

**THE REPUBLIC OF UGANDA**  
**IN THE HIGH COURT OF UGANDA AT KAMPALA**  
**LAND DIVISION**  
**MISC. APPLICATION NO. 0231 OF 2018**  
**(ARISING FROM CIVIL SUIT NO. 739 OF 2018**

**NATIONAL WATER**

**& SEWERAGE CORPORATION:..... APPLICANT**

**VERSUS**

**HIGENYI CHRISTOPHER:..... RESPONDENT**

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

**RULING**

This is an application by chamber summons brought under O.41 R2 (3) of the Civil Procedure Act and Section 33 of the Judicature Act for orders that;

- a) Permanent injunction be issued restraining the Respondent, his servant, agent or otherwise whosoever from undertaking any developments on the land comprised in plot 6146 and plot 1725 Muyenga Tank Hill which are adjacent to plot 616 FRV 200 folio 10 being those in contempt of a consent Judgment issued on 20<sup>th</sup> December 2017.
  
- b) That the developments on land comprised in plot 6146 and plot 1725 Muyenga Tank Hill which are adjacent to plot 616 FRV 200 Folio 10 being those in contempt of a consent Judgment be demolished under the supervision of KCCA and police and the suit land be restored back to its original position.
  
- c) That the Respondent be punished by detention in Civil prison for a period of 6 months for disobeying the said Court Judgment issued on 20<sup>th</sup> December 2017.

- d) That the Respondent be punished by payment of exemplary/punitive damages or compensation to the Applicant to tune of Ushs. 1,000,000,000/- (*one billion Uganda shillings*).
- e) That the Respondent be fined a sum of Ugshs. 500,000,000/- (*five hundred million*) for contempt of Court orders and
- f) Finally that costs be provided for.

This application has been supported by the grounds contained in the chamber summons and affidavit in support of Engineer. Alex Gisagara, the Applicant's Director Engineering services and briefly are that;

- i) This Applicant is the registered proprietor of the land and developments on the land comprised in plot 616 FRV 200 Folio 10 land at Muyenga Tank Hill (the suit land) whereon the Applicant has developed water tanks and works as defined under the Water Act.
- ii) That the developments on the land comprised of 5 water tanks with a capacity of 20,000,000 (*twenty million*) to 25,000,000 (*twenty five million*) litres of water and have been on the said land for the last 87 years with continuous upgrade to meet the exponential growth.
- iii) That the Respondent is a proprietor of property comprised in plots 6146 and 1725 Muyenga Tank Hill which are adjacent to the Applicants' land.
- iv) That sometime in July 2017, the Respondent started making critical excavation on his land comprised in plots 6146 and 1725 Muyenga Tank Hill and in the process, he encroached upon the Applicants' land and the activities also comprised the structural integrity of the Applicants' installations on plot 616 FRV Folio 10 land at Muyenga.
- v) That the actions of the Respondent were affecting the stability of the water tanks on the escarpment, as a result, the tanks are susceptible to grave and undue environment risks like floods and landslides. That this can also endanger the

lives of thousands of people within the vicinity of the facility and depriving thousands of people to access water together with the health consequences.

- vi) That on the 6<sup>th</sup> October, 2017, the Applicant filed HCCS No. 739 of 2017, and that on the 20<sup>th</sup> day of December 2017, the parties appeared before Her Worship Justine Atukwasa, the Assistant Registrar High Court Land Division who entered and issued a consent Judgment.
- vii) That the Respondent in total disregard of the Judgment of this Court did not carry out the said remedial works as agreed and continued with his infringing developments which affect the structural integrity of the structural integrity of the Applicant's installations.
- viii) That the said actions and developments are in contempt of Court and are infragant disregard and disobedience of the Judgment of this Court, and that the said developments are illegal as they contravene the Water Act.
- ix) That the Respondent was on the 7<sup>th</sup> day of February, 2018, served with a letter requiring him to comply with the Judgment of this Court, but to date he has not done so.

In opposition to this application, the Respondent Higenyi Christopher adduced the following affidavit evidence:

1. That he is the registered proprietor of land comprised in Block 244 Plot 6146 at Kisugu adjacent to the Applicant's land, and that in July 2017, he started developing his land upon obtaining the relevant approvals from NEMA (National Environmental Management Authority) and KCCA (Kampala City Council Authority) Physical Planning Authority for development of his land.
2. He state that the Applicant in October 2017, filed a suit in this Court, vide Civil Suit No. 739 of 2017 objecting to the developments of his land on grounds that he had compromised the integrity of the water tanks on the Applicant's land, destroyed the chain link fence, which was a threat to the public and that on 20<sup>th</sup> December 2017, he entered a consent Judgement with the Applicant on agreed terms.

3. He further states that he started on the remedial work as agreed in clause (ii) of the consent Judgment and has done 70% (*seventy percent*) of the said works which includes construction of a stone pitch fence and a solid retaining wall, and that the Applicant through Engineer Bigibwa Moses, its officer noted that the stone pitching he had put to protect the land from erosion had achieved over 60% (*sixty percent*) of the section and the remaining section could only be completed upon proper curing and drying of the said retaining wall at the lower section. That it was also suggested by the Applicants' officers (Engineer Bigibwa) that the remaining work; 30% (*thirty percent*) can be carried out after the pipe has been re-aligned.
4. He states that he wrote to the Applicant requesting for the costs of the sectional realignment of the water supply pipe and he undertook to incur the costs and that todate, the Applicant has not responded to the request and therefore, he cannot continue with any work until the water supply is relocated or realigned.
5. He states further that due to the complexity of the works involved in the realignment of the pipe, this section if the work shall be done solely by the Applicant or joint nominated contractor but at his cost, that if he continues with the remedial works before the pipe is realigned, it will result in future demolition of the works to carry out realignment of the pipe.
6. He denied being in contempt of the consent judgment and states that the delay was caused by the Applicant who has not furnished him with the cost of the realigning the water supply pipe, that this application has no merit since it arises out of a suit which was disposed of and that the remedies prayed by the Applicant are not available since the parties willingly entered into a consent Judgment which is deemed Courts' Judgment.

The Applicant in his affidavit in rejoinder sworn by Engineer Bigibwa Moses stated the following;

- a) That he is not aware of whether the Respondent commenced remedial action on the premises and denied ever visiting the premises.

- b) That he had never been tasked to supervise, in respect or discuss the works carried on by the Respondent.

Given the above brief background, I have raised the following issues for determination:-

- a) Whether the Respondent committed contempt of Court.
- b) Whether the Applicant is entitled to the reliefs sought.
- c) What remedies if any.

### **Resolution of the issue**

#### **a. Whether the Respondent committed contempt of Court.**

Counsel for the Applicant submitted that there is a Court order in existence issued on the 20<sup>th</sup> day of December 2017 by consent of both parties which was extracted and signed by both parties. However, that the Respondents' conduct is contemptuous and disrespectful of the said order. He also submitted that the Respondent has the ability to comply with the order which he voluntarily agreed to be bound by.

In reply, Counsel for the Respondent while citing the case of **Erasmus Masiko versus John Maniraguha MA No. 1481 of 16**, discussed the four ingredients of contempt to which he state that there must be;

- 1) Existence of a lawful order.
- 2) The potential contemnors' knowledge.
- 3) The potential contemnors' potential ability to comply.
- 4) The potential contemnors' failure to comply.

On all the above ingredients, Counsel for the Respondent confirmed that the consent judgment ordered the Respondent to do remedial works which he has substantially performed and he cannot be held to be in contempt of a Court Order. That there was no injunction order claimed to be infringed upon by the Respondent and that the Respondent was not obliged to observe an order which was vacated thus he is not in contempt of the order of a temporary injunction as alleged by the Applicant.

Contempt of Court has been defined in **Blacks' Law Dictionary 6<sup>th</sup> Edition**, as;

*“Anyway which is calculated to embarrass, hinder or obstruct Court in the administration of justice, or which is calculated to lessen its authority or its dignity.*

*“It is committed by any person who does any act in a wilful contravention of its*

*authority or dignity, or tending to impede or frustrate the administration of justice, or by the one who, being under the Courts' authority as a party to a proceeding therein, wilfully disobeys its lawful orders or fail to comply with an undertaking which he has given".*

**Halsbury's Law of England vol. 9 (1) at paragraph 492** defines civil contempt as;-

*'That punishable by way of committal or by sequestration'*

In *Wild Life Lodges Ltd versus County Council of Narok and Another (2005) 2EA 344 (HCK)* cited with approval from the case of *Confirm Uganda Ltd versus Megha Industries (U) Misc. App. No. 1084 of 2014* it was held that;

*"A Court of Law never acts in vain and such issues touching on Contempt of Court take precedence over any other case of invocation of the jurisdiction of the Court"*

Counsel for the Respondent submitted in Court that the Respondent has complied with the Court order and he had done 70% of the work. He referred Court to the photographs attached to the affidavit in reply showing work done. Counsel contends that the Applicants' chain link was damaged and remedial work included putting the link fence and that this has been substantially done to stop the soil to fall in.

He further submits that the Respondent was advised by the Applicants' engineer to stop construction to avoid damage to water supply pipe and that in order to continue, there was need to realign. The Respondent was doing so at his own cost and that he cannot be found in contempt for the works of which the Applicant has in any way stopped.

In the instant case, a consent judgement was entered into by the parties on the 20<sup>th</sup> December, 2017 where it was agreed among others that;-

- i) .....
- ii) *The Defendant (Respondent) immediately commences remedial works to reinstate the fence and the excavated section with construction conforming to agreed designs under the Plaintiff's supervision, quality control and approval.*
- iii) *The Defendant shall complete the agreed remedial works within 60 days from the date of signing of this consent"*

iv) .....

However, in line with the above orders, the Respondent in his affidavit evidence in paragraph 5 and 7 deponed that he commenced remedial work to re-instate the fence up to 70%. He attached photographs to prove the same. This evidence has not been disputed by the Applicant. It is also alleged by the Respondent that he was stopped from construction by the Applicants' engineer since there was need of proper curing and drying of the solid retaining wall.

In rebuttal, the Applicants' said engineer Bigibwa deponed in rejoinder that he was not aware of whether the Respondent commenced remedial action on the premises and denied ever visiting the premises and that he has never been tasked to supervise, inspect or discuss the works carried on by the Respondent.

To disapprove this fact before this Court that indeed the Respondent failed to obey the consent judgment, the Applicant must have attached an affidavit of the person entrusted with supervision of the works to be performed by the Respondent because, supervision of the work was a requirement of the consent judgment.

From the affidavit in rejoinder sworn by Engineer Bigibwa Moses, he failed to adduce evidence to rebut the allegations of the Respondent. The issue in controversy was failure to put into effect the remedial works agreed upon by the parties in the consent judgment, however, the Respondent's affidavit in reply clearly shows that the Respondent put the orders in effect by constructing the walls.

According to the consent judgment, clause 2 required the Plaintiff/Applicants' control and approval of the works. The Respondent claims in paragraph 10 of the affidavit in reply that he wrote to the Applicant requesting for the cost of the water supply pipe and he was to incur costs. With this, he attached a letter which was received by the Applicant. It is not disputed that this letter was not replied to date by the said Applicant. This illustrates that there was no

contempt for the Court order by the Respondent when he went ahead and put the orders into effect.

Article 28(1) of the Constitution provides that;

*‘in the determination of Civil Rights and Obligations or any Criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial Court, established by law’.* Further (12) of the same Article state that; *‘except for contempt of Court, no person shall be convicted of a criminal offence unless the offence is defined and the penalty for it prescribed by law’.*

Basing on the case of **Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd versus Uganda Revenue Authority MA No. 42/2010 by Hon. Lady Justice Irene Mulyagonja** and the case of **Hon. Sitenda versus Secretary General of the East African Community; Ref: No. 8/2012**, as cited in the case of **Megha Industries (U) versus Conform Uganda Limited, Misc. Cause No. 21 of 2014**, the conditions necessary to prove contempt of Court were outlined as follows:

- Existence of a lawful order,
- The contemnors’ knowledge of that order
- The potential contemnors’ failure to comply i.e., disobedience.

Once these conditions have been abused by a party, he or she is held liable for contempt of Court. In **Megha Industries (U) versus Conform Uganda Limited**, (supra), it was held;

*“Civil contempt is punishable by way of committal or by way of sequestration. Sequestration being the act of placing for a temporary period of time, the property of the contemnor into the hands of sequestrates who manage the property and receive the rent and profits. Civil contempt may also be punished by a fine or an injunction granted against the contemnor”.*

Having carefully studied the submissions of both Counsel and noted the principles established by the decided cases which have to be fulfilled for any action to amount to contempt of Court, I find that there is no contempt of the consent judgment.

**Issue No. 2;** Whether the Applicant is entitled to the reliefs sought.

It has to be noted that the Applicant's engineer claims not to have gone to the suit premises and he also denies ever been authorised to supervise, inspect or discuss the works carried on by the Respondent on plot 616 FRV 200 Folio 10 land at Muyenga Tank Hill which act the Applicant was obliged to do. Before the Applicant could file an application for disobedience of a Court Order, it could have had regard to the Respondent's response. The Applicant should have carried out an in-depth search as to whether the Respondent has completely disregarded the Court order before it could determine the way forward.

Be that as it may, in the case of **Megha Industries (U) versus Conform Uganda Limited**, (supra) **Justice Flavia Ssenoga Anglin** noted that;

*“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 in such a case is not a punishment, but is coercive to compel him to act in accordance with the order of Court”*

The Applicant has failed to demonstrate any refusal by the Respondent to the effect the orders and as such, the Respondent cannot be committed to Civil Prison

Section 98 of the Civil Procedure Act of which this application is brought states that, a Court has inherent powers to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. However, it is worthy to note that this jurisdiction must be exercised judiciously without prejudice.

It is important to note still that annexure 'B' of the Respondents' affidavit in reply, the Respondent attached photographs of the construction of the remedial works as agreed upon in the consent judgment.

Further the Applicant did not dispute as to whether the constructions in issue were done by the Respondent or not. Hence the Applicant is not justified in praying to Court to punish the Respondent where there was no contempt of Court.

The Applicant praying for a permanent injunction was at the wrong timing because it is not the duty of Court at this juncture to issue a permanent injunction in an

application of this nature. A permanent injunction is normally only granted at the close of a case as a final order.

In conclusion therefore, this application has no merit and thus, ought to be dismissed.

No order as to costs.

The Respondent must however cooperate with the Applicant and ensure that the remaining 30% (*thirty percent*) of works be completed within 60 days of this Ruling.

I so order.

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HENRY I. KAWESA

**Judge**

8/5/2018

08/05/2018:

Mr. Ssebufu Isanga for Applicant.

Mr. Waiswa Simon Peter for the Respondent.

Parties absent.

Court: For Ruling.

Court: Ruling delivered to the parties above.

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Henry I. Kawesa

JUDGE

8/5/2018