

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

MISCELLANEOUS APPLICATION NO. 22 OF 2017

(Arising from Civil Suit No. 619 of 2016)

1. JAMES MUSINGUNZI GARUGA

2. KINKIIZI DEVELOPMENT CO. LTD ::::::::::: APPLICANTS

Versus

1. DR. CHRIS BARYOMUNSI

2. TUMWEBAZE KARABENDA GODFREY ::::::::::: RESPONDENTS

3. KANUNGU FM

BEFORE: HON. MR. JUSTICE STEPHEN MUSOTA

RULING

This application is brought by Notice of motion Under Section 98 of the Civil Procedure Act, S.33 Judicature Act & Order 52 of the Civil Procedure Rules. It is for orders that;

1. *The Respondents are in contempt of Court orders.*
2. *The Respondents be committed to prison for contempt.*
3. *The Respondent be punished by payment of exemplary/Punitive damages or compensation to the Applicant to the tune of UGX.800,000,000/=.*
4. *The 1st Respondent be fined UGX.500,000,000/= as a sanction for contemptuous conduct.*
5. *Costs of this application be provided for.*

The grounds of this application as stated in the affidavit of JAMES MUSINGUNZI GARUGA who is the director of the 2nd Applicant are briefly as follows;

1. That the Applicants are plaintiffs in Civil Suit No.. 619 of 2016 and an Applicant in Miscellaneous Application No. 817 of 2016 and Miscellaneous Application 818 of 2016.
2. That on the 4th day of October 2016 an interim order was issued in Miscellaneous Application No. 818 of 2016 against the Respondents restraining them, their servants and or agents from publishing further libel against the Applicants or make further slanderous, malicious statements or any further defamatory statements against the Applicant in the manner complained of in Civil Suit No.. 619 of 2016.
3. That the said interim order was renewed on numerous occasions till 29th November 2016 when the application was finally determined in favour of the Applicants.
4. That at all material times the Respondents have been aware of the Civil Suit No. 619 of 2016 and the interim orders of this Honourable Court.
5. That on the 20th day of November at around 9:00p.m the Respondents well in total disregard of orders of Court and the principle of subjudice was hosted by the 3rd Respondent (KANUNGU FM) to discuss tea growing matters which are pending before Court.
6. That the Applicants obtained a recorded CD of the talk show and had it transcribed in Runyankole – Rukiga and translated into English for the purposes of understanding the exact contents.
7. That contents indicate that the intention of the talk show was to intimidate Applicants and witnesses and defeat the whole intention of Civil Suit No. 619 of 2016.

8. That those actions of the Respondents are unprecedented and not only threaten the independence of the Judiciary but further undermine the rule of law.
9. That the Respondents are in gross contempt of court.

This application was supported by the affidavits of James Musinguzi Garuga the Chairman Board of Directors of the 2nd Applicant sworn on the 13th January 2017, Mbabazi Emmanuel who is a tea farmer, and Turamyomwe Justus who is a Lecturer at Makerere University.

On the other hand, the Respondents filed their affidavit in reply through the 1st Respondent, 2nd Respondent and 3rd Respondent. Briefly, the 1st Respondent who is DR CHRIS BARYOMUNSI averred and stated as follows;

1. That prior to 29th November 2016 Court issued temporary orders pending the interparty hearing of Miscellaneous application No.818 of 2016 seeking for an interim relief.
2. That the 1st temporary order was issued on 4th October 2016 and expired on the 15th October 2016 the same was in the presence of my lawyers extended to the 15th November 2016 at 10:00am when the ruling for an application for the interim order was going to be delivered.
3. That I was informed by my lawyers that on the 15th November 2016 when they went to court to receive the ruling the learned trial Deputy Registrar was neither in his chambers nor around Court and were informed that the Registrar was not available to deliver the ruling and instead showed them a copy of the ruling notice for 17th November 2016 which was later served onto them.
4. That on the 20th day of November 2016, there was no valid order whatsoever in existence and known to me.
5. That on that date I did not appear on Kanungu FM as alleged by the Applicants because I departed from Uganda Entebbe International Airport for Cambodia on

official Government duties via Dubai, United Arab Emirates and Bangkok, Thailand and I arrived in Cambodia on the 21st day of November 2016 at 14:40 hours.

6. That the alleged recording by Mr. Mbabazi Emmanuel was fabricated, false with intentions to tarnish my image as on the alleged day of November 2016 I travelled out of the country.
7. That the contents of all the affidavits in support are just intended to put my good name to disrepute before the right thinking members of this country and to waste court's precious name.

The parties raised two issues for this court's determination and these are:

1. ***Whether the Respondents are in contempt of a court order.***
2. ***Whether the Applicant is entitled to the remedies prayed for.***

RESOLUTION OF ISSUES:

At the hearing of this application the Applicant was represented by M/S Agaba Saimon while the Respondents were represented by M/S Turyamuhebwa Francis.

In his submissions, counsel for the Applicant stated that on the 4th October 2016 an interim order was issued in Miscellaneous Application No. 818 of 2016 against the Respondents restraining them, their servants and agents from publishing further libel against the Applicants or make further slanderous statements or any other defamatory statements against the Applicant in the manner complained of in Civil Suit No. 619 of 2016.

That the said interim order was further renewed on numerous occasions until the 29th day of November 2016 when the application was finally determined and the Respondents were duly served.

That on the 20th day of November at around 9:00pm he was informed by a resident of Kanungu a one Mbambazi Emmanuel that the 1st and 2nd Respondents were being hosted by the 3rd Respondent and that introductory remarks indicated that they were purposely on radio to discuss matters relating to him and Kinkizi Development Tea Company for which he implored him to listen.

That after listening to the audio he was perturbed to learn that the Respondents well aware of the interim order and the fact that the case is still pending in Court for determination was hosted by the 3rd Respondent to discuss matters that are purely before this honourable Court for determination.

That from the contents of the CD, he learnt that the Respondents were in blatant contempt of Court and he consequently sent the CD to centre for languages and communication services Makerere University for transcription and translation.

That from the excerpts of the talk show it is clear the 1st Respondent in connivance with the 2nd and 3rd Respondents have all intentions to undermine the Court process by not only discussing matters that are before Court but went ahead to intimidate the plaintiffs and their witnesses in the matter.

On the other hand, counsel for the Respondent stated that this application is incompetent because the attachments to the affidavits do not contain an English translation of the alleged recording as alleged by the Applicants. Counsel for the Respondent cited section 88 of the Civil Procedure Act which states that the language of Courts shall be English, Evidence in all Courts shall be recorded in English. Counsel thus emphasized that this Court and the Respondents are not in position to discern the attached documents to arrive at the reliefs sought after in the absence of any translation.

It was also counsel's submission that on the 20th of November 2016 which the Applicants allege to be the date when the Respondents committed the contempt there was no order in existence and as such the Respondents cannot be held to be in contempt. That the Applicants have not in any manner adduced viable evidence by attaching a served order to prove that it was still running on 20th November 2016 but have instead attached two orders marked annexure "A" that expired on 15th November 2016 and annexure "B" that was issued on 29th November 2016.

Counsel further alleged that the 1st Respondent was not on Kanungu Radio Station on 20th November 2016 at 9:00p.m and that the 1st Respondent was out of the country as he was travelling to Cambodia. That the 1st Respondent departed from Entebbe and arrived in Cambodia on 21st November 2016 at 14:40hrs. He has attached a copy of the Air Ticket receipt marked "B1" and a boarding pass marked annexure "B2".

Thus the 1st Respondent denies ever being hosted on the 3rd Respondent's Radio Station on 20th November 2016 but rather asserts that he had travelled out of Uganda headed to Cambodia and the Applicants do not dispute this evidence.

It is also alleged that the Applicant's affidavit in rejoinder amounts to hearsay evidence not credible and is inadmissible by this Court. That he purports to allude to a fact that the date of 20th November 2016 was an error and the correct date when the alleged contemptuous acts took place was on 27th November 2016. That he decided to record the talk show using his phone and to an audio compact disc which he forwarded to Mr. James Musinguzi.

Counsel submitted that the 1st Applicant is not the one who tuned in to the Radio talk show and he did not record the alleged talk show. That the evidence of Mbabazi Emmanuel is direct as he was the one who alleges to have heard and recorded the alleged talk show and the 1st Applicant simply received what Mbabazi Emmanuel allegedly had recorded and told him what according to Mbabazi Emmanuel took place on 20th November 2016.

Having analysed the affidavit evidence and submissions above I will go ahead and dispose of this matter.

The main gist of the arguments of both counsel revolve 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 stated 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. 8/2012*** that the conditions which must be proved by the Applicant in contempt of court are;

- “1. Existence of a lawful order.***
- 2. The potential contemnor’s knowledge of the order.***
- 3. The potential contemnor’s ability to comply and***
- 4. The potential contemnor’s failure to comply with/ disobedience of the order.***

In this case the Applicants contend that interim orders were issued in ***Miscellaneous Application No. 818 of 2016 arising out of MA No. 817 of 2016*** all rising from ***Civil Suit***

No.619 of 2016 in the presence of DR. Chris Baryomunsi the 1st Respondent and counsel for the parties at the first hearing of the parties. That the learned Deputy Registrar issued an interim order on 4th October 2016 and the said orders were renewed at various successive intervals until 29th November when the final order was made.

Counsel for the Respondents stated that the Applicants have not in any manner adduced viable evidence by attaching a served order to prove that it was still running on 20th November 2016 but have instead attached two orders marked annexure “A” that expired on 15th November 2016 and annexure “B” that was issued on 29th November 2016.

The Respondents admitted having received the ruling Notice in line with paragraph 6 of the affidavit of the 1st Respondent. Annextures “B2” and “B4” show that these orders were subsequently served unto counsel for the Respondents on the dates of 15th and 29th of November 2016 and were duly received and the Respondents cannot deny that these orders were not served. What is in contention is whether the above order was operational on the alleged date when the act of contempt of Court was committed.

According to annexure “B3” which is the interim order issued on the 15th day of November 2016, before his Worship Ajiji Alex Mackay it was ordered that;

“Since the ruling is not ready and no reason has been given for the absence of the Respondents, the interim order of injunction issued on 14th October, 2016 retraining the Respondents, their servants and or agents from publishing further libel against the Applicant, or make further slanderous, malicious statements or any further defamatory publication against the Applicants in the manner herein complained is hereby extended until the ruling on this application is delivered”.

This shows that the interim order was still running on the 20th day of November 2016 because the ruling had not yet been delivered and hence existence of a lawful order.

Further, the renewed order on the 15th day of November 2016 was extracted along the said hearing notice and were jointly served unto the Respondent's counsel. Since counsel has a duty to diligently represent his or her client it was his duty to inform the Respondents of the said orders.

Counsel for the Respondent further alleged that the 1st Respondent was not on Kanungu Radio Station on 20th November 2016 at 9:00p.m and that the 1st Respondent was out of the country as he was travelling to Cambodia. That the 1st Respondent departed from Entebbe and arrived in Cambodia on 21st November 2016 at 14:40hrs and he has attached a copy of the Air Ticket receipt marked "B1" and a boarding pass marked annexure "B2".

It is noted that the Applicants in their affidavit and submissions stated that the alleged talk show which formed the subject matter of contempt of Court was held on the 20th day of November 2016. However, in his affidavit in rejoinder, the 1st Applicant clarified this and stated that the alleged Radio talk show took place on the 27th day of November 2016. When the Respondents were given an opportunity to make an application to reply in rejoinder, they neither denied nor challenged that correction of the said date. Since this correction in date was not rebutted by the Respondents this Court takes it that it is the correct date when the Radio talk show took place. The 1st Respondent having attached all proof that he was out of the country also corroborates that the said talk show did not take place on the 20th day of November 2016.

However the fact that all the 3 Respondents have not denied that the alleged Radio talk show took place on the 27th day of November 2016 confirms that it took place.

It is also necessary at this stage to state that since the correct date when the Radio talk show took place was 27th day of November the Respondents were in contempt of Court because the Court order was still running until the 29th day of November 2016.

I will also add that Courts exist to administer substantive justice so where an error in the date is corrected Courts will go ahead and decide the real dispute. Counsel for the Applicant has

cited the case of Ziriyo & 2 Ors Vs Kampala Capital City Authority & Anor Civil Suit No. 396 of 2012 to which I will allude. In that case, Her Lordship Tuhaise J had this to say;

“Courts do not exist for punishing erring parties that fail to strictly adhere to procedural requirements. Courts exist to adjudicate the real substance of disputes and to ensure that justice is administered without undue regard to technicalities in the context of Article 126(2) E of the Constitution”.

Therefore since this inconsistency of the date has been corrected by the Applicant in his affidavit in rejoinder and the Respondents did not rebut it, this Court takes it that the right date when the talk show took place was 27th November 2016.

Counsel for the Respondent also submitted that that the Applicant’s affidavit in rejoinder amounts to hearsay evidence not credible and is inadmissible by this Court. That he purports to allude to a fact that the date of 20th November 2016 was an error and the correct date when the alleged contemptuous acts took place was on 27th November 2016. That he decided to record the talk show using his phone and to an audio compact disc which he forwarded to Mr. James Musinguzi.

In the 1st Applicant’s affidavits and submissions of counsel, it is well elaborated that on the 20th day of November at around 9:00p.m he was informed by a resident of Kanungu a one Mbabazi Emmanuel that the 1st and 2nd Respondents were being hosted by the 3rd Respondent and that introductory remarks indicated that they were purposely on radio to discuss matters relating to him and Kinkiizi Development Tea Company for which he implored him to listen.

That Mr. Mbabazi Emmanuel proceeded to record the Radio talk and later produced Disc and sent to him as per his affidavit on record.

Counsel for the Respondent cited Section 59 of the Evidence Act Cap.6 which is to the effect that:

“Oral evidence must in all cases whatever be direct that is to say;

- a)
- b) ***If it refers to a fact which could be heard it must be the evidence of a witness who says he or she heard it.***
- c) ***If it refers to a fact which could be perceived by any other sense, or in any other manner, it must be evidence of a witness who says he or she perceived it by that sense or in that manner.***
- d)
- e)

In this case, it is on record that Mbabazi Emmanuel who heard the Radio talk show and recorded it swore an affidavit in support of Notice of Motion stating briefly that:

“On tuning to Kanungu FM I found a talk show which was chaired by Bruce and the discussants where Hon. Chris Baryomunsi and Godfrey Karabenda whose voices are well known to me since we have interacted together as residents of Kanungu for many years. That well aware of Civil Suit No.619 of 2016 and Miscellaneous Application No. 817 of 2016 I developed much interest in the talk show and decided to record the talk show from the car radio”.

It follows that since Mbabazi Emmanuel who swore an affidavit is the one who heard and recorded the evidence used by the 1st Applicant, this Court takes it that it is not hearsay evidence. The Applicants have disclosed the source of their information which was from one of the deponents who directly heard the talk show being aired and recorded it. This scenario is covered under Section 59 (b) of the Evidence Act and since it emanates from a properly sworn affidavit it cannot be termed as hearsay evidence.

Counsel for the Respondent also stated that this application is incompetent because the attachments to the affidavits do not contain an English translation of the alleged recording as

alleged by the Applicants. Counsel for the Respondent cited section 88 of the Civil Procedure Act which states that the language of Courts shall be English and, Evidence in all Courts shall be recorded in English. Counsel thus emphasized that this Court and the Respondents are not in position to discern the attached documents to arrive at the reliefs sought after in the absence of any translation.

It is noteworthy that in paragraph 8 of the affidavit of Turamyomwe Justus, it states that:

“THAT I went ahead and certified the Runyankole- Rukiga and English versions at the centre for languages and communications services Makerere University”.

The Applicant went ahead to translate the versions which is marked as annexure “A” on the record which is headed as **“TRANSLATION OF TEXT TRANSCRIBED FROM AN AUDIO RECORDING SAVED AS KANUNGU RADIO TALKSHOW”.**

Counsel for the Respondent submitted that the Applicants attempted to reproduce extracts of the alleged contemptuous recording which they have translated themselves. It is important to state that when Counsel for the Respondent made an application that the affidavit in rejoinder raised new matters, these new matters were in relation to paragraph 10, 11 and 12.

Learned counsel never informed Court that he had not been properly served the English translation of the Radio talk show. Counsel had an opportunity to pray to Court to cross examine the deponents on their affidavits but he did not and this implied that he accepted all the Applicants averments. This was the position in the case of **Samwiri Mussa Vs Rose Achen (1978) HCB 297**, where Ntabgoba Ag. J held that :

“where facts are sworn to in an affidavit and they are not denied or rebutted by the opposite party, the presumption is such facts are accepted”.

This court therefore finds that there was an English translation of the Radio talk show since there is one on the record which counsel for the Respondent did not deny receiving when he addressed new matters.

Issue 2: Whether the Applicant is entitled to the remedies prayed for.

The Applicant seek for orders that:

- a) The Respondents be committed to prison for contempt.
- b) The Respondents be punished by payment of exemplary damages or compensation to the Applicant to the tune of UGX.800,000,000/=
- c) The 1st Respondent be fined UGX.500,000,000/= as a sanction for contemptuous conduct.

The primary purpose of contempt proceedings is to preserve the effectiveness and sustenance of the power of Courts. **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 M.C. 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 this ruling till payment in full. However, the Court handed down a penalty of UGX.100,000,000/= for contempt of Court orders in Civil Suit 269/2011 which was to be deposited in Court.

In the circumstances of this case, I will award the Applicant exemplary damages of UGX.50,000,000/= (fifty million). The exemplary damages will carry interest at Court rate from the date of this ruling till payment in full. In addition the respondents will deposit in court a penalty of 2,000,000/= (Two Million Shillings only). The costs of this application are awarded to the Applicant.

I so order.

Stephen Musota

J U D G E

21.06.2017

RULING

21/6/2017:-

Mr. Patrick Kiconco Katabazi together with Mr. Simon Kagaba for the Applicants are in Court.

Mr. James Musinguzi Garuga is in Court.

Mr. Charles Byarugaba for the 2nd Applicant in Court.

Mr. Mulani Peter for the Respondents.

Respondents not in Court.

Ms. Busingye Jackie Court Clerk.

Court:-

Ruling delivered in presence of:

1. Mr. Patrick Kiconco Katabazi
2. Simon Kagaba for Applicants.
3. Mulani Peter for the Respondent.
4. Applicant Mr. Musinguzi James Garuga
5. Ms. Busingye Jackie Court Clerk.

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JOY BAHINGUZA KABAGYE

ASSISTANT REGISTRAR

21/6/2017

RULING