

- (c) That it is over 5 months since the respondent was ordered to do so but has never complied.
- (d) That the applicant instructed his lawyers to engage the respondent, but the respondent has kept on making false promises.
- (e) That due to the respondent's contempt, the applicant has failed to execute contracts between him and his clients.
- (f) That due to the respondent's acts, the applicant continues to suffer inconveniences and loss of money, and whereof he prays for general and punitive damages.
- (g) That it is fair and just for this application to be allowed

The respondent filed an affidavit in reply which was deponed by Mr. Devendra Ramji Patel, the director of the respondent company and opposed this application on the following grounds: -

- a) That it is not true that the respondent has not complied with the orders of this honourable court as the respondent immediately paid both damages and costs to the suit to the applicant.
- b) That around January 2023, the respondent company communicated to its lawyers that it needed to have a boundary opening on the suit land.
- c) That the respondent's lawyers engaged the applicant's lawyers and agreed to have a boundary opening exercise on 6th March 2023.
- d) That upon completion of the survey, a report was shared with the applicant showing that the neighbours were not comfortable and required coordinates from the applicant.
- e) That on 18th April, the respondent lawyers communicated to the applicant that the removal of the excavated materials would start on 22nd April 2023.

- f) That on 22nd April 2023, the respondent proceeded to excavate the soil but was halted by the applicant because he was not present, and the applicant suggested 26th of April 2023.
- g) That on 26th April 2023, in the presence of the applicant, the respondent started grading but the applicant and the neighbours were not comfortable with the likely outcome of the exercise due to a threat of erosion effects on the adjoining land.
- h) That on the 18th of May 2023, the lawyers of the respondent wrote a letter to the applicant informing him of the hiccup and the possibility of compensation, only to be served with this application of contempt of court.
- i) That the actions of the respondent do not amount to contempt of court.
- j) That in the interest of justice, this application should be dismissed with costs.

In his affidavit in rejoinder, the applicant rejoined as follows;-

- (a) That he does not know the person who deponed the affidavit in reply since they have never dealt together.
- (b) That he has never consented to anything that has the effect of varying court orders.
- (c) That he has never stopped the exercise of the removal of soil from his land but only attended the removal exercise which the respondent's workers failed to execute.
- (d) That the respondent has the obligation to remove the soil and deal with the neighbouring land in a safe manner.
- (e) That from 11/05/2023 when the applicant filed this application, the respondent has remained quiet and unbothered.

Background

The applicant was a successful party in Civil Suit No. 10 of 2021 before this honourable court wherein the respondent was ordered to; remove all the excavated material deposited on the suit land, forthwith; stop trespassing on the suit land; pay general and exemplary damages of UGX 50,000,000/= and UGX 5,000,000, respectively; pay interest on damages; and pay costs to the suit.

From the facts gathered in the affidavit, it appears that the respondent company complied with all other court orders save for one where it was ordered to remove all the excavated materials deposited on the applicant's land, forthwith, which prompted the filing of this application.

Representation and hearing

The applicant was represented by M/S Bagyenda & Co. Advocates while the respondent was represented by OSH Advocates. The applicant's counsel filed written submissions, but the respondent's counsel did not file their submissions despite Counsel Nathan Osinde giving assurance to this court that he would file by the 25th of August 2023, as per the court's record dated 17th of August 2023. Nonetheless, I will proceed to determine this application with consideration of the written submissions of the counsel for the applicant, and the affidavits in support together with the affidavit in reply and the affidavit in rejoinder.

Issues

Counsel for the applicant framed two (2) issues to address the ingredients of contempt of court and prayers thereto. The issues framed are; -

1. Whether the respondent is in contempt of a court order.
2. What remedies are available to the parties?

I will proceed to determine these issues as framed by the applicant's counsel.

Submissions by counsel for the Applicant

Counsel for the applicant referred this Court to the case of ***Ekau David Vs Dr. Jane Ruth Aceng & 2 others MA No.746 of 2018*** which laid down the principles of contempt of court as hereunder: -

- (a) The existence of lawful order.
- (b) Potential contemnor's knowledge of the order.
- (c) Potential contemnor's failure to comply, that is, disobedience of the order.

Counsel for the applicant went on to define the meaning of contempt of court as per the Black's Law Dictionary 9th Edition as "a conduct that defies the authority or dignity of a court."

Counsel for the applicant submitted that this honourable court issued a decree on the 25th of November 2022 wherein the respondent was ordered to remove all the excavated materials deposited on the applicant's land, forthwith. It was counsel for the applicant's submission that the applicant's lawyers have always reminded the respondent to comply with the court order, but the respondent has never complied for over 150 days.

On issue 2, the applicant's counsel submitted that general and punitive damages are awarded at the discretion of the court after an assessment of facts and all surrounding circumstances and the legal implications.

Counsel for the applicant submitted that the applicant has continued to suffer loss and inconveniences for which he seeks general damages.

Counsel for the applicant cited the case of ***Barbara Nambi Vs Raymond Lwanga HC MA No.213 of 2017*** where it was held that “***court orders have to be obeyed and to indicate to the contemnors that there is a serious consequence for disobedience of court orders.***”

Counsel for the respondent also referred this court to the decision in the case of ***Stanbic Bank Ltd and Another Vs Commissioner General URA HCMA NO.42 Of 2010*** where the court imposed a sum of UGX 100,000,000/= as a sufficient punishment to purge the contempt in that matter. Counsel for the applicant invited this honourable court to award a sum UGX. 100,000,0000/= against the respondent as general and punitive damages.

Consideration by Court

This application is based on the court’s discretionary power to grant the orders sought as enshrined under **Section 98 of the Civil Procedure Act** Cap 71 which in essence confers discretion upon this court to grant orders to ensure that justice is done and to prohibit conduct that obstructs or has the potential to obstruct the smooth administration of justice.

The Supreme Court of Uganda in the case of ***Prof. Fredrick Ssempebwa & 2 Others Vs Attorney General of Uganda Civil Application No.05 of 2019*** gave a detailed description of what amounts to contempt of court.

The Supreme Court drew a distinction between criminal and civil contempt. Referring to Black’s Law Dictionary 10th edition on page 385, the Court defined criminal contempt as “***an act that obstructs justice***

or attacks the integrity of the court, the criminal contempt proceedings are punitive in nature.” (Sic) The Supreme Court noted that this is an offence recognized under Article 28(12) of the constitution. The Supreme Court further noted that for one to be convicted of criminal contempt of court, the case must be proven beyond reasonable doubt just like other criminal offences.

On the other hand, the Supreme Court defined Civil contempt as **“the failure to obey a court order that was issued for another party’s benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he complies with the court order.”**

I am inclined to state that the application before me is not in respect of criminal contempt but rather it is a civil application for civil contempt. Civil contempt proceedings are typically brought by a disgruntled litigant aiming to compel another litigant to comply with the previous order granted in its favour.

The objective of contempt proceedings is to impose a penalty that will vindicate the court's honour, consequent upon the disregard of its previous order, as well as to compel performance in accordance with the previous order.

In the case of **Prof. Ssempebwa (supra)**, the Supreme Court stated that civil contempt is well embedded in the constitution of the Republic of Uganda under Article 126(1) under which judicial officers derive their judicial power. It was the Supreme Court’s observation that it is of great importance that when the court gives orders in the exercise of its judicial power, those orders must be respected, implemented, and take effect. Accordingly, nobody should interfere with court orders. The Supreme

Court further observed that civil contempt of court serves the purpose of empowering courts to enforce court orders and punish those who willfully and unlawfully disobey court orders.

The Supreme Court in the case of **Prof. Ssempebwa (supra)** set out the elements of civil contempt that must be proved. These ingredients are:

- a. That an order was issued by court
- b. That the order was brought to the attention/notice of the alleged contemnor
- c. That there was non-compliance with the order by the Respondent
- d. That the non-compliance was willful or mala fide.

The Supreme Court stated that the first 3 elements must be proved on balance of probability and the 4th element must be proved beyond reasonable doubt.

In the instant application, the first two elements are not in contention. I therefore find that they have been proved.

The next question, therefore, is whether there was non-compliance with the order by the respondent.

This court gave a decree on the 25th of November 2022 requiring the respondent to remove all excavated materials deposited on the applicant's land, forthwith, among other decrees.

According to Blacks Law Dictionary 6th Edition, Page 654, the word “forthwith” is defined to mean, ***“immediately without delay” or “within a reasonable time under circumstances of the case.”***

The case law on the meaning of "forthwith" is relatively sparse. However, there are a few cases that have interpreted the term. For example, in the

case of **U.S. ex rel. cartel vs Jennings D.CPa., 333 F. Supp 1392** as quoted by Black's Law Dictionary (Supra) Court held that "forthwith" means **"within such a time as to permit that which is to be done, to be done lawfully and according to the practical and ordinary course of things to be performed and accomplished."**

By and large, the meaning of "forthwith" is determined by the specific circumstances of the case. However, it is generally understood to mean that the action required must be taken within a reasonable amount of time, taking into account the circumstances.

Counsel for the applicant stated that by the time this application was filed, over 150 days had lapsed without the respondent complying with the court order. In its affidavit in reply deposed by the respondent company's director, one Devendra Ramji Patel, he admitted that indeed the company had not removed the excavated material on the suit land due to hiccups which were communicated to the applicant.

I must say that when this court issued the decree commanding the respondent to forthwith remove all excavated material deposited on the suit land, it was the court's mind that the removal of the excavated materials, would be done within reasonable time, lawfully and according to the practical and ordinary course of things to be performed and accomplished. But certainly not after 5 months.

In the premises, I find that the respondent did not comply with the court decree issued on the 25th day of November 2022 requiring it to forthwith remove all excavated material it deposited on the suit land.

The next question to determine is whether the non-compliance was willful or *mala fide*.

This element must be proven to establish civil contempt of court. The test for proof of this element was set out by the Supreme Court of Uganda in the case of **Prof. Ssempebwa (supra)** citing with approval a South African case of **Kakie V CC11 systems (pty) Ltd [2006] SCA54 (RSA)** where it held thus:

[9] “The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough since the non-complier may genuinely, albeit mistakenly, believe he or her is entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infractions. Even a refusal to comply that is objectively unreasonable may be bona fide (so unreasonableness could be evidence of lack of good faith).

[10] These requirements – that the refusal to obey should be both willful and mala fide, and that the unreasonable non-compliance, provided it is bona fide does not constitute contempt – accord with the broader definition of the crime, of which the non-compliance with the civil orders is a manifestation. They show that the offence is committed not by mere disregard of the court order but by the deliberate and intentional violation of the court’s dignity, repute, or authority that this evinces. An honest belief that non-compliance is justified or proper is incompatible with the intent.”

The supreme court also cited another South African case of **Lourens V Premier of the Free State Province and Another 95260[2017] ZASCA**

60 which applied the principles stated in the **Fakie case (supra)** and held thus:

“[12] it is now settled that the applicant must prove the requisite of contempt (the order, service of notice, non-compliance, willfulness and mala fides) beyond a reasonable doubt. But once these requisites have been proved, the respondent bears an evidential burden of showing that non-compliance was not willful and mala fide. Disobedience of the civil order will constitute contempt only if the breach of the order was committed deliberately and mala fide. Unreasonable non-compliance provided that it is bona fide does not constitute contempt. And where, as is the case, an applicant approaches a court on notice of motion, a dispute of fact as to whether non-compliance was willful and mala fide falls to be determined on the respondent version; unless the court considers that the respondent’s allegations do not raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on papers.”

In its affidavit in reply, the respondent stated that it had complied with all court orders issued as per the decree issued on 25th of November 2022 save for one order in issue – that is: the removal of the excavated material it deposited on the suit land.

The affidavit in reply by the respondent company narrates at length the steps that the respondent has taken to comply with the court order in issue. According to the affidavit in reply, the respondent took the following steps; -

- (a) Sometime in January 2023, the respondent communicated to its lawyers that it wanted to start the process of boundary opening in the presence of the applicant herein and the respondent required its lawyers to communicate to the applicant on its behalf.
- (b) The respondent's lawyers communicated to the applicant's lawyer, Counsel Mishele Geoffrey, on various dates through email where 6th March 2023 was set for boundary opening. A site meeting was held on the same date which was attended by the applicant.
- (c) After the boundary opening, the respondent company through its lawyers communicated to the applicant's lawyers that excavation works would commence on 22nd April 2023. The respondent workers proceeded to excavate the soil on 22nd April 2023 but were halted by the applicant because he needed the excavation to be conducted in his presence.
- (d) When the respondent workers proceeded again with excavation on the 26th of April 2023, the applicant and his neighbours were not comfortable with the likely outcome due to the threatened erosion effects of the adjoining land. The applicant stopped the exercise and indicated a possible meeting with the respondent. As per Annexure "E" of the affidavit in reply, the applicant intimidated the possibility of compensation so that excavation could be foregone.
- (e) On the 18th of May 2023, the respondent's lawyers wrote a letter informing the applicant of the hiccup during excavation and the possibility of compensation but instead, they were served with the instant application for contempt of court.

The affidavit in rejoinder deponed by the applicant did little to rebut the claims, and evidence presented in the affidavit in reply. In his affidavit in rejoinder, the applicant denied ever stopping the workers of the

respondent and stated that he was at the site only to witness the removal exercise, but the respondent workers failed to remove the excavated materials and retreated to Kampala.

From the foregoing, there is evidence that the respondent had initiated the process of removal of the excavated materials on the suit land, but the process was not completed due to the circumstances on the ground. The hiccups faced were well communicated to the respondent through his lawyers and it appears that the applicant had knowledge of what was taking place.

In the premises, I am inclined to believe that given the steps taken by the respondent and due to the hiccups faced by the respondent company while attempting to remove the excavated materials deposited on the suit land, its non-compliance with the court order vide **Civil suit No 10 of 2021** is bonafide and was in good faith. The noncompliance with the court order is not deliberate and is neither mala fide nor committed willfully.

As a result, I find that the respondent is not in contempt of the court order in Civil Suit No. 10 of 2021.

Issue 2: What remedies are available to the parties?

Counsel for the applicant prayed for general and punitive damages since the applicant has continued to suffer loss and inconveniences for which he seeks general damages. However, since I have resolved issue 1 in negative, it would be a waste of time to delve into the merits of these prayers.

On the issue of cost to the application, it is evident to Court that the respondent was diligently and responsibly undertaking reasonable measures to remove all the excavated materials from the suit land, as the circumstances on the ground dictated.

Regrettably, the applicant chose to prematurely invoke the jurisdiction of this honourable court, thereby unnecessarily expending judicial resources and engaging in litigation that could have been avoided through amicable negotiations. Given the unwarranted haste exhibited by the applicant in resorting to litigation when the respondent was, in fact, acting in a manner that is bonafide, this court deems it just and equitable to award costs against the applicant. This award serves not only to encourage a more prudent utilization of the legal process but also to underscore the importance of fostering a culture of alternative dispute resolution through constructive dialogue and cooperation among parties.

In summary, this application is dismissed with the costs of the application awarded to the respondent.

I so order.

Dated at Fort Portal this 29th day of September 2023

A handwritten signature in black ink, appearing to read 'Mugabo', written over a horizontal line.

Vincent Emmy Mugabo
Judge