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THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)
MISCELLANEOUS APPLICATION NO. 405 OF 2016
(ARISING FROM CIVIL SUIT NO. 024 OF 2016)

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1. NILE CONSTRUCTION
GENERAL CONTRACTORS LTD.
2. ENGINEER SERTZU G. MERSKEL :::::::::::::::::::: APPLICANTS
VERSUS

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PROF. DR. G.W. KANYEIHAMBA :::::::::::::::::::: RESPONDENT
BEFORE: HON. MR. JUSTICE BASHAJA K. ANDREW

R U L I N G:

This application is brought under Section 33 of the Judicature Act, Cap. 13; Section 98 Civil Procedure Act, Cap 71; Order 52 rr.1 & 3 of the Civil Procedure Rules, SI 71 -1 for orders that;

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- (a) The Respondent be detained in a Civil Prison for a period not exceeding six months for disobedience of a court order.***
- (b) Any other order as this Honourable Court deems fit including an order for the creation of a special certificate of title of mailo interest in the suit land and an order that the 1st Applicant be issued with a certificate of title for 99 years lease thereon.***
- (c) Costs of this application be provided for.***

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The grounds of the application are amplified in the affidavit of the 2nd Applicant, Eng. Sertz G. Merskel, but are briefly that;

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- (a) This Honourable Court issued an order in HCCS No. 24 of 2016 on 31st March, 2016.***
- (b) The Respondent has and continues to disobey the court order.***
- (c) It is in the interest of justice that the Respondent be compelled to obey the said court order.***

(d) It is also in the interest of justice that this Honourable Court orders the creation of a special certificate of title for the mailo interest and the Applicant be issued with a certificate of title on it for its lease interest of 99 years for the court order not to be issued in vain.

35 In his affidavit supporting the application, the 2nd Applicant states as follows:-

1. *That I am an adult male of sound mind, the second Applicant and deponent herein.*
2. *That the Applicants filed Civil Suit No. 24 of 2016 against the Respondent.*
3. *That this Honourable Court issued an order in respect of Civil Suit No. 024 of 2016 that the Applicants (Plaintiffs) deposit the outstanding amount with court at the Deputy*
40 *Registrar's Chambers on 4th April, 2016 and the Respondent (Defendant) should also on the same day deposit duly signed transfer forms and a duplicate certificate of title for the suit land with court at the Deputy Registrar's Chambers. (A copy of the said order is attached hereto and marked "A").*
4. *That the said order was made in presence of the Respondent's Advocates on the 31st*
45 *March, 2016.*
5. *That Applicants duly complied with the court order and deposited the outstanding sum of Shs.198,200,000 (One Hundred Ninety Eight Million, Two Hundred Thousand Shillings) with the Court as ordered.*
6. *That it is also in the interest of justice that this Honourable Court orders the creation of*
50 *a Special Certificate of Title for the mailo interest and the 1st Applicant be issued with a Certificate of Title on for its lease interest of 99 years on the suit land for the court order not to be issued in vain.*

- 55 7. *That Respondent has until to date not complied with the court order despite the Respondent's appearance in court before the Deputy Registrar on that day, 4th April, 2016.*
8. *That I have been advised by my aforesaid Advocates that failing to comply with a court order amounts to contempt of court and this Honorable Court can arrest and detain the Respondent in Civil Prison in a bid to compel him to comply together with such other orders that include, an order as to punitive damages against the Respondent.*
- 60 9. *That it is in the interest of administration of justice that the Respondent be compelled to comply with the court order through arrest and detention in civil prison or in such other ways as this Honourable Court deems fit.*
10. *That I swear this affidavit in support of an application for orders that;*
- (a) *That the Respondent be detained in civil prison for a period not exceeding six*
65 *months for disobedience of a court order or such order as this Honourable Court deems fit.*
- (b) *Costs be provided for.*
11. *That whatever is stated herein is true to the best of my knowledge and belief save what is stated in paragraph 7 which is true to the best of my information as imparted to me*
70 *by the sources disclosed herein."*

The Respondent filed an affidavit in reply opposing the application. He states as follows:-

1. *I am the Respondent in the above application and swear this affidavit in that capacity.*
2. *I have read the Applicants' application for an order that I be detained in a civil prison for alleged disobedience of a court order.*
- 75 3. *The Applicants are my tenants and have been so for a number of years.*

4. *In the dispute between me and the Applicants, we agree on every aspect of the lease agreement between me and the Applicants except on the exact location of the 5.16 acres which I agreed to lease to the Applicants.*
- 80 5. *The reason we failed to agree is that while I was hospitalized in U.K, the 1st Applicant and my former lawyer Mr. Oromo Emmanuel shifted the boundary marks of the actual area of land I leased to the Applicants and located them in other parts of my land which I had not leased to the Applicants.*
6. *When I returned from UK, I refused to accept their own choice of what they marked in my absence as the land I leased to the Applicants.*
- 85 7. *Then we agreed to resolve the dispute by employing independent land surveyors to verify the 5.16 acres which I agreed to lease to the Applicants.*
8. *The Applicants have refused to accept the findings of the independent surveyors on at least four occasions insisting that unless the surveyors' reports include what they demarcated in my absence, they will sue me.*
- 90 9. *It is not true that I am in contempt of court. On 4th April 2016 I appeared before the Deputy Registrar of this court and explained to her what transpired since the filing of the plaint in HCCS No. 024 of 2016 and the Deputy Registrar granted my request that the suit be heard by the learned judge of the High Court where I said I would pray for a site visit of the land in dispute.*
- 95 10. *The Applicants agreed to lease from me 5.16 acres at Shs.145, 000,000/= per acre of the said land subject to a survey which the parties agreed to and despite themselves engaging several surveyors, the Applicants have not agreed to accept any of the*

reports, insisting that I transfer part of my land of their choice which I did not lease to them.

100 11. *The Applicants are wrongly claiming that my land described in Recital 1 of the said lease agreement measures 5.16 acres includes my rock or the 0.6 situated far away from what I agreed to lease to them.*

12. *At the request of the Applicants, on 5th May, 2015 I signed mutation forms in respect of the land measuring 5.16 acres and gave them my Mailo titles in relation to the demarcation of their lease in land believing that the extra land described in Recital 1 of the said agreement would remain my property.*

13. *The balance of Shs.198,200,000/= which is due to me from the Applicants is in respect of 5.16 acres only and not the whole land described in Recital 1 of the Agreement, measuring 7.01 acres which is on the left side of the road.*

110 14. *The Applicants have adamantly refused to return my Mailo land registered titles in this particular case and for any other rocks I leased to them for which they unlawfully constructed what they call an access road again without my knowledge or consent and in spite of the fact that I had provided them access road to the said rocks, namely Block 397, Plot 264 and 287. I advised the Applicants to return my titles but they have not done so.*

115 15. *I am aggrieved by the order in HCCS No. 024 of 2016 which was made on 31st March, 2016 directing me to execute a transfer of the land in dispute to the Respondent and deposit a certificate of title in respect thereof in this court in that the dispute between me and the Respondent is only as the exact location of the acreage of the aid land they should be tenants of.*

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16. *On 30th May, 2016 I filed in this Honourable Court Miscellaneous Application No. 485 of 2016 against the Applicant for review of the said order. A copy of the said affidavit together with the supporting affidavit are hereto annexed together marked "A".*
- 125 17. *On 12th January, 2015 I entered an agreement to lease that part of my land that remains of the land on the left of the main public road that passes through my Country Farm comprised in Block 397 Plot 1802 and 1692 at Bweya Busiro for a term of 99 years. A copy of the said agreement is hereto annexed and marked "A".*
- 130 18. *It is in the interest of justice that this Honourable Court determined the said application and appoints an independent surveyor to ascertain the true location of the 5.16 acres out of 7.01 acres to assist in the determination of the said dispute on merit.*
19. *The enforcement of the said order against me will result in the dispute between me and the Applicants as to the location of the land I leased to them to remain undetermined.*
20. *I swear this affidavit in reply to an application for contempt of court proceedings against me.*
- 135 21. *I depose to the matters herein from my knowledge."*

Mr. J.F Kanyemibwa represented the Respondent while Mr. Brian Kirima the Applicants. The Respondent was directed to appear in person in court at the hearing of this application. However, his lawyer notified this court at the hearing that the Respondent was indisposed. Court took note of that fact, but since the Respondent had filed an affidavit in reply, the hearing of the application proceeded and the Respondent's lawyer argued the application even though the Respondent was absent in court.

The following are the issues for determination in this application;

1. ***Whether the Respondent is in contempt of court order in HCCS No. 24 of 2016.***

2. *What are the remedies available to the parties?*

145 **Resolution of Issues:**

Issue No.1: Whether the Respondent is in contempt of the court order in HCCS No. 24 of 2016.

There is scarcely an express statutory definition of the phrase “contempt of court”. There is also acute dearth of the phrase interpretation even in the decided cases. In such circumstances courts usually adopt the stance of assigning such a phrase its ordinary dictionary meaning. In *Black’s Law Dictionary (7th Ed) at page 313*, “contempt” is defined to mean;

155 *“...a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior 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 same definition was adopted by court in the case of *The Proctor & Gamble Co. vs. Kyole James Mutisho & 2 Or’s HC Misc. Application No. 135 of 2012*. Kiryabwire J, (as he then was) citing with approval the case of *Jennison vs. Baker (1972)1ALL ER 997* (at pages 1001 -1002) per Salmon LJ, held that there are many forms of contempt but which may be broadly classified as criminal or civil contempt. *The Proctor & Gamble case* (supra) also cited the case of *Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd vs. Uganda Revenue Authority, H.C Misc. Appl. No. 42 of 2010*; per Mulyagonja J, where it was held that criminal contempt is where Section 107 of the Penal Code Act is involved, while civil contempt is a common law misdemeanor to be applied by virtue of Section 14 (2) (b) and (c) of the Judicature Act (Cap 13) which makes applicable the common law principles in Uganda.

In the same case, it was held that the purpose of “contempt” is to ensure that justice is done and solely to prohibit acts, words or behavior that obstruct or have the potential to obstruct the smooth administration of justice. In *Stanbic Bank (U) Ltd. & Jacobsen Power Point Ltd* case (supra) the court cited with approval Salmon LJ, in *Jennison vs. Baker (supra)* where 170 Mulyagonja J, emphasized the importance of complying with court orders; and further quoted Romer LJ; in the case of *Hadkinson vs. Hadkinson (1952) ALL ER 567* that;

“Disregard of an order of court is a matter of sufficient concern, whatever the order may be...”

Romer LJ, himself relied on the case of *Church vs. Cremer (1 Corp Jemp 342)* where it was 175 held that;

“A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that suitors or their solicitors, could themselves judge whether the order was null or void – whether regular or irregular. That they should not come to the court and take it upon themselves to 180 determine such question. That a course of a party knowing of an order, which was null or 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...”

Clearly, for a party to challenge a court order, that party must apply to have it set aside but not to disobey it, even if the party does not agree with it for any reason whatsoever. This position was 185 succinctly re-affirmed by the Court of Appeal in more or less similar terms in *Housing Finance Bank Ltd & Another vs. Edward Musisi CAMA No.158 of 2010* at page 11 of judgment, that;

190 “A party who knows of an order, regardless of whether, in view of that party the order
is null and invalid or irregular, cannot be permitted to obey it, by reason of what that
party regards the order to be. It is not for party to choose whether or not to comply with
such an Order. The order must be complied with in totality in all circumstances by the
party concerned, subject to that party’s right to challenge the order in issue, in such a
lawful manner as the law permits. This may be by revision, review, or by appeal. See
195 *Chuck vs. Cremer (1Corp Jemp 342)*..... This is to ensure that the court issuing the
order not only must not be held in contempt, but must not whatever the circumstances,
appear to be held in contempt by any litigant. Otherwise to disobey an order of court, at
any party’s choice or whims, on the basis that such an order is null or irregular, or is
not acceptable or is not pleasant to the party concerned, as it is to commit contempt of
court. A court of law never acts in vain.”

In holding as such the Court of Appeal also cited with approval the Kenyan case of *Wildlife*
200 *Lodges Ltd. vs. County Council of Narok & Another [2005] EA 344 (HCK)*.

At the centre of the instant application lies a court order in *HCCS No.024 of 2016 Nile*
Construction General Contractors Ltd and Another vs. Prof. Dr. G.W Kanyeihamba. The
court order is dated 31st March, 2016. It specifically required the Respondent to perform his part
of the lease agreement which he entered into with the Applicants by handing over duly signed
205 transfer forms and certificate of title for 5.16 acres in Block 397 Plots 1802 and 1692 which the
Respondent leased to the Applicants. Part of Recital 1 of the lease agreement relevant to the
actual location of the 5.16 acres on the land states that;

“.....of that part (of it) the land that remains of the land on the left of the main
public road that passes through country farm similarly owned by the lessor...”

210 The actual location of the 5.16 acres on the land is also reinforced by the Respondent's evidence
in paragraph 17 of his affidavit in reply in this application that;

215 ***“On 12th January, 2015 I entered an agreement to lease that part of my land
that remains of the land on the left of the main public road that passes through
my Country Farm comprised in Block 397 Plot 1802 and 1692 at Bweya Busiro
for a term of 99 years. A copy of the said agreement is hereto annexed and
marked “A”. (Underlined for emphasis)***

The Applicants paid a consideration of UGX 145 million per acre. At the time of entering the
lease agreement the total acreage had not been ascertained but it was approximated to be 5 acres.
A deposit was paid by the Applicants to the Respondent who duly acknowledged it and the
220 balance was to be paid after ascertaining the precise acreage of the land as described in Recital 1
of the lease agreement as sold to the Applicants.

After a number of surveys some of which were commissioned by the Respondent, but whose
reports he could not accept for reasons known to him, the parties on 29th, April, 2015 signed an
Addendum to the lease agreement. Again the Respondent acknowledged receipt of further
225 deposits of the purchase price. He also signed mutation forms and provided his required passport
photographs to ease the subsequent registration process. Upon completion of the last and final
deposit of UGX 198.20 million on 31st December, 2015, the Respondent was supposed to sign
transfer forms and mutation forms in favour of the Applicants for 5.16 acres.

On 10th November, 2015, the Applicants through their lawyers wrote to the Respondent
230 informing him of their readiness to pay the final installment, and asked the Respondent to
prepare to sign the transfer. The letter shows it was received on 11th November, 2015. At the time
the final payment fell due the Respondent was unfortunately sick and had gone to the UK for

medical treatment. Upon his return, the Respondent was asked by the Applicants to perform his part of the lease agreement but he refused. On 22nd January, 2016 the Applicants instituted HCCS
235 No.24 of 2016 against him seeking;

***“An order that the final payment of Ugx 198,000,000 (one hundred Ninety Million Shillings) under the agreement for lease of 5.16 acres of land comprised in Block 397 Plot No.1802, and 1692 land at Dewe be made to the Defendant and thereunder the Defendant be ordered to hand over the mailo certificate of title together with duly
240 executed transfer forms for the suit land to the Plaintiffs.”***

The Respondent filed a defence and averred that it was instead the Applicants who were frustration the implementation of the lease agreement by not paying the final installment, and that this was in breach of the lease agreement. The Respondent also introduced extraneous matters to the Applicants’ claim, though not by way of counterclaim, that the Applicants were
245 holding on to his other mailo certificates of title for other land. Further, that they had taken 7.1 acres instead of 5.16 acres.

The case was referred for mediation but from the mediator’s report, the Respondent neither appeared nor assigned any excuse despite being given time to prepare. This went on for three occasions on 8th February,2016, 9th February, 2016, and 9th March, 2016 when the mediator
250 terminated the mediation and referred the matter back for hearing.

During the Scheduling of the case with Counsel for all the parties on 31st March,2016, it was duly observed that the defendant had not put up a credible defence. There was no breach of the lease agreement terms by the Applicants as averred by the Respondent. The Applicants had not failed to pay the final installment when they should have paid it. Also the Applicants had not
255 taken 7.1 acres. Instead the several survey reports on the parties’ pleadings clearly showed that

the Applicants were in occupation of only 5.16 acres. What remained was whether it would be the Applicants or the Respondent to make the first move; depositing the money or to sign the transfer forms and hand over certificate of title and be paid or vice versa. This was found not really an issue that merited serious judicial consideration and time of court.

260 It was essentially against that background; and particularly the consensus exhibited by Counsel for the parties during the scheduling of the case, that this court made the order that the Applicants on 4th April, 2016 deposit the final installment of the purchase price with the Deputy Registrar of this Court, and the Respondent also deposits signed transfer forms and the certificate of title and he picks the balance of the purchase price. The Deputy Registrar was
265 directed to;

“...acknowledge the completion of the transaction with documents duly signed by parties and or their counsel with a court seal.”

It was further ordered that;

“The case will be settled with no order as to costs.”

270 Again the order regarding settlement was owing to the consensus exhibited by both Counsel on behalf of their clients on the terms of the order, and in the same spirit of settlement it was considered not fair to condemn any one of the parties to costs.

The Applicants deposited the money. The Respondent appeared in person on the 4th April, 2016 before the Deputy Registrar. Rather than comply with the terms of the court order he attempted
275 to re- open the case by explaining the matters afresh and introducing new ones. That is the basis of the Respondent’s deposition as is clear from his affidavit in reply in paragraph 9 that;

“It is not true that I am in contempt of court. On 4th April 2016 I appeared before the Deputy Registrar of this court and explained to her what transpired since the filing of

280 ***the plaint in HCCS No. 024 of 2016 and the Deputy Registrar granted my request that
the suit be heard by the learned judge of the High Court where I said I would pray for
a site visit of the land in dispute.”***

This was obviously uncalled for because the Respondent was not required to “explain what transpired since the filing of the case”. That was already within the domain of the knowledge of the court. He was only required to comply. The Respondent had filed his defence and he never
285 raised anything at all to do with what transpired since the filing of the case which he was now vainly attempting to explain to the Deputy Registrar.

Apart from the above, the Respondent knew very well that the Deputy Registrar was not seized with power in her judicial capacity, no matter how meritorious or weighty the explanations, to “stay” the orders of a Judge and refer the matter back to the Judge. Such power does not reside
290 in the Deputy Registrar. For the Respondent to purport to have taken that rather strange path in our procedure to circumvent compliance with the court order was nothing short of contempt the court order in issue.

It is also certain that the Respondent knew very well that at that point the court had finally pronounced itself on the matter as expressed in the court order. Therefore for the Respondent to
295 suggest to the Deputy Registrar that he would thereafter request for a site visit would violate the *functus officio* rule. In any case, the court order was arrived at after all Counsel including Counsel for the Respondent realized at scheduling conference in court that there were no substantive issues for trial except for each party to specifically perform its part under the lease agreement. By not complying with the terms of the court order and assigning other alternatives reasons, the
300 Respondent was simply taking the path of defiance of the court order in issue for what he thought it to be. If he felt the order was not premised on proper facts which he was now seeking

to introduce, the course open to him was either to appeal against it or apply to have it reviewed and set aside but not to disobey it. He did not appeal. He applied for review but lost the application.

305 As was held in ***Church vs. Cremer*** ;(supra) that it would be most dangerous that suitors could themselves judge whether to obey the court order or not for whatever reasons. They should not come to the court and take it upon themselves to determine such question. The course open to such a party is to apply to the court that the order might be discharged, but as long as it exists it must not be disobeyed.

310 As alluded to above, indeed when this application was filed the Respondent also thereafter filed HCMA No.485 of 2016 seeking for a review of the court order for which he is said to be in contempt. Even though contempt proceedings take precedence, See: ***Housing Finance Bank Ltd case*** (supra) this court opted to hear the application for review first. This was because just in case it was set aside, the issue of contempt of the same court order sought to be reviewed would not arise. As already indicated above the findings of court in HCMA No.485 of 2016 are clearly that the application for review had no merit at all. The Respondent was still required to comply with the court order in HCCS No.024 of 2016 if he was to avert the consequences of the instant application. Up to the time of hearing this application the Respondent had continued to defy the court order simply raising the very same issues in his affidavit that he had raised earlier
315 and which were adjudicated upon and concluded or found to be totally different issues and
320 unrelated to those under consideration in the case. It is observed that no appeal lies so far against the orders in HCCS No. 024 of 2016 or HCMA No. 485 of 2016. Therefore, the refusal to comply with the court order by the Respondent is an act and behavior of deliberate disobedience and disregard of the sanctity of justice and dignity of court. There can be no

325 clearer case of contempt of court orders and the Respondent is found to be in contempt of the
court order in issue.

Issue No. 2: What are the remedies available to the parties?

Civil contempt of court is ordinarily issued by court as a coercive power wielding it only to
require the contemnor to comply with court's orders. Under Section.33 Judicature Act (supra)
330 the High Court has general powers to grant all such remedies, including those prayed for in this
case, to meet the ends of justice. The effect of civil contempt is succinctly expounded upon in
Halsbury's Laws of England Vol. 9(1) at paragraph 492 that;

335 ***".... 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 the hands of sequestrators, who manage the property and receive rents
and profits. Civil contempt may also be punishable by a fine or an injunction may be
granted against the contemnor..."***

In the case of ***Monica Mirembe Mukooza vs. K. Margaret HCMA No. 43 of 2013 (Arising from
HCMA No. 425 of 2016) (Arising from HCCS No. 61 of 2010,*** the High court relying on
340 ***Halsbury's Laws of England, 3rd Edition*** and on the case of ***Madhvani vs. Madhvani [1989]1
KALR 100 (Civil Suit No.774 of 1988 Jinja)*** held that;

345 ***"..... Courts have always taken a lenient view in favour of the liberty of the individual
and would only commit the contemnor of he/she had a very contemptuous and fragrant
disrespect to court. If there is a reasonable alternative method available of ensuring
that a court order is obeyed which does not involve committing the contemnor to prison
that alternative should be preferred."***

The Applicants herein pray for committal of the Respondent as contemnor to civil prison. This court, however, takes a lenient view in favour of the liberty of the individual, and finds alternative ways to make the contemnor comply with the court orders much fairer. The Respondent is of sick health and of advanced age and detaining him in civil prison would not be the appropriate sanction. This court doth issue the following orders;

1. *A Vesting Order doth issue vesting in the Applicants a leasehold interest of 5.16 acres for 99 years in land comprised in Busiro Block 397 Plot 1802 and Plot 1692 land at Bweya as per the Survey Report of the Commissioner Land Mapping & Surveys to Court dated 12th July,2016.*
2. *The Registrar of Titles is directed to issue the said leasehold certificate of title for 99 years to the Applicants on the said mailo land.*
3. *As a punitive measure against the Respondent for his intransigence and contemptuous conduct towards court orders whose net effect is that the Applicants have been inconvenienced in a number of ways, the Respondent is ordered to pay to the Applicants a fine of Shs.10 million.*
4. *The amount in (3) above attracts interest at court rate from the date of this ruling until payment in full.*
5. *In the event of the failure to pay the fine, it shall be enforced by way of civil debt recovery.*
6. *The Respondent shall pay costs of this application.*

BASHAIJA K. ANDREW
JUDGE
22/11/2016

Mr. Brian Kirima Counsel for Applicants present

2nd Applicant present

Counsel for Respondent absent

375 Respondent absent

Mr. G. Tumwikirize – Court Clerk present

Ruling read in open court

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BASHAIJA K. ANDREW
JUDGE
22/11/2016