

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**LAND DIVISION**

**MISCELLANEOUS APPLICATION NO 2026 OF 2018**

**(ARISING FROM CIVIL SUIT NO.130 of 2005)**

**JOSEPH MUTAAWE:.....APPLICANT**

**VERSUS**

**1. LUYINDA MARTINE**

**2. NAMUGALWA SANDRA KISAKYE**

**3. NDAGIRE JOAN:.....RESPONDENTS**

**BEFORE: HON. MR. JUSTICE HENRY I. KAWESA**

**RULING**

This application was brought by notice of motion under Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71, and O.52 rr1&3 of the Civil Procedure Rules SI 71-1 seeking for orders for;

1. A declaration that the Respondents are in contempt of a Court order issued on the 15<sup>th</sup> of September, 2017, vide Civil Suit No.130 of 2005.
2. An order directing the Respondents to sign transfer forms in favour of the Applicant.

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

3. An order of Ushs. 20,000,000/- only (*twenty million shillings*) as damages to the Applicant.
4. Costs of this application.

The grounds of this application are that;

1. This Honourable Court issued an order on the 15<sup>th</sup> Day of September 2017 vide HCCS No. 130 of 2005.
2. The Respondents are aware of the order.
3. The Respondents being Administrators of the estate of the late Kaleb Malwedde had the ability to comply with the order.
4. The Respondents blatantly refused to comply with the order.
5. The tenents and interest of justice shall be met if this application is granted.

The above grounds are supported by an affidavit deponed by the Applicant wherein he averred as follows;-

That he and Esseza Katende bought 4 (four) acres, and 1 (one) acre, of land respectively comprised at Kyadondo Block 118 Plot 72 (hereinafter suit land) from the late Kaleb Malwedde who died before executing transfer forms in his favour. That upon taking possession of the said land, Eseza Katende, Paulo Mutulakungo and Anthony Segawa began claiming ownership of the same.

That he, together with the Respondents, being Administrators of the estate of the late Kaleb Malwadde bought an action in this Court vide HCCS No. 130 of 2005 against the said claimants. It is his evidence

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

that at the final disposal of that suit, Court decreed that the Respondents, being Administrators of the estate of the late Kaleb Malwadde, were entitled to be registered as proprietors on the suit land and; also decreed that upon their registration, they had a duty to enable the him and Eseza Katende to acquire the land they respective bought from the deceased. *A copy of the plaint and decree in proof thereof were attached as annexure "A" and "B".*

Further that the Respondents are aware of the Court orders as the judgment originating the same was delivered in their presence and have copies of the decree. That being Administrators of the estate of the late Kaleb Malwadde, the Respondents have the ability to comply with the said order/decreed.

However, that the Respondents have blatantly refused to comply with the order by refusing to sign transfer forms in his favor despite several reminders. *A copy of a letter to the Respondents calling them on for a meeting and to sign transfer forms was attached as annexure "C".*

Last but not least, that he was advised by his Lawyers, which advice he verily believes as true, that the Respondent's conduct constitutes contempt of this Court's order issued vide HCCS No.130 of 2005.

The application was never opposed by the Respondents despite being served by the Applicant. Surprisingly, the 1<sup>st</sup> Applicant was in Court on the date of hearing of the application but he gave no reason for the failure to oppose the application. In the circumstances, I allowed the application to proceed ex parte.

The Applicants' Counsel filed submissions which I shall consider in determining the merits of the application. Mindful that there was no opposition from the Respondents, Counsel urged me to find that they had accepted the averments in the Applicant's affidavit. In doing so, he relied on the case of *Samwiri Mussa versus Rose Achen (1978) HCB 297*, which is to the effect that where facts are sworn to in an affidavit and they are not denied by the opposite party; the presumption is that they are accepted. The same proposition is stated in various cases such as *Makerere University versus St. Mark Education Institute Ltd. & Others [1994] KALR 26; Eridadi Ahimbisibwe versus World Food Programme & Others [1998] KALR 32; Kalyesubula Fenekansi versus Luwero District Land Board & Others; Miscellaneous Application No. 367 of 2011.*

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

Considering the facts and the authorities above, I am in agreement with Counsel for the Applicant. I therefore find that the Respondents admitted the averments in the Applicants' affidavit in support of the application.

Notwithstanding the above finding, the Applicants' Counsel still urged me to proceed with the merits of the application for the sake of completeness. To this end, he raised two issues as guides in the determination of the application and these are;

1. Whether the refusal of the Respondents to sign the transfer forms for the benefit of the Applicant for the subject land constitute contempt of Court orders vide HCCS No.130 of 2005.
2. If so, what are the available remedies.

In agreement with Counsel, I shall proceed with the issues as raised above.

Issue No.1:

Whether the refusal of the Respondents to sign transfer forms for the benefit of the Applicant for the subject land constitute contempt of Court orders vide HCCS No.130 of 2005

In his submissions, Counsel relied on the 7<sup>th</sup> Edn, of the **Black's Law Dictionary at page 313** and the case of ***Muriisa Nichola versus Attorney General & 3 Others HCMC No.035 of 2012*** to define contempt as the disobedience to the rules or orders of a judicial body. He further relied on the case of ***Sitenda Sebalu versus The Secretary General of the East African Community Reference No. 8 of 2012*** wherein the elements of contempt are stated as;

1. Existence of a lawful order.
2. Potential contemnor's knowledge of the order.
3. The potential contemnor's ability to comply.
4. The potential contemnor's failure to comply.

Counsel noted that the burden of proving all the above elements is on the Applicant and; that it is discharged by proving each one of them to a standard higher than the balance of probabilities. In

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

stating so, he relied on the case of *Wildlife Lodges Ltd versus Country Council of Narok & Anor (2005) 2 EA.*

As regard the first element; Counsel referred me to the averments in the Applicant's affidavit in support of the application which point to the existence of a judgment and decree vide HCCS No. 130 of 2005. He concluded that they prove the existence of a lawful Court order.

As regard the second element, he again relied on the averments above to emphasise that the Respondents were aware of the Court orders on ground having been present in Court when the judgment in HCCS No.130 of 2005 was delivered.

In respect of the third element, Counsel submitted that the Respondents had the ability to comply with the Court order on ground that they had been registered on the subject land on the 18<sup>th</sup> day of April 2018 vide Instrument No. WAK-00168033 in their capacity as Administrators of the estate of the late Kaleb Malwadde. In support of this submission, he referred me to paragraph 9 of the Applicant's affidavit in support of the application; *a certificate of title and a copy of a judgment vide CS No.130 of 2005 which he attached to his submission and marked as "A"*.

I however decline to consider the documents as evidence for the reasons that exhibits on evidence by affidavit are adduced by way of annexures to the affidavit itself, but not otherwise. If indeed the Applicant intended to rely on above documents, he ought to have properly tendered them. To hold otherwise, would be permitting Counsel to become a witness and Counsel in the same matter which is contrary to the law. See **Regulation 6 of the Advocates (Professional Conduct) Regulations, SI No.267-2.**

As regards the last element; Counsel submitted while referring to paragraph 10 of the affidavit in support of the application that Respondents failed to comply with the Court order. He then urged me not to condemn the Respondent's conduct.

I am in agreement with Counsel for the Applicant as regard the elements of contempt of Court. In this case, there is a Court order which was issued by this Court ordering the Respondents to

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAWE VS LUYINDA M & 3 ORS  
(RULING)**

take necessary measures to enable the registration of the Applicant on four acres of the suit land as soon as they become registered thereon. As the evidence suggests, this order was well in the knowledge of the Respondents since the judgment from which it accrued was delivered in their presence and; the decree therefrom extracted with their consent.

There was no evidence before me that the Respondents were indeed registered on the suit land in pursuance of the said order. However, considering that the Applicant's averments concerning their ability to comply with the order were unrebutted, I am convinced that the Respondents had registered on the suit land in pursuance of the Court orders and thus; had the ability to comply with the Court order.

Despite all that, the Respondents deliberately failed to comply with the order notwithstanding repeated demands by the Applicant.

In view of the above, I am in agreement with the Applicant's Counsel that the Respondents are in contempt of a Court order and I therefore find this issue in the affirmative.

Issue No.2:

If so, what are the available remedies

Counsel prayed for two reliefs against the Respondents. He prayed that Court be pleased to order that the Respondents be arrested and detained in Civil prison for contempt of an affirmative and mandatory Court order. He relied on the case of ***Megha Industries (U) Ltd versus Conform Uganda Ltd HCCM No.21 of 2014*** wherein Court stated that;

*“Civil contempt is ordered where the Defendant has refused to do an affirmative act required by the provisions of an order which either in form or substance was mandatory in character”.*

In the alternative to arrest and detention of the Respondents in Civil prison. Counsel prayed for an order of sequestration. According to his definition, which I agree with. Sequestration is an act of placing, for a temporary period of time, the property of the contemnor into the hand of sequestrators who manage the same and receive rent, and profits. He derived this definition from

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

the observations of Court in the case of *Megha Industries (U) Ltd versus Conform Uganda Ltd HCMC No.21 of 2014.*

Secondly, Counsel urged me to impose a fine of Ushs. 16,000,000/- (*sixteen million shillings*) against the Respondents as a punishment to restrain them from further contempt and; for the unnecessary inconvenience caused to the Applicant. In doing so, he again relied on the case of *Megha Industries (U) Ltd versus Conform Uganda Ltd (supra)* wherein Court stated that contempt proceedings are intended to punish the Respondent for disobeying a Court order and continuing with the conduct which was earlier complained of.

In addition to that, the Applicant also sought an order directing the Respondents to sign transfer forms and Ushs. 20,000,000/- only (*twenty million shillings*) as damages in his favour.

According to the **Halsbury's Laws of England Vol. 9(1) paragraph 492**, civil contempt "is punishable by way of committal or by way of sequestration... Civil Contempt may also be punished by a fine, or an injunction may be granted against the contemnor."

I entirely agree with this proposition much as it is based on common law which; as I understand, is applicable to our context by virtue of *Section 14(2) (b)(i) of the Judicature Act, Cap 13.*

See *Stanbic Bank (U) Ltd & Anor versus Commissioner General URA MA No.042 of 2010.*

As regards a fine; Court, in the case of *Megha Industries (U) Ltd versus Conform Uganda Ltd (supra)*, having found that there were no domestic authorities where a contemnor was committed to civil prison declined to grant the same although it ordered a suspended sentence of six months, in case contempt continued, the exercise of its discretion under Section 14(2)(c) of the Judicature Act Cap 13. Having failed to find the authority suggesting otherwise, I am also persuaded by this authority above. In view of this, I am as well of the opinion that a suspended sentence of six months against the Respondents is appropriate in the circumstance in case the contempt of the order vide HCCS No.130 of 2005 continues after this ruling. This is made in the alternative of the order of arrest and detention of the Respondents into Civil prison and sequestration.

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAWE VS LUYINDA M & 3 ORS  
(RULING)**

As regards a fine; Counsel for the Applicant suggested Ushs. 16,000,000/- only (*sixteen million shillings*) as punishment for contempt of Court.

Much as I understand that civil contempt ought not to be taken lightly, I found this figure excessive considering that it will ultimately be charged on the estate's property (the estate of the late Kaleb Malwadde).

In light of the circumstance, I shall instead give a fine of Ushs. 2,000,000/- only (*two million shillings*), which must be deposited in Court within 30 days of this order.

The order directing the Applicant to sign the transfer forms in favour of the Applicant is also awarded so as to reinforce the decree issued vide HCCS 130 of 2005.

Finally, the Applicant sought Ushs. 20,000,000/- only (*twenty million shillings*) as damages. He however did not specifically describe the type of damages he sought and; neither did his Counsel substantiate on this in his written submission. Regardless of that; as far as I know, contempt proceedings are only intended to punish the Respondent, and not to compensate the applicant by way of damages. **See Megha Industries (U) Ltd versus Conform Uganda Ltd HCCM No.21 of 2014.**

On that basis, I am unable to award any form of compensatory damages to the Applicant. Exceptionally, the same authority (**Megha Industries (U) Ltd versus Conform Uganda Ltd** (*supra*) suggests that exemplary damages can be awarded in contempt proceedings although; as I understand the case, such damages are awarded only because they are in their nature punitive/deterrent and not compensatory. As suggested by the case of **Justice R.K. Kasule versus Makerere University [1975] HCB 391**, and affirmed **in Esso Standard U) Ltd versus Semu Amanu Opio SCCA No.3 of 1993**, exemplary damages can be awarded in;

- (1). Cases of oppressive, arbitrary or unconstitutional actions by servants of government;
- (2). Cases where it is shown that the Defendant had deliberately committed tortious acts in continuous disregard of other's rights in order to obtain an unfair advantage which would outweigh any compensatory damages or that the sum given as compensation was insufficient to punish the Defendant for his or her conduct,



**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAWE VS LUYINDA M & 3 ORS  
(RULING)**

(3) Instances where they are expressly authorised by the statute).

In the instant case, the 2<sup>nd</sup> limb would be the closest applicable but; as the facts appear, there is nothing to suggest that the Respondent's conduct was calculated to obtain an unfair advantage which would outweigh any compensatory damages or that the sum given as compensation was insufficient to punish the Respondents. In fact, the proposition itself suggests that exemplary damages are only awarded in addition to any other claim for compensatory damages. This is unlike the instant case as no damages have been ordered against the Respondents.

For the reasons above, I am unable to grant the Applicant's prayer for damages.

The application therefore partially succeeds with the following orders:-

1. The Respondents are hereby ordered to sign transfer forms to enable the Applicant acquire four acres of land comprised in Kyadondo Block 118 Plot 72, as decreed in HCCS No.130 of 2005 within 30 days of this order.
2. A suspended sentence of six months committal is to be made against the Respondents, if they fail sign transfer forms to enable the Applicant to acquire four acres of land comprised in Kyadondo Block 118 Plot 72, as decreed in HCCS No.130 of 2005.
3. A sum of Ushs. 2,000,000 is awarded against the Respondents as a fine for contempt of a Court order vide HCCS No.130 of 2005. The sum must be deposited in this Court within 30 days of this order.
4. Taxed costs of the application are hereby granted to the Applicant.

I so order.

.....

Henry I. Kawesa

**JUDGE**

**MISC. APPLICATION NO. 2026 OF 2018-J. MUTAAWE VS LUYINDA M & 3 ORS  
(RULING)**

17/05/2019

17/05/2019:

Faizal Mulamira for the Applicant.

Applicant present.

1<sup>st</sup> Respondent present.

Court: Ruling delivered to the parties above.

.....

Henry I. Kawesa

**JUDGE**

17/05/2019