

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA
FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 0424 OF 2023

(Arising out of Civil Suit No. 111 of 2016 and Civil Suit No. 856 of 2016)

- 1. WOMERAKA FRED**
- 2. NAKAABALE RONALD**
- 3. KIWANUKA MARTIN WALULYA**
- 4. NAMPEWO HELLEN**
- 5. NAMUGENYI JOSEPHINE**
- 6. KATUMBA NICHOLAS**
- 7. NANTABA EVELYN**
- 8. MUGAMBWA VINCENT:..... APPLICANTS**
(Beneficiaries of the estate of the late Serubiri Robert)

VERSUS

MUKASA CHARLES WALUGEMBE:..... RESPONDENT

Before: Lady Justice Ketra Kitariisibwa Katunguka.

Ruling

Introduction.

1. The applicants and the respondent are all children and beneficiaries to the estate of the late Serubiri Robert who died in 2014; the respondent obtained letters of probate to the estate of the late Serubiri Robert; the applicants instituted Civil Suit No.111 of 2016 against the respondent for the revocation of the said probate on the grounds that the grant was obtained illegally and fraudulently by forging the deceased's Will; and that the respondent is mismanaging the estate property; the applicants were granted a temporary injunction vide Miscellaneous Application No.175 of 2016 on the 2nd day of December 2016, restraining either party from dealing in the estate of the late Serubiri Robert until the determination of the rights of ownership and management of the estate.
2. When Civil Suit No.111 of 2016 came up for hearing on 23/11/2022, counsel for the plaintiffs informed court that the defendant has constructed structures

on the estate land; the respondent responded that the structures are for the workers who guard his plantation and for the said worker's toilet; court directed counsel for the plaintiffs/applicants to liaise with counsel for defendant/respondent to carry out a locus visit of the land in the presence of the L.C1 chairperson within one week from 23/11/2022 and file a report to court; court ordered the defendant to stop constructing till court makes a decision.

3. The matter came up for further hearing on 30/3/2023; the 1st, 2nd, 3rd and 8th plaintiffs and their counsel were in court; the defendant and his counsel were absent in spite of court standing over the matter for 20 minutes; the plaintiffs' counsel notified court that a locus visit was conducted on the suit land and a report filed in court; the defendant and his counsel did not attend locus yet counsel for the defendant was contacted by letter concerning the locus visit; counsel for the plaintiffs prayed that the defendant/respondent be held in contempt of court orders and be punished accordingly;
4. Court considered the locus visit report on court record dated 7/12/2022, showing that a locus visit was conducted in the presence of the area L.C.1, some of the plaintiffs, counsel for the plaintiffs; the defendant and his counsel were absent; it is indicated in the report that a one Bakisula Herbert who is listed as an agent and caretaker of the defendant's land attended; attached to the report is an attendance list and photographs of the construction plantation and those who attended; the report showed that the defendant's caretaker acknowledged that the structures were being built by the defendant;
5. Court noted that contrary to what the defendant told court, the structures on the suit land did not look like site structures for workers; the structures were built with concrete blocks; in one of the photos, there was an ongoing foundation for a larger structure, there were building materials of bricks and stones poured on the site; court was convinced that there was an ongoing construction which could not be for workers; court found the defendant's actions in contempt of court orders issued in MA No. 175 of 2016.
6. The applicants have filed this instant application on 20th April 2023 seeking for orders that the respondent be found in contempt of court orders issued on 30/3/2023; because despite knowledge of the existing court orders, the respondent has continued to carry out illegal construction on the suit land.

7. The respondent denies knowledge of the court order issued on 30/3/2023; on the ground that the contempt order was not served on him or his lawyers and neither was he a party to the proceedings; he instead accuses the applicants of selling part of estate land in contempt of court temporary injunction order issued on 5/12/2016 in MA No.175 of 2016.

Preliminary points of law.

8. Counsel for the respondent raised preliminary objections to wit: - (a) The affidavit in support is defective and full of falsehoods as it purports to be sworn on behalf of Nampewo Hellen, Katumba Nicholas and Mugambwa Vicent yet there is no authorization to that effect. (b) Neither the respondent nor his lawyer have ever been served with the said contempt order obtained ex parte on 30th March, 2023 which the applicants purport to have been violated by the respondent. (c) The respondent has never violated the said order as alleged as the said construction is by persons who brought part of the suit land from the 5th applicant while there was a subsisting order of temporary injunction.
9. **Court's determination of the preliminary points of law.**
i)The affidavit in support is defective and full of falsehoods as it purports to be sworn on behalf of Nampewo Hellen, Katumba Nicholas and Mugambwa Vicent yet there is no authorization to that effect.
10. The respondent's counsel submits that the 3rd applicant deposed an affidavit in support of the application contending that he was swearing on his behalf and on behalf of all the applicants who had given him written authority to depose the same on their behalf; however, that a look at the written authority, the 4th, 6th and 8th applicants never authorized him to depose on their behalf. Counsel relies on; Baligasiima Vs. Kiiza & 17 Others, HCMA No.1495 of 2019, and Taremwa Kamishana & 8 Others Vs. Attorney General, Misc. Cause No. 38 of 2012; for the position that "an affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had authority of the other"; therefore, counsel prays that court finds the 3rd applicant's affidavit incompetent, incurably defective and the same be struck out with costs.
11. For the applicants, counsel cites Order 1 rule 12 of the Civil Procedure Rules; to submit that there is a written authority attached to affidavit in support which shows that more than five parties to the main suit authorized the 3rd applicant to swear an affidavit on their behalf because he had a clear understanding of the facts surrounding the grounds upon which this application is premised; that Order 1 rule 12 has been interpreted in several cases; **(Dr. James**

Akampunguza V. ABSA Bank Uganda Limited and Ors HCMA No.999 of 2021; where J. Richard Wabwire cited with approval **Namutebi Matilda vs Ssemanda Simon and 2 Others, MA No. 430/2021**, to the effect that “.....throughout the web of legal provisions relating to Affidavits, one golden thread is always to be seen; that what is required in Affidavits is the knowledge or belief of the deponent, rather than authorization by a party to the litigation...I have considered the available decisions positing the principle that a person is not to swear an Affidavit in a representative capacity unless he or she is an advocate or holder of power of attorney or duly authorized...Those decisions posit the view that where there is no written authority to swear on behalf of the others, the Affidavit is defective. I have not found any basis for that principle in the rules of evidence nor those of procedure. The principle appears to have developed from the analogy of representative suits, which analogy I find to be misplaced.” J. Richard Wabwire went on to hold that, “The import of the foregoing authority is that knowledge or belief of the deponent is of greater importance than the mandate of representation or authorization by a party to the litigation.”

12. The 3rd applicant deposed the affidavit in support of the application stating that he is a beneficiary of the estate of the late Serubiri Robert and with authority to depose the affidavit for himself and on behalf of all the applicants; attached thereto is a written consent to swear an affidavit dated 17/4/2023; it is signed by the 1st, 2nd, 5th and the 7th applicants.
13. The Oxford Dictionary of Law 4th Edition defines affidavit as “*A sworn written statement used mainly to support certain applications and in some circumstances, as evidence in court proceedings*”. (emphasis supplied); **Order 19 rule 3 of the Civil Procedure Rules** provides for matters to which affidavits shall be confined which are such facts as the deponent is able of his or her own knowledge to prove. In **George William Katatumba & Ors V. Abarihamwe Livestock Cooperative Society Ltd & Ors Miscellaneous Application No. 06 Of 2021 (Civil Division)**; court held that there is no legal basis for the proposition that before the particular deponent deposed to the facts in such circumstances, he had to first seek the authority of the others; I hold the same view and add that if he or she is a party with knowledge of particular facts to the case.
14. In this case the 3rd applicant deposes under paragraph 10 that whatever he has stated is true and correct to the best of his knowledge and belief save for paragraph 6 which source is his lawyers. In my view, what qualifies an

affidavit is that it should disclose facts or evidence which the deponent is able to prove; besides, **Section 133 of the Evidence Act Cap. 6** states that: “*subject to the provisions of any other law in force, no particular number of witnesses shall in any case be required for the proof of any fact.*” Therefore, I find that the failure of the 3rd applicant to obtain written consent from some of the applicants does not render the affidavit in support, defective.

The first preliminary objection is overruled.

Neither the respondent nor his lawyer have ever been served with the said contempt order obtained ex parte on 30th March 2023 which the applicants purport to have been violated by the respondent.

15. The respondent in his affidavit in reply denies knowledge of the ex-parte order as he was never party to the proceedings leading to its grant on the 30th of March 2023; counsel submitted that neither the respondent nor his counsel were served with the said order after being granted. The matter had been adjourned to 24th May 2023 and not 30th March 2023; that no formal application of contempt of court was ever filed against and or served onto the respondent or his lawyers; no hearing notice of the matter being fixed for hearing on 30th March 2023 was ever served;
16. Counsel for the respondent cited Nsangiranabo V. Col. Kaka Bagyenda & Anor. Misc. Application No.671 of 2019 and submitted that the contempt proceedings initiated by the applicant ought to have been initiated by formal application seeking to have the respondent found in contempt; it is his argument that the exparte contempt order dated 30th March, 2023 was obtained irregularly and in total disregard of the respondent’s non-derogable right to fair hearing;
17. In rejoinder, counsel for the applicant submitted that in Civil Suit No.856 of 2016 and Civil Suit No.111 of 2016, a temporary injunction was granted against all the parties in this application; restraining them from dealing in any property of the estate of the late Serubiri Robert until the rights of ownership and management of the estate are fully and finally resolved.;the applicants and respondent were aware of the existence of the temporary injunction on which the order granted on 30th March 2023 was premised, so the respondent was under obligation to obey the said order.

18. I have considered the submission by both counsel. There is no contention that court on 2/12/2016 in Miscellaneous Application No.175 of 2016 issued an order restraining either party from selling, disposing of, subdividing or transferring any property of the estate of the late Serubiri Robert until the rights of ownership and management of the estate are fully and finally resolved.
19. Failure by the applicants to bring to the attention of the respondents the order holding the latter in contempt is what is being questioned by the respondent since according to him the order was made in his absence.
20. I have considered the pleadings and nowhere is it proved by the applicants that they brought to the attention of the respondent the order of this court holding him in contempt; whether the respondent continued in contempt after court had found him in contempt would in my view depend on whether he was aware of the court order; I therefore agree with the respondent that while he knew of the orders of court restraining him from doing anything on the suit land, he was not aware that he had been held in contempt and that he was required pay UGX 2,000,000 into court account per month until he has demolished the structures on the suit land.
21. On the respondent's concern that he was not heard before court found him in contempt; I shall for clarity repeat what I stated above; when Civil Suit No.111 of 2016 came up for hearing on 23/11/2022, both parties and their counsel were present in court. Counsel for the plaintiffs informed court that the defendant has constructed structures on the estate land; **the respondent responded that the structures are for the workers who guard his plantation and for the said worker's toilet**; court directed counsel for the plaintiffs/applicants to liaise with counsel for defendant/respondent to carry out a locus visit of the land in the presence of the L.C1 chairperson within one week from 23/11/2022 and file a report to court; court ordered the defendant to stop constructing **till court makes a decision**;(emphasis supplied);
22. The visit to the suit land was to establish if what the parties had told court was true before court made its decision; on the part of the plaintiff that the defendant had constructed on the suit land; which was denied by the defendant who stated that the structures were a house and a toilet for his workers; the parties therefore had already been heard in court.

23. When the report was presented, court was satisfied that construction was taking place on the suit land and since the defendant had already conceded that he had workers there, court determined that he was continuing with activities on the suit land in disobedience of the court order; and court made a decision and held him in contempt; it is my finding that the respondent had been heard.

24. Knowledge and awareness of a court order is vital because one can not comply unless they are aware of the order. The respondent concedes that he became aware of the court order on 22/05/2023; he is deemed to have been aware of the court order on that day and not when it was issued on 17/4/2023; this application was filed on 20th April before the order of this court dated 17th April 2023 was brought to the attention of this court; therefore this application is premature; however the order of this court having been brought to the attention of the respondent must be complied with.

Before I take leave of the matter, I shall comment on two points:

25.A) The respondent's averments that the order is irregular because of the reasons he gives; the position of the law is that once a court order is made, the same is valid unless and until set aside on review or on appeal. In **Hadkinson v Hadkinson [1952] All ER, Romer L.J** relied on the case of Church v Cremer (1 Coop Temp Cott 342) where it was held that "A party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it . . . as long as it existed".

26. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed that: "*It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it.....*" court further stated that; "*Where a party considers an ex parte order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made ex parte*"

27. In **Amrit Goyal Vs. Harichand Goyal & 3 Others C.A.C.A No.109 of 2004**, court stated that; *“A court order is not a mere technical rule of procedure that can simply be ignored. Court orders must be respected and complied with. A court order must be obeyed, as ordered unless set aside or varied.”* (see also **Ekau v Dr. Aceng [2019] UGHCCD 134** where court stated: *“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.”* (highlighted for emphasis).

28. I have stated above that while the decision was delivered in the absence of the respondent and his counsel he the respondent had been heard; but in any case if he had issues he ought to have brought them to the attention of court; but not wait to raise it as a preliminary point of law; a contemnor must first purge himself before he can be heard because the same court being defied cannot be seen as haven at the convenience of a litigant; (see **Kabale University vs Henry Rwaganika & anor Appeal No. 007 of 2016** where the court cited *Hankinson vs Hankinson (supra)* *“a party in contempt by disobeying an existing order cannot be heard in a different but related cause of action, until such a person has purged himself/herself of the contempt.”* In **Comform Uganda Limited v Megha Industries (U) Ltd (Miscellaneous Application No.1084 OF 2014)**, court held; *“This court therefore finds that, the Applicants cannot have courts discretion exercised in their favor before they have purged themselves of contempt...To hold otherwise would be encouraging impunity by litigants who find court orders unpleasant and decide to disobey them.”*

29. If it had been proved that the respondent had been served with the order the objection emanating from its perceived irregularity would not have been upheld; In this case I have found that the respondent was not aware of the contempt order therefore the objection is upheld.

30. **B)** The submissions by counsel for the applicant appear to be as if they are seeking a contempt order within a contempt order which to me is an execution issue for court has already pronounced itself. I find that even if the applicant had proved that he had served the court order on the respondent, the duty of

court had already been done; if they, for some reason, did not agree with the ruling and orders of court, they ought to have applied the correct procedure.

The orders of this court issued on 30th March 2023 still stand and must be complied with.

This application having been brought before the orders of this court were brought to the attention of the respondent, is premature and therefore it is hereby dismissed.

Each party shall bear their costs.

It is so ordered.



Ketrah Kitariisibwa Katunguka

Judge

22/08/2023

Delivered by email to: kimanjensibambiadvoc@yahoo.com, kakeetolaw@yahoo.com, kabegamu15@gmail.com, balikurungifaisali@gmail.com.