

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
CIVIL DIVISION

MISC. APPLICATION NO. 276 OF 2012

(Arising from Miscellaneous Cause No. 66 of 2011)

MUTAMBO WEPUKHULU ::::::::::::::::::::::::::::::::::: APPLICANT

VERSUS

1. WASSWA BALUNYWA

2. ANNE B. AKANKWASA

3. MAKERERE UNIVERSITY BUSINESS SCHOOL ::::::::::: RESPONDENTS

BEFORE: HON JUSTICE ELDAD MWANGUSYA

RULING

This application is brought under Articles 128(2), (3), 50(2), 28(12), 23(1)(a) of the Constitution of Uganda 14 and 33 of the Judicature Act Cap 13 Section 64(c) and (e), 98 of the Civil Procedure Act, O. 52 rr 1,3 CPR seeking orders of this court that :-

- a. WASSWA BALUNYWA and ANNE B. AKANKWASA, the 1st and 2nd Respondents herein be arrested and committed to prison.
- b. A writ of sequestration doth issue appointing a sequestrator and attaching the salaries and properties of the respondents for the sequestrator's management.
- c. The 1st, 2nd and 3rd Respondents be fined UGX 50.000.000= as a sanction for contemptuous conduct.
- d. That the 1st, 2nd and 3rd Respondents pay the costs of this application.

The grounds of the application are contained in the affidavit of MUTAMBO PAUL WEPUKHULU, the applicant herein but are briefly that:-

1. The applicant and the Respondents on 21st November 2011 entered a consent judgment in which the Respondents agreed that the 3rd Respondent shall make arrangements to enable and allow the applicant to sit the 3rd Respondent's Accounting II examination scheduled for 2nd December 2011 and the Respondents shall ensure that the Applicant's examination script is marked and his results delivered to him by 20th December 2011.
2. The said Consent Judgment was signed by the Respondents with consent and authority of the 1st and 2nd Respondents.
3. The Applicant duly sat the said examination in December 2011 and for five (5) months or more than one hundred and fifty (150) days now the Respondents have refused, ignored and disobeyed the court order to deliver the Applicant's results to him by 20th December 2011.
4. To date the 1st, 2nd and 3rd Respondents being persons subject of the Consent Judgment were served with the said judgment but have disobeyed the same by continuing to hold onto the Applicant's Script and results to obstruct the administration of justice.
5. The refusal of the Respondents to release the results of the Applicant is making a mockery of this court and the justice system.
6. That the orders necessary for purposes of ensuring respect of this Honourable Court and enforcement of its orders in achieving a fair and just disposal of the applicant's grievance.

The affidavit of the applicant in support of the application to which the court judgment is annexed emphasises the failure of the Respondents to enforce the Consent Judgment for which they are liable in contempt. The applicant avers that the trial judge warned the Respondents of the implications of contempt which warning they did not heed.

In reply Professor Waswa Balunywa the 1st Respondent and Principal of the 3rd Respondent avers that in compliance with the Consent Judgment the applicant sat the Accounting II Examination where he scored 28 marks out of 70. The applicant's results were released and displayed on the Notice Board as per the University Regulations. The result slip was annexed to the affidavit. The 1st Respondent also avers that neither the 2nd Respondent nor himself were party to the Consent Judgment and neither were the orders directed to them.

Paragraph 16 of Professor Waswa Balunywa's affidavit is reproduced hereunder because the issue raised therein seems to be the bone of contention. While the applicant believes that he should have received a total mark that included his coursework the Respondents contend that the marks he had obtained in the academic year 2010 could not be added to the exam mark obtained in 2011.

Paragraph 16 *“That upon knowing his examination results, the applicant on the 5th day of March 2012 wrote to me a letter in which he requested the marks he had obtained in a coursework previously done in the academic year 2010 to be added to his final examination results for 2011 (A copy of the letter is hereby attached and marked Annexure “D”).*

In rejoinder the applicant swore a lengthy affidavit in which he insists that the Respondents were in contempt of court. He avers that the 1st Respondent was present when the trial judge warned him of the repercussions of his contemptuous conduct. Paragraph 5 of the affidavit degenerates into a personalisation of the matter when the applicant depones that *“the first Respondent is the architect of the grand scheme to defeat the Court Order and has made himself my tormentor and personally assured me that I shall never graduate from what he called his University and no court order or judgment shall change this”*.

Significantly the applicant depones in paragraph 10 that following the said Consent Judgment he sat for the said Accounting II Examination which was in contention and passed the same with $\frac{28}{70}$ marks and coupled with his coursework results of $\frac{23}{30}$ he passed the course unit with 51% and he qualifies to graduate from the 3rd Respondent.

The significance of this averment is that if following the consent judgment the applicant was enabled to sit the Examination and the marks were availed to him that was in full compliance with the consent judgment where the terms were as follows:-

- 1. The 1st Respondent shall make arrangements to enable and allow the applicant to sit the 1st Respondent’s Accounting II examination scheduled for the 2nd December 2011.***
- 2. The 1st Respondent shall make arrangements to enable and allow the applicant to sit the 1st Respondent shall ensure that the Applicant’s examination script for the Accounting II examination scheduled for the 2nd December 2011 is marked and his results delivered to him by the 20th December 2011.***
- 3. The proceedings of the 55th Irregularities Committee meeting of the 1st Respondent that took place on Thursday March 10 2011 in the School Council Room at 10.00 am and thereafter are hereby terminated.***
- 4. The issue of costs is hereby referred to the trial judge.***

My reading of paragraph 1 and 2 of this consent Judgment is that the 3rd Respondent herein was supposed to ensure that the applicant herein sat the Accounting II examination which according to paragraph 10 of the applicant’s affidavit was complied with.

According to the same paragraph 10 the applicant got his results. The third Respondent might not have executed the judgment within the time table set by the court but this is understandable considering that the applicant sat for the examination within the setting of the institution as his was not a special examination. Mr. Tendo Kabenge counsel for the applicants cited a number of contempt but the question is whether a Respondent who executes a judgment would be said to have been contemptuous of the court. I cite two of the definitions given by counsel for the applicant. The first is the definition in the case of **Housing Finance Bank Ltd & anor Vs Edward Musisi Misc Application No. 158 of 2010** where the Court of Appeal defined contempt as under:-

“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 that party regards the order to be. It is not for that party to choose whether 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 that party’s right to challenge the order in issue. This may be by way of Revision, Review or by Appeal. See CHUK CREMET (1 Corp Jemp 342). We hasten to add that it is the responsibility of and duty of the party concerned, in case that party for some genuine reason, finds compliance with the court order not possible, to appropriately move court issuing the order and bring to the attention of the court the reasons for not compliance.

This is to ensure that the court issuing the order not only must not be held in contempt, but must not, whatever the circumstances, appear to be held in contempt by any litigant. Otherwise to disobey an order of court, at any party’s 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. A court of law never acts in vain and, as such, issues touching on contempt of court take precedence over any other case of invocation of the jurisdiction of the court.”

The second definition is found in the case of **Stanbic Bank (U) Ltd & another Vs The Commissioner General URA MA 0042 of 2010 (Arising from Civil Suit No. 0479 of 2010)** where Justice Irene Mulyagonja (as she then was) bases 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 (1) 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 private injury.”

There are two key elements. The first element is disobedience which is also closely related to the element of non-compliance. In the circumstances it is the view of this court that there was no disobedience of the court orders given that the applicant was enabled to sit the examination and he knows his mark. The compliance with the court orders was within the institutions own administration of the exams so if the applicant was enabled to sit the exam with other students and his results were released with those of the students with whom he had done the examination, I would find that there was compliance with Consent Judgment and whatever the hitches that might have occurred the 3rd Respondent was not contemptuous of the court order. One of these hitches was the failure by the University to include the applicant's marks already obtained in a course work which was done before the court case giving rise to the Consent Judgment.

The coursework mark was never in issue and the Consent Judgment does not even mention it. What was in issue was the examination in which the applicant is alleged to have been found cheating. I would not consider this to be a repeated examination that would entail repetition of the entire course unit. I do not see any other way of interpreting the Consent Judgment because if by the time the Court set the time table for sitting the exam the coursework was already done I do not think that it was intended that the applicant does the coursework when the time for it had passed.

The other matter I wish to comment on is the citation of 1st Respondent Professor Waswa Balunywa and the 2nd Respondent Anne B. Akankwasa for contempt of court when they were not parties to the Consent Judgment. At the commencement of the trial it was stated that Anne Akankwasa was nonexistent and the application against her was withdrawn. Professor Waswa Balunywa remained in the suit. The issue is as to whether individuals like the two Respondents should have been brought to court for contempt when the running of an examination in an institution is a machinery that may involve more than the two individuals whose role however major also depends on the output of others within the institution. It is my view that even if Court had found that there was contempt, individuals within the institution would be not liable for the contempt. The institution and not individuals would be the one to suffer the damages for contempt because while it was party to the Consent Judgment the individuals whatever their role, were not.

In conclusion court finds that there was only a misunderstanding as to whether or not the applicant's coursework should be included in the marks to be released to him which had been resolved in this ruling. The 3rd Respondent is ordered to release the total marks obtained by the Applicant for the Accounting II Course Unit without any further delay.

Apart from the above order the rest of the application is dismissed.

On costs this matter has had a chequered History. Instead of Examination matters being resolved in the University court has had to step in and in my view each party should meet its own costs.

Eldad Mwangusya

J U D G E

26.03.2013

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