

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA – MAKINDYE
(FAMILY DIVISION)**

**MISC. APPLICATION NO. 176 OF 2019
(Arising out of Misc. Application No. 224 of 2015)
(Arising from HCCS No. 39 of 2014)**

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1. **JANE SEMPEBWA**
2. **JOHN FISHER MUKALAZI MUSOKE**
(SUING THROUGH THEIR LAWFUL
ATTORNEY DENNIS SEMPEBWA) APPLICANTS
VERSUS
NDIBALEKERA MAGDALENA RESPONDENT

RULING

BEFORE: HON. LADY JUSTICE KETRAH KITARIISIBWA KATUNGUKA

Introduction:

20 [1] This application is brought under O. 41 r 2(3) of the Civil Procedure Rules, S. 33
of the Judicature Act Cap 13, and S. 98 of the Civil Procedure Act by way of
chamber summons for a declaratory order that the respondent is in contempt of
court order in M. A 224 of 2015, made on the 13th April 2016; that the temporary
injunction issued in M.A 224 of 2015 restraining the respondent and her agents
25 from dealing with the estate of the late Juliana Nabikande Ndibalekera is still
subsisting until the hearing and determination of Civil Suit No. 39 of 2014; that
the registration and transfer of land forming part of the estate of the late Juliana
Nabikande Ndibalekera by the respondent is illegal and in contempt of the
aforesaid court order; that the respondent be punished by detention in civil prison
30 for a period of six months for disobeying the aforesaid court order; that the
respondent pay exemplary/punitive damages or compensation to the applicants to
the tune of UGX 500,000,000/= (Five hundred million Uganda shillings); that the
respondent be fined UGX 500,000,000/= (Five hundred million Uganda
shillings) for contempt of court orders; that costs of the application be provided.

[2] The grounds for this application are set out in the affidavit of Dennis Sempebwa, the lawful attorney of the applicants, but briefly are that;

The applicants are children of the late Juliana Nabikande Ndibalekera; the applicants through their lawful attorney, Dennis Sempebwa instituted C.S 39/2014 seeking amongst others, revocation of Letters of Administration of the estate of the late Juliana Nabikande Ndibalekera that were unlawfully and fraudulently obtained by the respondent; the applicants through their lawful attorney thereafter filed M.A 224 of 2015 seeking a temporary injunction to prevent the respondent from dealing with the estate of the late Juliana Nabikande Ndibalekera pending the determination of the main suit; on 13th April 2016 court granted the applicants a temporary injunction in M.A 224 of 2015 restraining the respondent and her agents from dealing with the estate of the late Juliana Nabikande Ndibalekera; the main suit is still pending before this honourable court; the respondent transferred to her names land comprised in Block 253 Plots 840, 841, 1348 and 1624 respectively, without the authority of the applicants and in complete disregard of the existing court order; the respondent proceeded to transfer Block 253 Plots 840 and 841 to a one Namusoke and to Bwayo Paul, Nankya Rose and Namakula respectively; the respondent by letter dated 27th December 2016 applied to have herself registered as administrator of the estate of the late Juliana Nabikande Ndibalekera for all land belonging to the deceased while still in full knowledge of the existing court order.

[3] The application is disputed by the respondent.

Background:

[4] The facts are that the biological children of the deceased, the late Juliana Nabikande Ndibalekera filed **HCCS No. 39 of 2014** seeking to revoke the Letters of Administration granted to the respondent. They successfully filed **Misc.**

Application No. 224 of 2015 and obtained a temporary injunction restraining the respondent from dealing in the estate of the deceased until the determination of the main suit, which suit is still pending. In contravention of the temporary injunction the respondent proceeded to transfer part of the estate into her names and sold some of the property to third parties which is contempt of a court order. The respondents deny the allegations.

Representation:

[5] The applicants are represented by Counsel Richard Bibangamba of M/S K & K Advocates while the respondent is represented by Counsel Byamugisha Nester of M/S Barya, Byamugisha & Co. Advocates together with Counsel Kenneth Gideon Munungu of M/S Mushabe, Munungu & Co. Advocates.

Resolution of the case:

Facts.

[6] The applicants seek a declaratory order that the respondent is in contempt of the court order in M. A 224 of 2015 and that the registration and transfer of land forming part of the estate of the late Juliana Nabikande Ndibalekera by the respondent is illegal and in contempt of the aforesaid court order; the respondent should as a consequence be detained in civil prison for six months and pay punitive damages of UGX 500,000,000/= (Five hundred million Uganda shillings) and also be fined UGX 500,000,000/= (Five hundred million Uganda shillings) for contempt of court orders and pay costs of the application as well.

[7] The issue for determination now is

- i. *Whether the respondent's actions amount to contempt of court;*
- ii. *Whether the applicants are entitled to the reliefs and prayers sought.*

Position of the Law.

[8] Section 98 of the CPA gives the High Court inherent powers to make decisions which are pertinent to the ends of justice. The position of the law is that for contempt of court to be found, the following conditions must exist; a lawful order, the potential contemnor's knowledge of the order and the potential contemnor's failure to comply i.e. disobedience of the order (see **Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd v The Commissioner General Uganda Revenue Authority MA 42/2010**).

Whether the respondent's actions amount to contempt of court.

10 ***Existence of a court order***

[9] Evidence was led to show that the court order vide MA 224/2015 was granted on 13th April 2016 in the presence of legal counsel of the respondent; the order was extracted by the applicants on 15th April 2016 and endorsed by the registrar; the respondent by letter dated 20th March 2017 applied to recall the extracted order which order was recalled and a fresh order signed by court on 29th March 2017; the respondent wrote to the applicants' lawyer regarding the court order granted on the 13th of April 2016 complaining of the applicants' attorney's actions and stating that the attorney was dealing in the estate contrary to the aforementioned court order.

20 ***The existence of a lawful court order is not disputed;***

Awareness of the court order by the respondent;

It is not disputed that the order was granted in the presence of counsel for the respondent and so the respondent was aware of the existence of the court order as at 13th April 2016 when it was granted. The respondent even went ahead to rely

on the said court order by raising issue with the actions of the applicants' attorney regarding his dealings in the estate. Furthermore, even though the respondent felt that the extracted court order was incorrect, the order still remained in force from the date it was granted (that is the 13th of April 2016).

5 [10] The case of **Hadkinson v Hadkinson [1952] All ER**, Romer L.J relied on the case of **Church v Cremer (1 Coop Temp Cott 342)** where it was held that "A party who knows of an order whether null or valid, regular or irregular, cannot be permitted to disobey it . . . as long as it existed". Thus the order as granted on 13th April 2016 and then extracted on 15th April 2016 was still in force until it was recalled and a fresh order granted on 29th March 2017. The respondent was aware of and bound by the order granted and then extracted on 15th April 2016 until it was recalled, whether or not it was incorrect. Additionally, as cited by applicants' counsel in the case of **Hon. Sitenda Sebalu v Secretary General of the East African Community Ref No. 8/2012**, a judgment of the court if undischarged must be obeyed.

Thus as at 13th April 2016 when judgment was delivered granting the temporary injunction against the respondent and in the presence of her counsel, the respondent was aware of the court order.

Whether the respondent breached a court order.

20 [11] The respondent in her affidavit evidence asserts that the transfers to her names done on 8th June 2016 and the attempted transfer of titles of the deceased to the respondent's name by way of her letter dated 27th December 2016 did not amount to contempt and were simply for purposes of preservation of the estate. As at the above dates, the extracted order of 15th April 2016 as granted by court on 13th April 2016 was in force and as earlier resolved the respondent was aware of the said order.

The temporary injunction barred any transfers of title until the disposal of the main suit (which is still pending). The purpose of a temporary injunction is to preserve the status quo until the question in the main suit is finally disposed of (see **E. L. T Kiyimba Kaggwa v Hajji Abdu Nasser Katende [1985] HCB 43**).

5 This therefore meant that the respondent was restrained from transferring the title from the name of the deceased to her name until CS 39/2014 is determined. As stated in the case of **Hadkinson (supra)**, as long as an order exists it must not be disobeyed. The respondent cannot therefore hide behind the argument that her actions were to preserve the estate especially since CS 39/2014 seeks to revoke
10 the letters of administration granted to her and the temporary injunction was intended to restrain her from changing the status quo under the guise of being an administrator of the estate of the deceased.

The respondent is thus in contempt of court.

[12] Counsel for the respondent argued that the only validly existing order is that of
15 29th March 2017 because counsel for the applicants did not adduce evidence that the order was recalled on 20th March 2017. I have taken judicial notice of the court order issued on 15th April 2016 which is attached to the pleadings and marked as A10. The next Order with the same citation is dated 29th March 2017 and also referring to the ruling of Her Lordship Alexandra Nkonge Rugadya of
20 13th April 2016. Court finds that from 15th April 2016 to 29th March 2017 the order in force was the one issued on 15th April 2016. There was no period in between when there was no injunction order.

The respondent also averred that the transfers to Namusoke Sarah were performed and concluded by her predecessor (the deceased) and her actions were
25 merely to put in effect what had already been concluded by the deceased. Further that the said property was no longer part of the estate of the deceased as it had already been sold by the deceased before her death. The transfer was executed on

10th January 2016 however the title was only transferred into the respondent's name on 2nd August 2017. The same applies to the transfers of title for Block 253 plot 841 which the respondent alleges were done by her former counsel. She led no evidence to prove this and moreover the title was first transferred to her names
5 on 29th December 2016 and later transferred to other third parties in 2018, all of which she claims to have been unaware of for that entire period. As already stated, the transfers of title into the respondent's name amounts to contempt and the transfers effected to the third parties, also done after the grant of the court order of which the respondent was aware amount to contempt of court.

10 The assertion that the transfer of Block 253 Plot 840 to Namusoke Sarah done on 10th January 2016 is unsustainable as the respondent lacked the authority to do so since she was not registered on the title as of that date and her later registration and then transfer to Namusoke Sarah were all done in contempt of the court order in MA 224/2015. All the above transactions were done after the extraction of the
15 court order as at 15th April 2016 and thus all amount to contempt of court.

[13] As regards Block 253 Plots 1348 and 1624, the transfer into the respondent's name was effected on 8th June 2016 after the extracted order of 15th April 2016 of which the respondent was aware; The said transfer was against maintaining the status quo of the estate property until determination of CS 39/2014 and thus
20 contempt of a court order.

Whether the applicants are entitled to the reliefs and prayers sought.

[14] The applicants seek orders that the respondent be detained in civil prison for six months and pay punitive damages of UGX 500,000,000/= (Five hundred million Uganda shillings) and also be fined UGX 500,000,000/= (Five hundred million
25 Uganda shillings) for contempt of court orders and pay costs of the application as well.

[15] Having found the respondent in contempt of court order, court must determine whether the respondent should be detained in civil prison. The applicants prayed that the orders sought be granted since a caution is not sufficient. He relied on the case of *Megha Industries (U) Ltd v Comform Uganda Limited HCMA 21/2014* that court orders are not issued in vain and ought to be respected as long as they remain in force.

[16] In the case of ***Megha Industries v Comform*** supra, the court, while relying on the case of ***Re Contempt of Dougherty 429, Michigan 81, 97, (1987)***, found that it is established in other jurisdictions that imprisonment for civil contempt is properly 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. A party in contempt stands to be committed until he complies with the order.

Counsel for the respondent submitted that since the respondent is a Namasole, a revered institution in Buganda she should be subjected to a caution in the event that she is found guilty. With all due respect to counsel for the respondent, while admittedly the respondent has been said to be the Namasole she was not sued as a Namasole and even if she was, there is no justification for breaching court orders with impunity by anyone, cultures and norms, with due respect, considered. In fact such would be the epitome of compliance to the law since they are revered. Having said that, this court is of the view that in conflicts between relatives the orders of court should as much as possible take into account need to promote reconciliation in line with Article 26 of the Constitution, and subjecting a family member in a suit to serving time in a civil prison when there is an alternative would not be the first considered/preferred option. In addition, the main suit before court is ongoing and requiring the respondent to serve time in a civil prison though possible may not positively facilitate the case adjudication process.

The respondent for that reason shall not be committed to civil prison; but her intentional disobedience and arrogant disregard of a Court Order cannot be entertained and must be punished. In the case of Housing Finance Bank Ltd & Another vs Edward Musisi Misc. Application No. 158 of 2010 the court of appeal held that,

‘the principle of law is that the whole purpose of litigation as a process of judicial administration is lost if orders by court through the set judicial process, in the normal functioning of courts are not complied with in full by those targeted and /or called upon to give due compliance. Further, it is not for a party to choose whether or not to comply with such order. The order **must be complied with in totality in all circumstances by the party concerned . . .**’ (emphasis supplied)

[17] The purpose of contempt as a principle is to preserve the effectiveness and sanctity of court orders and non-compliance must be punished and so in this case, court shall consider the monetary remedies sought by the applicants. In **El Termewy v Awdi & 3 Ors (C.S 95/2012) [2015] UGHCCD 4**, Justice Elizabeth Musoke cited the case of **Obongo v Municipal Council of Kisumu [1971] EA 91** where court noted that; “. . . a court if making a general award, may take into account factors such as malice or **arrogance** on the part of the defendant and this is regarded as increasing the injury suffered by the plaintiff . . . Damages enhanced on account of such aggravation are regarded as still being essentially compensatory in nature. On the other hand exemplary damages are completely outside the field of compensation . . . and their object is entirely punitive. Punitive damages are meant to punish, deter, express outrage of court at the defendant’s egregious, highhanded, malicious, vindictive, oppressive and/or malicious conduct.”

[18] In the instant case, the respondent’s acts of transferring the titles to her names and proceeding to transfer to third parties while fully aware of the court order and yet

seek to challenge the acts of the applicant's attorney while relying on the extracted order of 15th April 2016, and even transferring property without authority amounted to egregious and arrogant conduct. The applicants prayed for exemplary damages or compensation of UGX 500,000,000 (Five hundred million Uganda shillings) and a fine of UGX 500,000,000 (Five hundred million Uganda shillings) as well as costs. As earlier mentioned, compensation and exemplary damages differ as the latter are punitive in nature. The award of UGX 1,000,000,000 (One billion Uganda shillings) in total as both punitive and as a fine are excessive as a fine is also punitive in nature.

10 [19] In determining an award of exemplary damages, the case of **Esso Standard (U) LTD v Semu Amanu Opio SCCA 3/1993**, though dealing with breach of contract is instructive. The court relied on CASSELL CO LTD vs. BROOME (1972) 1 All E.R. 801 at p. 839 wherein the court noted that *“The difference between compensatory and punitive damages is that in assessing the former the jury or other tribunal must consider how much the defendant ought to pay. It can only cause confusion if they consider both questions at the same time. The only practical way to proceed is first to look at the case from the point of view of compensation to the plaintiff. He must not only be compensated for proved actual loss but also for any injury to his feelings and for having had to suffer insults, indignities and the like and where the defendant has behaved outrageously very full compensation may be proper for that so the tribunal will fix in their minds what sum would be proper as compensatory damages. Then if it has been determined that the case is a proper one for punitive damages, the tribunal must turn its attention to the defendant and ask itself whether the sum which it has already fixed as compensatory damages is or is not adequate to serve the second purpose of punishment or deterrence. If they think that that sum is adequate for the second purpose as well as for the first they must not add anything to it. It is sufficient both as compensatory and as punitive damages. But if they think that*

sum is insufficient as a punishment then they must add to it enough to bring it up to a sum sufficient as punishment.”

[20] As regards compensation, the applicants have not proved any actual loss that they
5 have suffered. Nevertheless the respondent’s high handed behavior through her
contempt of court calls for punitive damages. The Cassell case limited the award
of exemplary damages to the three cases as stated in Rookes vs Barnard(1964)
A.C. 1129, 1 All E.R. 367 amongst which was the motive of making profit as a
factor in awarding exemplary damages. Lord Devlin in the case of Rookes v
10 Barnard stated that;

‘With regard to the claim for exemplary damages, also referred to as punitive
damages, this represents a sum of money of a penal nature in addition to the
compensatory damages given for pecuniary loss and mental suffering. They are
deterrent in nature and aimed at curbing the repeat of the offending act. They are
15 given entirely without reference to any proved actual loss suffered by the plaintiff
(see *WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352*). If the trespass
is accompanied by aggravating circumstances, the plaintiff may be awarded
exemplary damages. Apart from cases in which exemplary damages are expressly
authorised by statute, exemplary damages should only be awarded in two
20 categories of cases; - cases in which the wrong complained of was an oppressive,
arbitrary or unconstitutional action by a servant of the government, **or cases in
which the defendant’s conduct has been calculated by him to make a profit
for himself which may well exceed the compensation made to the defendant
(see *Kanji Naran Patel v. Noor Essa and another [1965] 1 EA 484*).**
25 (Highlighted and underlined for emphasis)

I find that in the instant case the transfer of title to land comprised in Block 253
plots 1348 and 1624 into the respondent’s name and Block 253 plot 840 to
Namusoke Sarah are calculated moves to profit the respondent herself possibly to

the applicant's detriment before the main suit is finally determined. There is a lot one can do with property registered in one's names to change the status quo and to the detriment of interested parties. In the circumstances I find that the applicants are entitled to exemplary damages. As stated above UGX500,000,000 is excessive. In the case of Mega Industries (supra) court awarded extemporary damages of UGX 300,000,000 to the applicant company and a penalty of UGX 100,000,000 for contempt of court orders which money was to be deposited in court. The parties in that case however were companies while parties in this case are individuals. On that basis therefore, I will award the applicants exemplary damages of UGX 30,000,000/=. The exemplary damages shall carry interest at commercial rate from the date of this ruling till payment in full. The respondent will also deposit UGX 20,000,000/=into this court as a penalty for contempt of the court order. The costs of this application are awarded to the applicant.

In summary the application is allowed and I make the following orders;

- a) The respondent is in contempt of the court order in MA 224 of 2015;
- b) The temporary injunction issued in M.A 224 of 2015 restraining the respondent and her agents from dealing with the estate of the late Juliana Nabikande Ndibalekera is still subsisting until the hearing and determination of Civil Suit No. 39 of 2014;
- c) The registration and transfer of land forming part of the estate of the late Juliana Nabikande Ndibalekera by the respondent is illegal and in contempt of the aforesaid court order;
- d) The applicants are awarded exemplary damages as against the respondent as punitive damages to the tune of UGX 30,000,000/=;

- e) The sum of UGX 20,000,000/= is awarded against the respondent as a penalty for contempt of court orders in MA 224 of 2015 and shall be deposited in this court within one month from date of this ruling.
- f) The respondent shall bear the costs of this application.

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Dated at Kampala this 26th Day of August 2019.

**KETRAH KITARIISIBWA KATUNGUKA
JUDGE**