

UGANDA / JUDGMENT

National Water and Sewerage Cooperation (Miscellaneous Application 200 of 2021) [2023] UGHCCD 146 (7 March 2023)

[2023] UGHCCD 146

COURT

HC: Civil Division (Uganda)

BEFORE

Bukirwa, J

CASE / FILE NUMBER

Miscellaneous Application 200 of 2021

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION NO. 200 OF 2021 (Arising Out of Misc. Application
No. 131 of 2020) (Arising Out of Civil Suit No. 26 of 2020)

NATIONAL WATER AND SEWERAGE CORPORATION:..... VERSUS

OKECHO DON WILLIAM :.....RESPONDENT/DEFENDANT BEFORE:
HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA

RULING

Background

This Application is brought under Section 98 of the Judicature Act, Section 33 of the Judicature Act and Order 52 rules 1 & 2 of the Civil Procedure Rules S. I 71-1 seeking for: -

- a) A declaration that the Respondent is in contempt of court orders issued by this Honorable Court in Misc. Application No. 131 of 2020.
- b) Costs of the Application be provided for.

The Application is supported by an affidavit sworn by Dr. Charles Okuonzi, the Applicant's area manager and opposed by the Respondent affidavit in reply which have been taken into consideration in this Ruling.

Brief facts

Dr. Charles Okuonzi, the 1st Applicant's Area Manager, in the Affidavit in support of the Application contends that on the 18th day of August 2020, this Honourable Court issued a temporary injunction restraining the Respondent, his agents, servants, workers and those claiming under him from further construction, erecting any structure or interfering with the suit property until the final disposal of the main suit. On the 12th October 2021, Dr. Charles Okuonzi together with some staff members of the Applicant went to the suit property and found that the Respondent had gone ahead to construct a structure on a portion of the suit land and also planted trees on it in total violation of the court order.

On the other hand, the Respondent contends in his Affidavit in Reply that during the hearing of Misc. Application No. 131 of 2020, he clearly stated that he was in possession of the suit land and had constructed temporary structures thereon

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made out of iron sheets and a toilet which structures are still existent on the suit land to date. He further states that the only construction he did on the suit land after the temporary injunction was a replacement of the fence made of iron sheets which the wind had blown away.

Representation

The Applicant was represented by Counsel Muhanguzi Bob of Turyakira & Co. Advocates M/S while the Respondent was represented by Counsel Tuyiringire Onesmus of Tuyiringire & Co. Advocates. On the 13th October, 2022, the Respondent was directed to serve and file his written submissions by 27th October 2022 and the Applicant's Rejoinder would be filed and served by 3rd November 2022.

Submissions.

Counsel for the Applicant referred to the case of **Jack Erasmus Nsangiranabo Vs Col. Kaka Bagyenda & Attorney General** Misc. Application No. 1481 to demonstrate the conditions necessary to prove contempt of Court. He enumerated them as being the existence of a lawful order, the potential contemnor's knowledge of the order and potential contemnor's failure to comply that is disobedience of the order. Counsel submitted that there is a temporary injunction issued by this Honourable Court on the 18th August 2020 against the Respondent restraining the Respondent and his agents from continuing with any further development on the land or selling or otherwise disposing of the same suit land until Civil Suit no. 026 of 2020 is determined. A copy of the ruling was annexed to the Affidavit in Support of the Application. The said order was issued in the presence of the Respondent and his Counsel and therefore the Respondent was well aware of the order and that the Respondent has disobeyed the order by constructing an iron sheet fence (Annexure C1 of the affidavit in support), ongoing plumbing works (C2 and C3), wooden fence (C4), tree seedlings covered by concrete blocks (C6) and the latest being the wooden gazebo structure whose construction is ongoing.

Counsel further submitted that the photos attached to the Affidavit in Reply to the application marked G1-G5 clearly indicate that there was no iron sheet fencing, or plumbing works on the structure. Counsel relied on the case of Hadkinson Vs Hadkinson (1952) ALLER 567 at 569 for the proposition that a party who knows of an order, whether null and void, regular or irregular, cannot be permitted to disobey it.

In his submissions, the Respondent contended that the Applicant had brought this Application under Article 28(2) of the Constitution, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act yet it should have been

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brought under a clear provision specifically under Order 41 Rule 2 (3) of the Civil Procedure Rules which provides that:

"In cases of disobedience, or breach of any such terms, the court granting an injunction may order the property of the person guilty of the disobedience or breach to be attached and may also order the person to be detained in civil prison for a period not exceeding six months unless in the meantime, the court directs his or her release."

The Respondent's Counsel raised a preliminary objection on grounds that the application offended the law pertaining to service of summons since the application was signed and sealed by Court on 1st March 2021 but was only served on the Respondent on 15th March 2022, a year later. He contended that under Order 5 Rule 1 of the Civil Procedure Rules service of the application should have been effected within 21 days from the date issue. That since the Applicant had not filed an affidavit in rejoinder to rebut or explain what could have happened, the averments of the Respondent remain unchallenged. Counsel relied on the case of **Rwabunyoro Mugume David Vs. Kalule S. Simon King M. A. No.45 of 2014** to augment this position.

Counsel went on to explain that the Respondent had not violated the temporary injunction that had been issued by Court on 18th August 2020 since he had not carried out further construction nor planted any trees on the suit land since the Applicant had not demonstrated any change in the status quo in the Application since the grant of the injunction.

Counsel contended that in the event that the Court agrees with the Applicant, the Respondent should not be committed to civil prison as Courts have been cautious in invoking the process of committal to civil prison. Counsel relied on the case of Sanyu Mireiri Vs. Moses Bukonya HCMA No.937 of 1997 to emphasize his argument that it is at the Court's discretion to commit a person found to be in contempt of court and that it is not sufficient to prove only disobedience of the order but that the decree holder's interests were prejudiced and that committal for contempt would be the most appropriate remedy. Counsel contended that the Applicant's prayers for a fine and damages were misplaced and prayed that Court dismisses the Application with costs.

Issues

- 1. Whether there was contempt of Court orders by the Respondent.
- 2. What remedies are available to the parties.

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Analysis

Before I resolve the issues as raised, I will first deal with the preliminary objection raised by the Respondent under Paragraphs 4 and 5 of the Affidavit in Reply to the effect that the notice of motion is bad in law because it offends the law relating to the service of summons.

The Respondent noted that notice of motion was signed and sealed by Court on 1st March 2021, but it was not served on him until 15th March 2022 for hearing on 19th April 2021 at 10:00 am.

Counsel for the Applicant submitted that the application was filed on 10th November, 2021, was signed and sealed by the Deputy Registrar on 15th March, 2022 and was served on the Respondent on the same day. Counsel argued that despite the year of filing the application being 2021, the year in which the application was signed and sealed should have been properly recorded as 2022, and that the correct hearing date was indicated as 19th April 2021 despite the correct year being 2022.

Counsel concluded that the Applicant respects court documents and would not risk tampering with pleadings especially handwriting and endorsement of Court as they understand the professional and criminal ramification of such acts.

I have perused the Notice of Motion and observed the dates thereon. The Application was signed by Counsel for the Applicant on 10th November, 2021 and filed in court on the same day by inference from the court stamp acknowledging receipt of the same. The matter was fixed for the "19th day of April 2021" and signed and sealed by the Deputy Registrar on the 15th day of March 2021. Upon scrutiny of the Notice of Motion on the Court record, there was a correction of the year for the signing and sealing of the Application from 2021 to 2022.

In my opinion, Counsel for the Respondent's argument that the notice of motion was signed and sealed on 15th March 2021 does not hold water since the Application was filed on 10th November 2021. There is no way it could have been signed and sealed before it was filed. I agree with the Applicant's submission. The matter was filed in 2021 and due to the Court's delay, the same was only signed and sealed in 2022. Court ought to have amended the dates to be in Pari Materia with the year in which they were signed. In *Nabanja Vs Nabukalu* Misc. Application No. 250 of 2015, it was observed that the omissions of Court should not be visited on the litigant.

The objection is overruled.

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Regarding the mode of the Application, I disagree with the Respondent's contention that the Application should have been brought under Order 41 Rule 2(3) of the Civil Procedure Rules. This Order refers to injunctions and yet the instant Application is in regard of Contempt of a Court Order. In the absence of specific rules that provide for applications for contempt, I am agreeable to the mode adopted by the Applicant under Order 52 Rule 1 of the Civil Procedure Rules.

I will now turn to resolution of the issues as raised.

Issue No. 1: Whether there was contempt of Court orders by the Respondent.

Contempt of Court refers to any act which is calculated to embarrass, hinder or obstruct Court in the administration of justice, or which is calculated to lessen its authority or its dignity. It is committed by any person who does any act in a willful contravention of its authority or dignity, or tending to impede or frustrate the administration of justice, or by the one who, being under the Courts' authority as a party to a proceeding therein, willfully disobeys its lawful orders or fails to comply with an undertaking which he has been given." (Emphasis mine) Refer to Bagobedde Margret Vs Kabaseka Ruth Kasujja & 2 Others HCMA No. 0450 OF 2019 and Black's law Dictionary, 6th Edition)

In Hon. Sitenda Sebalu Vs Secretary General of the East African Community Ref. No. 8 of 2012, it was clearly stated that, "... it is a civil contempt to refuse or neglect to do an act required by a judgement or order of the Court within the time specified in that judgement, or to disobey a judgement or order requiring a person to abstain from doing a specific act."

A plethora of cases have explained the conditions necessary to prove contempt of court as;

1. Existence of a lawful order
2. The Potential contemnor's knowledge of the order.
3. The potential contemnor's failure to comply i.e. disobedience of the order. (Refer to Jack Erasmus Nsangiranabo Vs Col. Kaka Bagyenda & Attorney General Misc. Appln. No. 671 of 2019, Stanbic Bank (U) Ltd & Jacob Power Plant Ltd Vs Uganda Revenue Authority Misc. Appln. No. 24 of 2010, Bagobedde Margret Vs Kabaseka Ruth Kasujja & 2 Others (supra))

The temporary injunction from which this Application emanates was issued on the 18th day of August 2020 where in it was ordered that;

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1. A temporary injunction does issue restraining the Respondent from continuing with any further developments on the land or selling or otherwise disposing of the same.
2. Costs be in the cause.

From the foregoing, there is no doubt there is a Court order. I have perused the Court record and in particular the order itself. It was issued in the presence of the Respondent and his Counsel. It goes without saying that the Respondent had knowledge of the order.

This leaves us with one question. Whether the Respondent failed to comply with the order.

Under Paragraph 4 of the Affidavit in Support of the Application, Dr. Charles Okuonzi indicated that he together with some staff members of the Applicant went to the suit property and found that the Respondent had gone ahead and constructed a structure on a portion of the suit land, and also planted trees on it which he took photos which were annexed to the Affidavit in Support of the Application.

According to Paragraph 8 of the Affidavit in Reply sworn by the Respondent, he stated that under miscellaneous application no. 131 of 2020, he filed a reply which he has annexed to the reply herein as annexture "B". In paragraph 13 of annexture B to the reply, the respondent stated that he constructed a structure on the suit land and a toilet. He attached photos that is annexture G1, G2, G3, G4 and G5 which I will take to be the status of the suit land as at the time of the order.

The Respondent under Paragraph 12 of the Affidavit in Reply clearly states that the only construction that took place on the suit land following the issuance of the Court injunction was the replacement of the iron sheet fence which had been blown away by the wind. This is an admission that indeed there was some construction on the suit land.

I have carefully examined the photos as attached to the Respondent's reply which is a reflection of the status quo as at the time of grant of the order and the photos attached to the Affidavit in Support of the application.

A comparison of Annexture G1, G2 and G3 to the Affidavit in Reply which has the temporary iron sheet structure and Annexture C3 of the application in support shows that at the time of the grant of the order, the iron sheet fencing

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was not there. Logically speaking, it was put up after the order. The iron sheet fence was only at the side of the toilet.

A look at Annexture G6 of the Affidavit in Reply which is immediately after G5 with a toilet which in my opinion is the reflection of Annexture C6 of the affidavit in support of the application still with the toilet clearly shows that indeed trees have been planted and hidden in bricks.

Furthermore, Annexture G6 of the Affidavit in Reply which I believe is the reflection of C4 of the affidavit in support by virtue of the tree and the structure there on (though taken at different angles) clearly shows that there was an iron sheet fence, which has since been removed and replaced with a wooden fence and bricks have been ferried on the site.

A general look at the photos attached to the affidavit in reply and the photos attached to the affidavit in support of the application which photos were not disputed by the Respondent clearly shows a change of the status quo on the suit land.

Court had the opportunity of visiting the locus on 21st February, 2023 and as such, the findings of Court arising from this visit have been taken into account in this Ruling. Court observed that there was a grass thatched structure that had been constructed on the suit land in 2022 following the injunction that was issued by Court in 2020. There was also a moveable bar that had been placed on the land. On inquiry, the Respondent confirmed that both the grass thatched structure and moveable bar that had been constructed in 2022 to entertain the Respondent's clients who rent out rooms in the establishments on the land. I take this as an admission of contempt since the Court order was issued on 18th August 2020 yet the structures were constructed in 2022.

The general principle regarding respect of court orders was stated in *Hadkinson Vs Hadkinson* (1952) ALLER that a party who knows of an order whether null or void or irregular, cannot be permitted to disobey it.

The order restrained the Respondent from making further developments on the suit land. However, the Respondent admitted to constructing the grass thatched structure and moveable bar in 2022 after the order. This coupled with the other evidence on record that the respondent has changed the entire look of the suit land which is against the order.

Basing on the Respondent's admission, and the evidence before me, I find that all the ingredients of contempt of Court have been proved and thus answer Issue 1 in the affirmative.

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Issue 2.

The Applicant prayed for several orders to wit a declaration that the Respondent is in contempt of court order, the respondent be committed to civil prison for contempt of the court order, demolition of the erected structures on the land, a fine of one Hundred Million Shillings for disrespecting the Court Orders and Fifty Million Shillings in damages to the Applicant in recompense for contempt

Disregard of court orders is a serious matter which if not condemned has the effect of making Court a barking dog that does not bite. The Courts of law should never act in vain thus the contemnors must be punished. The power to punish for contempt is meant to inspire confidence and trust in the litigants and to ensure efficacy of the judiciary.

Civil contempt is punishable by way of civil prison or by way of sequestration. It can also be punishable by way of fine or an injunction against the contemnor. See *Stanbic bank (U) Ltd Vs Commissioner General Uganda Revenue Authority (supra)*.

The Respondent defied the court order by erecting a moveable bar and a grass thatched structure after the issuance of the temporary injunction.

The Respondent is herein ordered to demolish all the structures whether permanent or temporary that were not on the land at the time the order was passed. The Respondent should also remove the trees planted after the grant of the order and all the bricks ferried to the suit land after the issuance of the order. This Order should be complied with within two weeks from the date of this Ruling failure of which the Respondent shall be committed to civil prison until he complies.

The order in Misc. Application No. 131 of 2020 still subsists.

Each party to bear its own costs.

I so order.

HON. LADY JUSTICE FARIDAH SHAMILAH BUKIRWA

Delivered on 7th day of March 2023

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