

The Republic of Uganda

In the High Court of Uganda Holden at Soroti

Miscellaneous Application No. 135 of 2022

*(Arising from Miscellaneous Application No.165 of 2021)*

*(Arising from Miscellaneous Application No.35 of 2021)*

10

*(Arising from Civil Suit No. 037 of 2021)*

- 1. Isac Eryaku
  - 2. Martha Mbabazi Atai
- } :::::::::::::::::::::::::::::::::::::: Applicants

Versus

15 Hon. Asamo Hellen Grace :::::::::::::::::::::::::::::::::::::: Respondent

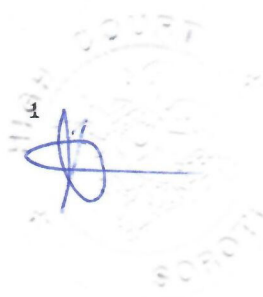
Before: Hon Justice Dr Henry Peter Adonyo

Ruling

1. Application:

20 The applicants jointly brought this application by Notice of Motion under Section 98 of the Civil Procedure Act, Cap 71 and Order 52 rules 1 and 3 of the Civil Procedure Rules against the respondent for orders that;

- 1) The respondent is in contempt of court orders vide; Miscellaneous Application No. 167 of 2021 and should be arrested and committed to civil prison for 6 (six) months.
- 25 2) An order compelling the respondent to uphold the orders in Miscellaneous Application No. 167 of 2021.



- 5
- 3) An order against the respondent to pay a fine of UGX 30,000,000 to the court and compensation of UGX 50,000,000 to the applicants for the contemptuous conduct.
  - 4) The respondent be ordered to pay exemplary damages to the applicants for the emotional torture she has subjected them to.
  - 10 5) The respondent be ordered to stop further violations of court orders.
  - 6) Costs of the application be provided for.

The grounds upon which the application is anchored are contained in the affidavit in support deposed by Isaac Eryaku, the 1<sup>st</sup> applicant on his and Martha Mbabazi Atai (2<sup>nd</sup> applicant)'s behalf. Pertinent note is paragraphs  
15 2, 4, 5 and 7 which for brevity have been reproduced here, that;

1. This Honourable Court issued orders on 4<sup>th</sup> March 2022 granting the applicants access to the grave of the late Iyapo Phoebe Auma to perform the last funeral rites and conduct prayers.
2. At the time this Honourable Court made the above orders, the grave of  
20 our beloved mother Iyapo Phoebe Auma was not enclosed as evidenced by annexure 'A' to the respondent's supplementary affidavit in reply to Misc Application No. 167 of 2021.
3. The respondent's advocate was present in court when the order was made and extracted the said order from the ruling of this court on 17<sup>th</sup>  
25 March 2022.
4. The applicants started organizing the last funeral rites and prayers for the late Iyapo Phoebe Auma.
5. Before the applicants could conduct the prayers and last funeral rites as planned, the respondent constructed a permanent structure around

5 the grave of the late Iyapo Phoebe Auma and locked out the applicants thus denying them access.

6. The respondent willfully denied the applicants their cultural and religious rights in total violation of the orders of this court.

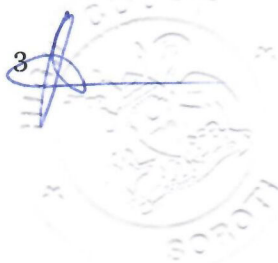
7. It is in the interest of justice and equity that this court grants the application.

10 The application was opposed by Hon. Asamo Hellen Grace, the respondent in her affidavit in reply, wherein under paragraph 26 upon the advice of her lawyer, she stated that the matter is frivolous and vexatious, bad in law, premature and misconceived and that the applicants are being busybodies  
15 wasting court's valuable time. For brevity, I shall reproduce paragraphs 3, 5, 7, 8, 9, 10, 18, 19, 22, 23, and 24 of the affidavit in reply which the respondent bases on to oppose the instant application. That;

1. I am unaware of the applicants' plans to organize the last funeral rites and prayers of our late mother Iyapo Phoebe Auma and they are at  
20 liberty to undertake that without any restrictions whatsoever as of right.

2. I am only responsible for the construction of a mausoleum to secure the graves of our fallen loved ones buried in Kongoto village, Bugondo sub-county, Kasilo county, Serere district from harsh weather  
25 conditions, freely grazing animals, rain and running water, bush among other conditions and I am not responsible for the padlock thereat.

3. I contend that I have never hired and/or deployed security before, during or after the burial of our late mother with the intent of depriving  
30 or violating the rights of the applicants to access the body or gave of



5 our late mother and that justifies the applicants' presence during the said burial at a time Uganda was under COVID-19 lockdown and visits thereafter.

10 4. I contend that I am not responsible for the alleged locking of the said mausoleum (which has been and was left open for anyone to access and pay their last respect and for ease of cleaning) leading to the alleged violation of the applicants' cultural and religious rights and rights of the dead and gross abuse of the applicants with impunity.

15 5. I contend that I am a law-abiding citizen who minds about other peoples' rights and complies with any lawful order and even the court order issued by this Honourable Court on 12<sup>th</sup> March 2022, through my lawyers Ms Ilukor Advocates & Solicitors vide a letter Ref: IAS/GEN/027/22 dated 18<sup>th</sup> March 2022, I forwarded the documents court had ordered me to avail the applicants through their then lawyers M/s Omongole & Co. Advocates who received the same on the 18<sup>th</sup> March 2022.

20 6. I am in utter shock and disbelief to be served with this application levying these allegations of contempt of lawful court order without having prior notification of the same to verify or confirm whether I am responsible for padlocking the said mausoleum and/or denying the applicants access thereof.

25 7. I contend and aver that, as a law-abiding and honourable citizen, a sister to the applicants among others, I am very innocent of all the unverified and/or unconfirmed allegations levied on me by the applicants leading to the alleged contempt of court orders issued on 30 14<sup>th</sup> March 2022 and it's the 1<sup>st</sup> applicant who is in charge, possession and occupation of the said portion of land that was given to the family

5 of the late Iyapo Phoebe Auma by family members of the late Mzee Otigo Asanasio seen in the photographs attached as "E", "F" and "G".

8. The applicants are engaging in blackmail, defamation, witch hunt and politicking for their selfish reasons with the hope of damaging the respondent's and/or extorting money from the respondent for the applicants' unknown reasons as they have continued discussing family issues on Etop radio involving journalists and writing about the respondent in the local daily newspaper of "Aiceret" in Teso dated 10<sup>th</sup> August 2022, sent the respondent several WhatsApp messages that the respondent is planning and vowed to kill the 1<sup>st</sup> applicant and that the respondent has put hitmen to trail/track and attack him, a complaint to Central Police Station of Serere and among others.

9. I have also asked Joseph Otigo Amolo – a cousin and Amolo James – cousin and area LC1 chairperson who are residents of Kongoto village, Bugondo sub-county, Kasilo county, Serere district to swear supplementary affidavits in reply to certain facts and allegations made by the applicants against the respondent.

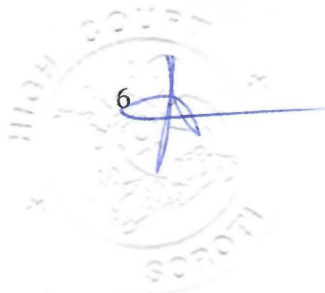
10. It is not the first time the applicants have made such unfounded allegations against the respondent of contempt of court orders, it also happened in Misc. Application No. 048 of 2021, Eryakia Isaac vs Hon. Asamo Hellen Grace in the Chief Magistrates Court of Soroti and he had to withdraw it on his own volition when I refused to budge to his plea for money and after his attempts were met by the hard truth of what happened before, during and after the burial of our late mother on 18 September 2022.



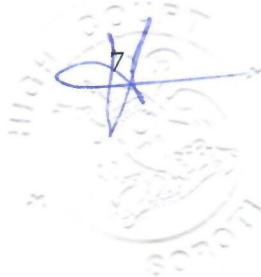
5 Supplementary affidavits:

Otigo Joseph Amolo, a cousin to the parties requested under paragraph 2 of the supplementary affidavit by Hon. Asamo Hellen Grace, the respondent, deposed a supplementary affidavit to clarify certain facts and issues as alleged by the applicants, that;

- 10 1. Sometime at the end of March or early April 2022, the respondent after the cases filed by the applicants in the High Court of Soroti vide HCMA 167 of 2021; at the Chief Magistrate's Court of Soroti Misc. Application No. 48 of 2021 had been concluded, decided to develop a simple house  
15 – a mausoleum to house the three graves of our fallen beloved ones i.e Atim Lucy – grandmother; Emokod Daniel – uncle to the applicants and Iyapo Phoebe Auma – mother to the parties and my aunty and she brought builders from Kampala to erect the said structures.
- 20 2. Being the person and relative on the ground in Kongoto village, it was my duty to help in the supervision of the said construction works, keep custody of the building materials and equipment, keep the respondent updated on the progress of the work and also take care of all the workers while at the site.
- 25 3. During the progress of the construction works, the 1<sup>st</sup> applicant used to come around to the site sometimes very early or very late until the works were completed.
4. During and upon completion of the said house at the graveyard, its access door was left open with no padlock to allow any persons or visitors and ourselves access the same to pay last respects and clean it up as often as possible.



- 5 5. Sometime on 17 May 2022, the 1<sup>st</sup> applicant ferried construction materials (bricks, sand, stones etc.) and sinking a pit latrine, started cutting trees and crops at my homestead without prior notice or discussion with me and this prompted me to lodge a complaint of criminal trespass and malicious damage of property at Apapai police post before it was later transferred to Serere Central Police station upon which the 1<sup>st</sup> applicant was summoned to police and detained a little after which he restrained himself from continuing with his malicious and destructive acts near the neighbourhood to the graveyards.
- 10
- 15 6. The 1<sup>st</sup> applicant upon receipt of the said portion of land immediately took possession and occupation of the same, and brought people to dig, cultivate, plant and erect grass-thatched huts, permanent house and wooden structure.
- 20 7. The respondent has never again been to the said graveyards from the time the 1<sup>st</sup> applicant took exclusive possession, occupation and utilization of the said land gifted to the family of the late Iyapo Phoebe Auma.
- 25 8. What I know is that, during and at the time the construction of the said mausoleum was completed and handed over, there was no padlock at the said access door and I was ever freely accessing the same to clean until that time when the 1<sup>st</sup> applicant took charge of the land including the grave yards.
- 30 9. I swear the supplementary affidavit in good faith and good intent of always clarifying facts, issues and allegations and falsehoods perpetrated by the applicants against their sister - the respondent just like it were in the earlier court applications.



5 10. I swear this supplementary affidavit in reply to prove that the respondent is responsible for the construction of the said freely accessible mausoleum and not responsible for the alleged padlocking of the same.

10 11. It is the 1<sup>st</sup> applicant who is responsible for the said padlocking of the mausoleum if any and that is why they are requesting this honorable court to demolish the said structure which has not in any way deprived them of access to conduct and exercise their cultural and religious rites thereof, save for the padlock he himself put thereto with the intent of blackmailing and/or bringing disrepute to the respondent.

15 Amolo James, the L.C1 Chairperson of Kongoto village, Bugondo sub-county, Kasilo county, Serere district under paragraph 2 of the second supplementary affidavit was requested by Hon. Asamo Hellen Grace, the respondent, to deposed this second supplementary affidavit to clarify certain facts alleged by the applicants, he now deposes this affidavit that;

20 1. Before, during and after the burial of the late Iyapo Phoebe Auma on 18<sup>th</sup> September 2021 at Kongoto village, Bugondo sub-county, Kasilo county, Serere district, there were no policemen restricting free access of mourners to the venue and the graveyard in as much as it was amidst COVID19 lockdown.

25 2. I can attest that during the progress of construction works of the mausoleum whose construction was monitored by me and its completion, there was no padlock on the access door deterring or preventing or denying any person access to the said graveyard.

30 3. The 1<sup>st</sup> applicant after the demarcation of their portion of land on 30 July 2022 which also encompasses the graveyards/mausoleum, took



5 immediate possession and occupation of the said land and took charge of the graveyards with a mausoleum already built.

4. At the time the mausoleum was being built and upon completion, every person had free access and there was no padlock whatsoever fixed by anyone at the access door thereafter.

10 5. I depone this supplementary affidavit in reply to prove that, the respondent has not denied the applicant access to the said graveyards and even the mausoleum built has an access door which after its completion was left open for all to access including the applicants.  
Paragraph 17

15 6. If the court could permit and grant us authority together with the area police, we would go and cut off the said padlock instead of it being used as an avenue of accusation and legal contestation. Paragraph 19

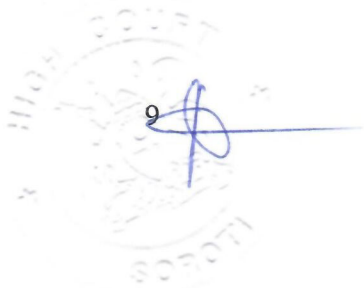
The applicants through Isac Eryaku deponed an affidavit in rejoinder wherefore he states that;

20 1. I did not at any time participate in the construction of a building to enclose our beloved late mother Iyapo Phoebe Auma's grave which is not in conformity with our culture and norms.

2. It is not true that the building in which my mother's grave is enclosed had free access but rather, it was kept under key and lock as evidenced  
25 in the annexures to my affidavit in support.

3. I state that the said building has never been open but rather kept locked with a padlock whose keys I have never received from the respondent.

4. It is not true that the respondent doesn't know about the padlock on a house she built yet ignored several pleas by the applicants to open her



5 building through phone calls, text messages and email in order to curtail our rights.

5. There is no doubt that the respondent who has admitted constructing a lockable house over our beloved late mother Iyapo Phoebe Auma's grave disguised as a "mausoleum" for her selfish purposes is in contempt of the orders of this court issued on 4<sup>th</sup> March 2022.

10 **2. Background:**

On 4<sup>th</sup> March 2022, this Honourable Court issued a court order vide Misc. Application No. 167 of 2021 with the following, that;

- 15 a) The applicants' application to exhume the body and rebury is rejected.
- b) The applicants shall be granted access to the grave of the late Iyapo Phoebe to perform the last funeral rites and conduct prayers.
- c) The applicants be granted access to the late Iyapo Phoebe's medical records to satisfy themselves with the cause of death.
- 20 d) The applicants' cultural and religious rights be protected from being violated by the respondent.

This is the court order in issue which the applicants contend that the respondent is in contempt of. The court order was issued by this court in the presence of Martha Mbabazi Atai, 2<sup>nd</sup> applicant; Ms. Lillian Omurangi, counsel for the Applicants and Mr. Illukor Emmanuel, counsel for the respondent in the absence of the 1<sup>st</sup> Applicant and the respondent.

25 According to the record, the court order was extracted M/s Illukor Advocates and Solicitors, counsel for the respondent. It was attached to the applicants' affidavit in reply marked as annexure "B".

5        2. Representation and Submissions:

The applicants were represented by M/s Engulu & Co. Advocates while the Respondent was represented by M/s Ilukor Advocates & Solicitors.

Parties herein filed written submissions which are considered together with the application itself, the reply to it and the affidavits for and against the application. The summary of the submissions is as below.

10        a. The applicants' case:

It is the applicants' case that on the 4<sup>th</sup> March 2022, the applicants obtained a court order vide Misc. 167 of 2021 which among others granted the applicants access to the grave of the late Iyapo Phoebe Auma to perform their last funeral rites and also directed that the applicants' cultural and religious rights be protected from violation by the respondent.

The applicants aver that in total violation of the said court order, the respondent enclosed the grave of the late Iyapo Phoebe Auma in a permanent house and kept it under key and lock thereby denying the applicants access to the said grave and also grossly violating the applicants' religious and cultural rights.

20        b. The respondent's case:

The Respondent avers that upon determination and conclusion of Misc. Application No.167 of 2021; Eryaku Isaac & Martha Mbabazi vs. Hon. Asamo Hellen Grace on the 4<sup>th</sup> day of March, 2022, obliged to the Orders of this Honourable court by availing the Applicants through M/s Omongole & Co. Advocates with the documentary evidence vide a letter Ref: IAS/Gen/027/22 dated 18<sup>th</sup> March, 2022 as ordered by this Honourable Court on the 4<sup>th</sup> March 2022.

The Respondent contends that being mindful of the environment in Kongoto Village, Bugondo Sub-County, Kasilo County, Serere District decided to build a simple Mausoleum enclosing the three graves of the late Emokod Daniel, Atim Lucy and Iyapo Phoebe Auma with an access door for any person to freely access, pay their last respect, clean the grave yards. The respondent  
10 avers that the mausoleum was built with the intention of preserving the grave yard/graves against harsh weather vagaries, wild bush, and freely grazing animals. That upon completion, it was left open without a padlock on the access door.

The Respondent contends that she was shocked to be served with this  
15 Application for alleged Contempt of lawful Order on alleged violation of the Applicants' Cultural and Religious rights and denied access into the said Mausoleum by the padlock fixed on the access door, for which the Respondent denies responsibility thereof, save for the Mausoleum.

The Respondent avers and contends that, the 1st Applicant upon sub-  
20 division of the customary land, is in total and exclusive possession and occupation of the land comprised of about 7 acres/gardens including the said grave yard, and has built homestead thereon.

### 3. Issues for the Resolution of this Application:

Distilled from the pleadings of the parties, the following issues are framed  
25 for the resolution of this application.

- a) Whether the Respondent is in contempt of the court order vide Misc. No. 167 of 2021, issued on 4<sup>th</sup> March 2022? And if so,
- b) What remedies are the applicants entitled to?

5

#### 4. Resolution:

Contempt of court refers to behaviour that takes place during, or in connection with, legal proceedings that prejudices or impedes the administration of justice or creates a real risk of that happening. Examples of contempt of court include deliberately breaching a court order, taking, and publishing photographs in court, and publishing information that could prejudice a trial.

‘Contempt of court’ happens when someone risks unfairly influencing a court case. It may stop somebody from getting a fair trial and can affect a trial’s outcome.

15 Contempt of court includes:

- a. disobeying or ignoring a court order.
- b. taking photos or shouting out in court.
- c. refusing to answer the court’s questions if you’re called as a witness.
- d. publicly commenting on a court case, for example on social media or online news articles.

20

If you are found to be in contempt of court, you could go to prison get a fine, or both. Contempt of court is not a criminal offence, even though it is punishable by imprisonment.

- Court orders can be imposed by a judge in legal proceedings and breaching them can amount to contempt of court or a criminal offence. Breaching an order imposed during civil proceedings, can amount to contempt. It is expected that the parties themselves will inform the court of the breach and start contempt proceedings.

25

5 In only a very limited number of cases where a party is either unable to start contempt proceedings, or there is a significant public interest involved then the law officers may start proceedings.

The position of the law is that for contempt of court to be found, the following conditions must exist; a lawful order, the potential contemnor's knowledge  
10 of the order and the potential contemnor's failure to comply i.e. disobedience of the order.

See: ***Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd v The Commissioner General Uganda Revenue Authority MA 42/2010.***

Section 98 of the Civil Procedure Act, Cap 71 provides the High Court with  
15 inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The Constitution of the Republic of Uganda, 1995 also confers upon the High Court unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law.  
20 (see Article 139 (1) of The Constitution of the Republic of Uganda, 1995).

The High Court is commanded to exercise its jurisdiction in conformity with the common law and doctrines of equity where by its obliged to exercise its discretion in conformity with principles of Justice, equity and good conscience respectively. See Sec.14(2) (b) (1) and 14(2) (c) of the Judicature  
25 Act.

This application relates to contempt of court and Justice Kiryabwire of the Court of Appeal of Uganda, in the case of ***Uganda Super League V Attorney General Constitutional Application No. 73 of 2013*** while

5 citing the **Black's Law Dictionary 7<sup>th</sup> Edition** defined contempt of court as the "conduct that defies the authority or dignity of the court."

**Halsbury's Laws of England [ Volume 9, 4th Edition]** classifies contempt of court in two categories, that is;

- 10 - Criminal contempt which is committed by words or acts that impede Administration of justice and,
- Civil Contempt which arises when there is disobedience to judgment, orders or other court process and involves private jury.

15 Accordingly, any course of conduct which abuses and makes a mockery of the judicial process and which thus extends its wicked influence beyond the parties to the action and affects the interest of the public in the administration of justice is contempt of court.

The rationale is around the preserving and safeguarding the rule of law so that 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  
20 directed.

The position of the law is that for contempt of court to be found against any party or person, the following conditions must exist;

- a. there must be a lawful order,
- b. the potential contemnor has knowledge of the order and;
- 25 c. the potential contemnor's failure to comply i.e. disobedience of the order

5 See: ***Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd v The Commissioner General Uganda Revenue Authority HCMA 42 of 2010.***

The standard of proof in contempt proceedings is higher than proof of probabilities and almost but not exactly beyond reasonable doubt.

10 See: ***Hon. Sitenda Ssebalu versus Secretary General of the East African Community No.8 of 2012.***

In the persuasive decision of *Re Contempt of Dougherty* 429, Michigan 81, 97 and [1987], the holding of the court was that;

15 ***“... imprisonment for civil contempt is properly ordered where the Defendant has refused to do an affirmative act by the provisions of an order, which either in form or substance was mandatory in character.”***

Further in the same above case, it was pointed out that;

20 ***“ ...if the contempt consists in refusal of a party to do something which he is ordered to do for the benefit and advantage of the opposite party.... The Contemnor stands to be committed until he complies with the order. The order in such a case is not a punishment but is coercive to compel the Contemnor to act in accordance with the order of court.”***

25 The position of the court in the case of *Hon Sitenda Ssebalu v Secretary General of the East African Community EACJ Reference No.8 of 2012* is thus that for contempt of court to be found, the following principles have to be established: -



- 5 a) Existence of a lawful order.
- b) Potential contemnor's knowledge of the order.
- c) Potential contemnor's failure to comply, that is, disobedience of the order. Section 98 of the Civil Procedure Act, Cap 71

Issue 1:

- 10 a) Whether the Respondent is in Contempt of the Court order issued vide Misc. No. 167 of 2021 and issued on 4<sup>th</sup> March 2022?

It is without contestation that the parties agree that there is a court order. Both mention it in their submissions and pleadings. The contents of the court order in issue have already been reflected in this ruling under the  
15 background.

**Section 98 of the Civil Procedure Act, Cap 71** enjoins the High Court with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

**The Constitution of the Republic of Uganda, 1995** also confers upon  
20 the High Court unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by this Constitution or other law. (see Article 139 (1) of The Constitution of the Republic of Uganda, 1995).

The High Court is enjoined to exercise its jurisdiction in conformity with the  
25 common law and doctrines of equity where it is obliged to exercise its discretion in conformity with principles of justice, equity and good conscience respectively. See Sec.14(2) (b) (1) and 14(2) (c) of the Judicature Act.

5 This application relates to contempt of court and Justice Kiryabwire of the Court of Appeal of Uganda, in the case of ***Uganda Super League V Attorney General Constitutional Application No. 73 of 2013*** while citing the **Black's Law Dictionary 7<sup>th</sup> Edition** defined contempt of courts as **“conduct that defies the authority or dignity of the court.”**

10 The Learned Judge went on further to cite with approval **Halsbury's Laws of England [ Volume 9, 4<sup>th</sup> Edition]** wherein Contempt of court is classified into two categories, that is;

15 ***“Criminal contempt which is committed by words or acts that impede Administration of justice and Civil Contempt which arises when there is disobedience to judgment, orders or other court process and involves private jury.”***

Accordingly, any course of conduct which abuses and makes a mockery of the judicial process and which thus extends its wicked influence beyond the parties to the action and affects the interest of the public in the  
20 administration of justice is contempt of court. The rationale is around preserving and safeguarding the rule of law so that 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.

Hon. Justice Mr. Bashaija K. Andrew in ***Muriisa Nicholas vs Attorney General and 3 Others High Court Miscellaneous Application No. 035 of 2012*** observed that;

***“ There exists an acute dearth as to the statutory and judicial authorities on the phrase “contempt of court” in Uganda. In such***

5            *circumstances court is enjoined to assign the phrase its meaning in ordinary parlance”.*

**Black’s Law Dictionary (7<sup>th</sup> Ed) at p.313** defines contempt 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*  
10 *or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair respect due to such a body.”*

The position of the law is that for contempt of court to be found against any party or person, the following conditions must exist;

- a. there must be a lawful order,
- 15        b. the potential contemnor has knowledge of the order and;
- c. the potential contemnor's failure to comply i.e. disobedience of the order

See: ***Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd v The Commissioner General Uganda Revenue Authority HCMA 42 of***  
20 ***2010.***

The standard of proof in contempt proceedings is higher than proof of probabilities and almost but not exactly beyond reasonable doubt.

See: ***Hon. Sitenda Ssebalu versus Secretary General of the East African Community No.8 of 2012***

25 I agree with the above legal position of ***Hon Sitenda Ssebalu v Secretary General of the East African Community EACJ Reference No.8 of 2012*** as to the ingredients of contempt of court proceedings and the jurisdiction of this court to handle such matters.

5 The position of the law is thus that for contempt of court to be found, the following principles have to be established: -

a) Existence of a lawful order.

b) Potential contemnor's knowledge of the order.

10 c) Potential contemnor's failure to comply, that is, disobedience of the order.

1. Existence of a court Order:

I have perused the affidavits on file and the entire record of proceedings. I am guided by the principle that parties are bound by their pleadings.

15 Annexure "B" of the affidavit in support of the application shows that this court issued court orders vide **Miscellaneous Application No. 167 of 2021**. I have already in part 2 (background) of this ruling highlighted the contents of the court order as deduced from the record and annexure "B" to the affidavit in support of this instant application.

20 The respondent under paragraph 10 of her affidavit in reply confirms the court order issued by the court vide Miscellaneous Application No. 167 of 2021.

25 Thus, in line with the case of *Massa vs Achen [1978] HCB 297*, it was held that: - "**where facts are sworn in an affidavit and they are not denied or rebutted by the opposite party, the presumption is that such facts are accepted.**"

In the instant application, the fact of the existence of a court order is accepted by the parties.

5 Accordingly, from the affidavit evidence of the applicants and my further  
consideration of the fact that the respondent in her affidavit in reply to this  
application does not deny the existence of the said court order instead, she  
confirms the same, then this court is satisfied that the first ground for the  
establishment of whether there is contempt of court or not has occurred is  
10 proved. Accordingly, I would find that the applicants have proved the first  
ground that there was an existing court order.

2. Potential contemnor's knowledge of the order:

The second ground for consideration is whether the respondent had  
knowledge of the court orders.

15 As stated in the case of ***Housing Finance Bank Ltd & another v  
Edward Musisi M.A 58 of 2010***, the Court of Appeal held that the  
general principle is that a person cannot be held in contempt without  
knowledge of a court order. However, a party who knows of an order  
regardless of whether, in view of that party, the order is null or valid, regular  
20 or irregular; cannot be permitted to disobey it by reason of what that party  
regards the order to be as 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 respect of this aspect, the applicants in their affidavit in support of the  
application depose that the respondent's advocate was present in court when  
25 the order was made and extracted the said order from the ruling of this court  
on 17<sup>th</sup> March 2022.

Furthermore, counsel for the applicants submitted that the respondent's  
counsel was present on the day the court order was delivered on the 4<sup>th</sup> of  
March 2022 thus, notice to the respondent's counsel is automatically notified

5 to the respondent. Indeed, upon perusal of the record, the said orders were  
extracted by M/s Illukor Advocates and Solicitors, counsel for the  
respondent and it was issued by this court in the presence of Martha Mbabazi  
Atai, 2<sup>nd</sup> applicant; Ms Lillian Omurangi, counsel for the Applicants and Mr  
Illukor Emmanuel, counsel for the respondent in the absence of the 1<sup>st</sup>  
10 Applicant and the respondent.

The foregoing be as it may, **Order 49 rule 2 of the Civil Procedure  
Rules** provides that all orders, notices and documents required by the  
Act to be given to or served on any person, shall be served in the manner  
provided for the service of summons. Proof of knowledge of the court Order  
15 can only be by way of proof of service as provided for by the rules of civil  
procedure.

According to **Order 5 Rule 16 of the Civil Procedure Rules**, proof of  
service of summons is by an affidavit of service, and this must state the time  
when and the manner in which summons was served, and the name and  
20 address of the person, if any, identifying the person served and witnessing  
the delivery of summons.

Normally, I would have expected the applicants to prove that the respondent  
knew of the order as proof of service of the court process by way of an  
affidavit of service and none is on record. However, since it was the  
25 respondent's counsel who extracted the court order as per the record, I will  
impute the knowledge of the counsel onto the respondent.

The above be as it may, this court is required to be satisfied that indeed the  
respondent did/did not have knowledge of the court order.

5 Counsel for the respondent had the respondent's audience and he is expected to have informed her and interpreted the order for her, telling her of its existence. No further evidence is adduced to rebut the deposition of the applicants that the respondent had knowledge of the said court order.

10 In *Muriisa Nicholas v Attorney General HCMA No. 35 of 2012, (unreported)*, Hon. Justice Mr. Bashaija K. Andrew observed that;

15 *"...the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process, in the normal functioning of courts, are not complied with in full by those targeted and/or called upon to give due compliance/effect.*

*A state organ, or agency or a person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain."*

20 This court is obliged to preserve its sanctity by prohibiting any further contempt of its orders as court orders are not issued in vain.

Accordingly, I would find that the ground that the potential contemnor has knowledge of the order is proved by the applicants since the respondent's counsel is the one who extracted the order and with that counsel's knowledge is imputed onto the respondent.

25 3. Whether the respondent failed to comply?

In this aspect, the evidence on the record is clear as to the contents of the orders which are the subject of these proceedings. For brevity, I will only reproduce the aspects of the order for which upon my perusal, I find that the

5 applicants are alleging that the respondent's activities are contemptuous of;  
that,

- a) The applicants shall be granted access to the grave of the late Iyapo Phoebe to perform the last funeral rites and conduct prayers.
- b) The applicants' cultural and religious rights be protected from being  
10 violated by the respondent.

I have taken note of the evidence led by the applicants under paragraphs 5 and 7 of the affidavit in support of the application to the effect that the actions of the respondent of constructing a permanent structure around the grave of the late Iyapo Phoebe Auma, locked out the applicants from  
15 conducting the last funeral rites and prayers for the late Iyapo Phoebe Auma, thereby denied the applicants their cultural and religious rights in total violation of the orders of this court. They attached photographs of the mausoleum marked as "D", "E" and "F".

I have also perused the affidavit in reply and found no concrete rebuttal to  
20 the allegations therein. The respondent under paragraphs 5 and 8 admits to the construction of a mausoleum but contends that it was constructed to secure the graves of the parties' fallen loved ones buried in Kongoto village, Bugondo sub-county, Kasilo county, Serere district from harsh weather conditions, freely grazing animals, rain and running water, bush among  
25 other conditions. The respondent, however, contends that she is not responsible for the padlock that was placed on the mausoleum. The respondent further under paragraph 4 of the affidavit in reply avers that she is not responsible for the alleged locking of the said mausoleum (which has been and was left open for anyone to access and pay their last respect and for  
30 ease of cleaning).



5 Furthermore, in the supplementary affidavit of Amolo James under paragraphs 7 and 8, he deposed that during the progress of construction works of the mausoleum whose construction was monitored by me and its completion, there was no padlock on the access door deterring or preventing or denying any person access to the said graveyard. Amolo James, further  
10 deposes under paragraph 11 that at the time the mausoleum was being built and upon completion, every person had free access and there was no padlock whatsoever fixed by anyone at the access door thereafter.

Amolo James under paragraph 15 of the supplementary affidavit deposes that as the area LC1 chairperson, I confirm that, the said mausoleum has  
15 been freely accessible to everyone upon completion of its construction with no padlock fixed on the access door and it is now the 1<sup>st</sup> applicant who is in exclusive possession and occupation of the said portion of land.

Upon my reading of the pleadings, I note that, firstly, the construction of the mausoleum by the respondent is not in dispute but secondly the “fixing” of  
20 the padlock on the mausoleum is what is in dispute. The photographs adduced by the affidavit in support, that is annexures marked “C” of how the graves were before the mausoleum and “D” and “E” of how the graves were after construction of the mausoleum, it is depicted on annexure “E” a padlock fixed thereto.

25 The question that this court must answer is;

Did the construction of a mausoleum fetter the court order that “*the applicants shall be granted access to the grave of the late Iyapo Phoebe to perform the last funeral rites and conduct prayers*”?

The next question is that;

5 Did the mausoleum with or without a padlock fetter that court order thereby making the respondent's action contemptuous or not?

In the pleadings, the question as to who put a padlock on the access door of the mausoleum was not answered with direct evidence apart from a contention by Otigo Joseph Amolo who under paragraph 21 of his  
10 supplementary affidavit averred that it was the 1<sup>st</sup> applicant who is responsible to the said padlocking of the mausoleum. In reply, the 1<sup>st</sup> applicant in his affidavit in rejoinder averred under paragraph 3 that he did not at any time participate in the construction of a building to enclose the parties' beloved late mother Iyapo Phoebe Auma's grave which is not in  
15 conformity with our culture and norms.

I may go back and forth the different voluminous pleadings of the parties and the evidence attached, however, my finding is that the alleged restricted access to the grave of the late Iyapo Phoebe Auma, the applicants' mother, would be possible if the mausoleum was locked with an inaccessible key to  
20 the applicants.

In the pleadings before the court, it is evidently not clear who put the padlock on the mausoleum access door yet this would have helped considerably.

The court will also not by conjecture and not by evidence go into determining whether a mausoleum over the graves of loved ones is synonymous with the  
25 Iteso culture as this was not the subject of the application.

It is trite that the duty and burden of proof lies on applicant to prove his or her case because he/ she is the one who seeks a decision of this court in his favour. See Sections 101 and 102 of the Evidence Act.

5 In this matter, it is my finding that the applicants have failed to prove that it is the respondent who placed a padlock on the access door of the mausoleum that she built. This conclusion resolves this issue and would thus purge the respondent of any alleged contemptuous activity of the court orders issued by this court vide High Court Miscellaneous Application No. 135 of 2022.

10 c. Issue No. 2: What remedies are the applicants entitled to?

The resolution of Issue No. 1 above resolves this application in the negative meaning that there are no remedies for the applicants as this Honourable Court has found that the applicant has not proved that the alleged restricted access to the mausoleum vide a padlock placed on its doors were placed by  
15 the respondent.

Accordingly, this application for contempt of court would be disallowed and the respondent is not found to have been in contempt of the court this orders issued vide HCMA 167 of 2021 for the above reasons.

The application is also dismissed with no order as costs since the parties are  
20 a family according to their pleadings.

Before I take leave of this matter, I urge the parties herein to try to live harmoniously them being family and would well be advised to try to resolve some of their differences through a win win mechanism such as mediation than altercating all the time.as the latter behavior does not benefit any one  
25 with their continued unreasonable altercations seen by this Honourable as disillusioning to dignity their deceased relative.

#### 4. Orders:

The application is also dismissed with no order as costs since the parties are a family according to their pleadings.

5 I so order



.....  
Hon. Justice Dr Henry Peter Adonyo

Judge

19<sup>th</sup> April, 2023

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