

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(CIVIL DIVISION)
MISCELLANEOUS APPLICATION NO. 180 OF 2023
(ARISING OUT OF MISC. APPLICATION NO. 133 OF 2023)
(ARISING OUT OF MISC. APPLICATION NO. 132 OF 2023)
(ARISING FROM CIVIL SUIT NO. 0092 OF 2023)

1. BULLION REFINERY LIMITED
2. AURNISH TRADING LIMITED
3. METAL TESTING AND SMELTING CO. LTD :::::::::::::::::::: APPLICANTS

VERSUS

1. JOHN MUSINGUZI RUJOKI
(COMMISSIONER GENERAL URA)
2. ABEL KAGUMIRE
(COMMISIONER CUSTOMS-URA)
3. ESUNGET SIMON
(MANAGER, ENTEBBE CUSTOMS-URA) :::::::::::::::::::: **RESPONDENTS**

BEFORE: HON. JUSTICE BONIFACE WAMALA

RULING

Introduction

[1] The Applicants brought this application by Notice of Motion under Section 98 and 64(e) of the Civil Procedure Act, Sections 33 and 142(b) and (c) of the Judicature Act and Order 52 of the CPR seeking the following reliefs;

- a) A declaration that the Respondents be held in contempt of Court for refusing, ignoring and failing to implement the orders issued on 4th April 2023 vide M.A No. 133 of 2023.
- b) A declaration that the Respondents be held responsible as public officers having failed, refused and ignored to comply with the orders of this Honorable Court and are not fit to hold a public office established by law.

- c) An order compelling the Respondents to obey the Court Orders and be appropriately punished jointly and severally for the said contempt and the Applicants be atoned by an order committing the Respondents to civil prison for disobeying a lawful order of this Court.
- d) An order directing each of the contemnors/ Respondents to pay the Applicants compensatory damages of UGX 200,000,000/= for contempt of the court order.
- e) Interest at the court rate on (d) and (f) from the time of award till payment in full.
- f) The costs of the application be paid by the Respondents.

[2] The grounds of the application are set out in the Chamber Summons and in an affidavit in support thereof deposed by **Atukunda Isaac**, an advocate of the High Court of Uganda and Company Secretary of the 1st Applicant. Briefly, the grounds are that the Applicants instituted Misc. Application No. 133 of 2023 against the Attorney General and URA seeking an interim order of an injunction against the Respondents and all agents/entities deriving authority from them from enforcing Regulation 3 of the Mining and Minerals (Export Levy on Refined Gold) Regulations, 2023 on all gold imported into Uganda intended for processing and subsequent exportation. The interim injunction order was granted in the presence of Counsel for the Attorney General and URA. The respective offices were also formally served and they acknowledged receipt of the Court Order on 5th April 2023. However, the Respondents continued to issue assessments to the Applicants and to compel them to pay the export levy pursuant to the impugned regulation before exporting their goods which actions are illegal and an abuse of court process. The deponent averred that court orders are not issued in vain; that the administration of justice requires the Respondents be penalized for disobedience of a lawful court order; that the Applicants merit an award of general and punitive damages; that the Applicants will suffer substantial loss and that it is in the interest of justice

and promotion of the sanctity of courts and building confidence in the judicial system that the orders sought be granted.

[3] The Application was opposed through two affidavits in reply deposed by **Mr. Sam Kwerit**, a legal officer in the Legal Services and Board Affairs Department of the 2nd Respondent, and **Mr. Esunget Simon**, the 3rd Respondent and Manager of Entebbe – Customs Department of the Uganda Revenue Authority. In his affidavit, **Esunget Simon** stated that he is aware that an interim order restraining the Attorney General and URA from implementing the impugned Regulations was issued on 4th April 2023 and expired on 28th April 2023. He stated that in 2021, Parliament made an amendment to the Mining Act by imposing a 5% export levy on processed gold exports which came into force on 1st July 2021. On 21st August 2021, the Ministry of Finance Planning and Economic Development instructed URA to halt payment of the levy until the law is amended with retrospective application to which they would pay USD 200 per kg. Upon that instruction, URA entered into indemnity agreements with individual gold exporters that would allow them export without payment and submit postdated cheques as a guarantee that the exporters would pay the appropriate tax once the law is amended. In 2022, the Mining and Minerals Act 2022 was enacted which gave powers to the Minister to issue a statutory instrument gazetting the applicable rates for gold exports. On 1st March 2023, the Minister published in the gazette the Mining and Minerals (Export Levy on Refined Gold) Regulations 2023 imposing an export levy of USD 200 per kg on processed gold with a retrospective effective date of 1st July 2021.

[4] The deponent further stated that pursuant to the Regulations, URA computed the tax arrears for all gold exported from 1st July 2021 until 1st March 2023 and issued demand notices to the respective gold exporters including the Applicants. He stated that some of the companies expressed readiness to comply and already made partial payments on their tax arrears

and have been paying the export levy until the Applicants challenged the legality of the Statutory Instrument and obtained a court order. Following the court order and at the request of the Applicants to provisionally export their gold, URA continued to clear their gold for export before paying the required taxes. URA requested the Applicants to execute/ renew indemnity agreements that are administrative arrangements to facilitate exports without payment whenever the applicable rate is in contention to which the applicants declined. The Applicants however on their own volition and without any formal demand from the Respondents continued to make self-assessment on the ASYCUDA system used by URA and effecting payment. He concluded that the Respondents did not act in contempt of the court order and prayed that the application be dismissed with costs. The affidavit of Sam Kwerit reinforces the same averments.

[5] The Applicants filed an affidavit in rejoinder whose contents I have also taken into consideration.

Representation and Hearing

[6] At the hearing, the Applicants were represented **Mr. Tayebwa Martin** while the Respondents were represented by **Mr. Ssali Alex Aliddeki, Ms. Christine Mpumwire** and **Mr. Donald Bakashaba**. Counsel agreed to make and file written submissions which were duly filed and have been considered in the determination of this matter.

Issues for Determination by the Court

[7] Two issues are up for determination by the Court, namely;

- a) Whether the Respondents are in contempt of the Court Order issued on 4th April 2023?**
- b) What remedies are available to the parties?**

Issue 1: Whether the Respondents are in contempt of the Court Order issued on 4th April 2023?

Submissions by Counsel for the Applicants

[8] Counsel for the Applicant cited the cases of *Jack Erasmus Ngabirano v Col. Kaka Bagyenda and AG, HCMA No. 671 of 2019* to the effect that in an application for contempt of Court, the Court has to establish the existence of a lawful order, the potential contemnors knowledge of the order and the potential contemnor's failure to comply i.e. the disobedience of the order. Counsel argued that the Applicants had proved the said elements by their evidence in the affidavits. Counsel submitted that the Respondents, despite having knowledge of the court order, continued to impose the export levy on the Applicants pursuant to the Regulations whose implementation was stayed. Counsel disputed the Respondents' contention that the Applicants' assessments were self-initiated and executed and argued that the system on which they make declarations is owned and managed by the Respondents and that upon making the declarations, it automatically generates levy assessments and the Applicants would not be allowed to export unless the assessments are cleared. Counsel stated that the Applicants had no option but to pay the export levy in order to export their gold since they had to fulfill their contractual obligations with their clients. Counsel prayed that the Court be pleased to grant the application.

Submissions by Counsel for the Respondents

[9] In Reply, Counsel for the Respondents relied on the case of *Barbra Nambi v Raymond Lwanga, HCMA No. 213 of 2017* which sets out the essential elements to be established for the Court to find contempt of a court order. Counsel submitted that the assessments on which the Applicants base their allegations of contempt of court are self-generated on the ASYCUDA system at the Applicants' request and the payments were done by the Applicants on their

own volition without any demand from the Respondents. Counsel submitted that the Respondents could not put down the self-assessment option on the system following the court order as it requires approvals from the East African Community Customs Union Secretariat which procedure is lengthy. Counsel further submitted that there was a need on the part of URA to keep a track record of what was being exported by the Applicants and there is no way the 2nd Respondent would be able to compute levy on unrecorded gold exports if it were successful in the main suit. Counsel also argued that doing otherwise would be an abuse of the set uniform procedures of the customs union and spirit of the East African Community.

[10] Counsel for the Respondents also submitted that there is no evidence of a single consignment of the Applicants that has been held by the Respondent and that the rest of the gold export companies apart from the Applicants are compliant with the export levy laws, have cleared their arrears and have threatened action against URA for discriminatory treatment. Counsel concluded that the current application is aimed at buying time for the Applicants to illegitimately continue not to pay accrued arrears of levies on gold exports and should not be allowed to further that agenda. Counsel prayed that the application be dismissed with costs.

[11] Counsel for the Applicants made and filed submissions in rejoinder which I have also taken into consideration.

Determination by the Court

[12] Contempt of court is defined as an act or omission tending to "unlawfully and intentionally violate the dignity, repute or authority of a judicial body, or interfering in the administration of justice in a matter pending before it". See: Principles of Criminal Law 1st ed., (Juta, Cape Town 1991) at 627; R v Almon (1765) 97 ER 94 at 100; Ahnee and Others v Director of Public Prosecutions

[1999] 2 WLR 1305 (PC) and R v Metropolitan Police Commissioner, Ex parte Blackburn (No 2) [1968] 2 All ER 319 (CA).

[13] Under the law, the recognition given to contempt is not to protect the tender and hurt feelings of the judge, rather it is to protect public confidence in the administration of justice, without which the standard of conduct of all those who may have business before the courts is likely to be weakened, if not destroyed. Conduct is calculated to prejudice the due administration of justice if there is a real risk, as opposed to a remote possibility, that prejudice will result. Contempt of court may thus take many forms; it may be committed by the person's action or inaction. Among other forms, contempt of court occurs when an individual intentionally and demonstrably disobeys a court order. To constitute contempt of this nature, the act or omission which contravenes the court order must have been intentional but not necessarily deliberately contumacious (willfully disobedient or deliberately defiant). It is well established that it is no answer to say that the act was not contumacious in the sense that, in doing it, there was not direct intention to disobey the order. The requirement of intention excludes only casual or accidental acts. See: *Angelina Lamunu Langoya v Olweny George William, HCC Misc. Application No. 30 of 2019.*

[14] In that regard, therefore, the conditions which must be proved by an applicant in contempt of court proceedings are;

- a) The existence of a lawful court order.
- b) The potential contemnor's knowledge of the court order.
- c) The potential contemnor's failure or refusal to comply with the order or disobedience of the order. (See: *Hon. Sitenda Sebalu v Secretary General of East African Community Ref. No. 8 of 2012; Dr. Charles Twesigye v Kyambogo University HC Misc. Application No. 120 of 2017 and Angelina Lamunu Langoya vs Olweny George William HCC Misc. Application No. 30 of 2019).*

[15] On the case before me, it is not in dispute that this Court issued an interim order vide HCMA No. 133 of 2023 on 4th April 2023. It is also not in dispute that the Respondents had actual knowledge of existence of the said order. The only contention, therefore, is whether the Respondents disobeyed the said court order. The alleged acts of contempt of the court order according to the Applicants are that the Respondents have continued compelling the Applicants to pay the export levy indicating that their goods will not be cleared for export unless they pay the export levy as assessed. Counsel for the Applicants referred the Court to copies of assessments showing that the Applicants have had to continue paying the export levy. For the Respondents, it was argued that the assessments are system generated at the Applicants' request and the payments were done by the Applicants at their own volition without any demand from the Respondents. In rejoinder, it was stated by the Applicants that the URA system automatically generates levy assessments against which the Applicants would not be allowed to export unless assessments are cleared through payment of the levy.

[16] To determine the present contention, the Court has to establish whether the Respondents' acts or omissions amounted to disobedience of the court order and, if so, whether the said actions or omissions were done with the intention of disobeying the court order. To do so, I need to examine the court order in issue. The relevant part of the interim order that was issued by the Court on 4th April 2023 upon the consent of all the parties to the matter read that *"... an Interim Order is issued restraining the Respondents from implementing the Statutory Instrument on Mining and Mineral (Export Levy on Refined Gold) Regulations, 2023 ..."* The provision of the statutory instrument relevant to these proceedings is regulation 3 thereof which provides as follows;

“Levy on processed gold

(1) There shall be charged a levy on processed gold which is exported out of Uganda at the rate of United States Dollars two hundred per kilogram.

(2) The levy referred to in sub-regulation (1) shall be paid by the exporter to the Uganda Revenue Authority at the time the processed gold is exported out of Uganda”.

[17] The implementation of the above regulation is what was stayed by the interim order. A reading of the court order as against the relevant regulation reveals to me that what was stayed by the court is “payment of the levy on processed gold to Uganda Revenue Authority (URA) by the exporter at the time of export”. The order did not strip URA of its powers to regulate the export of processed gold. Specifically, the order did not stop URA from applying other customs requirements that are essential to the export of processed gold. URA remained a regulator in that regard and it had the duty to devise means to ensure that the trade goes on albeit without payment of the particular levy by the exporters. The argument by the Applicants sounds as if upon the court staying payment of the levy, URA remained with no role in the regulation and control of the gold export business; thus the exporters would not need any clearance by the authority in that regard. If that is the line of thought on the part of the Applicants, I would find it misguided and would reject it.

[18] On the other hand, if the foregoing is not what the Applicants intended to communicate, they ought to have considered that payment of levy was not the only customs requirement that had to be undertaken before the processed gold could be exported. As such, the authority could not simply pull down the declaration and assessment forms from the system; even if they had the capacity to do so single-handedly. It has been indicated by the Respondents in their evidence that upon issuance of the subject order, URA took some

measures to see to how the export business could go on without payment of the export levy. The Authority issued a letter dated 17th April 2023 titled “GUIDANCE ON CLEARANCE OF GOLD EXPORTS IN LIGHT OF THE COURT ORDER HALTING COLLECTION OF THE EXPORT LEVY ON PROCESSED GOLD”. The relevant part of the letter reads –

“In light of the above, your gold exports shall accordingly be cleared through customs without payment of export levy until court pronounces itself on the matter. In order to facilitate clearance through customs, this is to guide as follows ...”

[19] Among others, the guidelines included entering into indemnity agreements with URA to facilitate clearance of gold without payment of export levy, making customs declarations in the system and availing all supporting documents, depositing cheques as guarantee equivalent to the tax payable and completion of form C12. It is averred by the Respondents and is not denied by the Applicants that the latter objected to the above guidelines. As such, no formal arrangement materialized as to how the Authority would control the business during the relevant period without the exporters paying the levy. It appears to me that it was such mis-coordination that led to the Applicants making assessments on the system which required them to effect payment since no formal arrangement had been concluded between the exporters and the Authority.

[20] The evidence and circumstances pointed out above reveal that URA took some steps towards compliance with the court order. As I have stated above, the order did not require the Authority to abdicate their role as a regulator of the export business. It was therefore in their right and power for them to put in place a process by which they could clear the export of processed gold at the same time without having to make the exporters pay the relevant levy in the meantime. They attempted to do so but did not get the cooperation of the

Applicants. I do not find these circumstances consistent with an intention to disobey a court order. I have believed the Respondents' assertion that they intended and made efforts to comply with the court order.

[21] On the above premises, therefore, the Applicants have failed to establish to the satisfaction of the Court that the Respondents acted in contempt of the subject court order. The application accordingly fails and is dismissed with costs to the Respondents.

It is so ordered.

Dated, signed and delivered by email this 20th day of October, 2023.

A handwritten signature in blue ink, appearing to read 'Boniface Wamala', with a long horizontal flourish extending to the right.

Boniface Wamala
JUDGE