

UGANDA / JUDGMENT

Twesigye v Kyambogo University (MISCELLANEOUS APPLICATION No. 120 OF 2017) [2017] UGHCCD 193 (1 August 2017) [2017] UGHCCD 193

COURT

HC: Civil Division (Uganda)

BEFORE

Musota, J

CASE / FILE NUMBER

MISCELLANEOUS APPLICATION No. 120 OF 2017

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

MISCELLANEOUS APPLICATION No. 120 OF 2017

(Arising from Miscellaneous cause No. 148 of 2016)

(Arising from Kyambogo University staff Tribunal Appeal case No. 2 of 2014)

(Arising from Kyambogo University Disciplinary case No.2 of 2014)

DR. CHARLES TWESIGYE ::::::::::::::: APPLICANT

Versus

KYAMBOGO UNIVERSITY ::::::::::::::: RESPONDENT

BEFORE: HON. JUSTICE STEPHEN MUSOTA

RULING

This application is brought by Notice of Motion under Articles 126 (2) (a) (b) & (3), Sections 33 & 36 of the Judicature Act, Cap 13 as amended by Act No. 3 of 2002, Section 34 and 98 of the Civil Procedure Act and Section 52 rules 1 & 3 Civil Procedure Rules. It is for orders that:

1. The respondent has committed contempt of court.
2. The Vice Chancellor and University Secretary be committed to Civil Prison for contempt of court till the respondent complies with the court order.

3. The respondent do pay to the applicant UGX.300,000,000/= as general damages for contempt of court.
4. The respondent do pay UGX.100,000,000 to the applicant as aggravated damages.
5. The respondent do pay a fine to court of UGX.50,000,000 for the contempt of court.
6. Costs of this application be provided for.

The grounds of this application as stated by Dr. Charles Twesigye are that;

1. The applicant is an associate professor at the respondent University.
2. In 2016 the applicant applied for an order of mandamus and on 31/10/2016 obtained the same ordering the respondent to provide to the applicant the records of proceedings in a decision by the University appointments Board made in 2014 and university staff tribunal delivered in 2016.
3. The order was duly served on the respondent.
4. The respondent partially complied with the order in that it provided only the record of proceedings in Kyambogo University Staff Tribunal Appeal Case No.2 of 2014 but not that in Kyambogo Disciplinary case No.2012.
5. The applicant contends that the refusal or failure of the respondent to fully comply with the court order by providing all the records applied for is contempt of court.
6. The applicant further contends that the refusal or failure of the respondent to provide the record of proceedings ordered by court to enable him prepare and prosecute his appeal is a violation of his right to appeal and violation of his constitutional right to fair hearing and denial of Justice.
7. It is proper, fair and in the interest of justice that the respondent is found in contempt of court.

The respondent filed an affidavit in reply sworn by PATRICK W. MADAYA who briefly stated;

* That the respondent's tribunal considered the applicant's appeal and allowed it and also set aside the decision of the Appointments' Board made on the 16th April 2014 for having been reached without hearing the applicant.

* That the respondent's tribunal reasoned that since the applicant had during the period he was charged with unethical conduct been promoted, continued to work normally and earned salary, he hadn't suffered any damages.

- That the respondent duly delivered to the applicant the record of proceedings in Kyambogo University Staff Tribunal Appeal Case No.2 of 2014 the only record of proceedings in its possession.

* That the respondent contends and avers that according to the ruling of its tribunal wherein the applicant appealed the decision in University disciplinary case No.2 of 2012; the tribunal ruled that the applicant had been condemned unheard and the Appointments Board's decision was quashed.

* That the respondent cannot therefore be in contempt for not providing to the applicant a record of proceedings that is not in its possession.

That in reply to paragraphs 20 and 21 of the affidavit in support, the respondent contends that the applicant can still rely on the record of proceedings in the University Tribunal and its ruling about the decision of the Appointments Board for his appeal.

In the applicant's submissions, it was stated that the contention by the respondent that it has not complied with the order to provide the records of the Disciplinary Case No. 2 of 2012 because it does not have them is untenable as it is not supported by any evidence and the respondent is duty bound to maintain such records.

That on the contrary, there is evidence on court record that point to the existence of the records in Appointments Board Case No. 2 of 2012 in the possession of the respondent. That the evidence includes a letter dated 23/5/2014 the respondent's director, Human resources wrote to the applicant referring to the communication dated 10/1/2012 in which the applicant was charged with unethical or unprofessional conduct.

That the above communication meant that on 16/4/2012 there was a meeting of the Appointments Board, during which the members deliberated on the charges against the applicant and came to the conclusion that he was guilty as charged and he was sentenced as stated in the letter. That such drastic decisions could not be taken by the Appointments Board of the respondent a reputable public University without keeping records of the proceedings under which the decisions were made.

Counsel for the applicant also stated that the respondent's tribunal considered the applicant's appeal and allowed it and set aside the decision of the Appointments Board made on 16/4/2014 for having been reached without hearing the applicant. It is also counsel's submission that the respondent averred that the ***"applicant was given an initial hearing before the appointments board with which he was aggrieved and he appealed the same."***

Counsel wondered why they did not provide the record for the initial hearing and nowhere in the affidavit in reply did the respondent indicate that there were no records in Kyambogo Appointment's Board No. 2 of 2012. Case No. 2 of 2012.

On the other hand, counsel for the respondent argued that the order was couched in general terms and it ordered the respondent to provide to the applicant the proceedings within one month from 31st October 2016. The respondent duly complied by providing the applicant with the record of proceedings in Kyambogo University Case No.2 of 2012.

Counsel stated that it would have fully complied with the impugned court order if it had also provided the record of proceedings for Kyambogo University Disciplinary Case No.2 of 2012. That as was stated in the affidavit in reply it duly served on the applicant only the record of proceedings in its possession.

It was further emphasized that the sole reason for non compliance was because as was properly ruled by the respondent's tribunal there was no hearing before the decision of the Appointments Board made on the 16/4/2014 from which a record of proceedings could be generated.

On the issue to do with damages, counsel stated that the decision in the case of **Megha industries (U) Ltd Misc. cause No.21 of 2014** is not applicable given the fact that the respondent therein was guilty for contempt of court orders by continuing to commit an economic tort of passing off. That in this application, the applicant was aware that there was no record of proceedings because there was no hearing before the decision of the appointment's board made on the 16/4/2014 from which a record of proceedings could be generated.

Having analysed the affidavit evidence and submissions above I will go ahead and dispose off this matter. The main gist of the arguments of both counsel revolved around the question of contempt of court.

The Black's Law Dictionary 7th Edition P. 313 defines contempt of court as a disregard of or disobedience to, the rules or orders of a legislative or Judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair respect due to such a body.

Contempt of court has also been well described in the case of **Megha Industries Ltd Vs Conform Uganda Ltd HCMC No.21 of 2014** *where the judge held that contempt of court exists where there is a lawful court order and the potential contemnor must have been aware of the court order and failed to comply with the order*. It was further elaborated in the case of ***Hon. Sitenda Sebalu Vs Secretary General of the East African Community Ref. No. 8 of 2012*** that the conditions which must be proved by the applicant in contempt of court are that;

1. Existence of a lawful order.
2. The potential contemnor's knowledge of the order.
3. The potential contemnor's ability to comply.
4. The potential contemnor's failure to comply with/ disobedience of the order.

It is clear from the record that on 31st .10.2016 the respondent was ordered to provide to the applicant within 30 days a record of proceedings the applicant had applied for in Miscellaneous cause No.148 of 2016. These were records of proceedings in two matters namely **Kyambogo university Staff Tribunal Appeal Case N0.2 of 2014** and **Kyambogo University appointments Board case No.2 of 2012**.

Pursuant to the order, the respondent only provided to the applicant the record of proceedings in Kyambogo University Staff Tribunal Appeal case No.2 of 2014 and did not supply to the applicant the proceedings of Kyambogo University Appointments Board case No.2 of 2012.

The reason given by the respondent for not availing the respondent with the record is that there was no hearing before the decision of the appointment's board was made on the 16th April 2014 from which a record of proceedings could be generated.

It is important to first state that the order of mandamus was granted by consent of the parties as the respondent promised to provide the records of the proceedings the applicant had applied for. By this consent, the respondent was well aware that the both records existed and if the scenario was otherwise the respondent would there and then challenge or apply for variation of the order on the ground that it is unable to avail both records.

It is also clear that in Misc. Cause No.148 of 2016 in Paragraph 5, the respondent averred that;

“the applicant was given an initial hearing before the Appointments Board with which he was aggrieved and he appealed the same.”

This is an indication that there was at least a hearing before the appointments board and a partial record of the proceedings.

It is further confirmed that in a letter dated 23.35.2014 the Respondent's director, Human resources wrote to the applicant referring to the communication dated 10.1.2012 in which the applicant was charged with unethical or unprofessional conduct and he was informed of the following recommendations:

1. During the 49th meeting of the appointments board held on 16th April, 2014, the Board concluded that there was sufficient evidence to prove that while the applicant was Head of department Biological sciences he committed unethical/unprofessional conduct as charged.
2. Accordingly, the letter served as a formal written warning asking him to refrain from any kind of misconduct against the University's terms and conditions of service.
3. In addition, the Board had barred him from holding an administrative position in the University for the following 5 years from the date of receipt of that communication.

By these deliberations by the committee it was not possible for the committee to come to such decisions without any records of Proceedings. As stated by counsel for the applicant, such drastic decisions could not be taken by the appointments board of the respondent a reputable Public University without keeping records of the proceedings under which the decisions were made.

The respondent has attached a copy of the ruling of the tribunal as proof that there was no record of the proceedings of the appointments board. In the ruling, it was stated that;

“In the absence of the record of proceedings of the disciplinary subcommittee before the tribunal, the tribunal could not ascertain whether the charges were read to the applicant and he pleaded to them and concluded that the applicant was not accorded a fair hearing.”

This statement means that the record of proceedings could not have been availed to the committee because of different circumstances but did not specifically mean that they did not exist. It is further shown that no reason was given for the absence of the record of proceedings before the subcommittee. I would also add that it was not possible for such a board to have such strong deliberations without the principles of Natural justice being fulfilled that is fair hearing before the board. If the respondent still maintains that there was no record then the decisions they made could be null and void because it cannot be ascertained whether the decisions were arrived at fairly.

It is therefore outright that the respondent disobeyed part of the court order which amounts to contempt of court. In the case of ***Housing Finance Bank Ltd & Another Vs Edward Musisi Misc. Application No.158 of 2010,*** the court of appeal held at page 11 that;

“the principle of law is that the whole purpose of litigation as a process of Judicial administration is lost if orders by court through the set Judicial process, in the normal functioning of the courts are not complied with in full by those targeted and /or called upon to give due compliance. Further, it is not for that party to choose whether or not to comply with such 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 lawful way as the law permits. It was also stated that Otherwise to disobey an order of court or offer no explanation for non compliance to the issuing court, at any party’s choice or whims, on the basis that such an order is null or irregular, or is not acceptable or is not pleasant to the party concerned is to commit contempt of court.”

The above decision is the correct position of the law and therefore the respondent was in contempt of court when he refused to avail the applicant with the record of proceedings. The respondent has failed to prove to this court on a balance of probability that there was no record of proceedings in ***Kyambogo University appointments Board case No.2 of 2012.***

On the issue of remedies counsel for the applicant submitted that the remedies granted in ***Megha industries (U) Ltd Vs Conform Uganda Ltd Misc. Cause No.21 of 2014*** are applicable. That in that case court found the respondent in contempt of court and it imposed on the respondent exemplary damages of UGX.300,000,000/= to be paid to the applicant, a fine of UGX.100,000,000/= to be deposited in court in addition to ordering a suspended sentence of six months to be meted out against the respondents if the contempt complained of persisted.

Counsel stated that General damages are claimed as compensation for the wrong the applicant has suffered by having been denied his statutory right to appeal, which also amounts to denial of his constitutional right to a fair hearing.

That exemplary damages are claimed as punishment for the contempt to serve as a warning and deterrence for other potential contemnors not to engage in contempt of court in order to protect the sanctity of court decisions and authority of the courts.

On the other hand, counsel for the respondent submitted that the decision in ***Megha Industries (u) Ltd*** (supra) is not applicable to the instant case given the fact that the respondent therein was guilty for contempt of court orders by continuing to commit an economic tort of passing off. That the tortuous actions of the contemnor in the decision continued to cause loss of profits and business to the applicant in that matter and it was on that economic basis that the learned trial judge granted the various remedies in the amounts now prayed for by the applicant in this matter.

The primary purpose of contempt is to preserve the effectiveness and sustenance of the power of courts see: ***People Vs Krz 35 Mich App. 643, 656 (1971)***. For the reasons I have given above, I will find merit in this application and it is accordingly allowed.

In the case of ***Mega Industries (U) Ltd Vs Comfoam Uganda Ltd MC 21 of 2014*** court awarded Exemplary damages of UGX. 300,000,000/= to the applicant company with payment of interest at court rate from the date of the ruling till payment in full. The court handed down a penalty of UGX.100,000,000/= for contempt of court orders in Civil suit 269 of 2011 which was to be deposited in court.

In the circumstances of this case, I will award the applicant exemplary damages of UGX.20,000,000/= (Twenty million) for the delay the applicant has suffered by not preparing his appeal because without that record of proceedings, the Appellate Court will not be able to fully appreciate the extent of unfairness and injustice the applicant suffered in the course of the hearing before the Board. The exemplary damages will carry interest at court rate from the date of this ruling till payment in full. The respondent will also deposit a fine of 2,000,000 (two million shillings) into this court. The costs of this application are awarded to the applicant.

Stephen Musota

J U D G E

01.08.2017

01/08/2017:-

Mr. Henry Rwaganika for the applicant in court.

Mr. Silas Baguma for the respondent in court.

Both parties are not in court.

Ms. Shamim Namaganda Court Clerk.

Mr. Rwaganika:-

It is for ruling.

Court:-

Ruling delivered in open court in the presence of:

Mr. Henry Rwaganika for the applicant.

Mr. Silas Baguma for the respondent.

Ms. Shamim Namaganda Court Clerk.

Joy Bahinguza Kabagye

ASSISTANT REGISTRAR

01/08/2017

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Prepared on 14 October 2026 · Esheria