THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

Miscellaneous Application No. 746 of 2018

[Arising from Miscellaneous Cause No. 268 of 2017]

EKAU DAVID::APPLICANT

VERSUS

1. DR. JANE RUTH ACENG

2. THE MINISTER OF HEALTH

3. ATTORNEY GENERAL:: RESPONDENTS

BEFORE: HON. JUSTICE SSEKAANA MUSA

RULING

BRIEF FACTS

The Applicant filed an Application for Judicial Review against the Attorney General and the Minister of Health herein vide Misc. Cause No. 268 of 2017 seeking inter alia Judicial Review by way of Certiorari to Quash the decision of the 1st Respondent herein who is Minister of Health embedded in her letter dated 19th day of May 2017 barring the Applicant from being inaugurated to serve as a representative of the Pharmaceutical Society of Uganda to the National Drug Authority and an order of mandamus compelling the Minister of Health to inaugurate and give the Applicant the terms of reference as a representative of the Pharmaceutical Society of Uganda to the National Drug Authority.

The Application was heard and disposed of inter-party in favor of the Applicant wherein the following orders were issued;

- The Minister of Health is directed to issue an instrument that facilitates the Applicant to take up his position as the Representative of the Pharmaceutical Society of Uganda.

- The 2nd Respondent is ordered to ensure that the Representative takes up his role as a member of National Drug Authority within 30 days from the date of the ruling.

- The Applicant is awarded costs of this Application.

The orders above were to be complied with by the Minister of Health who is the current 1st Respondent herein within 30 days from the 24th day of August 2018, the date of the ruling. However the said orders were not complied with hence this Application. The applicant sought the following to be determined to support a finding for contempt;

1. ***Whether the 1st respondent who is the Minister of Health's act of not issuing an instrument that facilitates the applicant to take up his position as the Representative of the Pharmaceutical Society of Uganda was in Contempt of this Court's Order issued on the 24th day of August, 2018.***

2. ***Whether the 1st respondent who is the Minister of Health's act of not ensuring that the applicant takes up his role as a member of the National Drug Authority within 30 days from the date of the ruling was in contempt of this Court's Order issued on 24th day of August, 2018.***

3. ***Whether the 1st respondent can appropriately be punished for the alleged contempt by payment of exemplary damages of 2,000,000,000/= to the applicant.***

4. ***The 1st respondent be committed to Civil Prison for disobeying the said court Order.***

5. ***The 1st respondent be fined a sum of 1,000,000,000/= for contempt of Court Orders.***

6. ***Costs of this application be provided for.***

The Applicant filed an affidavit in support of the Application and an affidavit in rejoinder dated 11th January 2019. The 1st Respondent filed an affidavit in reply dated 09th day of January 2019.

The 2nd and 3rd Respondents filed a joint affidavit in reply also dated 09th day of January 2019 respectively sworn by ***Dr. Jane Ruth Aceng*** and Nabasa Charity.

The 1st respondent in specific answer to the application stated in her affidavit reply;

That compliance with orders set out by the applicant is premature for the following reasons;

i. That being dissatisfied with the ruling of Hon Musa Ssekaana delivered on 24th August 2018 under Miscellaneous Cause No. 268 of 2017, the 2nd and 3rd respondent filed a Notice of Appeal at the High Court as well as a letter requesting for the certified record of proceedings.

ii. That we took further steps to move Miscellaneous Application No. 268 of 2017 to Execution Division to enable us file a stay of execution of the said orders.

iii. That we applied for stay of execution on the 30th day of October 2018 for a stay of Orders, which application is yet to be heard.

iv. That due to the delay in fixing the above application for stay, we in addition filed an application for interim stay of execution owing to administration delays of forwarding the file to the judge at Execution Division.

v. That the said interim application for stay of execution of orders that the applicant seeks under this application and the pending appeal in the Court of Appeal, render this application redundant and the same should be dismissed with costs to the respondents

At the hearing of this application the parties were advised to file written submissions which I have had the occasion of reading and consider in the determination of this application.

The applicant was represented by *Mr. Bosco Okiror and Mr Ben Ikilai* whereas the 1st respondent was represented by *Mr. John Kaddu* holding brief for *Ms Katusiime Leliah* and 2nd & 3rd were represented by *Ms Nabaasa Charity* holding brief for *Mr Adrole Richard*.

There are two issues arising that is;

1. *Whether the 1st Respondent who is the Minister of Health is in contempt of court order dated 24th August 2018.*

2. *What remedies are available to the applicant?*

Submissions

Counsel for the applicant cited the case of *Babra Nambi vs Raymond Lwanga High Court Misc. Appl. No 213 of 2017* wherein it was stated that;

Before any action can be found to amount to contempt of court, the following principles have to be established: -

- Existence of a lawful order.
- Potential contemnor's knowledge of the order.
- Potential contemnor's failure to comply, that is, disobedience of the order.

Learned counsel for the applicant submitted that the Respondents knowledge of the lawful order and their disobedience of the same were confirmed by the failure to comply with the order within a period of 30 days from the 24th day of August 2018.

Counsel further submitted that the Respondents allude to filing a Notice of Appeal, an Application for stay of execution and an application for interim order but the purported application for stay of execution attached as annexure "D" in all the Affidavits the Respondents was filed on the 30th day of October 2018 well after the days within which the order of this court was to be complied with.

Counsel submitted that the Applicant has never applied for and/ or commenced any execution proceedings to warrant the Respondents applying for stay of execution and interim order which is evidenced by Paragraph 7 in the Applicant's Affidavit in rejoinder.

Counsel in his submissions concluded that the purported Application for stay of Execution and or Interim order filed by the Respondents are baseless and amount to abuse of Court process.

Counsel cited the case *Sendege Senyondo vs The Bank Secretary Bank of Uganda & Another: High Court Misc. Appn. No. 98 Of 2018* ***Hon. Lady Justice Basaza Wasswa*** held at page 32 that:

"It is however not a defence to an application to be found in contempt to say that the disobedience was as a consequence of having challenged by way of an appeal, the order under review for disobedience and the application to be found in contempt of."

The Hon. Lady Justice further held at page 32 that;

"The second Respondent has not purged itself of the contempt of the Registrar's order. Mere filing of an Appeal or an application against the order means that the order is being challenged. The rule is clear that a challenge to the order or assertion that the order was null or void or irregular is no defence to the uncompromising obligation to obey court orders"

The uncompromising nature of the obligation to obey Court orders was considered in *Hadkinson vs. Hadknison [1952] 2 All ER 567* and cited with approval by ***Hon Justice Andrew Bashaija***, In *Erasmus Masiko vs John Imaniraguha, Christopher Mulenga & Commissioner Land Registration. High Court Misc. Appn. No. 1481 of 2016;*

"It follows that there ought, in the very least, to have been an effort by the 1st Respondent who is the 2nd Respondent in her official capacity to purge itself of the contempt by making the payment in court as security for full compliance pending the intended appeal. The Appeal as well as the Application for stay of execution does not purge the 1st and 2nd Respondent of contempt"

Learned counsel for the 2nd and 3rd respondents submitted that respondents have purged themselves of the contempt of the Court's orders by lodging an appeal as well as filing the subsequent applications which show that they challenged the orders made by this court.

Counsel further submitted that it will be unjust and defeat the interest of justice if this Court were to find the Respondents in contempt of the Court orders albeit having diligently taken all reasonable steps and effort to have the orders of the Court stayed as set out in paragraph 11 of the Affidavit of Charity Nabasa.

Counsel cited the case of *Housing Finance Bank Ltd & Anor vs Edward Musisi; Misc. Application No. 158 of 2010* wherein the court of appeal held that

"I am of the considered opinion that lodging an appeal and staying execution falls well within the ambit of "to challenge the order in issue, in such a lawful way as the law permits"

Counsel prayed that the Court be pleased to find that the respondents are not in contempt of the orders issued by the Court and in the unlikely event that the Court finds that the order have not been complied with, it then finds that for the reasons advanced, the Respondents are not in contempt of the Court orders.

Determination

Black's Law Dictionary (*Ninth Edition*) defines contempt of court as:

"*Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment*."

In the Matter of Collins Odumba [2016] eKLR, the Employment & Labour Relations Court of Kenya at Kericho extensively discussed the contempt of court. D. K. N. MARETE held that:

"*The law and practice on contempt of court has come out clearly that the essence of contempt proceedings is not to assuage the feelings of the judge or install the dignity of the court. Far from this, it is intended to safeguard the supremacy of the law. In the authority of Johnson vs Grant, 1923 SC 789 at 790 Lord President Clyde stated that;*

"…The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged."

The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is

dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.

In the case of *Kenya Tea Growers Association v Francis Atwoli and 5 ors [2012] eKLR* Lenaola J cited with approval the case of *Clarke and Others v Chadburn & Others [1985] 1All E.R (PC), 211* in which the court observed that;

"*I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed, wilful disobedience to an order of the court is punishable as a contempt of court, and I feel no doubt that such disobedience may properly be described as being illegal….even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it*."

This clearly illustrates why courts will not sit and watch in the wake of contempt of court. Disobedience of court orders and or summons would in total disparage the rule of law and lead to anarchy. This would be too much for any of us to await and face. Judges and judicial officers may risk being accused or seen to defend their lofty positions in this exercise, but this would be worth every coin bearing in mind the possible alternatives.

In the instant case basing on the case of *Babra Nambi v Raymond Lwanga* (supra) as cited by counsel for the applicant it is an undisputed fact that there is in existence a lawful court order, which the Respondents certainly know and did not comply with.

I find that the respondents' justification for not complying with the orders of this court by way of filing an appeal and the subsequent application for stay of execution as well as interim stay of execution untenable, baseless and devoid of merit.

The respondents were already in contempt of court when the 30 days directed by this court within which to comply with court's orders elapsed. This implies that the When the Court issued an Order on 24th August 2018, the same had to be complied with by 23rd September 2018. The applicants filed an application for stay of execution on the 30th October 2018 which was over 37 days after the expiry of the period they had been ordered to comply with the Order.

The respondents cannot therefore hide behind the justification of filing an appeal and staying execution to purge themselves of contempt.

In Housing Finance Bank Ltd & Another vs. Edward Musisi (supra) at page 11, it was held that;

"The principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders issued by Court through its 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."

It would be futile for a court to issue orders that are not effective owing to the parties' disobedience of such orders; and yet the court continues to issue such other orders on top of those already issued but disobeyed.

The 1st applicant as the Minister of Health was obliged to comply with an order of Mandamus and any failure to comply is a contempt of court which she has to be punished by a fine or imprisonment.

The finding of Contempt will be normally made against the Minister acting in his/her official capacity as the order granted in judicial review will normally have been made against the minister. See *M v Home Office [1994] 1 AC 377*

In exceptional circumstances like the present case, a Minister may be personally liable for contempt if he or she has engaged in action which amounts to default. Normally, however, the appropriate action will be to make a finding of contempt against a Minister acting in his/her official capacity rather than his/her personal capacity. See *M v Home Office ibid.*

The 1st respondent took the '***Oath of Minister***' before assuming office and swore to "***support and uphold the Constitution of the Republic of Uganda as by law established;***"

The support and upholding of the Constitution enjoins the Minister to comply with Article 128 of the Constitution which provides for Independence of the Judiciary.

1. *The courts shall be independent and shall not be subject to the control or direction of any person or authority.*

2. *No person or any authority shall interfere with the courts or judicial officers in the exercise of their judicial functions.*

3. *All organs and agencies of the State shall accord to the courts such assistance as may be required to ensure effectiveness of the courts.*

Therefore any acts of contempt of lawful court orders directly or indirectly infringe on the Independence of the Judiciary and to a greater extent the Rule of Law in this country.

The courts are enjoined to uphold the Constitution and have to fly high the flag of Rule of Law which aims at the progressive diminution of arbitrariness in the exercise of public power. Any attempt to curtail their function through disobedience of their lawful orders must be treated with the highest contempt it deserves.

Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely- that is to say, it can validly be used only in the right and proper way which the Constitution conferring it is presumed to have intended.

Any contempt of court is unconstitutional and is thus criminal in nature/character and ought to be punished as such. There is an element of public policy in punishing civil contempt, since administration of justice would be undermined if the order of any court of law could be disregarded with impunity. See *Attorney General vs Times Newspapers Ltd* [1974] AC 273 at 308A

The coercive power of an order of court ultimately derives from the institutional legitimacy of the judiciary. In this regard, judicial legitimacy is a function of, amongst others, how widely court orders are adhered to, and subjective attitudes of those that are bound by court orders. Enforcing respect for court orders serves the public interest of promoting respect for the rule of law, which is an essential element of our society. See ***Civil Procedure and Practice in Uganda*** *2nd Edition page 39 by Ssekaana Musa*

The 1st respondent's failure to comply with a clear order is a serious affront to rule of law and constitutionalism. This is a violation of the Constitution which she swore to support and uphold. The reason put forward for her failure to comply with the clear order is too lame and weak in the circumstances. By the time the 1st respondent purported to apply for stay of execution on 30th

October 2018, she was already in contempt by 37 days since the said order was to be effected by 23rd September 2018.

This Court finds that the 1st or 2nd respondent is in contempt of court for failure to have the applicant take his position on the National Drug Authority as the elected Representative of Pharmaceutical Society of Uganda.

Remedies

The Applicant prayed for exemplary /punitive damages of Ug. Shs 2,000,000,000/=. The applicant also seeks that the 1st Respondent is committed to civil prison for disobeying the orders of Court and in addition seeks that the 1st Respondent be fined Ug. Shs 1,000,000,000/=

The Applicant has been out of office from the 09th day of January 2017 when the inauguration took place to date as evidenced by Annexure "R.1" in the Affidavit in rejoinder due to the unreasonable, illegal, irregular, vindictive and malicious acts of the 1st Respondent who has been the Minister of Health since then to date. It would therefore be appropriate in the circumstances of this case for the 1st Respondent who is the 2nd Respondent in her official capacity to pay a fine since the disobedience is intentional.

Since this court has resolved that the 1st or 2nd respondent is in contempt of court, what is left is for court to determine the remedies available.

The very fact of a finding of Contempt against a Minister or department is considered sufficient vindication of the rule of law and sufficient to ensure that orders of the courts are obeyed. But the actions of disobedience are causing injury to the party entitled to take office and this could be deliberately intended to ensure that the applicant never assumes office.

This court is obliged to give punitive sanctions to ensure that the 1st respondent/2nd respondent obliges to principles of rule of law and constitutionalism.

According to the case of *Semanda & 2 Ors v Kaheebwa & Anor Miscellaneous Application No. 1625 of 2016* Courts in Uganda have derived punishments for civil contempt from common law decisions, where the punishments are provided for in the Contempt of Court Act (1981).

This is because Uganda *"has no equivalent of the Contempt of Court Act"*. However, decided cases have established that "*disobedience of civil court orders is known and ought not to be allowed by courts."* -See *Stanbic Bank (U) Ltd & Another vs. Commissioner General Uganda Revenue Authority Miscellaneous Application 0042/2010.*

In the case of *Re Contempt of Dougherty 492, Michigan 81, 97 (1987)* as cited by counsel for the applicant, it was held that "*imprisonment for civil contempt is properly ordered where the Defendant has refused to do an affirmative act required by the provisions of an order which, either in form or substance was mandatory in character." The order in such a case is not a punishment but is coercive to compel him to act in accordance with the order of court."*

In these circumstances however I shall not commit the respondents to civil prison. It would be futile to commit them to civil prison since that would be another excuse not to act on the orders of this court since the 1st respondent would be out of her office.

With regard to the fine for the 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. In the case of *Stanbic Bank Ltd & Anor vs The Commissioner General URA MA 42 of 2010*. Court imposed a fine of 100m/= as sufficient punishment to purge the contempt in that matter.

In this case the 1st or 2nd respondent is therefore directed to pay shs 20,000,000 as a fine. The fine should be deposited in court within a reasonable time.

The applicant has been out of office from the 09th day of January 2017 when the inauguration took place till date. The applicant should be paid all entitlements' and monetary benefits including allowances since January 2017 until he takes office as the Elected Representative of Pharmaceutical Society of Uganda.

This application is allowed with costs.

I so order.

SSEKAANA MUSA

JUDGE

17th/06/2019