

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MIISC APPLICATION NO. 1495 OF 2016

(ARISING FROM MIISC APPLICATION NO. 471 OF 2016)

(ARISING FROM CIVIL SUIT NO. 279 OF 2016)

BISHOP PATRICK BALIGASIIMA:::APPLICANT

VERSUS

1. KIIZA DANIEL
2. KAFEERO GERALD
3. ISAAC KAKOBYA
4. KYOMUGISHA JOYCE
5. LUKYAMUZI KYOLABA
6. OWORI JOHN
7. SEBWANA ALI
8. BASEMERA AMOTI
9. KAWESA IVAN
10. KALIMBA STEPHEN
11. KYOLABA JOHN
12. NANDOKHA JACKSON
13. LUBEGA JOTHAM
14. ZIRABA CHRISTOPHER
15. WESSUME ABDUL
16. MASIKOMA ROBERT
17. KADENE YUSUF :::::::::::::::::::::::::::::::::::RESPONDENTS
(Trading as Abalema United Effort Limited)

Before: HON. MR. JUSTICE HENRY I. KAWESA

RULING

The Applicant brought this application by Notice of Motion for orders that the Respondents be cited for contempt of this Court's order issued on 20th June 2016.

The grounds in support of the application are contained in the affidavit of the Applicant; Bishop Patrick Baligasima. The Respondents opposed this application and filed affidavits in reply sworn by Kyomugisha Joyce, Kawesa Ivan, Kalimba Steven and Isaac Kakobya. The Applicant filed an affidavit in reply to the Respondent's joint reply through Kyomugisha Joyce. The Applicant was cross examined on this evidence; whereafter all parties through

their Lawyers submitted on this application. I will not repeat the submissions, but will immediately determine the issues raised as follows;

On the preliminary objections; The Applicant in submissions raised two issues as hereunder;

1. Whether the Respondents are guilty of contempt of a Court order.
2. Remedies available.

He raised a preliminary objection against the Respondent's affidavit of Kyomugisha Joyce as incompetent being filed outside 15 days from the date of service. He also attached this affidavit for being joint which is not tenable in law since she could not legally depone on behalf of persons without a letter from the 16 Respondents, to depone on their behalf. He argues that she lacks the company's resolution and she is not the General Secretary.

This objection was not responded to by the Respondent's Counsel specifically but also raised a preliminary objection under O.5 r6 of the Civil Procedure Rules on grounds that the Applicant did not honour the schedules of the time given by Court to file submissions.

They argue that the Applicant filed submissions out of time and without leave of Court on the 13th day of December 2018 and served the same on 14th December 2018, in total abuse of O.51 r6 of the Civil Procedure Rules.

The Respondents also argued that the Applicant did not swear his affidavit before a Commissioner for Oaths, contrary to Section 5 of the Commissioner for Oaths Act – Cap 5 and r7 of the Commissioner for Oaths Rules. He prayed that the Applicant's affidavit in support be struck out with costs.

Counsel for 3rd, 9th and 10th Respondents also in response raised an objection that the application was brought against wrong parties and ought to be dismissed summarily.

The arguments above raise serious matters which in my opinion are preliminary though substantive and I will discuss them in the way they have been raised and discussed. I will begin by pointing out that this Court is enjoined under Article 126(2)(e) of the Constitution to administer substantial justice and avoid technicalities. In an application of this nature, this Court is mindful of the fact that the purpose of all litigation is to try as much as possible to promote justice so that all matters in controversy between parties are fairly adjudicated upon; and determined. With that, I mind to resolve the preliminary objection as follows;

(1) Kyomugisha Joyce's affidavit in reply:

The Applicant raised issues with the said affidavit having been filed out of time and without leave of court. The Applicant also faulted it for being sworn on behalf of others without their authority.

The Applicant referred this Court to a copy of an affidavit of service of Niringiye Ponsiano. The said copy is not attached to the pleadings or to the submissions. It is not therefore possible to determine concisely the date of service. Whereas the laws quoted are right, the Applicant bears the burden under Section 102 – 104 of the Evidence Act to prove that fact. Without such proof, I'm unable to determine whether the alleged response was outside the 15 days threshold. This argument is not proved.

On the fact that the affidavit is sworn without authority of the deponents on whose behalf, it's made the case of **Binaisa Nakalema & 3 Others versus Mucunguzi Myers; MA No. 460 of 2013**, Court discussed the provisions of O.1 rr10(2) and 13 of the Civil Procedure Rules and O.3 r2(a) of the Civil Procedure Rules and guided that a person swearing on behalf of the others, ought to have their authority in writing which must be attached as evidence and filed on the Court record. The Court referred to it earlier decisions in **Taremwa Kamishana Tomas versus AG (supra)** and **Vicent Kafeero & 11 Ors versus AG; Misc Application No. 048 of 2012, Mukuye & 106 Ors versus Madhvani Group Ltd; Misc. Application No. 0821 of 2013** from **Civil Suit No 0651/2012, Makerere University versus St. Mark Education Institute & Ors; HC Civil Suit No. 378 of 1993**, which states that;

“An affidavit is defective by reason of being sworn on behalf of another without showing that the deponent had the authority of the other”.

It was held in that case that the affidavit was incurably defective. This affidavit was sworn on behalf of 15 others. It does state so under paragraph I of the said affidavit that;

‘I am a female adult Ugandan of sound mind and the Respondent’s General Secretary, with full knowledge of the facts pertaining to this application and I jointly depone this affidavit in such capacity’

The affidavit however does not have the requisite letter of authority from the deponents referred to. As has been held by other Courts in similar cases, such an affidavit is incompetent and inherently defective. As a result, the arguments on this ground are sustained.

3. Affidavit of Applicant Bishop Patrick Baligasima

The objection is that the affidavit was not deponed before a Commissioner for Oaths.

The record of proceedings in Court, from which this objection arises, shows the following discose.

“Deo Bitaguma is a Commissioner for Oaths

I have met him, I do not know his office...”

Proof in Civil matters is a balance of probabilities. In this matter, the questions which were put to the deponent did not specifically examine him as to whether he swore the affidavit before a Commissioner for Oaths. The question was whether he knew “Deo Bitaguma” and whether he knew his office. The response given by the deponent to the inquiry do not suggest that he did not depone the affidavit before a Commissioner for Oaths as alleged. The affidavit bears the name and signature of the Commissioner for Oath before whom it was sworn. I do not find fault therefore with this affidavit. The objection is overruled.

4. Application was brought against a wrong party

Counsel for the 3rd, 9th and 10th Respondents submitted that Abalema United Efforts Ltd is a Limited Liability Company with the capacity to be sued. He said annexure ‘A’ to the reply to the affidavit lists subscribers and all the 16 named are not.

He referred to Section 27 of the Company's Act, which defines members of the Company as the subscribers to the memorandum.

Secondly, he argued that the Applicant should have sued the Directors; not the Respondents. The application is brought in the names of Bishop Patrick Baligasima versus Kiiza Daniel & Ors; t/a Abalema United Effort Ltd.

In paragraph 3 & 4 of the Notice of Motion, the Court order was issued in the presence of all the parties in the suit and their Counsel. A review of the Court order granted under Civil Suit No. 279/2016 was between;

Abalema United Effort Ltd.

Versus

- 1. Uganda Land Commission**
- 2. Commissioner Land Registration**
- 3. Patrick Baligasima**

In the application, the Applicant named the Respondents as Kiiza Daniel & 15 Ors, *t/a Abalema United Effort Limited*. The arguments as raised imply that the Applicant ought to have brought this application as against Abalema United Effort Ltd; which is the party suing under Civil Suit No. 279 of 2016.

The arguments raised in support of the said averment are right in as far as they relate to the rights to sue and be sued in law. However, this Court is a Court of justice. All parties came to Court for redress.

Under Civil Suit No. 279 of 2016, the Applicant was dragged to Court by Abalema United Effort Ltd. under Section 15(2) of the Company Act. This company operates as a legal entity separate from its individual shareholders and Directors. The Applicant complains under this application that the Company has disobeyed the order of Court.

In law where such a scenario arises and certain mischief's are traceable upon the '*human blood individuals*' who comprise the '*Legal blood*' of the company, then the *legal maxim* of '*lifting the veil*' comes into play. (See Section 328 of the Company Act). The Applicant named these individuals and tried to establish their link by asserting '*t/a Abalema United Effort*'. This however, was a wrong procedure because it amounted to a misjoinder of parties. Under O.1 r10(1);

“where a suit has been instituted in the name of the wrong person as Plaintiff or where it is doubtful, whether it has been instituted in the name of the right Plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as a Plaintiff upon such terms as the Court think fit”

Further O.1 r(9), provides that;

“No suit shall be defeated by reason of the mis-joinder or non joinder of parties and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it”

And O.1 r10(2);

“ the Court may at any stage of proceedings either upon or without the application of either party and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined, whether as the Plaintiff or the Defendant, or whose presence before the Court, may be necessary in order to enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit be added”.

I have perused the application and Civil Suit No. 279 of 2016. The intended parties are the same, save for the technical hatch that Abalema United Effort is a separate Legal Entity from the 16 members listed as parties ‘t/a Abalema United Effort Ltd. This means that in the interest of justice, following O.1 r10(2) above, this Court has the discretion to lift the veil and check if the named 16 individuals are part of the blood stream of *Abalema United Effort Ltd.*

Looking at the affidavit in reply by the Respondent under paragraph 17 and 18, a number of documents were attached as ‘B-J’ and ‘G’- and ‘I’ which show that there are dealings between the company, the individuals named and the Applicant before Court which dealings have a bearing on issues for determination in this Court.

Guided by Article 126(2)(e) and O.10 of the Civil Procedure Rules above, I therefore invoke the discretion of this Court to order that the *Abalema United Effort (Ltd)* be substituted in this application as the proper party to be sued in its own capacity and the 16 individuals named to

be retained as parties in their own right also as different individuals thereof. For that reason, the preliminary objection is not sustained.

Having determined the preliminary objection, I now determined the issues as follows:

The Applicant complains that the Respondent committed contempt of Court against this Courts' orders of a temporary injunction.

The Respondents denied. It was argued for the 3rd, 9th and 10th Respondents that according to their affidavits that what was done was to add debris to fill the gharries that came as a result of the recent rains. Counsel argued that the above was not a change in the *status quo*.

On the other hand, Counsel for the other Respondents stated that the Respondents brought murrum on to their land as normal renovation to enable the smooth running of their business. They also contend that they were in possession and occupation of the parking space at the time of issuance of the Court order while the Applicant occupied the church.

A look at the Court order issued on the 20th day of June 2016, paragraph 3 provides that;

“The Applicant and the 3rd Respondents shall continue to occupy the portions of the land they currently occupy without any of them attempting to displace or evict the other party before the case is finally disposed off”.

It is not denied by the Respondents that they brought the alleged murrum on the site. The conflict is that whereas the Applicant claims the said part, the Respondents also claim the said area is in their part of occupation.

It is also not denied that the murrum/debris was brought on the site after the issuance of the Court order.

What did Court mean by paragraph 3 of the Order?

The order simply means that the parties were bound to maintain the *status quo* of the suit land as it was before the grant of the injunction. The order prohibited any selling, alienating, transferring the land, disposing or evicting of either party's interests.

According to the Applicant, the introduction of the murrum on the premises by the Respondents under paragraph , 8, 9 and 10 of the Notice of Motion and paragraphs 7, 8, 9, 10, 11 and 12 of the affidavit in support by Bishop Patrick Baligasima show that the Respondents rented the parking space, who brought in debris and blocked access to the church as per photos CI-C12 (paragraph 8 of the affidavit).

As noted the Respondents have conceded that they are entitled to utilize their portion of this land and hence the debris was brought on their part of the land.

I must point out that the order of the Court was intended to protect the *status quo*. It was aimed at avoiding such a scenario where one party continues to introduce a use of the subject matter which greatly compromises the *status quo* and ends up offending the other party to their detriment yet before determination of the main suit.

In introducing debris, the access to the Applicants' side (church) was allegedly affected. The Applicant stated so in Paragraphs 3-13 of the affidavit in support and his affidavit in rejoinder to Kyomugisha Joyce's affidavit paragraph 8-9, that the *status quo* was altered.

Respondent's affidavit through Kaweesa Ivan from Par.6-13 shows that in their view the status quo was now altered. Kalumba Steven under status quo remained undistributed Isaac Kakobya Para.6- 13 also states i.e. status quo was not altered.

What is status quo?

In ***Daniel Mukyaya versus Administrator General; HCCS 630/1993***, it was held that *the primary purpose of an order of a temporary injunction was to be the preservation of the status quo of the subject matter of litigation pending the final determination of the rights of the parties.*

In ***Gapco versus Muwanga Muhamed t/a Musa and Moses Services; HCCS 84 of 1998***, it was held that; *status quo means 'the existing state of things, existing prior to a particular point in time'.*

From the definition above, the *status quo* to consider in this application is that which was existing at the time of the order. Clearly there was no debris/murram on the area complained of. If it were so, the order would have been in vain. The Respondents and Applicants were ordered by Court not to “*sell, alienate or transfer any part of the suit land*”. The applicant alleged that Respondent alienate the suit land to a third party who in turn introduced the debris. Though the Respondents denies the fact that they rented it to a 3rd party, they agreed that they introduced the debris as their side of the land. This admission is indicative of the fact that the Respondents did not comply with the Court order by introducing debris on the land – which substantially changed the *status quo*.

The general principle regarding respect of Court orders was stated in **Chuck versus Cremer (I Coop Tempt Cott 342)** cited in the judgment of **Romer L J** in **Hadkinson versus Hadkinson**, that; *a party who knows of an order whether null or regular or irregular, cannot be permitted to disobey it*. The parties in the order are named as Abalema United Effort Limited versus Uganda Land Commission, Commissioner Land Registration and P. Baligasima.

Court has found in the course of this trial that, Abalema United Effort Limited carries out its affairs on behalf of various individuals; the named Respondents being some of them in various capacities. The contents of the Court were therefore known to them since they are part and belong to or have interest in Abalema United Effort Limited. I do hold that all the Respondents were made aware of the said Court order.

It’s also trite law that Court orders are made in Notice to the whole world. Whether one is a party or not, a party the contents of a given Court order must be obeyed; once notice of the service is dully brought to their attention.

This is the principle in **Wildlife Lodge Ltd. versus County Council of Narok and Another (2005) EA 344**. This is the crux of this application. The parties are all aware of the Court order given *inter parties* which was issued by this Court on the 20th day of June, 2016. Court orders are never given in vain. The matters which constitute the main cause but are yet to be determined so that the property rights are finally settled. However before that, Court ordered that either party stays (*put*) on their part of the suit lands; and wait for Court’s decisions.

Before that happens, the Respondents have began dealing with the property be *inter alia* introducing thereon debris. According to the Applicant, this has greatly altered the *status quo*.

This is a matter of evidence. Evidence has been provided to Court to show that the Respondents have poured debris on the site/suit land. They also concede to the same. This was an act of contempt of the Court order. This is so because in ***Megha Industries (U) Ltd versus Confom (U) Ltd***, it was stated that; ‘for contempt of Court to exist, there must be a lawful order and the potential contemnor must have been aware of the Court order and failed to comply with the order or disobeyed the Court order. I do find in this case that this issue is proved.

Remedies:

The Applicant prayed that the Respondents be jointly and severally be cited for contempt of Court order of 20th June, 2016 and be placed in Civil Prison for 6 months. He also prayed for vacant possession, compensation of 70,000,000/=, (*seventy million shillings*), a Court fine of shs. 100,000,000/- only (*one hundred thousand shillings*) and costs.

I do hold that in ***Stanbic Bank (U) Ltd & Anor versus Commissioner General URA; MSC No. 0042/2010 J. Mulyagonja*** held that;

“Uganda has no equivalent of contempt of Court Act that disobedience to Civil Court order(s) is known and ought not to be allowed by the Courts, especially in a case like this where a statutory authority is found to consciously and intentionally disobeying a Court order”.

(S.14(2)(b)(i) 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 Section 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 High Court shall exercise its discretion in conformity with the principles of justice, equity and good conscience. Its further provided by Section 14(3) of Judicature Act that applied law and Common Law and the doctrines of equity shall be in force only in so far as the circumstances of Uganda and of its peoples permit and subject to such qualifications as circumstances may render necessary.

It is my view that the dictates of justice and equity as well as the circumstances of the people of Uganda today, require me to apply the Common Law and all the doctrines of equity in this matter. Moreover S.98 Civil Procedure Act provides that;

‘nothing in that Act shall be deemed to limit or otherwise affect the inherent powers 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. Contempt of Court is one of such abuse of the court process’.

The above is a very informative statement of the law on the remedies.

Given the circumstances of this application, I have already discussed the fact that the Respondents are liable for contempt. The contemptuous act, involved the act of “*lifting the veil*” in order to be able to apportion blame. It is fair that the company therefore be held liable for the actions of its individual members. The Applicant is therefore granted a specific performance order in the terms as follows:-

1. The Respondent Company is ordered to remove all the offensive debris that has been introduced on the suit land and make sure that the *status quo* is restored as it was by time of the Court order. This should be done within 7 days from the date of the Ruling herein.
2. If the Respondent company does not comply with this specific performance within the 7 days period, the Respondents will be liable to pay a fine of Shs. 50,000,000/= (*Fifty million shillings*) to the consolidated fund vide the High Court Registrar and the Applicant will be granted an automatic order to remove the said debris so as to restore the *status quo* to its original position as per Court order.
3. Costs to Applicant.

I so order.

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Henry I. Kawesa

J U D G E

24/1/2019

24/1/2019

Mr. Lukwago Geoffrey for the 1st – 15th Respondents.

Mr. Bemanyisa for the Applicant.

Mr. Baale Musa and Lukwago Geoffrey for the Respondents.

Applicant absent.

7th Respondent present.

Julia: Court clerk.

Court:

Ruling delivered in chambers.

Before me:

Samuel Emokor

DEPUTY REGISTRAR

23/01/19