

Lwanga v Lubwama & Another
(Miscellaneous Cause 47 of 2024)
[2024] UGHCLD 194 (23 July 2024)
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- ii) The caveat lodged by the 1st Respondent on the Applicant's land comprised in Busiro Block 313 Plot 950 land at Kiumu Wakiso district be unconditionally removed.
- iii) The 2nd Respondent unconditionally removes the caveat lodged on the Applicant's land comprised in Busiro Block 313 Plot 950 land at Kiumu Wakiso district.
- iv) The 1st respondent be ordered to pay general damages of Ug shs 50,000,000 (Uganda shillings fifty million only) for lodging a caveat onto the applicant's land comprised in Busiro Block 313 Plot 950 at Kiumu in Wakiso district without reasonable cause.
- v) Costs of this application be provided for.

Background

2. The Applicant purchased the subject land from the 1st Respondent and was accordingly registered onto the certificate of title on the 16th day of July 1998. However, the 1st Respondent in 2019 lodged a caveat onto the suit land claiming that he had only sold ten (10) acres to the Applicant yet he transferred 11.5 acres he thus lodged a caveat which the applicant seeks to set aside.

Applicant's evidence

- 3. The grounds on which the application is based are contained in the Notice of Motion and affidavit deposed by **LWANGA STEPHEN GOBERO**, the Applicant and briefly are:
- i) That the applicant is the registered proprietor of land comprised in Busiro Block 313 Plot 950 at Kiumu in Wakiso district measuring 4.690 hectares having purchased the same from the 1st Respondent Lubwama Peter Jarius Nvule Musoke in 1998.
- ii) That the 1st Respondent undertook to transfer the land title in my name and on the 16th day of July 1998 under instrument number KLA197293 my name was entered onto the register as proprietor and I have enjoyed quiet possession without 3rd party claims or interferences whatsoever.
- iii) That I recently discovered that in 2019, the 1st respondent lodged a caveat on my entire land claiming ownership of a portion of my land measuring approximately 1.5 acres. The 1st respondent has no interest whatsoever in the said piece of land as the same was fully paid for and the respondent himself transferred the entire land into my names in 1998.
- iv) That since 2019 when the 1st Respondent lodged the said caveat, he has never taken any step legally to prove this claim and I have

been informed by my lawyers of Ssemambo & Ssemambo Advocates which information I verily believe to be true that a caveat is a temporary protection for a caveator and it cannot subsist on my title permanently where the 1st respondent has failed to undertake any legal action.

- v) That the 1st Respondent had an obligation to commence legal action as soon as he had lodged the caveat if he indeed had any claim against me which he did not do and I have further been advised by my lawyers that the 1st respondent cannot sustain any claim against me challenging my proprietorship of 25years.
- vi) That the indefinite existence of the caveat lodged by the 1st respondent on my entire land for four years has fettered my rights as the registered proprietor to deal with my property in whatever way I desire and the respondents do not have any just and reasonable cause to show why the caveat should not lapse.
- vii) That I have been greatly inconvenienced and affected by the 1st respondent's action for which I pray that this Honourable Court be pleased to order the 1st respondent to pay general damages of Ug shs 50,000,000 and it is in the interest of justice that this application is allowed.

1st Respondent's Evidence

- 4. The 1st Respondent opposed this application by filing an affidavit in reply deposed by a one Ronald Kiyimba Luganda which briefly states as follows;
- i) That the facts surrounding the dispute between the applicant and the 1st Respondent who approached me seeking help to redeem his 1.5 acres from the Applicant's land comprised in Busiro Block 313 Plot 950 land at Kiumu Wakiso district in 2019.
- ii) That I was informed by the 1st respondent which information I verily believe to be true that the Applicant approached him with the view of purchasing ten (10) acres off his land formerly comprised in Busiro Block 313 Plot 950 land at Kiumu Wakiso district, an agreement was made on 24/2/1998 in respect of the purchase of ten (10) acres where the applicant made a part payment of Ug shs 7,000,000 leaving an outstanding balance of Ug shs 8,000,000.
- iii) The 1st respondent further informed me that he left Uganda for United States before the transaction could be concluded but left all instruments of transfer with a surveyor whom he sourced together with the Applicant. The Applicant did not pay the outstanding balance of Ug shs 8,000,000 but transferred the subject land into

his names including the extra 1.5 acres contrary to what was agreed.

- iv) That the 1st Respondent solicited the services of M/s Kityo & Co. Advocates where the 1st Respondent was advised that he could not easily recover the outstanding balance of the purchase price since his claim was time barred but he could claim the additional 1.5 acres since it was not purchased by the applicant.

- v) That on 29th March 2019, the 1st Respondent's Advocate wrote to the Applicant to return the 1.5 acres that he did not pay for but the applicant responded refuting the claims alleging that he paid all the money amounting to Ug shs 17,500,000 for 11.5 acres. The applicant did not provide any proof of payment of the outstanding balance or amendment to the agreement for purchase of the extra 1.5 acres.
- vi) That I advised the 1st Respondent to lodge a caveat on the applicant's land then comprised in Busiro Block 313 Plot 950 which was lodged but I have since discovered that prior to, or soon after the institution of this suit, the applicant commenced parallel procedures for removal of the 1st Respondent's caveat on land comprised in Busiro Block 313 Plot 950 land at Kiumu Wakiso

district on about the 1st day of March 2024 with the office of the 2nd Respondent.

- vii) That I have also discovered that the 1st Respondent's caveat has since been lapsed upon application of the Applicant to the 2nd Respondent and the land has since been subdivided pursuant to a mutation form lodged at the land office on the 17th day of March 2024 into plots ranging between 10919 to 10992.
- viii) That in further proof that the subject land comprised in Busiro Block 313 Plot 950 is no longer in existence and as such is no longer affected by the 1st Respondent's caveat, the Applicant's application is over taken by events and as such any Court orders issued relating to the removal of the caveat shall be in vain.
- ix) That I have been informed by the 1st Respondent's lawyers of M/s Kityo & Co. Advocates which information I verily believe to be true that the conduct of the applicant commencing parallel procedures of removal of the 1st Respondent's caveat amounts to an illegality, an abuse of court process and the same ought not to be condoned by this Honourable Court.

In rejoinder

- 5. The Applicant filed an affidavit in rejoinder which briefly states as follows;
- i) That the affidavit in reply is incompetent and incurably defective and shall pray that it is struck out with costs on the following preliminary objections; that the affidavit in reply was deposed by a person who has no written authority from the 1st Respondent and paragraphs 3,4,5,6,7,8,10,11,12,13 & 19 of the affidavit in reply are tainted with hearsay evidence not within the deponent's knowledge.
- ii) That this application is not intended to determine proprietorship but only concerned with the cause as to why the caveat lodged by the 1st respondent should not be removed which he has failed to prove before this Honourable Court.

Representation;

6. The Applicant is represented by Mr. Lukwago David & Wasswa Kassim Sensalo of M/s Ssemambo & Ssemambo Advocates and the 1st Respondent is represented by Mr. Sekonge Gilbert of M/s Kityo & Co. Advocates. The applicant and the 1st respondent filed their respective affidavits and submissions which I have considered in the determination of this application.

Preliminary Objections

7. The Applicant raised two preliminary objections which I shall address below:

i) The 1st Respondent's affidavit in reply was deposed by a person who has no written authority from the 1st Respondent as required under the law which offends Order 3 rules 1 & 2 of the Civil Procedure Rules and the same should be struck out with costs.

- 8. Counsel for the applicant submitted that the affidavit deposed by Ronald Kiyimba Luganda offends the provisions of Order 3 rules 1 & 2 and relying on the authority of MHK Engineering services (U) ltd v Madowell Limited MA No. 825 of 2018 where it was held that the provisions of Order 3 rule 2 of the Civil Procedure Rules shows that where the deponent of an affidavit in reply is neither in possession of a power of attorney nor an agent for a party not resident within the local limits of the jurisdiction of the Court where the appearance was necessary, they cannot be categorized as a recognized agent.
- 9. In resolution, this Court shall rely on the authority of **Jethro Jones Opolot v Attorney General MA No. 687 of 2021 [2023]** where Hon. Justice Ssekaana Musa citing the authority of **Namutebi Matilda v Ssemanda Simon & 2 others Misc. Application No. 430 of 2021,**

Hon. Justice Stephen Mubiru, at great length discussed the law on affidavits and stated as follows*;"One golden thread is always to be seen; that what is required in affidavits is the knowledge or belief of the deponent, rather that authorization by a party to the litigation. Their content is dictated by substantive rules of evidence and their form by rules of procedure. I have considered the available decisions positing the principle that a person is not to swear an affidavit in a representative capacity unless he/she is an advocate or holder of power of attorney or duly authorized"*

- 10. An affidavit being evidence, it is restricted to matters within the deponent's knowledge and belief. The affidavit in question deposed by Ronald Kiyimba Luganda, was not sworn in a representative capacity "on behalf of the 1st Respondent" to require the deponent to obtain written authority or power of attorney in order to depone the affidavit in reply.
- 11. The basis of this preliminary objection is rather a misconception thus the same is hereby overruled.

- ii) The contents of paragraphs 3,4,5,6,7,7,10,11,12,13 and 19 of the 1st Respondent's affidavit in reply are tainted with hearsay evidence and are not within the deponent's knowledge which

offends Order 19 rule 3 (1) of the Civil procedure Rule SI 71-1 and the same should be struck out with costs.

- 12. Counsel for the Applicant submitted that hearsay evidence is inadmissible except in certain circumstances and Order 19 rule 3(1) of the Civil Procedure Rules provides that affidavits shall be confined to such facts as the deponent is able to his/her own knowledge to prove, except on interlocutory applications, on which statements of his/her belief may be admitted provided that the grounds thereof are stated.
- 13. Counsel for the Applicant relied on the authority of **Otime John v Uganda Civil Aviation Authority & 3 others Misc. Cause No. 301 of 2021** where Hon. Justice Musa Ssekaana observed as follows; "The instant application is not an interlocutory application and the applicant cannot depose to information that is not within his own knowledge, It therefore offended Order 19 rule 3.
- 14. **Order 19 rule 3 (1) of the Civil Procedure Rules** provides that affidavits shall be confined to such facts as the deponent is able of his or her own knowledge to prove, except on interlocutory applications, on which statements of his/her belief may be admitted, provided that the grounds thereof are stated.
- 15. The instant application being a miscellaneous cause stands independent and neither is it interlocutory in nature so as to constitute

facts outside the knowledge of the deponent, The deponent in his affidavit keeps stating "I was informed" which is a clear illustration of the fact that all the facts he alludes to are not within his knowledge contrary to the provisions of Order 19 rule 3 (1) of the Civil Procedure rules.

16. Therefore, this preliminary objection is hereby sustained.

17. Therefore, I will proceed to determine the application on its own merit.

i) Whether the Respondents have shown any just cause why the caveat should not be removed.

- 10. The Applicant contends to have purchased all the suit land measuring 11.5 acres from the 1st Respondent and accordingly transferred the certificate of title into his names on the 16th day of July 1998. However, the 1st Respondent claims that the Applicant had only purchased 10 acres thus he lodged a caveat on the suit land claiming that the Applicant illegally added to his land an extra 1.5 acres which was the basis of his claim.
- 11. The Applicant contends that the 1st Respondent lodged his caveat in 2019 but he has since taken no step to have his dispute resolved.

12. *Section 140 (1) of the Registration of Titles Act provides; Notice of caveat to be given; lapse of caveat etc.*

- (1)*Upon the receipt of such caveat the commissioner shall notify the receipt to the person against whose application to be registered as proprietor or, as the case may be, to the proprietor against whose title to deal with the estate or interest the caveat has been lodged; and that applicant or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may, if he or she thinks fit, summon the caveator to attend before the Court to show cause why the caveat should not be removed; and the Court may, upon proof that the caveator has been summoned, make such order in the premises either exparte or otherwise, and as to costs as to it seems fit. (emphasis mine)*
- 13. According paragraph 15 and 16 of the Affidavit in reply, the Applicant made an application dated 10th February 2012 to the office of the 2nd Respondent to remove the 1st Respondent's caveat and on 4th March 2024 the notice to caveator was issued.
- 14. Suffice to note that the caveat in question has since been removed as per the search report dated 6th June 2024 and the Applicant has since gone ahead to subdivide the subject land into different plots as per the mutation form attached onto the affidavit in reply.
- 13 15. As rightly cited by Counsel for the Applicant the authority of **Rutungu Properties limited v Linda Harriet Carrington & another**

Civil Appeal No. 61 of 2010 where Court cited the authority of **Boynes Versus Gather (1969) EA 383** where it was held that the primary objective of a caveat is to give the caveator temporary protection. It is not the intention of the law that the caveator should relax and sit back for eternity without taking steps to handle the controversy, so as to determine the thoughts of the parties affected by its existence and the same position was expounded by Court in **Nakabuye Agnes v Martin Strokes & Anor Misc. Cause No. 38 of 2021**.

- 16. Whereas it is true that the Applicant did not take any steps to have his disputes resolved since 2019 when he lodged the caveat. However, the said caveat, subject of this application is no longer registered on the land as the same was long removed by the office of the 2nd respondent thus rendering this application a mere moot.
- 17. It is trite law that Court orders should not be issued in vain as they are intended to serve the purpose for which they are issued.
- 18. Having found this whole application to be a moot, the Applicant is not entitled to any of the remedies sought thus this application is hereby dismissed with no order as to costs.

I SO ORDER.

NALUZZE AISHA BATALA

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JUDGE

23/07/2024

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