

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**

**MISCELLANEOUS APPLICATION NO. 729 OF 2012 2007**

***ARISING FROM MISCELLANEOUS APPLICATION NO 815 OF 2012***

***ARISING OUT OF CIVIL SUIT NO. 377 OF 2010***

- 1. JOSEPH NYAKANA**
- 2. GEORGINA KATUSHABE**  
[Suing as administrators of the  
estate of the late Florence Kabanyoro Aboki].....**APPLICANTS**

**VERSUS**

- 1. BETHUEL NSUBUGA**
- 2. KIWANUKA JOHN.....RESPONDENTS**

**BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE**

**RULING**

This application was by chamber summons brought under section 98 of the Civil Procedure Act; Order 1 rule 10(2), Order 6 rules 19 & 31 and Order 41 rules 2(3) & 9 of the Civil Procedure Rules for orders that:-

- a) The 1<sup>st</sup> respondent be arrested and detained in civil prison for disobedience to and breaching the terms of the order of the temporary injunction granted by this court in miscellaneous application no 815 of 2010 ***Joseph Nyakana & Anor V Bethuel Nsubuga & Anor.***
- b) Urban Utility Consults Ltd be joined as a defendant to civil suit no 377 of 2010 ***Joseph Nyakana & Anor V Bethuel Nsubuga & Anor*** and the plaint be amended accordingly.
- c) Costs of this application be provided for.

The application is supported by the affidavit of **Joseph Nyakana** the applicant and is based on the grounds that:-

- 1. On the 2<sup>nd</sup> day of February 2011 this honorable court granted a temporary injunction in miscellaneous application no 815 of 2010 *Joseph Nyakana & Anor V Bethuel Nsubuga & Anor* restraining the respondent from disposing off,**

- trespassing upon, alienating, transferring and/or evicting the applicants from the kibanja at Bwerenga, Entebbe (suit kibanja).
2. In disobedience to the orders of court the 1<sup>st</sup> respondent in or around the month of June 2011 executed transfers of various portions of the suit kibanja to Urban Utility Consults Ltd.
  3. It is in the interests of justice that the 1<sup>st</sup> respondent be arrested and detained in civil prison for disobeying the orders of this honourable court by transferring and or failing to preserve the suit kibanja until after determination of civil suit no. 377 of 2010.
  4. Urban Utility Consults Ltd through its servants and or agents entered and trespassed on the suit kibanja and is cutting down trees and destroying crops thereon.
  5. The presence of Urban Utility Consults Ltd is essential to ensure that all issues in the suit are heard and finally determined.
  6. It is in the interests of justice that this application be allowed.

The application was opposed by the respondents who filed two affidavits in reply deponed to by **Bethuel Nsubuga** the 1<sup>st</sup> respondent.

The facts as brought out in the said affidavit are that on the 2<sup>nd</sup> day of February 2011 this honorable court granted a temporary injunction in miscellaneous application no 815 of 2010 **Joseph Nyakana & Anor V Bethuel Nsubuga & Anor** restraining the respondent from disposing off, trespassing upon, alienating, transferring and/or evicting the applicants from the kibanja at Bwerenga, Entebbe (suit kibanja). In disobedience to the orders of court the 1<sup>st</sup> respondent in or around the month of June 2011 executed transfers of various portions of the suit kibanja to Urban Utility Consults Ltd.

It was submitted for the applicant by learned Counsel Ekirapa that Order 41 rules 2 and 3 Civil Procedure Rules empower court to attach the property of a person disobeying a court order and to detain such person in a civil prison, and that court can do anything necessary for the ends of justice under section 98 of the Civil Procedure Act. Counsel also submitted that the transfers were effected on the suit kibanja by the 1<sup>st</sup> respondent after the issue of the court injunction. He contended that by his conduct the 1<sup>st</sup> respondent had represented himself before court as the registered owner of the suit property. He cited **Samee Khan V Bindu Khan SLP (C) No. 11992 of 1998** to support his submissions.

The 1<sup>st</sup> respondent in his affidavit in reply in averred that he was fulfilling orders of court in civil suit no. 66 of 2009. In his supplementary affidavit in reply, he averred that he had already sold the land to Urban Utility Consults Ltd which information he gave to his advocate with instructions that they reply to the application and the plaint. He averred that he never concealed the information from court and that the mistakes of his advocate should not be visited on him.

Learned Counsel Tebusweke for the respondents submitted that an injunction should not be used as an instrument of oppression. He submitted that the applicant had a duty to enforce the court injunction by registering the order on the certificate of title, and that after filing transfer forms, it was difficult for the respondent to prevail on the Registrar of Titles and other interested parties like Urban Utility Consults Ltd. He prayed court to excuse the 1<sup>st</sup> respondent from the mistakes of his counsel as he was of poor health and was acting in his capacity as administrator of the estate, and the fact that the person in occupation at that time was considered the proper owner of the land until the question of ownership between Nyakana and Kiwanuka is resolved. He contended that it would be unjust for court to detain the 1<sup>st</sup> respondent to civil prison. He cited **Madhvani V Madhvani [1989] 1KALR 100** to support his submissions.

On the question of joining Urban Utility Consults Ltd as a defendant to civil suit no. 377 of 2010, the applicant averred in his supporting affidavit that Urban Utility Consults Ltd through its servants and or agents entered and trespassed on the suit kibanja, is cutting down trees and destroying crops thereon, and that its being joined as a defendant is essential to ensure that all issues in the suit are heard and finally determined. It was submitted for the applicant that the interests of justice would be served if the application is allowed. Counsel for the respondent submitted on this point that there is a pending suit **CS 109/2011 Urban Utilities V Bethuel Nsubuga, Joseph Nyakana & John Kiwanuka**, and that consolidation of the said suit to civil suit no. 377 of 2010 would serve the same purpose. In reply the applicant's Counsel submitted that consolidation is most appropriate after it has been ordered that Urban Utility Consults Ltd is party to civil suit no. 377 of 2010.

I have looked at the application and all affidavits on this matter, including the pleadings in civil suit no. 377 of 2010. I have also analysed the submissions of Counsel and the law applicable to the situation.

I will first address the applicant's prayer to have the 1<sup>st</sup> respondent arrested and detained in civil prison for disobedience to and breaching the terms of the order of the temporary injunction. Order 41 rule 3 of the Civil Procedure Rules provides that in cases of disobedience or of breach of any terms, the court granting an injunction may order the property of the person guilty of the disobedience or breach to be attached, and may also order the person to be detained in a civil prison not exceeding six months unless in the meantime the court directs his or her release.

The law is that an injunction must be obeyed while it lasts. In **Madhvani V Madhvani [1989] 1KALR 100**, it was observed by Bahigaine J, as she then was, that a court is always concerned that the order it issues is respected. Generally, in case of default, the court acts to enforce obedience of its orders. However, whether the contemner will be punished for or compelled to purge his/her contempt will depend upon the precise circumstances which are in question.

In this case, the affidavit evidence from both sides reveals that by the time the temporary injunction was issued the 1<sup>st</sup> respondent had already subdivided the suit land into numerous

plots though he remained the registered proprietor of the same. This evidence came out clearly in paragraph 6 of the applicant's supporting affidavit and paragraphs 3, 4 and 5 of the respondent's affidavit in reply. Annexure **A** to the 1<sup>st</sup> respondent's affidavit in reply reveals that Urban Utility Consults Ltd purchased the land where the suit kibanja is situated from the 1<sup>st</sup> respondent on 22<sup>nd</sup> December 2009 and was at liberty to commence survey of the land. It is also revealed in the adduced affidavit evidence that the stated factors were not revealed to court when the application for grant of temporary injunction was being heard. The 1<sup>st</sup> respondent has averred in his supplementary affidavit that he did not conceal the said information from court but he gave it to his advocate whose wrongs should not be visited on him.

I must state that on concealing such information which was definitely relevant to how the application for temporary injunction in miscellaneous application 815 of 2010 would have been resolved was most unfortunate. If the concealment was done by the 1<sup>st</sup> respondent's advocate, it was unprofessional on his/her part as an officer of court. I will however not dwell on this point since the advocate in question did not put his position to this court as to be judged. I will focus my attention on the issue at stake, and that is whether the 1<sup>st</sup> respondent should be committed to civil prison for disobedience of this court's injunction issued on 2<sup>nd</sup> February 2011 in miscellaneous application no 815 of 2010 **Joseph Nyakana & Anor V Bethuel Nsubuga & Anor**.

Detaining a disobedient party in civil prison is a mode of punishment for that party's being guilty of such disobedience. Enforcement of the order in civil contempt is for the benefit of one party against another as opposed to criminal contempt where it is to uphold the majesty of law and the dignity of court. It was observed in **Madhvani V Madhvani, supra**, that courts have always taken a lenient view in favour of the liberty of the individual and would only commit the contemner if he/she had a very contemptuous and flagrant disrespect to the court. If there is a reasonable alternative method available of ensuring that a court order is obeyed which does not involve committing the contemner to prison, that alternative should be taken. This underlines the concept that the liberty of the citizen is sacrosanct. I have no reason to depart from this concept. I will only add that the wording in Order 41 rule 2(3) of the CPR, which uses the words "*may*", apparently leaves it to the discretion of court to order for a contemner's civil imprisonment in cases of violation or disobedience of a court injunction.

The 1<sup>st</sup> respondent's affidavit evidence is that he respected the orders of court but that at the time they were issued the *status quo* had changed. He averred that he had no control over the Registrar of Titles in registering the land. The 1<sup>st</sup> applicant himself confirms that at the time the court injunction was issued the 1<sup>st</sup> respondent had already sub divided the suit land. It is inferred from the evidence adduced that the mutations, transfers and registrations of the suit land subsequent to the court injunction happened in the office of the Registrar of Titles. It is the respondent's contention that after filing transfer forms it was difficult for him to prevail over other interested parties like the Registrar of Titles or Urban Utility Consults Ltd who had acquired the land.

I note that the applicant drew the attention of the Registrar of Titles to an interim order issued on 23<sup>rd</sup> November 2010 by the Registrar of this court, by a letter annexure **H** to the supporting affidavit. While the appellant was vigilant enough to do this he did not exercise the same vigilance regarding the subsequent temporary injunction that was issued by this court. It is clear as per the applicant's affidavit evidence, especially as contained in annexures **I**, that certificates of title were eventually issued in favour of Urban Utility Consults Ltd on 21<sup>st</sup> June 2011, that is, after the injunction was issued. The respondent's evidence, which was not rebutted by the applicant however, is that this was done by the Registrar of Titles and Urban Utility Consults Ltd over whom he had no control. The applicant has adduced no evidence to satisfy me on the balance of probabilities that the 1<sup>st</sup> respondent's conduct since the injunction was issued, was that of disobedience and breaching the terms of the temporary injunction granted by this court in miscellaneous application no 815 of 2010 **Joseph Nyakana & Anor V Bethuel Nsubuga & Anor**.

The instant case is distinguishable from that of **Samee Khan V Bindu Khan SLP (C) No. 11992 of 1998** cited by the applicant's Counsel. In that case the supreme court of India was determining the issue of whether the court cannot order the detention of the defendant without ordering attachment of his property (as had been so decided by a single Judge of the lower court) in a situation where the said defendant had conceded that the impugned obstruction was done by him. The supreme court disagreed with the single Judge but found it not necessary to put the defendant in prison as he had apologised and removed the obstruction. The facts and issues in the instant case are different in that the 1<sup>st</sup> respondent denies disobedience of the court injunction and adduces evidence that the alleged disobedience was by parties he had no control over. I therefore find the case cited by the applicant's Counsel not applicable or not persuasive in the instant situation.

In my opinion, on basis of the evidence availed to this court, respect or obedience of those aspects of the court injunction that the 1<sup>st</sup> respondent had no control over directly or through his agents or servants cannot amount to disobedience or disrespect of a court order on his part. I would therefore decline to commit the 1<sup>st</sup> respondent to civil prison for disobeying or disrespecting the court injunction issued in miscellaneous application no 815 of 2010 **Joseph Nyakana & Anor V Bethuel Nsubuga & Anor**.

On the prayer that Urban Utility Consults Ltd be joined as a defendant to civil suit no 377 of 2010 **Joseph Nyakana & Anor V Bethuel Nsubuga & Anor** and amending the plaint to that effect, Order 1 rule 3 of the CPR provides as follows:-

***“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against those persons, any common questions of law or fact would arise.”***

I note that the hearing in civil suit no. 377 of 2010 is in advanced stages. The plaintiff has already closed his case and the defence side is calling its witnesses. Adding Urban Utility Consults Ltd at this stage of the hearing presupposes that the matter goes back to the stage of pleadings to allow amendments incorporating and serving the added party. This would include allowing the added party to file its defence and the plaintiffs to file replies, to repeat the scheduling conference to accommodate the added party's input, as well as repeat the process of examining and cross examining those witnesses who have already testified to allow the added party to cross examine them. In my opinion, this tantamounts to hearing the case *de novo*. This would not be desirable to this court in terms of time and resources. Besides, it was brought to this court's attention by both Counsel that there is a pending suit **CS 109/2011 *Urban Utilities V Bethuel Nsubuga, Joseph Nyakana & John Kiwanuka*** where the issues concerning Urban Utility Consults Ltd will be addressed.

In **Teopista Kyebitama V Damiano Batuma [1976] HCB 295** it was held that where two or more suits are filed involving the same parties and arising from the same cause of action they should be either consolidated for the purpose of determining liability, or only one of them, the first in point of time, be heard first. In my opinion, in view of the given circumstances I would decline to add Urban Utility Consults Ltd at this stage of the hearing.

In the premises, and on the foregoing authorities, I dismiss this application with costs.

**Dated at Kampala** this 31<sup>st</sup> day of January 2013.

Percy Night Tuhaise.

**JUDGE.**