

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(EXECUTION AND BAILIFFS DIVISION)**

MISCELLEANOUS APPLICATION NO. 1242 OF 2016

**(ARISING FROM MISC. APPLICATION NO. 696 OF 2016)
(ARISING FROM HCT – EMA NO. 514 OF 2016)**

WILFRED BUGINGO APPLICANT/ JUDGMENT CREDITOR

VERSUS

**STANDARD CHARTERED BANK LTD RESPONDENT/
3rd GARNISHEE BANK**

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

RULING

This was application made under S.98 CPA, S.33 Judicature Act and 0.52 rr 1 and 3 C.P.R.

It seeks orders of this court declaring that the actions of the Respondent / 3rd Garnishee Bank of failing to remit to the Applicant all the total sum of US Dollars 22,217.54 and Shs. 14,145,972/- that was on the Judgment Debtors accounts number 8766413695600 and 0100413695600 respectively was a violation and disobedience of court orders hence amounting to contempt of court.

Also that the officials of the Respondent bank particularly the Directors and Secretary be committed to Civil Prison for violation and contempt of court orders issued in Miscellenous Application 696/2016, Bugingo Wilfred vs. Standard Bank (1st Garnishee), Barclays Bank (U) Ltd (2nd Garnishee) and Standard Chartered Bank Ltd (3rd Garnishee) and Willy Jagwe and Other Judgment Debtors.

Further that exemplary damages, fine and costs be awarded to the Applicant.

The Application was supported by the affidavit of the Applicant, Wilfred Bugingo, setting out the background to the application interalia.

There is also a supplementary affidavit of the Applicant indicating that the Respondent conceded that the Garnishee order nisi had been abused and violated.

There is an affidavit in reply deponed by Sheila Kawooya, Counsel for the Respondent.

There are also two affidavits in rejoinder deponed by the Applicant and Moses Lwanyaga, Advocate, respectively.

5 The application was called for hearing on 21.06.16. Counsel for the Applicant went through the grounds of the application and the supporting affidavits. He submitted that in the affidavit in reply of 17.06.16, the Respondents concede to paragraphs 1-10 of the supporting affidavit.

10 That the Respondent admits that a garnishee order nisi was issued and served on them. By the time of the order nisi, they held a total of \$22,217.054 on the account No. 87004413695600 for one Willy Jagwe against whom the order nisi was issued. And that they held a total of Shs. 14,145,972/- on account No. 0100413695600 for the same person.

15 Further that by their own admission the account was fraudulently unfrozen and the money was withdrawn by the Judgment Debtor.

20 Counsel asserted that despite being aware of the order nisi freezing the Judgment Debtor's accounts and the order of this court re-affirming the same, the Respondent either through negligence or connivance allowed perpetuation of the fraudulent act of transfer of the money from the account out of reach of the Applicant.

Court was urged to note the willful disobedience of the order nisi dated 14.04.16 – Annexure D, which the Respondent received and acknowledged on 19.04.16.

25 But that when court issued the garnishee order absolute, the Respondent initially rejected it, demanding that the amounts and the accounts from which the money was to be withdrawn be clarified. Court clarified the amounts and the accounts – Annexure F supporting affidavit but the Respondent only remitted Shs. 12,764,000/- Annexure G on 01.06.16.

30 That this confirms that:-

- 30 - The Respondent knew of the court orders freezing the accounts but went ahead to violate it in contempt. The fraud is only an aggravating circumstance.
- 35 - The Respondent knew that the order nisi had been made absolute but chose how much money to remit.

Counsel contends that, the actions of the Respondent were deliberate and calculated defiance of the orders of this court.

40 It was argued that, the order of stay referred to court proceedings and not court transactions.

The Respondent also admits receiving the order of the Court of Appeal thirteen (13) days after they had been served with the order absolute.

45 The order of the Court of Appeal is said to have been received on 13.06.16 at 3pm. Yet the garnishee order absolute was received on 31.05.16. And the Applicant's account was credited on 01.06.16.

By refusing or failing to comply with the three orders of this court, the Respondent allowed or participated in the fraudulent disobedience of the orders. Counsel referred court to SS. 33 and 14 Judicature Act, S. 98 Civil Procedure Act and also relied on the case of **Megha Industries (u) Ltd vs. Conform Uganda Ltd Miscellenous Cause No. 21/2014.**

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It was then prayed that the application be allowed and all remedies sought granted.

Counsel proposed that Shs. 200,000,000/- be granted as exemplary damages, a fine of Shs. 78,000,000/- be imposed and also the sum of Shs. 78,000,000/- be credited to the Applicant's account.

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Emphasizing that court orders do not act retrospectively and Court of Appeal orders were received after the orders of this court had been served, it was necessary to grant the orders sought by the Applicant to send out a strong message that court orders have to be obeyed and that failure to do so carries consequences. Otherwise that, there will be perpetual contempt of court, resulting into failure by court to enforce its decisions.

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And that the acts of the Respondent deprived the Applicant of the fruits of his judgment. Taxed costs of the application were also applied for.

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In reply, Counsel for the Respondent concedes to the averments in paragraph 1-10 of the affidavit in support; indicating the amounts that were on the Judgment Debtor's accounts at the time of the order nisi.

He submitted that while the Respondent was willing to comply with the order absolute and had authorized payments, it was discovered that the account had been fraudulently unfrozen and the money withdrawn, but went ahead to pay what remained on the account while trying to establish the source of the fraud.

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Further that, the bank was willing and is still willing to pay the Applicant the balance of the money that had been taken from the Judgment Debtor's account. However that, they were served with an order of stay from the Court of Appeal and were advised to stay all proceedings including the payment although they are still willing to pay the money to the Applicant.

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It was asserted that there was no willful defiance of the order of court and therefore that the Respondent cannot be found to have been in contempt.

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It was then prayed that the application be dismissed for those reasons, adding that the damages and fine sought were baseless considering the sums involved and that the Respondent is willing to pay. Also that the Respondent in the circumstances required time to verify the circumstances under which the money was taken off the account and the loss that might have been occasioned to the Applicant cannot justify the sums of the fine and exemplary damages sought.

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And that it would only be fair if each party meets its own costs of the application.

In rejoinder, it was maintained for the Applicant that the Respondent was in contempt of court orders.

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The Respondent is a corporation and the fraud was committed by officials of the bank.

That the moment the order nisi was issued, the assumption of the law is that the account was frozen and the moneys there could not be removed.

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The bank was expected to fully comply with the order absolute the moment it was issued and that partial compliance was an abuse of court process.

That exemplary damages are in order as they are meant to act as deterrence to others who would be contemnors.

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Commenting about the two orders from High Court and from the Court of Appeal, Counsel for the Applicant said that both orders have legal force and if they came at the same time, and are in conflict, then the order of the higher court would take precedence.

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But that in the circumstances of the present case, where there were two equal equities, the first in time is the first in right and therefore prevails. The order absolute of the High Court was received on 31.05.16 and the order of the Court of Appeal was received on 13.06.16. Therefore the order of the Court of Appeal could not apply retrospectively to the one of the High Court that came earlier.

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The willingness of the Respondent to pay is not a defence to contempt proceedings when the order was not obeyed. There were thirteen days between the orders of the High Court and those of the Court of Appeal and yet only partial remittance of the money was made.

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And the Registrar's alleged advice is not indicated anywhere in proceedings.

Insisting that there was a violation of the garnishee order nisi and no justifiable excuse for violation of the three orders of court, Counsel once again prayed that application should be allowed.

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Having given the submissions of both Counsel the best consideration, I can in the circumstances, I find that the following are the issues to be determined.

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- 1) Whether the Respondents were in contempt of court orders.
- 2) What remedies if any are available to the Applicant?

Whether the Respondents were in Contempt of court orders.

Decided cases have established principles that have to be met for any action to amount to contempt of court. They are:-

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- Existence of a lawful order.
- The potential contemnor's knowledge of the order.

10 - The potential contemnor's failure to comply that is disobedience of the order.

In the present case, it is admitted that a garnishee order nisi was issued against the Respondent. It was duly served and received. Once a garnishee order nisi is issued, the account is frozen and the funds there on should not be removed.

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By the time the order was received by the Respondent, the two accounts of the Judgment Debtor had funds on them.

20 While the Applicant and the Judgment Debtor were given a chance to explore an out of court settlement before the garnishee absolute was issued, court directed the Respondent bank to maintain the status quo in respect of the garnishee order nisi.

25 When the parties failed to reach a settlement, court issued garnishee order absolute on 30.05.16, instructing the Respondent and other banks to pay the Applicant moneys on the Judgment Debtor's accounts.

However, the Respondent declined to honor the garnishee order absolute demanding that the moneys held on the Judgment Debtor's accounts be disclosed.

30 On 31.05.06, court issued another garnishee order absolute indicating the money in dollars and shillings on the Judgment Debtor's two accounts. That is US Dollars 22,217.54 and Shs. 14,245,972/- respectively.

35 However, on 01.06.16 the Respondent only remitted a total of Shs. 12,765,154/- from the total sum they held for the Judgment debtor.

40 While the Respondent bank was issued with a notice form the Applicant's lawyers directing them to fully comply with the order, to date they have failed and or refused to comply with orders of court.

Since the Respondents do not deny the existence of the court order or the knowledge thereof, and it is apparent that they failed to comply with the same, although they had the ability to do so, this court finds that they were in contempt of court.

The Respondent's argument that they were willing and are still willing to comply with the garnishee order absolute but failed to do so although payment had been authorized, because the account had been fraudulently unfrozen and they were trying to establish the source of the fraud cannot be sustained. Reason being that, it is on record that upon receipt of the initial order garnishee absolute, they demanded that it be amended to indicate the amounts on the accounts, yet the account was under their control.

And when the order was amended, they still failed to fully comply with the same.

And although the Respondents contend that they were served with an order of the Court of Appeal staying payment, it is not disputed that the Court of Appeal order was received by the Respondents almost two weeks after the garnishee order absolute had been served on them, thirteen days (13) to be exact.

If the Respondents had fully complied with the garnishee order absolute as soon as it was issued as they ought to have done, the Court of Appeal order would have been of no consequence.

This is because it is an established general principle of law that ***“a party who knows of an order..... cannot be permitted to disobey it As long as the order exists, it must not be disobeyed.”***

The contempt of court was committed long before the Court of Appeal order was received by the Respondents. The disobedience of the garnishee order absolute appears to have been a deliberate ploy / tactic by the Respondents to defeat the course of justice in order to deny the Applicant the fruits of his judgment.

The alleged fraud on the account of the Judgment Debtor which from the affidavit in reply of the Respondents appears to have been an inside job should not have been allowed to interfere with the rights of the Applicant. The payment of all the funds to the Respondent would not have stopped the investigations, more so as part payment was done.

In the circumstances there is therefore no justifiable excuse for the bank to have disobeyed the court orders.

What remedies are available to the Applicant?

The Applicant sought orders declaring that failure of the Respondents to remit moneys to Applicant as directed by court amounted to contempt of court;-

- Committal of the officials of the bank to civil prison.
- Payment of exemplary damages fine and costs of the applicant

Declaration: having already found that the Respondents failed to comply with the court orders, it is hereby declared that they were in contempt of court.

Other Remedies:

5 It has been established by decided cases that examples of punishments for civil contempt are derived from the common law decisions, where the punishments are provided for in The Contempt of Court Act (1981).

10 Further that *“Uganda has no equivalent of the Contempt of Court Act,”* but courts have emphasized that *“disobedience of civil orders is known and ought not to be allowed by courts.”* – Refer to **Stanbic Bank (U) Ltd and Another vs. Commissioner General, Uganda Revenue Authority Miscellaneous Application 6042/2010.**

15 S.14 (2) (b) (1) and 14 (2) (c) of the Judicature Act – whereby the *“High Court is enjoined to exercise its jurisdiction in conformity with the Common Law and doctrines of equity, and whereby court is obliged to exercise its discretion in conformity with the principles of justice, equity and good conscience respectively”* comes in handy to assist court determine whether the rest of the orders sought by the Applicant should be allowed.

20 According to Halsburys Laws of England Volume 9 (1) paragraphs 492 cited in the **Stanbic Bank case (Supra)** – *“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 granted against the contemnor.”*

25 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 – Refer to **Re contempt of Dougherty 429, Michigan 81, 97, and (1987).**

30 It has been explained that *“if the contempt consist 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 the contemnor 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 the contemnor to act in accordance with the order of court”.*

35 It has already been found in the present case that the Respondent refused to obey orders of this court that were mandatory in character and that would have been for the benefit and advantage of the Applicant.

40 Committal of the Directors and Secretary of the Respondent Bank would therefore have been appropriate to compel them to act in accordance with the court order, but as matters stand now, the accounts of the Judgment Debtor were illegally unfrozen. Therefore committing the Respondents to civil prison would be an exercise in futility. It is therefore not granted.

Exemplary Damages:

Exemplary damages are by their nature intended to punish the Defendant – See case of **A vs. B [1974] INZLR 673 and 677** and **Loomis vs. Rohan (1974) 46 DLR (3d) 423** cited by Hon Justice Katureebe in his paper to Judicial Officers dated 18.06.2008.

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The cases of **Ntabgoba vs. Editor in Chief of the New Vision & Another [2004] 2EA 234, Bhadelia Habib Ltd vs. Commissioner General Uganda Revenue Authority [1997 – 2001] UCL 2002** and **Ahmad Ibrahim Bholm vs. Car & General Ltd SCCA 12/2012** were also referred to.

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Having found that the Respondents disobeyed the decree nisi and released the funds, in total disregard of the order of this court affirming that the decree was still in effect, and finally refusing to honor the decree absolute, the Applicant is entitled to exemplary damages. He has been greatly inconvenienced by the actions of the Respondents. The Shs. 200,000,000/- applied for by the Applicant is hereby reduced to Shs. 100,000,000/- with interest at the rate of 6% from the date of judgment until payment in full.

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While the Respondent contends that the Judgment Debtor fraudulently withdrew the money from the accounts, as already indicated in this ruling, this must have been with the assistance of staff within the Respondents banks for which the Respondents are vicariously liable. By releasing money which had been frozen by orders of court, the Respondent allowed the Judgment Debtor to obtain an unfair advantage over the Applicant; who has to date been denied the fruits of his judgment.

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25 **Fine for Contempt of Court:**

Counsel for the Applicant prayed court to award a fine equivalent to the sum the Respondent failed to credit to the Applicant's account.

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While the rationale behind a fine for contempt is to send out a firm message that court orders have to be obeyed and to indicate to contemnors that there are consequences for disobedience of court orders the Shs. 78,000,000/- sought by Counsel for the Applicant would be excessive, more so since the fine is not meant for the benefit of the Applicant. And the Applicant is also seeking another order that the same amount of money be credited to his account.

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Certainly, justice must be tempered with mercy, more so in the circumstances of the present case where it is claimed that the Respondent were willing to pay but were prevented from doing so by internal fraud. Shs. 10,000,000/- will suffice as a fine to meet the ends of justice. The funds must be credited to the account of court.

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Crediting the Applicant's Account:

Since the court order from the Court of Appeal was received by the bank long after they ought to have paid the money to the Applicant but did not do so, it is only just and equitable that the Shs. 78,000,000/- claimed by the Applicant be credited to his account.

5 The Court of Appeal order could not act retrospectively.

The funds to be paid with interest at court rate of 6% from the date when the money ought to have been paid until payment in full.

10 **Costs:**

Costs follow the event unless for good cause court orders otherwise. The taxed costs of the application are granted to the Applicant.

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The application is allowed and following orders are made:-

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1) It is declared that the actions of the Respondent of failing to remit to the Applicant \$22,217.54 and Shs. 14,145,972/- that were in the Judgment Debtor's accounts that had been frozen by the garnishee nisi amounted to contempt of court.

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2) The Respondent to pay the Applicant Shs. 100,000,000/- as exemplary damages together with interest at the rate of 6% from the date of the ruling until payment in full.

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3) The Respondent to pay Shs. 10,000,000/- as fine for contempt of court orders. The sums to be deposited in court.

4) The Respondent to deposit Shs. 78,000,000/- in the Applicant's account, the sums that were due and owing to the Applicant from the Judgment Debtor accounts, with interest at 6% from the date the garnishee order absolute was issued till payment in full.

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5) Taxed costs of the application are also granted to the Applicant.

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Flavia Senoga Anglin
Judge
26.10.16