

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

MISC. APPLICATION NO. 2052/2016

(Arising from Misc. Application No. 1032/2015)

(Under CIVIL Suit NO. 829/2015)

- 1. FATUMA DUSTO NALUMANSI**
- 2. MRS. NSUBUGA MARY**
- 3. NKUMBI GODFREY SALONGO**
- 4. NANKYA REGINA:.....PLAINTIFFS**

VERSUS

- 1. ISA BUKENYA**
- 2. KAKEMBO HADIJA SEBADUKA**
- 3. EDWARD NGOBYA**
- 4. MWIJUKYE VINCENT:.....RESPONDENTS**

BEFORE: HON. MR. JUSTICE J.W. KWESIGA

RULING:

This application by Notice of Motion was brought under Section 33, Judicature Act. And S.98 of Civil Procedure Act. Seeking several Orders:-

"That the Respondents are in contempt of Court Orders dated 24th November 2015 and that they be arrested and detained in prison for contempt of Court", plus several other reliefs that will be attended to in this ruling.

This application was filed at Nakawa, the then Central Circuit of the High Court, before it was wound up. The record shows that the trial Judge at Nakawa Ordered for filing of Written Submissions on which this ruling is based.

The grounds of this application are that on 24/11/2015 the Court Ordered that:-

- (a) There should not be further construction until the trial Judge directed otherwise.
- (b) The access road in Mwijuke Ronald's land under dispute to the home of the 1st Applicant stop or wait the trial Judges' directions.
- (c) That in contempt of the above Orders, the Respondents continued to construct and 1st and 2nd Respondents fully developed the only current access to the 1st Applicants' home.

The application is supported by the affidavits of Nalumansi Fatuma and Nkumbi Godfrey (Applicants).

This application was opposed and affidavits of 1st, 2nd and 3rd Respondents were filed.

1st Respondent stated that the Interim Order allegedly violated allowed him to construct in areas on which construction had already started before the Order.

He contended that he constructed on the old place and no new construction has been done in violation of Court Order. That there has never been an access in his land and that by the time the Court visited the locus in quo, he had already constructed his security house and had dug the foundation for his fence.

- (ii) 2nd Respondent (Mwijukye Ronald) stated that he was not aware of the Court

Order, it was not extracted by by his Lawyer as alleged and that the Court Order was made long after his wall fence had been constructed.

- (iii) 3rd Respondent, Edward Ngobe stated he never constructed in any new area as prohibited by the Court Order.

I have considered the Advocate's written submissions based on the above allegations of contempt of the Court Order and explanation given in rebuttal by the Respondent's affidavits.

The burden of proof lies on the Applicant for the Orders in an application seeking reliefs or Orders in contempt of Court Orders, the Applicant must prove:-

1. That there existed a lawful Court Order.
2. That the Respondent knew of the existence of the Court Order and that he violated the Order.

Before the Deputy Registrar made the Interim Order in question he visited the locus in quo and he noted;- " There is resistance by the 1st Applicant stopping Mwijukye from blocking the well known access which she has used since 1993. The same access is in Mwijukye's second plot All developments by Mwijukye looked recently put up especially the perimeter wall and pit latrine"

This evidence establishes that the perimeter wall existed before the Order and therefore, I am unable to find for the Applicant that this construction was done in violation of a Court Order.

For contempt to occur, there must be an existing Order before the act complained of occurred. It must be made clear that a decision that there was no contempt of Court Order on one aspect of alleged act does not dispose of the whole application.

The 1st Applicant alleges that the 1st Respondent built a security house within 2 weeks when she was with the Lawyers preparing for hearing. Paragraph 10 of the 1st Applicants' rejoinder portrays that before the Order was made, the 1st Respondent raised the security house.

This is corroborated by the pictures taken during the visiting of the locus in quo. The very house

picture taken at the visit is the same security house attached to the affidavit as annexure 'J' in the rejoinder.

In as far as the above acts complained of, there is no evidence that there was violation of Order made on 24th November 2015 because this

Order was made after the Registrars visit and taking of the photographs which show the construction done before the visit.

The Applicant stated that the 1st Respondent raised a fresh foundation which was not in existence at the time of visiting of the locus in quo. Annexures A, B, C, D and the affidavit in support show fresh digging in the new area.

It is clear that the wire mesh fence is a new development that was not present at the time of visiting the locus in quo. I have considered this with the 1st Respondent's admission when he states that he built the wire mesh on an already existing foundation.

However, the annexures depict that there was fresh digging which was contrary to the Court Order of 24th November 2015. The parties to a Court Order must obey the Court Order in its' totality.

The evidence of 1st Respondent is to the effect that the Court Order allowed him to construct in areas on which construction had already commenced before the Court Order.

That the Court Order did not make specification as to what amounted to "*new areas*". He also averred that he was not in Court when the Order was made. It is not for the party to decide to go around a Court Order allegedly because it is not clear or specific.

He/She would, where the Order is not clear seek clarification to avoid disobedience.

This position has been settled in decisions of Court's available. In *Housing Finance Bank Ltd. Versus Edward Musisi, Msc. Application 158 of 2010* it was held;- "*A party who knows of and regardless of whether, in view of that party, the Order is or valid, regular or irregular cannot be permitted to disobey reason of what that party regards the Order to be. It is t for that party to choose whether or not to comply with such den The Order must be complied with in totality in all circumstances by the party*

concerned subject to the party's right to challenge the Order in issue".

The Respondent, if aggrieved by the Interim Order whether for reasons that it, was ambiguous or otherwise had options of appealing against it, seeking its review or revision. As long as an Order exists, it must not be disobeyed.

In view of the above, the Respondent knowingly carried out fresh construction in disobedience of the Court Order.

The Applicant seeks an Order of arrest and imprisonment of the Respondents. There are four (4) Respondents in this matter and there must be proof of contempt against each one of them.

The issue of whether there is an access road on the suit land or not is a matter to be resolved at the trial of the head suit and the reliefs pending in the head suit ought to wait for the conclusion of the head suit and cannot be managed in an application for contempt of Court.

In this application I have not found any evidence to show that the 2nd , 3rd and 4th Respondent carried out any fresh construction after the Court Order came in force and they are outright absolved. ***It has been established by the decision of other jurisdiction that imprisonment for Civil contempt is properly Ordered where the***

Defendant has refused to do an affirmative act required by the previous of an Order which either in form or substance was mandatory in character. -----If the contempt consists in refusal of a party to do something which he is Ordered to do for the benefit and advantage of the opposite party, the process is Civil and he stands to be committed until he complies with the Order: The Order is in such a case is not a punishment but it is to coerce or compel him to act in accordance with the Order".

See:- Meqha Industries (U) Ltd. Versus Conform Uq. Ltd. Misc. Application 196/20121.

REMEDIES:-

1. The 1st Respondent, contrary to Court Order, constructed a wire mesh fence. It is hereby Ordered that he removes the wiremesh fence within 7 (Seven) days from the date of this Order and failure to do so within the given time he shall be arrested and imprisoned until he complies with this Court Order.
2. The Applicant has not proved any damages suffered by construction of wire mesh fence. None is awarded.
3. No Order to open the access road is appropriate until the head suit is heard and disposed of on it's merits.
4. No evidence that Military Officers allegedly threatening the Applicant were Agents or Employees of the Respondents and no Orders are made against any party properly or legally employing security guards.
5. I have found no merits in the preliminary objections in this application and I will not spend time on them since I have resolved the whole application on merits based on the record I have found and examined. My observation is that a great deal of time and efforts, in this case, have been spent on interlocutory applications rather than pursuing the head suit.

The solution to the parties' rights over the disputed land will be best managed through disposal of the head suit.

6. In view of the above, I Order that costs in this application shall follow the outcome of the head suit.

J. W. Kwesiga **Judge**

25/11/2016

In the presence of:-

- > Ms. Janet Nakakande for the Applicant
- > The Applicants are all present
- > Respondents not in Court
- > Ms. Nalunkuma Irene - Court Clerk

Order regardless of whether, in view of that party, the Order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that party regards the Order to be. It is not for that 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 subject to the party's right to challenge the Order in issue

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