

UGANDA / JUDGMENT

Tukamwesiga v Kabatererana & 4 Others (Miscellaneous Application 151 of 2022) [2023] UGHC 282 (17 March 2023) [2023] UGHC 282

COURT

High Court of Uganda

BEFORE

Joyce Kavuma, J

CASE / FILE NUMBER

Miscellaneous Application 151 of 2022

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THE REPUBLIC OF UGANDA IN THE HIGH COURT OF UGANDA AT MBARARA HCT-05-CV-MA-0151-2022

(Arising from HCT-05-CV-CS-0042-2021) TUKAMWESIGA JOTHAM :::::::::::::::::::::::::::::::
VERSUS

1. JUSTINA KABATERERANA

(As Administratrix of the estate of the late Erisa Kabaterana)

2. ATUHE RONALD

- 3. BASIIME ALLEN

- 4. KYARIMPA MABLE

5. MATOVU DUES :::::::::::::::::::::::::::::::

BEFORE: HON LADY JUSTICE JOYCE KAVUMA

RULING

Background

§\Gamma\$ 17 This application was brought by Chamber Summons under Order 41 rule 1 of the Civil Procedure Rules, Section 98 of the Civil Procedure Act and Section 33 of the Judicature Act seeking for orders that:

1. The Respondents are in contempt of a court order issued on the 16th November 2021 vide Misc. No. 156 of 2021.

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- 2. An order that the Respondents or their agents be restrained from distributing the said estate until determination of the main suit.
- 3. An order that the Respondents pay UGX 20,000,000/ \$=\$ as general damages.
- 4. An order that the Respondents further pay a fine of UGX 10,000,000/= for disobeying lawful court orders.
- 5. Costs pf this application be provided for.

The grounds upon which the summons was based were wrongly placed in the summons. This is so because technically, this is supposed to be a document issued out by the court to the parties. Therefore, court cannot formulate grounds. Be that as it may, the grounds were briefly that;

- 1. That the 1st Respondent fraudulently obtained letters of administration of the estate of the late Erisa Kabaterana.
- 2. The Applicant filed a suit in this honourable court and a temporary injunction vide Misc. No. 156 of 2021 was subsequently issued against the 1st Respondent with her knowledge.
- 3. That despite the 1st Respondent appearing in court at the hearing of the application for a temporary injunction and a subsequent order issued against her, the 1st Respondent has in contempt of the said order called and held a meeting of the 2nd, 3rd, 4th and 5th Respondents on 06/03/2022 to divide land forming part of the estate.
- 4. That the Respondents in the same meeting resolved that the 1st Respondent gives the 2nd Respondent part of the land bequeathed to the Applicant and his brother Ndyasiima Geresomu.
- 5. That the 2nd Respondent on 7th March 2022 took possession of the aforesaid land and has since started cultivating the land,

mulching and planting bananas and removed part of the boundary marks on the same.

- 6. That the 2nd Respondent is not a beneficiary of the estate of the late Elisa Kabaterana and has since stopped the applicant and other beneficiaries from cutting bananas from the land and further through the 1st Respondent caused his arrest on tramp up charges before the Isingiro Magistrate Grade One Court.
- 7. That the Respondent's acts amount to not only impunity but also contempt of court.
- 8. That it is in the interest of justice and in the best interest of the Applicant that this application be granted.

The application was supported by an affidavit sworn by the and opposed by a joint affidavit of the \$2^{nd}\$, \$3^{rd}\$, \$4^{th}\$ and \$5^{th}\$ Respondents. I have taken cognizance of the contents of all the affidavits in coming to this ruling.

I found no affidavit in reply from the 1st Respondent. Substantially, this means that she did not contest this application and orders sought therein against her. It is therefore taken that the 1st Respondent by failing to file an affidavit in reply or offer any arguments in defence of the averments in the application raised by the Applicant, she fully accepts what is stated for the Applicant. (See Prof. Oloka Onyango & Ors vs. Attorney General (Constitutional Petition No.6/2014)).

The above notwithstanding, I found submissions by counsel for the 1st Respondent in which counsel states that the 1st Respondent filed a reply. This court will still need to investigate whether all the Respondents are indeed in contempt so as to reach a justiciable decision.

Representation.

The Applicant was represented by M/s Manigaruhanga & Co. \$[2]\$ advocates, M/s legal Aid Project of the Uganda Law Society filed submissions on behalf of the \$1^{st}\$ Respondent while the \$2^{nd}\$ to \$5^{th}\$ Respondents were represented by M/s Mujurizi, Alinaitwe & Byamukama Advocates.

All counsel involved filed written submissions which I have ably considered.

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Analysis and decision.

This court Nsangiranabo vs. Col. Kaka Bagyenda and Anor (Civil \$[3]\$ Miscellaneous Application 671 of 2019) made a restatement of the principles that a party claiming contempt of court ought to establish in order to succeed on such an application. These are:

- The existence of a lawful order.
- 2. Potential contemnor's knowledge of the order.
- 3. Potential contemnor's failure to comply, that is, disobedience of the order.

1.1. Existence of a lawful order.

It is not disputed by all parties to this application that this court [4] presided over by the learned Acting Deputy Registrar, in HCT-05-CV- MA-0156-2021, on 16th November 2021, issued a temporary injunction restraining the 1st Respondent in this matter or her agents from distributing the estate of the late Elisa Kabaterana until determination of the main suit.

The first limb of this application is therefore satisfied.

Potential contemnor's knowledge of the order. \$1.2.\$

> The general principle is that a person cannot be held in contempt [5] without knowledge of the order. A party who knows of an order regardless of whether, in view of that party, the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards the order to be. It is not for that party to choose whether or not to comply with such order. The order must be complied with. (See Ssekaana J in *Nsangiranabo vs. Col. Kaka Bagyenda and Anor* (supra)).

> The record of this court on 16th November 2021, shows that the 1st Respondent was in court and so was her counsel when the temporary injunction order was issued by the learned Acting Deputy Registrar. The second limb of this application is therefore satisfied against the 1st Respondent.

> The 2nd to 5th Respondents deposed in their affidavit in reply that they were never parties to HCT-05-CV-MA-0156-2021. This is true. They depose further that because of this, they were not aware of the court orders and have therefore not breached or violated them.

T61 An injunction is an equitable remedy. It was always the law that such remedies were issued in personam; that is, between the parties in the suit where it was sought and not in rem; that is against the whole world. This was based on the fact that only those who have had the opportunity to be heard either directly or by representation should be subjected to the orders of court.

However, the courts have recognized that a decree or order binding no more than those present in court does not adequately protect the interests of the person who had secured the order/injunction. (See *Seaward vs. Paterson*, [1897] 1 Ch. 545 (CA)).

In *Seaward* (supra), a lessor obtained an injunction restraining his lessee from violating a covenant requiring quiet and orderly occupancy. In disregard of the injunction, the lessee, assisted by another held boxing matches on the premises and caused a serious disturbance. In a contempt proceeding brought against the other party, he contended inter alia that since he was neither a party to the injunction proceeding nor a servant or agent of any party to the proceedings, the court lacked jurisdiction to punish him. The court held him guilty of contempt and rejected this argument. The court observed that;

"A motion to commit a man for breach of an injunction, which is technically wrong unless he is bound by the injunction is one thing; and a motion to commit a man for contempt of court, not because he is bound by the injunction by being a party to the

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cause, but because he is conducting himself so as to obstruct the course of justice, is another and totally different thing... In the one case the party who is bound by the injunction is proceeded against for the purpose of enforcing the order of the court for the benefit of the person who got it. In the other case the court will not allow its process to be set at naught and treated with contempt."

If all non-parties were allowed to violate the decree with [7] impunity, the party could avoid the court's mandate simply by procuring others to do the forbidden act. Because of this, the courts have tried to extend the scope of persons bound by an injunction to six additional categories of persons; (1) agents of the enjoined party; (2) aiders and abettors of the enjoined party; (3) successors in interest to the enjoined party; (4) those coming into contact with the particular res (in rem injunctions); and (5) members of the same "class" as the enjoined party; and (6) persons cognizant of the injunction. (See Editorial Board, Minn. L. Rev., "Binding Non-parties to Injunction Decrees" (1965). *Minnesota Law Review*. 2834).

The knowledge of the potential contemnor must be actual as opposed to constructive knowledge. This is applicable to parties and non-parties alike.

in the instant application, the averments in the affidavits of both parties point to the fact that all the parties are beneficiaries to the estate of the late Erisa Kabaterana and are thus taken to fall within categories (4) and

- (5) above. They are therefore bound by the injunction despite not having been party to the injunction proceedings. I find the second limb satisfied.

Potential contemnor's failure to comply, that is, disobedience of the \$1.3.\$ order.

The general rule is that a potential contemnor is held in contempt [8] for a wilful refusal to comply to a court order. Wilful refusal to comply to a court order occurs where the acts of the alleged contemnor are not casual, accidental or unintentional, and constitute contumacious disregard of the court order. (See *Steiner Products Ltd vs. Willy Steiner Ltd* [1966] 2 ALLER 387). However, contempt may also be committed in the absence of wilful disobedience on the part of the contemnor. (See for example in *Stancomb vs. Trowbridge UDC* [1910] 2 Ch. 190 and *Knight vs. Clinton* [1971] Ch. 700).

In the instant case, the court order issued by the learned Acting Registrar of this court was in the following terms;

"...issue a temporary injunction to restrain the Respondent or agents from distributing the said estate until determination of the main suit..."

\$[9]\$ The key aspect of the order related to "distribution" of the estate.

The Applicant deposed in paragraphs 5 and 6 of his affidavit in support of the instant application that the 1st Respondent has in contempt of the above order called and held a meeting of the 2nd, 3rd, 4th and 5th Respondents on 6th March 2022 to divide land forming part of the

estate. That in that meeting, it was resolved by the 1st Respondent that the 2nd Respondent takes part of the land bequeathed to the Applicant and his brother. That the 2nd Respondent on 7th March 2022 took possession of the aforementioned land and has since started cultivating the land, mulching and planting bananas on it.

On their part, the 2nd, 3rd, 4th and 5th Respondents, under paragraphs 13 and 14 of their affidavit in reply denied ever attending any meeting convened by the 1st Respondent to distribute the estate. The 2nd Respondent did not however specifically deny having been given the part of the land belonging to the Applicant and his brother let alone cultivating it save for merely saying that these averments were misconceived and speculative. I would find these averments as accepted against him. Because of this, I find him and the 1st Respondent in contempt of the court order.

The 3rd, 4th and 5th Respondent save for attending a meeting where the estate was distributed, the Applicant has failed to prove any acts that constitute contumacious disregard of the court order issued on 16th November 2021. I would therefore not find them in contempt.

This application therefore succeeds against the 1st and 2nd Respondents.

Remedies.

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[10] The applicant prayed for the following orders;

1. The Respondents be found in contempt of the court order issued on 16th November 2021.

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The 1st and 2nd Respondents are found in contempt of the court order issued on 16th November 2021.

2. The Respondents or their agents be restrained from distributing the said estate until determination of the main suit.

Since already a court order was issued by this court in HCT-05-CV-MA-0156-2021 in similar terms, this court maintains the same orders as issued by this court.

3. The Respondents pay UGX 20,000,000/= as general damages.

It now trite that damages are not meant to enrich the successful litigant far beyond their actual losses nor should the successful litigant get any less at the expense of their adversary. They are awarded on the principle of "restitution" in integrum." They are meant to restore the successful litigant to as much as possible to the original position they were prior to the wrong done by the adversary.

The Applicant has not led any evidence of actual losses he has suffered to entitle him an award of general damages beyond enrichment.

This court therefore does not award general damages to the Applicant.

4. The Respondents pay a fine of UGX 10,000,000/= for disobeying this court's lawful orders.

This court having found the 1st and 2nd Respondents in contempt, would ordinarily impose a sanction against them to send a stern message to other potential contemnors.

In the case of Ekau vs. Dr. Aceng (Misc. Appn. no. 746 of 2018), this court held that:

> "With regard to the fine for contempt; the purpose of the fine is to send a firm message to the Respondents and other would-be contemnors that, court orders are not issued in vain and ought to be respected and obeyed as long as they remain in force."

This being a matter involving members of the same family, I find an award of a fine would cause more discord among the family members. In the alternative thereof, I issue a stern warning against the 1st and 2nd Respondents to immediately stop and desist from committing acts in further contempt of the court order issued on 16th November 2021. However, should they fail to do so, they will be liable to pay a fine of \$UGX\$ 10,000,000/= each for contempt.

5. Costs of this application.

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In relation to costs, costs depend entirely on the result of the litigation. Simply put, costs follow the event. Whichever party that has judgment recorded in his or her favor is entitled to the costs unless the court, in its discretion and for good reasons decides otherwise. (See Section 27(1) (2) CPA). The Applicant, having been the successful party in this application is entitled to the costs.

- I therefore in effect make the following orders; Γ
- 1. The 1st and 2nd Respondents are found in contempt of the court order issued on 16th November 2021.

- 2. This court issues a stern warning against the \$1\$ st and \$2\$ nd Respondents to immediately stop and desist from committing acts in further contempt of the court order issued on 16th November 2021. Should they fail to do so, they will be liable to pay a fine of UGX 20,000,000/ \$=\$ each for further contempt.
- 3. This application succeeds against the \$1^{\text{st}}\$ and \$2^{\text{nd}}\$ Respondents.
- 4. The \$1\$ st and \$2\$ nd Respondents shall meet the costs of this application.

I so order.

Dated, delivered and signed on thisday of March 2023.

ce Kavuma Judge.

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Prepared on 14 October 2026 · Esheria