

IN THE SUPERIOR COURT OF JUDICATURE IN THE HIGH COURT OF JUSTICE SOWUTUOM, ACCRA HELD ON TUESDAY, THE 14TH DAY OF NOVEMBER, 2023 BEFORE HER LADYSHIP, JANE HARRIET AKWELEY QUAYE (MRS.), JUSTICE OF THE HIGH COURT

COURT CASE NO. CC/13/2023

THE REPUBLIC

VRS

1. MARSHWOOD BANNOR
2. RAFIQ BARNOR
3. PRINCE



RESPONDENTS

EXPARTE JOSEPH AMARTEY

(SUING AS HEAD OF THE Kofi Baah family of Obuakuse and for himself)



APPLICANT

J U D G M E N T

A motion for committal for contempt was filed pursuant to order 50 rule 1(2) of C.I. 47 against the Respondents by the Applicant. The grounds for the application are found in a 19 page affidavit in support sworn to by the applicant Joseph Amartey Quaye. Applicant stated that the contempt proceedings stem from suit number EI/S44/202HC/ and commenced by Joseph Amartey Quaye (suing as head of the Kofi Baah family of Obuakuse and for himself) vrs I. Marshwood Barnor 2. Rafiq Barnor 3. Prince for specified reliefs endorsed on the writ. The applicant instituted the action for a declaration of title to the land which is the subject matter of dispute with the Respondents. The Respondents had started construction activities on the disputed land and the Applicant sought an injunction order to restrain the Respondents from continuing with the construction

works. Even though the application for injunction was duly served on the Respondents they continued to undertake construction activities on the land the subject matter of the dispute. The Applicant could not move the application for injunction because the Respondents filed a motion to set aside the writ of summons and statement of claim. Subsequently this court dismissed the Respondent's motion and ordered the case to take its normal course. In addition the court cautioned the parties against undertaking any development on the land before the determination of the matter in court. At the hearing of the application for interlocutor injunction this court decided to adopt the earlier order of injunction made by the High Court Amasaman restraining the parties herein and their workmen, privies or assigns from undertaking any activities on the land in dispute. However the Respondent defied the orders of this court and employed the services of land guards and continued with the construction activities in total disregard of the orders of the court. By their willful conduct the Respondents seeks to change the nature of the land through their activities before the final determination of the dispute in clear disregard for the injunction orders and directives of the court. The conduct of the Respondents have brought the administration of justice and the judicial machinery into disrepute and they ought to be punished and placed in prison custody

An affidavit in opposition to the application for contempt was filed by the 2nd Defendant Rafiq Bannor. In his affidavit in opposition the 3rd defendant deposed that he was the one who commenced construction on the disputed land before the order of injunction was made by the Amasaman High Court and have since the making of the said order discontinued development on the disputed area till date. That the 1st and 3rd Respondents have no land under construction on the disputed area. That this court did not adopt the injunction order made by the Amasaman High Court but rather dismissed the injunction application filed by both parties on the ground that both applications were incompetent before the court since the order of injunction has already been determined and granted

by the Amasaman High Court to restrain both parties. According to the 2nd Defendant the structure in the photographs, exhibit D was his structure developed and roofed way before the Amasaman High Court made its order of injunction on 23rd January, 2023. That the pictures have been edited and postdated intentionally to make a case of falsehood. That it is rather the Applicant who is disregarding the authority of his court and continuing with the construction on the land as shown in exhibit NKA series

The court has taken into consideration all the processes filed by the parties, including the affidavits, exhibits and submission filed by Counsel for Applicant. It has also taken into consideration the law and authorities pertaining to the subject matter of contempt.

Merriam-Webster's Dictionary of Law defines contempt of court as follows:

"Wilful disobedience or open disrespect of the orders, authority, or dignity of a court or a Judge acting in a judicial capacity by disruptive language or conduct or by failure to obey the court's orders".

Contempt may be civil or criminal in nature. It may be contempt *in facia curiae* and it may be *ex facie curiae*.

In **RE EFFIDUASE STOOL AFFAIRS (NO.2); REPUBLIC v. ODURO NUMAPAU, PRESIDENT OF THE NATIONAL HOUSE OF CHIEFS & OTHERS; EX -PARTE AMEYAW II (NO.2)**, (1998-99) SCGLR 639, the Supreme Court noted as follows when it set out the distinction between the two main types of contempt known to the law that:

"Contempt of Court was constituted by an act or conduct that tended to bring the authority and administration of the law into disrespect or disregard or to interfere with, or prejudice parties, litigants or their witnesses in respect of pending proceedings.....Civil contempt are those quasi-contempt which consist in the failure to do something which the party is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court, while criminal contempt are acts done in disrespect of the court or its process, or which obstruct the administration of justice or tend to bring the

court into disrespect.”

The application before me is one in the nature of a civil contempt. Civil contempt consists in wilful disobedience to the orders, judgments decrees or directions of a court requiring a Respondent to do an act or refrain from doing an act. In civil contempt the order that is alleged to have been disobeyed should be clear. Indeed the ingredient that needs to be established in a civil contempt of this nature has been spelt out in the case of **REPUBLIC v COURT OF APPEAL; EX PARTE SITO [2001-2002] 1 GLR 319 @ 336-337** Adzoe JSC noted as follows:

“The type of contempt charged against the appellant involves wilful disobedience to the judgment or order, or other process of a court; it must import a demand to do or abstain from doing something. A refusal to comply with that demand of the court is what constitutes the offence of contempt which the courts consider as an obstruction to the fair administration of justice and also as an affront to the dignity of the court. The offence interferes with the administration of justice because it in effect denies a party his right to enjoy the benefits of the judgment or order; ... Some degree of fault or misconduct must be established against the contemnor to show that his disobedience was wilful. Indeed, three essential elements in the offence appear to be identified by the authorities, namely: (1) There must be a judgment or order requiring the contemnor to do or abstain from doing something. (2) It must be shown that the contemnor knows what precisely he is expected to do or abstain from doing. (3) It must be shown that he failed to comply with the terms of the judgment or order, and that his disobedience is wilful.

Starting from the standard of proof, there is no gainsaying in the fact that this is a quasi-criminal action and the standard of proof cast by law on the Applicant to prove his claim is one beyond reasonable doubt. In the case of **COMET PRODUCTS UK LTD v HAWKES PLASTICS LTD [1971] 1 ALLER 1141 @1143**, Lord Denning that:

“Although this is a civil contempt it partakes of the nature of a criminal charge. The defendant is liable to be punished for it. He may be sent to prison. The rules as to criminal

charges have always been applied to such a proceeding... it must be proved with the same degree of satisfaction as in the criminal charge"

See also **IN RE EFFIDUASE STOOL AFFAIRS** supra, wherein the Supreme Court noted on the standard as follows that:

"Since contempt of court is quasi criminal and the punishment for it might include a fine or imprisonment the standard of proof required was proof beyond reasonable doubt. An applicant must therefore first make out a prima facie case of contempt before the court could consider the defence put up by the respondents"

Likewise **REBULIC v BOAENG & ODRO; EXPARTE AGYENIM - BOATENG & ORS** [2009] SCGLR 154.

Section 13(1) of the Evidence Act, NRCD 323 states as follows:

'In any civil or criminal action the burden of persuasion as to the commission by a party of a crime which is directly in issue requires proof beyond a reasonable doubt'.

And there seems to be a further emphasis under section 22 of the Act which states that:

'in a criminal action, a presumption operates against the accused as to a fact which is essential to guilt only if the existence of the basic facts that give rise to the presumption are found or otherwise established beyond reasonable doubt...'

What is meant by reasonable doubt is simple that the court must be fully convinced and satisfied as far as the evidence is concerned that indeed the accused or indicted persons are guilty of the offence charged. As per Denning J (as he then was) in the case of **Miller v Minister of Pensions** [1947]2All ER371 at 373 on reasonable doubt

"it need not reach certainty, but it must carry a high degree of probability, proof beyond reasonable doubt does not mean proof beyond a shadow of doubt, the law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice"

Can it be said that the Applicant in this matter before this court has satisfied the test in this civil contempt that there was an order by the court which the Respondents have failed or refused to comply with the order and the non-compliance has been willful on her part? Respondents would only have a case to answer if only the Applicant succeed in establishing a prima facie case that the court will deem it fit to consider the defence of the Respondents.

Evaluation

Order 50 of the High Court (Civil Procedure) Rules 2004 (C.I.47). **Committal for contempt**

“1. (1) The power of the Court to punish for contempt of court may be exercised by an order of committal.

(2) Committal proceedings shall be commenced by an application to the Court.

(3) The application shall be supported by an affidavit stating inter alia the grounds of the application.

(4) Subject to subrule (5), the notice of motion, together with a copy of the affidavit in support of the application shall be served personally on the person sought to be committed. “

Even though the Applicant filed this application under order 50 R 1(2) of C.I. 47, this case per the facts falls under the principles of committal as articulated in the case of the **REPUBLIC VRS HIGH COURT (COMMERCIAL DIISION ACCRA), EX PARTE MILLICOM GHANA LIMITED & ORS; SUPERPHONE COMPANY LIMITED, INTERESTED PARTY (2009) SCGLR 41**, where the court had granted an injunction restraining the defendant from interfering with or disrupting or operating in the

plaintiff's territory or in any way that undermines the plaintiff's business. The plaintiff had brought contempt committal application against defendant for disobeying this order of injunction of the court.

Atuguba JSC (as he then was) summed up the position of the law as follows

“As the applicant chose enforcement by means of committal, the relevant provision is, particularly on the facts of this case, order 43 r 5(1) (b) (cc) and 7(1) and (2)....”

Order 43 Rule 5 of the High Court Civil Procedure Amendment Rules, 2004, CI 47

“5. Enforcement of judgment to do or abstain from doing an act

(1) Where

(a) ...

(b) A person disobeys a judgment or order requiring the person to abstain from doing an act, the judgment or order may, subject to these Rules be enforced by one or more of the following means,

(aa)...

(bb) ...or

(cc) an order of committal against that person or, where that person is a body corporate, against any director or other officer”

The Rule 7(1) and (2) provides:

“7. Service of copy of judgment before enforcement under rule 5

(1) In this rule references to an order shall be construed as including references to a judgment.

(2) Subject to Orders 21 rule 14 (2) and 22 rule 6 (3) and sub rule (6) of this rule, an order shall not be enforced under rule 5 unless

(a) A copy of the order has been served personally on the person required to do or abstain from doing the act in question; and

(b) In the case of an order requiring a person to do an act, the copy has been served before the expiration of the time within which the person was required to do the act.

(3) Subject as stated, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as provided in rule 5 sub rule (1) paragraph (bb) or (cc) unless

(a) a copy of the order has also been served personally on the officer against whose property leave is sought to issue a writ of sequestration or against whom an order of committal is sought; and

(b) In the case of an order requiring the body corporate to do an act, the copy has been served before the expiration of the time within which the body was required to do the act.

(4) There shall be indorsed on the copy of an order served under this rule a notice informing the person on whom the copy is served

(a) in the case of service under sub rule (2), that if the person neglects to obey the order within the time specified in the order, or, if the order is to abstain from doing an act, and the person disobeys the order, the person is liable to process of execution; and

(b) in the case of service under sub rule (3), that if the body corporate neglects to obey the order within the time specified or, if the order is to abstain from doing an act, and the body corporate disobeys the order, it is liable to process of execution.”

Therefore order 43, rules 5 and 7 of CI47 has a mandatory requirement for the service of penal notice when an order or judgment or decision of the court has been flouted.

In this instant case the Applicant is also alleging that the Respondent has disobeyed an order of injunction granted by the court restraining both parties, their agents relatives assigns etc. from dealing with the land in dispute until the final determination of the matter.

The Applicant in this case therefore has to satisfy the court that it has met the mandatory requirements of order 43, rules 5 and 7 of CI47. The Applicant was mandated to serve the order personally on the Respondent and to indorse on the order a notice informing the Respondent that if he disobeys the order she shall be liable to the process of execution. The combined effect of order 43 rules 5 and 7 of C.I. 47 is that for the order or judgment upon which the application for committal was brought to be enforced, the Respondent ought to have been served with copies of the order or judgment, indorsed with a penal notice. It is important to note that the endorsement of the penal notice is a necessary precondition for the enforcement of an order or judgment under order 43 rule 5 by way of committal. I have given thoughtful consideration to this application and the requirements that an applicant to a contempt application should satisfy. I have also given consideration of the provisions of order 43 rules 5 and 7 of the High Court (Civil Procedure) Rules 2004 (C.I.47).

The onus is on the Applicant to establish that in serving exhibit C, the order for interlocutory injunction of 23rd January, 2023 on the Respondent, he indorsed the penal notice on the said order before service on Respondent. I have examined the affidavit filed by the Applicant and nowhere does the Applicant give an indication that they indorsed the penal notice on the order before service on the Respondent. The failure by the Applicant to indorse the penal notice on the order which was served on the Respondent is a violation of a condition precedent.

What then is the legal effect of this non-compliance with these mandatory provisions under order 43 rules 5 (cc) of CI. 47.

BOYEFIO V. NTHC LTD. [1996-1997] SCGLR531 holding 5 that *“the law was clear that where an enactment has prescribed a special procedure by which something was to be done, it was that procedure that has to be followed...”*

Also in **HEWARD –MILLS v HEWARD-MILLS [1992-1993] GBR, 239, C.A.** It was held that where a statutory condition ought to be complied with before a court could have jurisdiction to make an order, failure to comply with such a condition would leave the Court with no discretion to make an order or orders in the matter.

The Supreme court in **MUNJI (SUBSTITUTED BY MUMUNI v IDDRISU & ORS) [2013-20140 1 SCGLR 429**, held per holding “ (1) that the Court of Appeal has rightly concluded that the Plaintiff-applicant’s application for extension of time within which to appeal from the decision of the High Court, offended and was not in conformity with rule 9(4) of the Court of Appeal Rules, 1997 (CI. 19). That application therefore has no legal basis and did not constitute proper and legal proceeding before the High Court Judge as required by Order 1 rule (1) of the High Court (Civil Procedure) Rules, 2004 (CI. 47) or its predecessor order 2 rule 1 of the High Court (Civil Procedure) Rules, 1954 (LN 140A). The High Court Judge therefore had no jurisdiction to make the order extending time within which to appeal. The order is therefore null and void”

Atuguba JSC in **NETWORK COMPUTER SYSTEMS LIMITED V INTELSTAT GLOBAL SALES & MARKETING LIMITED [2012] 1SCGLR 218**, stated that:

“it has been persistently held that a judgment or order obtained without jurisdiction can be set aside at any time (though an utter abuse of the process is another matter. The celebrated case of MOSI v BEGYINA [1963] 1GLR 637 still reigns on this issue”

In this instant case, the failure of the Applicants to serve the application personally on the Respondent as well to endorse constitutes a violation of Order 43 rules 5 (cc) of CI.

47. This rule being mandatory precondition, their non-compliance had the effect of depriving the Court of jurisdiction in the matter

Application is hereby struck out as incompetent with cost of GHC1000 awarded against the Applicants in favour of the Respondent.

JUSTICE HARRIET JANE AKWELEY QUAYE (MRS)

JUSTICE OF THE HIGH COURT