

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISC. APPLICATION NO. 961 OF 2013
(ARISING OUT OF CIVIL SUIT NO. 728 OF 2007)**

ALBERT LUBWAMA..... APPLICANT

VERSUS

- 1. SWIFT LINKS INVESTMENTS LTD**
- 2. GERALD SEKITOLEKO RESPONDENTS**
- 3. GERALD SSALI**
- 4. GERALDINE NAMUGERWA SSALI**

RULING

The applicant presented this application by chamber summons under Article 128 (2), (3), 50 (2), 28 (12), 23 (1) (a) of the Constitution of Uganda 1995, Sections 33 and 98 CPA, Section 107 (1) (d), (g) (i), (3) and 117 of the Penal Code Act seeking for orders that;

1. The respondents show cause why they should not be committed to civil prison.
2. A writ of sequestration doth issue appointing a sequestrator of this honorable court's choice to manage the assets of the respondents.
3. An order doth issue directing the respondents jointly and severally to pay the applicant damages and the compensation to the tune of UGX 500,000,000/=.
4. An order doth issue directing the respondents jointly and severally to pay a fine of UGX 100,000/=
5. Costs of the application.

The grounds of the application where that the respondents were in contempt of an order of this court granted on 8/4/08 barring further trespass, alienation and/or interference with land comprised in land formerly known as LRV 3186 Folio 20 Plot 47 Block 447 Kitinda (hereinafter called the suit land), and they have continued to be in contempt to date which is prejudicial to the applicant.

In his affidavits in support and rejoinder to the application, the applicant substantiated the claim by stating that he filed HCCS No.728 of 2007 against the 1st respondent for trespass and

cancellation of the land title in respect of the suit land and was granted a temporary injunction against the 1st respondent on 8/4/08 which order was served upon the 1st, 2nd and 3rd respondents as well as the registrar of Titles. That he also at one time met and warned the 4th respondent to desist from trespassing on the suit land. That notwithstanding the presence of the order, the 1st respondent with the active involvement of the 2nd and 3rd respondents fraudulently removed a caveat existing on the suit land, and then had it subdivided into several plots (to wit plots 76, 77 and 78 Folios 17, 18, 19 and 20), had him evicted and transferred the suit land. He maintained that the incidences of contempt were all committed during the subsistence of the court order and that the 2nd and 3rd defendants should not be allowed to hide behind the façade of the 1st respondent's legal personality.

In reply, the 2nd respondent filed an affidavit in which he contended that the application was brought under the wrong law and using wrong procedure, brought against persons who are not parties to the suit, is frivolous and vexatious and an abuse of court process, contained *mis joinder* of orders and seeks orders not provided for by law. They in addition contended that there is an earlier cause (Misc Application No. 1140 of 2008) on record, which is similar to the current application but abandoned by the applicant. They in addition contested the inclusion of the 2nd and 3rd respondents to the cause yet no attempts had been made to lift the veil of incorporation. They further argued that the application was presented with inordinate delay since the acts complained of allegedly arose way back in 2008 and by its nature; the application was intended to delay justice. The 3rd and 4th respondents did not file any affidavits in response to the application.

Both parties filed written submissions by which several issues were put up for resolution.

Issues:-

➤ **Whether the application is properly before court**

The pertinent issues raised thereunder are as follows:-

1. The application was brought under the wrong provisions of law.
2. The application is frivolous and vexatious and an abuse of court process.
3. The application was brought after undue delay and is an afterthought.

4. The application is brought against persons who are not parties to the suit.
5. The applicant has never applied to lift the veil so as to proceed against the 2nd and 3rd respondents.
6. There is Misc Application No. 1140 of 2008 on record with similar facts and prayers that was abandoned by the applicant.

➤ Whether there is contempt of the order by the respondents.

➤ What remedies are available to the parties?

The application was brought under the wrong provisions of law.

The application was brought after undue delay and it is an afterthought.

The application hereof is frivolous and vexatious and an abuse of court process.

Counsel for the respondent submitted that no clear provisions of the CPR were cited. That the application should have been brought under **Order 41 rule 2 (3) CPR** by way of chamber summons as provided for under **Order 41 rule 9 CPR**. That in violation of the correct law and procedure, the applicant sought prayers for orders which are not provided for. He argued that a writ of sequestration is a common law remedy whose procedure is not provided for under our law and could only be sought by notice of motion **Order 52 rule 1** and not by chamber summons. Also that the applicant failed to relate the provisions of the Constitution relied on to the application.

The applicant opted to bring this application under constitutional provisions that generally deal with independence of the judiciary and enforcement of fundamental rights and freedoms. It is only Articles 23 (a) and 28 (12) that make reference to the penalty of contempt of court orders. I agree with counsel for the respondents that the correct procedure should have been under **Order 41 rule 2 (3)** which provide as follows:-

In cases of disobedience or breach of any such terms, the court granting an injunction may order the property of the person guilty of the disobedience or breach to be attached, and may also order the person to be detained in a civil prison for a period not exceeding 6 months unless in the meantime the court directs his or her release.

The above notwithstanding, developments in our courts have taken the liberal approach to consider rules as mere handmaidens of justice, meant to give notice to the court and the other party of the intended claim, for example for the court in the case of **Intraship (U) Ltd vs. G.M Combined (U) LTD (1994) VI KALR at 42 took the same view** where an application was wrongly brought before court, Justice Lugayizi held that the citing of a wrong rule does not in itself bar the court from using its discretion to entertain the merits of the matter where it is shown that no injustice would result.

I accordingly choose the liberal approach that use of a wrong law, will not bar this court from entertaining the merits of the case where the claim is clear and properly stated and the respondents have not shown that they will suffer any injustice as a result. I am in my decision, also fortified by Article 126 (2) (e) of the Constitution which provides that substantive justice shall be administered without undue regard to technicalities. I find that the application regardless of a few technicalities was properly before court and I will therefore proceed to decide it as presented. In the same vein, the application is not frivolous and vexatious

The acts complained of took place in May 2008 and on the face of it, there was undue delay to present this application. However, I have not seen any time limits paged against bringing such an action. To my mind a complaint of contempt is a serious one. As was held in **Chuck Vs Cremer (I Coop Tempt Cott 342)** quoted by Romer L J in **Hardkinson Vs Hardkinson (1952) ALIER 567 at 571** that “*disregard of an order of court is a matter of sufficient gravity whatever the order may be*”. That in my view would entail a court to act on such a complaint at whatever time it is given notice; irrespective of the time lapse. In any case, as I will show later in this ruling, the line between civil and criminal contempt is a very thin one. I accordingly decline to disregard the complaint simply because six years have passed since the acts complained of took place.

- **The application is brought against persons who are not parties to the suit.**
- **The applicant has never applied to lift the veil so as to proceed against the 2nd and 3rd respondents.**

Counsel for the respondent submitted that the 2nd, 3rd and 4th respondents are not parties to the main suit and cannot be joined as respondents in this application. Relying on the authority of

Salomon vs. A. Salomon & Co. Ltd [1897] AC 22 (which laid down the principle that a company is a legal entity capable of a separate existence), he argued that although the 2nd and 3rd respondents are shareholders and directors of the 1st respondent, this does not give the applicant an automatic right to add them as parties to this application as an incorporated company is deemed to be a separate legal entity from its owners whose liability does not extend to the members. He argued therefore that, the applicant needed to first have applied to lift the veil of incorporation and then add the shareholders/directors as a party to the suit.

Counsel for the applicant did agree that that a company is distinct from its shareholders and acts through resolutions arrived at either by the board or the general assembly. He argued however that the order to maintain the status quo was made in the presence of the 2nd and 3rd respondent's who directors of the 1st respondent are. The same respondents then without authority deliberately and fraudulently alienated the suit property. They individually violated an existing court order by executing transfers of the suit land to 3rd parties. He quoted the authority of **Bashaija Kazoora John Vs. Bitekyerezo Medard and Electoral Commission HC EP 4 of 2004** where it was held that court orders are orders in *rem* and bind the whole world. He argued therefore that it is vain for the 2nd, 3rd and 4th respondents to state that because they are not parties to the main suit and hence at liberty to violate the court order by doing exactly what is prohibited.

I agree with the legal principle that a company has an existence separate from that of its members. However, under Order 41 Rule 5 CPR, an injunction against a corporation is binding not only on the corporation itself, but also on all its members and officers whose personal actions it seeks to restrain. I believe the complaint here is that the 1st respondent through the 2nd and 3rd respondents, its agents, perpetrated fraudulent acts to defeat a court order which amounted to contempt. This in my view would allow the court to hold the particular officers accountable, since a company which is only a legal person cannot reasonably be held accountable for actions that bear a "human character" and cannot be made to bear some remedies of contempt e.g. civil prison.

The record bears witness that the 2nd and 3rd respondents are not parties in the main suit. Ordinarily, the proper procedure should have been for the applicant to first apply to court before trial by summons (under)Order 1 Rule 10(2)CPR) or at the trial of the suit in a summary manner, to add them as defendants in the main suit before instituting this application. However, this is no ordinary application; it is an application seeking for a remedy against a party who is stated to be in contempt of a court order. I do agree with counsel for the applicant that court orders are “orders in *rem*” and therefore should be obeyed by all persons or at least those who are reasonably expected to have had or should have had notice of such orders and this would include even those who are not party to the actions from which they arise.

The 2nd and 3rd respondents are stated to be directors of the company who signed an instrument of transfer on behalf of the 1st respondent in favour of third parties including the 4th respondent when there was an existing court order barring them from doing so. The 4th respondent is stated to have been warned by the applicant of his interest in the suit land and even ordered off the land. However, it is not stated whether this was before or after the order was granted. An instrument of transfer was presented as Annexure “C” by the applicant. It shows that two people signed as directors of the 1st respondent, as vendor. Their signature are not in Latin character and therefore it cannot be discerned which director signed the document. The 2nd respondent admits in his affidavit that he is a director of the 1st respondent and that the 1st respondent did indeed transfer the property to third parties without any objection being raised by the applicant. I am not prepared at this point to even speculate who signed as vendor, but since the 2nd applicant admits to be a director of the company and does not specifically deny signing the transfer instrument on behalf of the 1st respondent, there is *prima facie* evidence that he could have been one of the signatories. The 3rd respondent did not file an affidavit in reply to this action and therefore it is taken that he does not oppose the allegations made.

However the same does not hold with the 4th respondent. She is not connected to the 1st respondent and is only stated to be a party who purchased the suit property after being warned against trespassing on the suit land by the applicant. Counsel for the respondent denied representing her and counsel for the applicant admitted that he had not filed proof of service. It should be noted that the main suit was discontinued against the 4th defendant on 22/8/13 due to

non service of the summons. This was before this application was filed. Thereafter, there is obviously no one on record as her legal representative and therefore it cannot be said that she was served with this application. She may have been properly sued as possibly one of the persons who abused an existing court order, but she cannot be condemned in contempt without knowing the complaint against her. I accordingly hold that the 4th respondent cannot be held in contempt since she is not aware of the complaint against her.

That there is Misc. Application No.1140 of 2008 on record a similar application which was abandoned.

Counsel for the respondent invited court to take judicial notice of the existence of MA 1140 of 2008 on court record which was previously filed but abandoned by the applicant. That that application if prosecuted, would fundamentally dispose of the matter before court now. That since this application has never been withdrawn, the applicant could not opt to file and argue yet another application *denovo*. Counsel for the applicant admitted filing that application but argued that its fixture was impeded due to the case overload at the division. None of the parties attached the pleadings of MA 1140/08 to this application and I have perused the record and found no indication of its existence. Although both parties agreed that MA.1140 of 2008 exists, I am unable to come to a conclusion on whether the contents of that application are at variance or similar to this application. Thus regardless of the submissions on this point, I am still bound to make a decision on this application and will do so. Ofcourse the orders I give herein may or may not have a bearing on the final decision of that application but that should come to bear if that application is ever heard and disposed of. This objection is therefore also rejected.

Issue two: - Whether there is contempt of the order by the respondents.

I find it more useful to describe the meaning of contempt according to what but instead what it can or may entail. According to **Salmon L J in Jenison Vs Baker (1972) 1 ALIER 97 at pages 1001** followed with authority by Justice Mulyagonja in **Stanbic Bank (U) Ltd & Anor Vrs The Commissioner General URA Misc. Application No.42 of 2010 (unreported)** it was **held that;**

“Contempt of court may take many forms. It may consist of what is somewhat archaically called contempt in the face of the court, e.g. by disrupting the proceedings of

a court in session or by improperly refusing to answer questions when giving evidence. It may, in a criminal case consist of prejudicing a fair trial by publishing material likely to influence a jury. It may, as in the present case, consist of refusing to obey an order of the court. These are only a few of the many examples that could be given of contempt. Contempt has sometimes been classified as criminal and civil contempt. I think that at any rate, this is an unhelpful and almost meaningless classification.”

Also, according to **Halsbury’s Laws of England Volume 1 (1) 2001 paragraph 458**, gave a useful classification as follows;

“It is a civil contempt of court to refuse or neglect to do an act required by a judgment or order of the court within the time specified in the judgment or order, or to disobey a judgment or order requiring a person to abstain from doing a specified act..”

My brother Justice Bashaija was of the view in **Muriisa Nicholas Vs AG & Ors(Misc. Cause No. 35/12 unreported)** that contempt is a matter of both law and fact. The party who alleges the contempt needs to adduce evidence or point out instances of contempt for it to be duly established. Similar to the quoted case, the instances of contempt in this matter were brought out in the three affidavits filed in support and rebuttal, of the application. This in my view would suffice as proceedings on a complaint of contempt in which both parties have been heard. That notwithstanding, I caution myself that a claim of contempt is a very serious one indeed and would thus require evidence that is of commensurate strength. My finding is based on the authority of **Wild Life Lodges Ltd vs. County Council of Narok and another (supra)** quoted by the applicant which provides in part that “...*In cases of alleged contempt, the breach of which the alleged contemnor is cited, must not really be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities...*”

Counsel for the applicant contended that a temporary injunctive order for preservation of the suit land was issued by court on the 8/4/2008 in the presence of the parties and/or their representatives. That less than a month thereafter, the 1st respondent applied to the commissioner land registration and was granted leave to subdivide the suit land into various plots. Subsequent to that, the 2nd and 3rd respondents in an *ultra vires* transaction subdivided and transferred the suit

land unto themselves and the 4th respondent. Since the acts of the 2nd and 3rd respondents were not authorized by the 1st respondent and hence not agents, they are individually liable for their acts. He quoted Halsbury's **Laws of England vol. 9 (1) at paragraph 492** which defines civil contempt as that punishable by way of committal or by sequestration.

Counsel for the respondent in reply submitted that the injunction was issued on 8/4/08 for a period of three months only and conversely would lapse on 8/7/08 and therefore the respondents could not be held in contempt of a court order which expired almost 6 years back. They argued that the applicant had sat on his rights for too long and this application is only an afterthought. It was also argued that the orders sought in the application would render the main suit nugatory. It was also stated in reply that the 1st respondent has been in actual and uninterrupted possession of the suit land since purchase in 2004. They have now sold it to third parties who also took actual possession and have developed their respective plots without any interruption. They also argued that the application to subdivide the suit land as attached on the affidavit was made by the 1st respondent's advocate on its behalf as the registered proprietor and not on behalf of the 2nd, 3rd and 4th respondents.

In the case of **Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd Vs. Uganda Revenue Authority MA 42 of 2010** in emphasizing the importance of complying with court orders the learned Judge relied on the case of **Hardkinson vs. Hardkinson [1952] ALLER 567** where *Romer J.* held that;

“A party, who knows of an order, whether null or regular or irregular, cannot be permitted to disobey it.... It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge or irregular. That they should come to the court and not take (it) upon themselves to determine such a question. That the course of a party knowing of an order, which was null and irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.”

It is not in dispute that a temporary injunction was granted in favour of the applicant on 8/4/08 by which the respondent, its agents and/or assignees were restrained from evicting the applicant, further trespass, constructing, alienating, and/or interfering in any way with the suit land. The

order was to remain in force until 8/7/08 and there was a subsequent renewal. It is not denied that the 1st respondent had notice of the order since it was delivered in court in the presence of their advocates. The averments by the applicant that the suit land was subdivided into plots 76, 77, and 78 Folios 17, 18, 19 and 20 respectively were opposed by the 2nd respondent as “*a pack of lies*”. Conversely, the 1st applicant presented Annexure A which indicated that on 6/5/08, the applicant through their advocates, wrote to the commissioner land registration applying for the suit property to be subdivided into plots 76, 77, 78 and 79.

In addition, the applicant presented a copy of a transfer instrument indicating that the 1st respondent purported to transfer Block 447 Plots 76 and 79 to one Geraldine Namugerwa Ssali, whom I presume is the 4th respondent. Although this incident took place before the order was issued, it was an on-going process that involved payment of stamp duty (see embossing stamp of URA dated 7/5/08) and culminated into Ms Ssali being registered on Plot 79 on 4/6/08. In my view, the process of applying for a sub division and transfer certainly happened during the lifetime of the court order. In fact, those facts are supported by the averments of Gerald Ssali in his affidavit that at some unspecified time, the 1st respondent “..... *sold the suit land to other persons who took actual possession and developed their respective plots without interruption*”. From the above facts, I am persuaded that the 1st respondents through the act or acts of its agents purported to have the suit land sub divided into several plots one of which was transferred to a person not a party to the main suit. The House of Lords in **Stancomb Vs Trowbridge Urban District Council (1910) 2Ch 190 (at 194)** ruled on acts of contempt by a corporation thus:-

“In my judgment, if a person or a corporation is restrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process or contempt, if he or it in fact does the act, and it is no answer to say that the act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order.”

Accordingly I find that the actions of the 1st respondent amounted to an act in violation of the existing temporary injunction that specifically restricted them from dealing in the manner that they sought out to do. In my view this was in contempt of court and I so hold.

I have already found that the 1st applicant could only act through the ‘human decisions and actions’ of its agents, (who would under company law be the directors). The 4th respondent has already been exonerated. The 3rd respondent has admitted that he is a director in the 1st respondent and also that the 1st respondent have already had the suit land transferred into the names of third parties. However, neither the 2nd or 3rd defendant did admit that it was them in particular who signed the instrument on behalf of the 1st respondent. A charge of contempt is a serious one and the applicant is therefore put to proof of the actual involvement of those two respondents which proof as I have already found, is the type that is high and excepted to be above a mere balance of probabilities.

I did scrutinize the instrument of transfer presented to impute the involvement of the 2nd and 3rd respondents as directors. The signatures are not legible and are also not in Latin character. No evidence was availed to show that the 2nd and 3rd respondents are the only directors of the 1st respondent or specifically that both were sitting directors at the time the instrument was signed. There could be a possibility that another set of directors signed that instrument. Even if I was to find otherwise, the applicant would still be required to show that the 2nd and 3rd respondents knowing about the application, wantonly did not prevent it or allowed it to continue. I have not seen that type of evidence. For that reason, I find that it has not been proved to the sufficient standard that the 2nd and 3rd respondents signed the offending transfer and I therefore decline to find them in contempt.

Issue three

What remedies available to the applicant?

I have found that the 1st respondent was in contempt of the court order. Under Order 43 Rule 1(3) I may order their committal into civil prison or the attachment of the 1st respondent’s property. The first option is of course not possible in the present circumstances. Unfortunately, the applicant has not guided the court on the available property against which the order of attachment can be made, this is so especially when there is yet (unproved) evidence that the suit property has been sold and is held by third parties. None the less, the applicant is entitled to some

remedy which must be the type that would be punishment of a civil contempt but one that would not preempt the final outcome of the main suit.

The applicant has sought an alternative remedy of a writ of sequestration which I have not found in our laws but present in English Common Law (see for example **Halsbury's Law of England Vol 9 (1) at paragraph 492** which states that:-

“Civil contempt is punishable by way of committal or by way of sequestration. The effect of the writ of sequestration is to place, for a temporary period, the property of the contemnor into hands of sequestrates who manage the property and receive rent and profits. Civil contempt may also be punished by a fine, or an injunction may be granted against the contemnor.”

Thus civil contempt can be punished by a fine and this has been the case in several English authorities e.g. in **J.R. Rix Sons Vrs Owners of the Steamship or Motor Vessel Jarlinn (The Jarlinn) (1965) ALLER 36** when a fine of three hundred pounds was issued against the owners of vessel for violating a court order. S.14 (2) (b) (1) of the Judicature Act empowers this court to exercise its jurisdiction in conformity with the common law and the doctrines of equity. And by virtue of S.14 (2) (c) of the same Act, where no express law or rule is applicable to any matter in issue before the High Court, the court shall exercise its discretion in conformity with the principles of justice, equity and good conscience. It is further provided by S.14 (3) of the Judicature Act that the applied law, the common law and the doctrines of equity shall be in force only in as far as the circumstances of Uganda and of its peoples permit, and subject to such qualifications as circumstances may render necessary. It is my considered view that this circumstances of this case call for the application of the dictates of justice and equity, and principles derived from the common law.

In fact, S.98 CPA provides that nothing in that Act shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court with no doubt. Contempt of court is one of one

such abuse of the court process. The applicant sought a fine of Shs.100,000/-. In my view, the actions of the 1st respondent were grave. I therefore order that the 1st respondent do pay a fine of Shs.500,000/- to the Registrar of this court in order to purge the contempt. The fine shall be paid within 30 days of the date of this order.

The 1st respondent shall also pay the costs of this application in any event.

I so order.

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EVA K. LUSWATA
JUDGE
11th July 2014