. 04 of 2020 between the parties. That the mediation was done before His Worship Kunikiina David who conducted a hearing on 25th September 2020 and mediation failed. He referred to the Mediation Report attached as Annexure R5 to the Affidavit in rejoinder.

Counsel argued that order X1A rule 1(4) of the Civil Procedure (Amendment) Rules, 2019 creates an exception to the requirement to extract summons within 28 days of filing of a defence or last reply. He contended that the requirement does not apply to actions in which

a matter has been referred to an official referee or arbitrator. He relied on the case of **Carlton Douglas Kasirye vs Sheena Ahumuza Bageine, HCMA 150 of 2020** where it was held that;

5 *"It is clear to me that by the role played by a mediator, he /she performs the function of an official referee of the court..... A Court accredited mediator, therefore, fits well within the meaning of an official referee as used under Order XIA Rule 1(4) (c) 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 28 days provided for under sub-rule (2) of Rule 1 of Order X1A. The suit would therefore fall under the exceptions provided for under sub-rule (4).*

10 It was counsel's argument that the applicants' suit having been referred for mediation cannot by any stretch of the imagination be taken to have abated on the grounds of failure to extract summons within 28 days since it fell under the exceptions provided by the very law.

Respondent's Submissions

15 Counsel for respondent submitted that the authority of Carlton Douglas Kasirye vs. Sheena Ahumuza Bageine (supra) is distinguishable from the facts at hand in that in that case the matter had come up before the trial judge who referred the case for mediation on the consent of both parties to the case.

According to counsel, no reference was ever made to the said mediator to constitute the said mediator as a referee properly envisaged by Order X1A rule 1 (4).

20 Counsel further submitted that this case has never been referred to the mediator by the trial judge but rather the said appearance was made under *rules 4(1) & (5) of the Judicature (Mediation) Rules, S.I No. 10 of 2013* with a summary filed under rule 5 and not by a court reference.

25 Counsel relied on the provisions of Order XIA rule 1 (2) of the Civil Procedure (Amendment) Rules, 2019 which is to the effect that where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18 (5) of Order VIII of these Rules."

30 He further cited Order XIA rule 1 (6) of the Civil Procedure (Amendment) Rules, 2019 and concluded that the above provisions are couched in mandatory language and non-compliance with the same leads to abatement of the suit and that a suit that has abated is no more by operation of the above law.



Applicants' Submissions in Rejoinder.

In his submission in rejoinder counsel for the applicants relied on the provisions of Order XIA rule 1(4) (e) and contended that the rule does not specifically state that the matter has to be referred to the mediator by the trial Judge. He contended that the respondent has not shown
5 any authority or cited any law which states that the exemption under Order XIA rule 1 (4) applies to cases only referred to mediation by a Judge.

Determination of Court.

Issue 1 Whether the Applicants were given a fair hearing.

Articles 28 and 44 of the 1995 Uganda Constitution provide for a non derogable right to a fair
10 hearing.

Order XIA rule 1 (2) of the Civil Procedure (Amendment) Rules, 2019 provides that;

“Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules.”

15 Order XIA rule 1 (6) of the Civil Procedure (Amendment) Rules, 2019 is to the effect that if the plaintiff does not take out a summons for directions in accordance with sub-rules (2) or (6) the suit shall abate.

In the instant case, the summons for directions was taken out on the 1st of December 2021 way after the time in which they were supposed to be taken out consequently, the suit in
20 my view could abate subject to the exceptions.

In the case of **Seruwu Jude vs. Swangz Avenue Ltd HCCA No. 0039 of 2021**, it was held that the court has to look at all the circumstances of the case before it can conclude that the suit has abated. The court has the discretion in the matter which has to be exercised judiciously. Justice Mubiru stated that;

25 *“The automatic abatement of suits under Order 11A Rule (6) when invoked and applied automatically will be counterproductive because under Order 11A Rule (7), where a suit has abated the plaintiff may, subject to the law of limitation, file a fresh suit. The court will then be inundated with repeat suits over the same subject matter. Consequently, the suit shall be abated by the court under Order 11A Rule (6) only when it is satisfied that such
30 an order is necessary to save the time and expense of the trial then the Plaintiff’s suit*

cannot progress with the dispatch which the circumstance of the suit and the available court resources require. This will inevitably be determined on a case-by-case basis after hearing the parties." (Emphasis added)

5 As per paragraphs 4 and 5 of the affidavit in support and paragraphs 5 and 6 of the affidavit in reply, when the parties appeared on the 15th of February 2022, the registrar intimated to the parties that he was referring the file to the trial judge for a ruling.

Counsel for the respondent submitted that both parties attended court on 14th December 2021, but the registrar was indisposed. That parties again attended court on the 15th of February 2022.

10 Counsel further reported that when parties attended court on 21st February 2022, they intimated to the deputy registrar that they intended to raise a preliminary objection against the summons for directions and notified the registrar also of a pending application by way of a letter, dated 6th December 2021 seeking an order for abatement.

15 He maintained that the deputy registrar allowed both parties to submit orally and the order was allowed in a ruling delivered by this court on 13th April 2022.

As per the proceedings of 21st February 2022, the deputy registrar stayed the hearing of the summons for directions upon request by counsel for the respondent to have the file forwarded to the trial judge for determination of their application made by way of a letter dated 6th December 2021 seeking an order for abatement of the suit.

20 Again from the proceedings of 10th March 2022, it is evident that the deputy registrar after informing parties about the guidance by the trial Judge fixed the matter for 13th April 2022. The records further show that when the matter came up on 13th April 2022, the deputy registrar in the presence of parties upon study of the file, agreed with counsel for the respondent and dismissed the suit for having abated for failure to take out summons for
25 directions within 28 days of filing written statement of defence or last reply.

In view of the above, I am convinced that parties were given a hearing.

30 However, before I take leave of this issue of according parties a fair hearing in the event of abatement of suits, I must state that when the Civil Procedure Rules was amended by the insertion of Order X1A which introduced summons for directions, the said provision did not specify the procedure under which the affected suit would abate. What is provided under rule 1 (6) is that the suit shall abate. This court has taken judicial notice of the common practice

that has been adopted by advocates and parties by writing a letter to either the Registrar or the trial judge to have the matter abated.

I further observed that often times the concerned judicial officers have been abating suits by noting on the said letters that the suit has abated and thereafter the defendant extracts the order.

With the utmost respect, I find that the procedure does not give the plaintiff an opportunity to be heard in the process of abating the said suit at the initiative of the defendant.

It is against that background that I consider it fit and proper to suggest the following;

1. Order XIA may be invoked by court on its own motion and abate a suit.
2. Upon receipt of a letter requesting court to abate the matter, the court should summon the plaintiff(s) to show cause why the suit should not be abated and, upon being satisfied that the suit is one that must be abated, proceed to abate the same.
3. A Defendant who is desirous of having a suit abated may consider filing an application under Order 52 for an order that the suit be abated as provided under order XIA rule 1 (6) of the Civil Procedure (Amendment) Rules, 2019.

In my view unless the above procedure is adhered to, suits will continue to be abated without the knowledge of the plaintiff(s) and without a record of proceedings under which the said suit was abated.

Issue 2 Whether the suit was redundant.

According to the record the suit was filed on 6th January 2020 and the written statement of defence and counterclaim was filed on the 22nd of January 2020. A reply to the written statement of defence and counterclaim was filed on 13th of February 2020.

In their affidavit in rejoinder, paragraphs 3 and 4 thereof and annexures 'C' and 'D' of the affidavit in support of the application, the applicants averred that Misc. Application No. 007 of 2020 was filed and it was dismissed on 19th February 2020 on grounds that it stood with no affidavit in support and that a temporary injunction was subsequently issued on 14th July 2020 in Misc. Application No.0043 of 2020 in the presence of both parties and their counsel.

The records indeed indicate that an application for a temporary injunction was filed on 13th January 2020 and the same was dismissed on technicality on the 23rd January 2020.

The record further indicates that the applicants filed a fresh application for temporary injunction on the 17th of February 2020 and the respondent filed an affidavit in reply on 3rd of

March 2020. Available information on record indicates that a hearing notice was issued on the 12th of June 2020 for hearing of the application on 17th of June 2020 and the application was allowed and an order to that effect issued on 14th July 2020.

5 The applicants state under paragraph 8 of their affidavit in rejoinder that this matter went for mediation under Mediation Cause No. 04 of 2020 and the mediation report marked R5 shows that a hearing was held on 25th September, 2020 and the same was reported to have failed.

10 Under paragraph 14 of the affidavit in support, the applicants averred that after the lifting of the lockdown and handling of interlocutory matters, their new lawyers, M/ S Alliance Advocates took out summons for directions, which was issued by the deputy registrar of this court for hearing on 15th of February 2022.

Going by the plaintiffs' averments, it would seem that the last action on this matter was on 25th September 2020 where mediation was reported as failed (see mediation report marked as R5).

15 For those reasons, it is the considered view of this court that the matter remained redundant till 1st of December 2021 when the plaintiff's new lawyers, M/S Alliance Advocates took out summons for directions.

Issue 3 Whether the suit abated.

Order XIA 1 (2) of the Civil Procedure (Amendment) Rules, 2019 provides that;

20 *"Where a suit has been instituted by way of a plaint, the plaintiff shall take out summons for direction within 28 days from the date of the last reply or rejoinder referred to in rule 18(5) of Order VIII of these Rules."*

From the wordings of the above provisions, it can be deduced that summons for directions should be taken out within 28 days from the date of the last reply for purposes of preparing for scheduling and to deal with any interlocutory applications among others.

25 It is stipulated under Order XIA rule 1 (6) of the Civil Procedure (Amendment) Rules, 2019 that; *"If the plaintiff does not take out a summons for direction in accordance with sub rules (2) or (6) the suit shall abate.*

However, there are exceptions to taking out summons for directions, which ought to be taken into consideration.

30 Order XIA rule 4(e) of the Civil Procedure (Amendment) Rules, 2019 provides that;

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'This rule applies to all actions instituted by way of plaint, except an action in which a matter has been referred for trial to an official referee or arbitrator'.

Under paragraph 8 of the affidavit in rejoinder, the applicants averred that the matter was referred for mediation before His Worship Kunikiina David who conducted unsuccessfully
5 Mediation Cause File No. 4 of 2020 on 25th September 2020. A mediation report marked as R5 was attached.

Under the circumstances therefore, it is imperative to establish whether the mediation process the applicants relied on qualifies as an exception under Order XIA rule 4(e) of the *Civil Procedure (Amendment) Rules, 2019*.

10 His Lordship, Justice Wamala Boniface in **Misc. Application No. 150 Of 2020 Carlton Douglas Kasirye v Sheena Ahumuza Bageine a.k.a Tash**, while relying on the definition of a referee in Black's Law Dictionary, 5th Edition, p. 1151 and the definitions of a mediation and a mediator as provided under the Judicature (Mediation) Rules, S.I No. 10 of 2013, where
15 "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 and "Mediator" as "a person eligible to conduct mediation under these Rules", [Emphasis added] held that;

20 *"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..... A court accredited mediator, therefore, fits well within the meaning of an official referee as used under Order XIA Rule 1(4) (c) 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 28 days provided for under sub-rule (2) of Rule 1 of Order X1A. The suit would therefore fall under the exceptions provided for under sub-*
25 *rule (4).*

Counsel for the applicants relied on the case of ***Carlton Douglas Kasirye vs Sheena Ahumuza Bageine a.k.a Tash, HCMA 150 of 2020 (supra)*** and contended that the applicants' suit having been referred for mediation cannot by any stretch of the imagination be taken to have abated on the grounds of failure to extract summons within 28 days since it
30 fell under the exceptions provided by the very law.

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The applicants stated under paragraph 8 of the affidavit in rejoinder that this matter went for mediation under Mediation Cause No. 04 of 2020 and the mediation report to that effect marked as R5 shows that a hearing was held on 25th September, 2020 and the same failed.

5 Rule 8 of the Judicature (Mediation) Rules, 2013 is to the effect that civil actions referred to mediations under the said rules should be completed within sixty days from date of commencement of mediation.

10 Although the applicants have produced evidence by way of a mediation report under case File No. 01 of 2020, stated to have been conducted by Kunikina David, a Magistrate on 25th of September 2020 and the mediation was reported as failed, there is no indication as to who and when the matter was referred to the mediator

In my view, in the absence of evidence of who and when parties were referred to mediation, the only conclusion this court would arrive at is that this matter was never referred to mediation as per the Judicature (Mediation) Rules, S.I No. 10 of 2013 as the applicants claim.

15 It is therefore the finding of this court that the mediation report relied on does not meet the exception of the official referee provided under Order XIA rule 1 (4)(e) of the Civil Procedure (Amendment) Rules, 2019.

Since order X1A rule 1(6) is couched in mandatory terms it follows therefore that by the time the impugned order of the registrar of this court dismissing Civil Suit No. 001 of 2020 was made on the 13th of April 2022, the said suit had abated.

20 This application is accordingly dismissed with no order as to costs.

I so order.

Dated at Mbale this 19th day of June 2023.

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MARGARET APINY
JUDGE



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