

UGANDA / JUDGMENT

Mwesigye v Ondo (Ma No. 306 of 2012) [2013] UGHCCD 69 (22 May 2013)

[2013] UGHCCD 69

COURT

HC: Civil Division (Uganda)

CASE / FILE NUMBER

Ma No. 306 of 2012

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(CIVIL DIVISION)****MA NO. 306 OF 2012**

(Arising from Misc. Cause No. 103 of 2011)

DR. FRANK MWESIGYE ::::::::::::::::::::::::::::::::::: APPLICANT**VERSUS****HON. DR. CHRISTINE ONDOA ::::::::::::::::::::::::::::::::::: RESPONDENT****BEFORE: HON. JUSTICE ELDAD MWANGUSYA****RULING**

This application was brought under Section 9(b) of the Civil Procedure Act and Order 52 rules 1, 2 and 3 of the Civil Procedure Rules for orders that;

1. The respondent be committed to civil prison for contempt of the orders of the High Court
2. A declaration be made that the respondent's decision contained in her letter MH/NDA/159 of 3rd April 2012, is null and void having been made ultra vires and in contempt of the ruling of this court
3. Costs for the application

The grounds of the application are contained in the affidavit of DR. FRANK MWESIGYE the applicant herein but are briefly:-

1. This court delivered a ruling in Miscellaneous Cause N.103 of 2011 on 29th March, 2012

2. That on 03/04/2012, the respondent without any colour of right or authority attempted to reverse the ruling of the court by issuing to the applicant a letter MH/NDA/159
3. The action of the respondent was taken in her personal capacity as she had no legal authority to issue the said letter in any other capacity
4. That her action amounted to blatant contempt of court
5. That the decision of the respondent contained with the said letter be declared null and void
6. That the respondent be committed to civil prison for a period of six months for contempt of court

The applicant's affidavit in support of the application to which the court judgment is annexed emphasises the failure by the respondent to honour/ enforce the court orders to which she is liable in contempt of court

In reply, Dr. Ondo D. J Christine, the respondent and Minister of Health averred that the Attorney General's letter dated 8th May 2012 attached to the applicant's application was in response to a letter from the applicant's advocates and ignored a letter written by NDA's advocate over the same letter. She went ahead to state that the Attorney General did not have the right to advise NDA, as it (NDA) was not legally represented by the AG.

She further averred that contrary to the applicant's claim, the decision communicated to applicant in her letter vide MH/NDA/159 was made in the respondent's official capacity as the appointing authority; this letter is independent of the main cause and premised on negating, reversing, halting or otherwise making ineffectual the ruling therein; is a valid decision that has not been challenged in any competent proceeding and does not in any way constitute contempt of court.

She also averred that there is a pending appeal vide Civil appeal no.74 of 2012 in the Court of Appeal and an interim order to stay execution pending determination of the appeal vide Civil Application No.78 of 2012

When the parties appeared before court for hearing 3 issues were raised i.e.

1. Whether the respondent's decision contained in her letter Ref MH/NDA/159 dated 03/04/2012 is null and void for having been made ultra vires
2. Whether the decision of the Minister was in contempt of the court ruling
3. Remedies available
4. Costs

The parties were allowed to file their written submissions by 12/01/2013 and the rejoinder if any by 16/04/2013.

Representation

Mr. Kenneth Kakuru of M/s Kakuru & Co. Advocates appeared for the applicant while Mr. Tibaijuka of M/s Tibaijuka & Co Advocates appeared for the respondent.

Mr Kakuru contended that the respondent neither removed nor dissolved the interim Board as the court had earlier on found that the Minister had no power to dissolve the old Board and her actions were *ultravires*. As such the failure/ refusal by the respondent to comply with the court order constituted contempt of court.

The law relating to contempt of court has been discussed in a number of authorities, for instance, **Stanbic Bank (U) Ltd & Anor v The Commissioner General, URA MA 42 of 2010** where Mulyagonja J cited with approval the definition of contempt of court as set out by Salmon J in the English case of **Jenison V Baker (1972)**¹ All ER 997 at page 1001;

.....it may, as in the present case, consist of refusing to obey an order of court...

As to whether the respondent was contemptuous of the court order, Mr Kakuru contended that the respondent's action were *ultra vires* of the court order which stated that the action of dissolving the National Drug Authority Board was null and void. The purpose of the court order was to protect the integrity of NDA which had been violated by the respondent's action, thus by keeping the interim board and keeping the applicant out of office was to continue with the status quo that existed prior to the order. It was also his contention that the act of dismissing the applicant retrospectively on 2nd/04/2012, the respondent was attempting to validate the acts and decisions of the interim board from 15//07/2011 on wards yet the same had been declared null and void by court.

Counsel went ahead to state that it is trite law that a party who knows of an order, whether null or regular or irregular cannot be permitted to disobey it; see **Stanbic bank (U) Ltd & Anor v The Commissioner General, URA (supra)** it is immaterial that a person is not party to court proceedings, he/she may be held in contempt; see **Attorney General, Kiruhura District local Government v Electoral Commission and George Ruyondo HCMA No.35 of 2012** and **Housing Finance Bank Ltd & Anor v Edward Musisi CA No.158 of 2010**. Counsel maintained that even if the respondent was not party to the original court proceedings, she can nonetheless be held in contempt for disregarding it as it was an order in rem and not in persona.

Mr Kakuru cited a host of authorities i.e. **Re Munhemeso Supreme court of Zimbabwe (1994)** 1 LRC 282; **R v Big M Drug Mart Ltd, supreme court of Canada (1985)** 18 DLR (4th) 321 at 374; **Abuki & Anor v AG constitution petition No.2 of 1997**; **Bennet Coleman and Co. Ltd v Union of India (1973)** Sc 106 at 108; which with due respect I have not found relevant in the case before me.

Counsel further contended that the effect of the respondent's decision was to block the implementation and realisation of the orders of court. It enabled an interim board to remain in place where the court had declared its existence null and void; this in effect has the effect of blocking the administration of justice.

Mr Kakuru invited court to grant punitive remedies to the tune of shs. 50 million and that the respondent be committed to civil prison for a period of two weeks.

In reply, counsel for the respondent raised two preliminary matters of law that that he invited court to deliberate upon before delving into the merits of the application; i.e.

1. Whether the applicant's application is tenable when the respondent has never been served with the same
2. Whether the applicant is entitled to make submissions outside his pleadings.

On the first preliminary point of law, Mr Tibaijuka contended that much as the respondent filed an affidavit in reply to this application, no service of the application had been effected on the respondent. He contended that he only got information about the application when he had gone to the Civil registry to which he made a copy and took it to NDA; and that the respondent used the copy she had secured from NDA to give instructions to him/ the advocate. In that regard, he contended that the filing of a defence by the defendant should not be treated as a waiver by him or her of any irregularity in the summons or service of summons. It is trite law that failure to serve process where such service is required, is a failure which goes to the root of our conception of the proper procedure of litigation; see *Craig v Canseen* (1943)1 All ER 108. On this basis, counsel invited court to strike out the applicant's application with costs

As to whether counsel could make submissions outside his pleadings; Mr Tibaijuka contended that there are only two grounds on which the application is based of which one, of them touching on the issue of appeal was abandoned by Mr. Kakuru. He contended that the applicant sneaked into something new, that is, the applicant's submission that by failing to reinstate the old board with him as the chair, the respondent has thereby obstructed justice and committed contempt of court. Mr Tibaijuka maintained that this submission is not based on the applicant's pleading. It is trite law that an applicant is bound by his pleadings and is legally barred from seeking any relief or remedy not founded on those pleadings; *Rwabinumi v Bahimbisomwe SCCA No.10 of 2009*.

Turning to the merits of the application Mr. Tibaijuka contended that in the event that the communication in the letter in issue was legally flawed, then it constituted a fresh cause of action that warranted an independent action to determine it; it is difficult to see how the applicant can pursue and get such a substantive remedy in an interlocutory application, as in the present case.

Counsel further contended that much as the learned judge made it clear that the dissolution of the Board was null and void, the question of the applicant having been dismissed did/does not arise. The impugned letter was addressed to the applicant clearly informed him of the termination without any camouflage. Counsel further contended that declaring the said letter null and void would have the effect of giving the applicant a remedy on his private claim arising

from contract, which he would never have got on judicial review application but in an ordinary suit; see *UTODA v KCCA HCMC NO.137/2011*. Counsel went ahead to state that the applicant's present complaint arose from a separate action directed against him personally; the original main cause having arose from the respondent's action of dissolving the Authority and appointing a new Board. He should not have instituted contempt of court proceedings but a new action altogether.

As to whether the minister was in contempt of court; Mr. Tibaijuka contended that in judicial review court cannot substitute its own decision and impose its own conditions, but must leave this to the decision making body, the applicant cannot therefore indirectly seek to have this court substitute its own decision for that of the respondent arising out from judicial review proceedings. Furthermore, the applicant in the 1st issue sought to have the decision of the respondent communicated in the impugned letter declared null and void; this means that the applicant's action for contempt of court was premature as the decision in the said letter has never been declared so. It is also clear from the record that the interim Board gave instructions to the respondent's advocate to appeal against the orders from which the alleged contempt of court proceedings arise.

Counsel further contended that the respondent was never served with the Ruling nor the extracted court yet it was not disputed that she was never a party to the proceedings, additionally the correspondences attached to the applicant's pleadings were written after the applicant's dismissal and are there inconsequential and ex post facto. He cited *Muhumuza Hillary V Keith Kalyegira & Anor HCMC No.364 of 2010* for the preposition that no party is entitled to an order or remedy which affects another party before or outside that court without due service.

Much as the Attorney General in a letter dated 8/5/2012 represented that the court had quashed the respondent's decision; Mr. Tibaijuka contended that this was a gross misrepresentation as no order of certiorari was ever made by the court to quash any decision. The applicant through contempt of court proceedings is ingeniously trying to get a remedy which was never granted in the main cause, i.e. the remedy of reinstatement yet there was never any order to this effect. It was also counsel's contention that the authorities cited by the applicant are distinguishable from the instant authority in as much as there is no contempt of court orders in the instant application.

Counsel contended that the authorities cited by the applicant are distinguishable from the instant authority in as much as there is no contempt of court order in the instant application.

Regarding the remedies available, Mr Tibaijuka contended that the applicant did not **leal**

d any evidence that would warrant the award the grant of punitive damages nor committal into civil prison of the respondent. The cases cited by Mr. Kakuru are on remedies are likewise distinguishable, he thus invite court to dismiss the application with costs.

I have considered the able submission of counsel on the preliminary point and in my view where a party has not been served but has like in this case defended the action and participated in the trial in which she addressed court in support of her case by way of written submissions I would find that the non service is not fatal. No prejudice has been occasioned to her and I would overrule the preliminary objection.

The law on contempt of court has been discussed in a number of authorities.

The term contempt of court has been defined in **Black's Law Dictionary, 7th Edition** as; **conduct that defies the authority or dignity of the court.**

It was also defined in **Stanbic Bank (U) Ltd & Anor v The Commissioner General, URA MA 42 of 2010** arising from Civil Suit No. 479 of 2010 where Justice Mulyagonja based her definition on Halsbury's laws of England, Vol 9 (1) 4th Edition which is as follows;

"Contempt of court can be classified as either criminal contempt, consisting of words or acts which impede or interfere with the administration of justice or which create substantial risk that the course of justice will be seriously impeded or prejudiced, or contempt in procedure, otherwise known as civil contempt consisting of disobedience to judgment, orders or other process of court and involving in private injury"

The concept of contempt of court is premised on the elements of non compliance and disobedience. Counsel for the applicant contended that the respondent did not comply with the court orders; he gave instances upon which he based his allegation of contemptuous conduct. The respondent however denied the said allegation and maintained that the impugned letter authored by herself that the applicant alleged to be in contempt was not deliberated upon in the main cause that gave rise to the proceedings before this court. The respondent maintained that the impugned letter was written after the ruling in the main cause and that the respondent instituted an appeal in the court of Appeal and a stay of execution.

It is settled law that a party who knows of an order regardless of whether in the view of that party the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what the party regards the order to be. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawfully way as the law permits. The authority of **Housing Finance Bank Limited & Anor v Edward Musisi MA No. 158 of 2010 (CA)** is instructive.

I am of the considered opinion that lodging an appeal and staying execution falls well within the ambit of "to challenge the order in issue, in such a lawfully way as the law permits' as so envisaged in **Housing Finance Bank Limited & Anor v Edward Musisi (supra)**.

I also hold the view that the circumstances under which the impugned letter in which the applicant is dismissed as Chairperson constitutes a separate cause of action from the one tried in the original motion. If after studying the court ruling the Respondent realised that she had made a mistake which she now seeks to correct but in the process takes some action that may not be consistent with the court ruling to me would not amount to contemptuous conduct.

This later action would have to be tried in order to establish as to whether or not the Minister had power to dismiss the applicant as she purports to do and this coupled with the fact that the original decision is till subject of an appeal makes this application untenable.

In the circumstance I find no merit in the application which is dismissed with costs to the respondent.

Eldad Mwangusya

J U D G E

22.05.2013

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