

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(EXECUTION AND BAILIFFS DIVISION)

MISCELLANEOUS APPLICATION NO. 2928 OF 2015

5 **(ARISING OUT OF MISCELLANEOUS APPLICATION NO. 1920 OF 2015 AND
EMA 233 OF 2014 AND HC C.S 274 OF 2010)**

METROPOLITAN PROPERTIES LTD ---APPLICANT/RESPONDENT

VS

10 **OSCAR MUGUME ----- RESPONDENT / APPLICANT**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This application was brought under 0.22 rr 1 (1) (a) and 0.52 r 1 C.P.R. The Applicant seeks to set aside the order of this court allowing the Respondent to pay the decretal sum in
15 installments of Shs. 10,000,000/- per month from 15.09.15 and instead a warrant of arrest issued against the Respondent.

Costs of the application to be in the cause.

When the application was called for hearing on 14.04.16, Counsel for the Applicant gave the background. He submitted that in civil suit 274 of 2010, the court decreed that the
20 Respondent pays the decretal sum of Shs. 100,000,000/- plus fixed costs of the suit. The costs were taxed and allowed at Shs. 8,398,760/-. The order was made in 2014.

The Respondent / judgment debtor appealed to the Court of Appeal and applied for stay of execution.

The Appeal was rejected whereof the Applicant applied for execution of the decree.

25 On 08.03.15, the Applicant applied for the arrest of the Respondent but the order expired before the Respondent could be arrested.

On 22.04.15, the Applicant applied for another warrant of arrest. The Respondent was arrested in Entebbe. The Bailiff alleged that the Respondent had an armed guard with him and he was taken to Nalwoga Police Post Entebbe, whereby he was released by police. – Refer to the affidavit of the Bailiff.

- 5 On 07.08.15, Counsel for the Respondent filed this application 1920/15 seeking orders that the Respondent be allowed to deposit the decretal sum into court, in installments.

The application was allowed by court on 15.09.15 and the Respondent was directed to pay the decretal sum in installments of Shs. 10,000,000/- per month with effect from the date of the ruling and thereafter on or before the 15th day of each subsequent month until payment in
10 full.

The first installment was deposited in court by Counsel for the Respondent on 23.09.15 and the receipt issued indicated it was a security deposit in Miscellaneous Application 2230/14.

Since then, no other deposit has been made by the Respondent and it is seven months since the Respondent was allowed to pay in installments.

- 15 Counsel for the Applicant asserts that the Respondent's conduct is in clear breach of the court order and amounts to contempt of court.

Referring to the Respondent's affidavit in reply, Counsel pointed out that the Respondent claims that he was advised by his Counsel that the current application is premature, which is surprising considering that the Respondent was directed to pay Shs. 10,000,000/- every
20 month.

Further that, the Respondent says he was told he would have to pay in August, 2016, which would be unprofessional if that was the advise he was given.

Counsel asserts that this is an attempt by the Respondent to avoid the court order, which did not provide for any option and to how payment should be made.

- 25 It was then prayed that application be allowed and an arrest warrant issued against the Respondent. The whole amount of Shs. 108,398,760/- less the Shs. 10,000,000/- deposited in court is now due and payable – Shs. 98,398,760/-.

In reply, Counsel for the Respondent relied upon the affidavit in reply to the present application and the affidavit in support of Miscellaneous Application 1920/15.

She contended that there is a pending appeal where arguments have already been filed. The appeal is at the level of scheduling.

However, Counsel admitted that the application for stay of execution in the Court of Appeal was dismissed on the ground that the stay of execution ought to have been first applied for in
5 the court that passed the decree.

But that the application was never heard on merit.

It was admitted that the Respondent had been arrested by a Court Bailiff as stated by Counsel for the Applicant. And that on 14.07.15, the Respondent paid Shs. 12,000,000.- to the Bailiff. Shs. 10,000,000/- was part payment of the decretal sum, while Shs. 2,000,000/- was Bailiff's
10 costs.

However that, the lawyers of the Applicant declined to receive the Shs. 10,000,000/- and demanded for the whole decretal sum. That is when the Respondent applied to court to be allowed to pay in installments.

Counsel insisted that the Respondent had not absconded and was not dodging payment of the
15 decretal sum. While he is currently out of the country, he has been informed of what is happening and will be back in the country next week that is 21.04.16.

That when he returns, he will make another payment of Shs. 30,000,000/-. And that by applying for a warrant of arrest, Counsel for the Applicant intends to punish the Respondent instead of resorting to other modes of execution.

20 It was also Counsel's prayer that court extends the time within which the Respondent should clear the arrears of the decretal sum. S.98 C.P.A was cited in support.

In rejoinder, Counsel for the Applicant indicated that the submissions of Counsel for the Respondent were _____. He reiterated that seven months had passed since the first installment was deposited by the Respondent and added that court has responsibility to take into account
25 the rights of both parties. And that if court is persuaded to extend the time within, the Respondent should pay, then the whole outstanding amount ought to be paid in a lump sum.

Court has gone through the application, the supporting affidavit and the affidavit in reply, and has also heard the submissions of both Counsel.

It is apparent that the Respondent defaulted in payment of the installments that were directed by Court right from the time the order was made on 15.09.15 to date.

The first installment was deposited in court on 23.09.15. However, the receipt issued indicate that it was security for deposit in another case and not Miscellaneous Application 1920/15
5 where the order to pay in installments was made.

Since then, as pointed out by Counsel for Applicant, the Respondent had not made any other deposits and it is seven months since court granted his application. By failure to meet the agreed installments, the whole amount became due and payable.

The Respondent is said to be out of the country, but he did not give any reasonable excuse for
10 not paying the installments that were decreed by court. In the circumstances, court finds that he is guilty of contempt of court.

Decided cases have established that ***“disobedience of civil court cases ought not to be allowed by courts.”*** – See **Stanbic Bank (u) Ltd & Another vs. Commissioner General of URA Miscellaneous Application 0042/2010.**

15 The general principle established by court is that ***“a party who knows of an order.....cannot be permitted to disobey it. As long as the order exists, it must not be disobeyed.”***

The Respondent’s contention that the application for his arrest is prematurely before court cannot be sustained while the order was to expire on 05.08.16 that is the date when the last
20 installment decreed by court ought to have been paid.

The best the Applicant ought to have done is to return to court and apply to be given a chance to explore other avenues of payment; it is not the duty of the Applicant to implore the Respondent to do that.

While Counsel for the Respondent applied to court to exercise its discretion under S.98 of the
25 CPA and allow extension of time within which the Respondent ought to make the payments, ***“this power ought to be exercised judiciously and where it appears equitable to do so.”***

As rightly pointed out by Counsel for the Applicant, the rights of both parties have got to be considered.

This court is also aware that the C.A of Appeal has held that “**a party in contempt of court by disobeying an existing order cannot be heard in a different, but related cause or motion until such a person had __ himself of the contempt.**” – See **CA Constitutional Court of Uganda Application 19/2011 – Musisi and Another vs. Namugemyi Margaret,**
5 and also the case of **Hadkinson vs. Hadkinson [1952] 2 AUER 579.**

Courts have clearly stated that “***A court of law never acts in vain and as such, issues touching on contempt of court take precedence over any other case of the invocation of the jurisdiction of court.***”

In the present case, if court were to exercise its discretion and extend time within which the
10 Respondent should pay the installments, it would amount to encouraging the apparent impunity of the Respondent, whose conduct seems to suggest that he found the orders of court inconvenient and instead of returning to court to seek its indulgence, decided to ignore the orders.

Court is also constrained to comment on the purported affidavit in reply of the Respondent
15 although Counsel for the Applicant did not.

Counsel for the Respondent told court that since the Respondent is out of the country, the affidavit was drawn up, his signature scanned and placed thereon and it was then taken to a Commission of Oaths.

It is evident that the Respondent never appeared before the Commissioner of Oaths. His non-
20 appearance was in violation of the mandatory requirement that an affidavit has got to be sworn before and signed by a Commissioner for Oaths – Refer to the case of **Kakooza John Baptist vs. Electoral Commission and Another S.C Election Petition Appeal No. 11/2007.**

See also the case of **Majyambere vs. Bhakresa Kahl HC A 727/11** where court
25 pronounced itself on the effect of SS. 5 and 6 of the Commissioner for Oaths (Advocates) Act and r 7 made there under.

The Respondent never having appeared before the Commissioner of Oaths, court finds that there is no affidavit in reply and in essence, the application before court is not opposed.

“***A court of law cannot uphold what is illegal***” –**Makula International vs. Cardinal**
30 **Nsubuga [1982] HCB Case.**

For all the reasons set out herein, the application is allowed. The warrant of arrest to issue for the Respondent to appear before court to show cause why he should not be committed to a civil prison.

Costs of the application are granted to the Applicant.

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FLAVIA SENOGA ANGLIN

JUDGE

10 **19.04.16**