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THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

(CORAM: Egonda-Ntende, Musoke & Obura, JJA)

CIVIL APPEAL NO. 61 OF 2010

(Arising from the decision of the High Court of Uganda at Kampala in High Court

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Miscellaneous Cause No. 74 of 2009 before His Lordship Joseph Murangira, delivered on 05.02.2010)

RUTUNGU PROPERTIES LIMITED:.....APPELLANT

VERSUS

1. LINDA HARRIET CARRINGTON

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2. HARRIET KABAGENYI:.....RESPONDENT

JUDGMENT OF HELLEN OBURA, JA

This is an appeal against a ruling of the High Court (J Murangira, J.) by which the appellant's application was dismissed.

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The background facts to this appeal are that on 19th February 2007 the appellant bought from the previous registered owner, Rwest Contractors Ltd, land at Sekiunga comprised in Mailo Register Block 395 Plot 1391 and was on 9th May 2008 registered as proprietor of the land under instrument No. 374738.

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On 10th March 2008 the respondents also purchased the same land from Rwest Contractors Ltd, paid a deposit and subsequently lodged a caveat to protect their interest which was registered by the Commissioner Land Registration on 20th November 2008 vide Instrument No. KLA 397363.

5 The appellant then filed in the High Court of Uganda at Kampala an application against the respondents seeking for orders that the respondents be jointly and severally summoned to show cause why that caveat should not be removed. The appellant also sought for an order that the Caveat be unconditionally removed.

10 On 5th February 2010 the High Court heard the application and dismissed it on grounds that the respondents raised triable issues in their affidavit in reply which, in the court's view, could not be resolved in the application but required an ordinary plaint. The trial Court also found that the respondents had properly lodged the caveat having had a caveatable interest and as such the trial court could not revoke that caveat.

15 The appellant being dissatisfied with the decision of the trial Judge lodged the instant appeal on the following three grounds;

- 20 1. *The Learned trial Judge erred in law when he failed to apply the correct principles in determining whether the respondents' caveat ought to be removed from the Register Book in respect of the land comprised in Mailo Register Block 395 Plot 1391 at Sekiunga.*
2. *The Learned trial Judge erred in law when he failed to properly evaluate the evidence on record upon which he based the exercise of his discretion in a manifestly wrong manner to maintain the Caveat on the Register Book.*
- 25 3. *The learned trial Judge erred in both law and fact when he held that there are triable issues when there was no evidence on record to show that the appellant's title as registered proprietor of the land was being impeached for fraud by the previous proprietor or the respondent.*

5 At the hearing of this appeal Mr. Nkurunziza Peter appeared for the appellant while Mr. Magezi John appeared for the respondents. Both counsel, with the leave of court, filed written submissions.

The appellant's counsel argued ground 1 separately then grounds 2 and 3 together.

10 In support of the first ground of appeal, counsel for the appellant submitted that the learned trial Judge did not consider whether or not the respondents had commenced proceedings for cancellation of the appellant's title or which of the parties had acquired equitable interests in the suit land first. He faulted the learned trial Judge for failing to follow and apply the correct principles concerning removal of caveats. He prayed that ground one be upheld by this Court.

15 On grounds 2 and 3 counsel for the appellant submitted that the respondents' caveat which fettered the appellant's right as registered proprietor to deal with the land ought to have been removed by the learned trial Judge upon proper evaluation of the facts availed to him, with due regard to the balance of interest of the parties particularly as the respondents had repudiated the sale and are seeking refund of the deposit yet no action had been commenced for recovery of the land in any court. The appellant's counsel contended that the learned trial
20 Judge erred in law and in fact by not properly evaluating the evidence before him. Further, that the learned trial Judge exercised his discretion in a manifestly wrong manner. He prayed that the court finds in the appellant's favour on grounds 2 and 3.

In reply to ground 1 of appeal, the respondents' counsel supported the decision of the trial Judge and contended that the learned trial Judge was correct in his application of the
25 principles of removal of caveats. He submitted that the respondents having confirmed the particulars of the suit land, its ownership and unencumbered nature, paid Rwest Contractors Ltd a deposit of Ug. Shs. 45,000,000/= and to secure that interest they lodged a caveat on 20th November 2008 which was justified. Further, that the respondents in their affidavit in reply to the application had also claimed that the appellant had acquired the suit land by fraud. The

5 respondents' counsel agreed with the learned trial Judge that such an allegation required a fully-fledged trial to disprove or establish fraud for which reason the trial Judge was correct in holding that there are triable issues that could only be dealt with in a civil suit. It was further submitted for the respondent that the trial Judge was correct in holding that the caveat on the suit land should be maintained because the respondents carried out due diligence, a
10 prerequisite for all intending purchasers of real estate to exercise during such transactions, confirmed the unencumbered nature of the suit land and paid a deposit for it.

In reply to ground 2 it was submitted for the respondents that the trial Judge correctly evaluated the evidence on record in the form of a sale agreement and receipts for the deposit of Ug. Shs. 45,000,000/= which created an equitable interest that ought to be protected by a
15 caveat. Counsel argued that the respondents having lodged their caveat under section 139 (1) of the Registration of Titles Act, the court would not order the removal of a caveat under summary proceedings corresponding with section 140 of the RTA. It was also his contention that the delay cannot be visited upon the respondents who exercised patience as they gave the vendor time to secure the certificate of title and surrender it to the respondents for further
20 action. Counsel explained that from the time of the purchase to revocation of sale by the respondents, the duration exhibited good will from the respondents towards the vendor to perform its obligation under the sale agreement.

On ground 3 the respondents' counsel submitted that issues of fraud can only be addressed by conducting a proper hearing. The respondents' counsel also submitted that the
25 respondents' repudiated the sale agreement and evoked termination provisions accordingly and demanded a refund because there is no evidence that the respondents received the certificate of title or refund at all. Counsel prayed that this appeal be dismissed with costs and the caveat be maintained.

5 In his submissions in rejoinder on ground 1, the appellant's counsel submitted that the appellant was registered as proprietor before the respondents lodged their caveat and yet there is no evidence to show that the appellants' purchase of the land was rescinded. He argued that no inquiries were made by the respondents about the status of the appellant's purchase or where the certificate of title was or why it was not handed over to the respondents
10 by the vendor in accordance with their 10th March 2008 sale agreement.

On grounds 2 and 3 the appellant's counsel referred to the respondents' submissions that the respondents had repudiated the sale agreement, demanded for a refund because they had not received the certificate of title or refund of their money and argued that the respondents' interest in the land, if any, had ceased before their caveat was lodged and so they had no
15 caveatable interest.

This being a first appeal, this Court is obliged to reappraise all the evidence on record, draw inferences of fact and come to its own conclusions. See: **Rule 30(1) of the Judicature (Court of Appeal Rules) Direction S.I 13-10; Fr. Narcensio Bemugisa & Ors vs Eric Tibebaaga [2004] UGSC 18**. Accordingly I have carefully studied the court record and considered the
20 submissions of both counsel. I shall consider the grounds in the order set out by counsel for the appellant.

On ground 1, the appellant's complaint is that the trial Judge failed to apply the correct principles in determining whether to remove the caveat or not. It is imperative to reproduce the decision of the trial Judge at page 62 paragraph 3 line 14-34 where he stated as follows:

25 *The respondents through their affidavit sworn on 19th October 2009 in reply by Enoth Mugabi and Lucky Karungi opposed the application I have read the affidavits filed on record by the respondents. These affidavits raise trial issues which, in my view, cannot be resolved in such an application before this Court. Again, I have perused the affidavit in rejoinder sworn by Ben Kavuya replying*

5 to the affidavits in support of the respondents' case, and his said affidavits, too, raise triable issues whereby there is need to adduce evidence, which evidence has to be subjected to cross examination by the opposite party.

10 The facts of the cases for both parties and the submissions of both parties clearly show that both parties claim interests in the suit land. I am of the considered view that such interest in the suit land cannot be determined in such application like this one. The issues are complex and they have to be settled when either party filed a suit in Court by way of a plaint. The issues raised in their pleadings are for a fully fledged trial and not for matters to be decided by way of an application supported by affidavit evidence and the respondents
15 opposing the application by filing affidavits.

It is important that I restate the purpose of a caveat based on a number of decisions so as to resolve the issue whether the learned trial Judge failed to apply the correct principles in determining whether to remove the caveat or not. In the case of **BOYNES VERSUS GATHER (1969) EA 385** it was held;

20 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.

25 In the persuasive Court of Appeal of Malaysia decision in **Lim Ah Moi v Ams Periasamy Suppiah Pillay Civil Appeal No. A-2-641-1995** it was held;

"It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far reaching effect,

5 *it is vital that claims made by a caveator are enforced by action without undue delay.*”

In **Eng Mee Young and Others v Letchumanan s/o Velayutham [1980] A.C 331** the Privy Council held as follows:

10 *“The caveat under the Torrens systems has often been likened to a statutory injunction of an interlocutory nature restraining the caveatee from dealing with land pending the determination by the court of the caveator’s claim to title over the land, in an ordinary action brought by the caveator against the caveatee for that purpose. Their Lordships accept this as an apt analogy with its collar that caveats are available, in*
15 *appropriate cases, for the interim protection of rights to title to land or registrable interests in land that are alleged by the Caveator but not yet proved...in their Lordships view a distinction must be drawn between cases where the applicant is the registered proprietor of the land (i.e caveatee) and cases where the applicant is some other person who*
20 *claims an interest in it. In the former case the caveatee can rely upon his registered title as prima facie evidence of his unfettered right to deal with the land as he pleases; it is for the caveator to satisfy court that there are sufficient grounds in fact and law for continuing in force a caveat which prevents him from doing so ”*

25 In the above case Lord Diplock held;

“Once the caveatee has met the first requirement of satisfying the Court that the claim on which his caveat is based does raise serious questions to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the

5 *caveat in existence until proceedings brought and prosecuted timeously*
by the caveator, for specific performance of the contract of sale which he
alleged had been tried. An illustration of the application of this principle is
to be found in the case of *Teo Ai Choo v Leong Sze Hian* [1982]2 MLJ 12
where *Sinnathuray J*, directed the removal of a caveat because of a delay
10 of eleven months during which period no action had been filed. I
emphasise that delay was the sole reason for the removal of caveat in
that case.

Where a caveat ought to remain or ought to be removed involves the
exercise of discretion by the Judge hearing an application under S. 327
15 of the Code. Particular attention should be paid to the words "may make
such order on the application as it may think just" that appear in the
section. These words make it clear that a Court hearing an application to
remove a caveat is very much concerned with the justice of the case. The
process involves balancing of competing considerations and an
20 evaluation of the evidence and, the facts of each particular case until the
balance conclusively shifts in one direction or the other.

It is clear from the above authorities that a caveat is similar to an interlocutory injunction as
it only gives temporary protection of interest as the caveator is required to bring an ordinary
action without undue delay to determine the caveator's rights as against other rights or
25 competing interests and to obtain a permanent remedy in appropriate cases.

In the instant case, the caveatee is the registered proprietor and therefore all he has to prove
is that he holds the registered title to the suit land as this acts as prima facie evidence of his
unfettered right to deal with the land as he may please.

On the other hand the respondents as caveator must prove the existence of the following:

- 5 1. The caveator has sufficient grounds to maintain the caveat.
2. The caveator has brought an ordinary action timeously against the caveatee.
3. The balance of convenience lies in maintaining the caveat rather than its removal.

In his affidavit in support of the application, at page 7 of the record of appeal, the appellant's managing director deposed in paragraph 2 that the appellant is the registered proprietor of the land comprised in Busiro Block 395 Plot 1391 land at Sekiunga and a copy of the certificate of title was attached to that effect. In paragraph 7 of the affidavit in support of the application, it was averred that the appellant's interest is to sell and dispose of its land. On page 25 of the record of appeal, under paragraph 12 of the affidavit in reply the respondents stated that they were aware that the land in question had been transferred to the appellant and their only concern was that the transfer was illegal and fraudulent.

It is my view that the appellant by the above evidence had demonstrated prima facie evidence of its unfettered right to deal with the land as the appellant company pleased. Therefore the duty shifted to the caveator/respondents to show sufficient grounds to maintain the caveat.

Concerning sufficient grounds, the respondents in their affidavit in reply on page 25 of the record stated the steps they took before purchasing the land from Rwest Contractors Ltd. The gist of paragraphs 2, 3 and 4 of the affidavit in reply is that the respondents carried out necessary inquiries in the land registry, confirmed ownership of the land in question, found the land unencumbered and went ahead to purchase the same from Rwest Contractors Ltd, paid a deposit on the purchase price and subsequently lodged a caveat on the land to protect their interest. Although the respondents contended in paragraph 8 of the affidavit in reply that the appellant's purchase of the property was not supported by a signed deed or memorandum, on page 28 of the record of appeal under paragraph 15 of the affidavit in rejoinder, the appellant confirmed purchasing the land in question on 19th February 2007

5 and payment of Ugx. 100,000,000/= to Rwest Contractors Ltd as per the sale agreement that was annexed to the affidavit in rejoinder. The allegations of the respondents are not borne out by the evidence.

In addition to showing sufficient grounds, the respondents are obliged to show that as caveator, they had brought an ordinary action timeously against the caveatee. From the
10 authorities already mentioned a caveat being akin to a statutory injunction granting temporary relief, should be followed by ordinary action under which the caveator's interests can be determined so as to give them permanent relief where it is merited and such actions are instituted by the caveator. On pages 28 and 29 of the record of appeal, under paragraph 6, the appellant stated that Rwest Contractors Ltd did not deny selling the land in question
15 to the appellant. The respondents had not instituted a suit against the appellants for cancellation of the transfer and recovery of the land on the basis of the alleged fraud or any illegal act.

It is not disputed that the respondents have not instituted any action to determine the interests of both parties following their lodging of a caveat on 20th November 2008. From
20 20th November 2008 up to 5th February 2010 when the decision in the trial court was rendered, the respondents who were under a duty to file an action in which their interest as against those of the appellant would be determined and the alleged fraud or illegality would also be investigated did not do so. I find that there was a delay of 15 months from the date of registration of the caveat until determination of the application in the trial court.

25 I am not persuaded by the argument of the respondent's counsel that there was no unreasonable delay or that the delay cannot be visited on the respondent because they exercised patience as they waited for the vendor to secure the certificate of title. The respondents have offered no satisfactory explanation for their failure to institute any court action to prove their interest. I believe that even as the respondents exercised patience with

5 the vendor they had an obligation to go ahead and institute a court action soon after they lodged the caveat which was meant to protect their interest for only a limited time.

In **Teo Ai Choo v Leong Sze Hian (supra)** a delay of eleven months during which period no action had been filed entitled the court to order removal of a caveat. In this case since the respondents have not filed any action to determine their interest, I find that they have conducted
10 themselves in a dilatory manner and such conduct must be discouraged as it breeds abuse of the caveat scheme.

On page 8 of the record of appeal, under paragraph 12 of the affidavit in support of the application, the appellant referred to Clause 9 of the sale agreement between the respondents' and Rwest Contractors Ltd in which the respondents agreed to a refund of
15 consideration in the event of third party claims. To that end, there is a letter on page 20 of the record in which the respondents through their lawyer sought a refund of their money arising from what they termed a failed contract. It should be noted that while the appellant was registered as proprietor of the suit land on 9th May 2008, the respondents' caveat was lodged subsequent to that on 20th November 2008. Since the respondents had already sought for a
20 refund they had shown disinterest in pursuing the equitable interest in the land and this perhaps explains their failure to file any ordinary action to recover the land. As such the trial court was bound to balance the interests of the two parties to find out whether there was need to maintain the caveat.

Had the learned trial court considered the interest of the two parties, it would have found that
25 the delay or failure/refusal of the respondents to file an action to determine their interest on the land coupled with the demand for a refund of their monies, were clear evidence that the respondents had no interest in the suit land and as such the continuance of their caveat on it was not justified.

5 As far as the balance of convenience is concerned, the facts of this case show that the respondents had opted to rescind the agreement and seek for a refund of their money while the appellant as registered proprietor intended to dispose of the land in question by sale. On page 28 of the record, under paragraph 4, it was stated that the appellant is in real estate business whereby it buys and sells land. Failure to sell the suit land since 2008 to date would
10 cause hardship to any real estate business unlike the respondents who had opted to obtain a refund of their money from the vendor and according to the submissions of their counsel had revoked the sale. I therefore find that the balance of convenience favoured the removal of the caveat.

In conclusion of ground 1 of the appeal, I find that the learned trial Judge erred when he
15 failed to apply the correct principles in determining whether the respondents' caveat ought to be removed from the Register Book in respect of the land comprised in Mailo Register Block 395 Plot 1391 at Sekiunga. For that reason ground 1 succeeds.

On ground 2 and 3 it is my view that these grounds are partly traversed in ground 1. In a nutshell, the appellant is accusing the respondents of simply lodging a caveat and deciding
20 to sit on their laurels in the hope that their rights are forever protected. It is trite law that a party that has interests in land must seek to safeguard those interests. One way of protecting that interest is indeed by lodging a caveat under **Section 139 (1) of the Registration of Titles Act Cap. 230** which provides as follows:

25 *"Any beneficiary or other person claiming an estate or interest in land under the operation of this Act or in any lease or mortgage under any unregistered instrument or by devolution in law or otherwise may lodge a caveat with the registrar in the form in the Fifteenth schedule to this Act or as near to that as circumstances permit, forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until*

5 *after notice of the intended registration or dealing is given to the caveator, or unless the instrument is expressed to be subject to the claim of the caveator as is required in the caveat, or unless the caveator consents in writing to the registration.”*

10 As already discussed in ground 1, a caveat is not meant to last forever. It is settled that a caveator is duty bound to bring an action to enforce his or her claim without undue delay. This was not done in the instant case. The reason is discernable as it is clear from the submissions by the respondents' counsel that the respondents had repudiated the sale agreement and evoked the termination provisions accordingly and demanded a refund of their money. This is a clear indication that the respondents' interest had shifted from the land to their money and as such, by the time they lodged the caveat they had no intent to pursue legal action to 15 recover the land but rather to recover their money. This evidence was on the court record for the trial Judge to evaluate and had he properly evaluated it, he would have found that the respondents had no interest in the suit land to be protected by a caveat against that of the appellant. Grounds 2 and 3 therefore succeed.

20 In the result, all the grounds of appeal having succeeded, I would allow this appeal with costs here and below. I would order the Commissioner for Land Registration/ Registrar of Titles to immediately cancel the respondents' caveat registered under Instrument No. KLA 397363.

Dated at Kampala this.....21st.....day ofNov.....2019.

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Hellen Obura

JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA
IN THE COURT OF APPEAL OF UGANDA AT KAMPALA
(Coram: Egonda-Ntende, Musoke and Obura, JJA)
CIVIL APPEAL NO. 61 OF 2010
BETWEEN

RUTUNGU PROPERTIES LIMITED:..... APPELLANT

AND

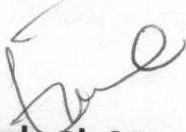
1. LINDA HARRIET CARRINGTON
2. HARRIET KABAGENYI:..... RESPONDENT

JUDGMENT OF ELIZABETH MUSOKE, JA

I have had the benefit of reading in draft the judgment of my learned sister, Hellen Obura, JA. I concur with the reasoning and conclusions reached therein.

I, too, agree that the appeal should be allowed with costs in this Court and the Court below.

Dated at Kampala this 21st day of Nov,2019


Elizabeth Musoke
JUSTICE OF APPEAL

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

[Coram: Egonda-Ntende, Musoke & Obura, JJA]

CIVIL APPEAL NO. 61 OF 2010

(Arising from High Court Miscellaneous Cause No 74 of 2009)

BETWEEN

RUTUNGU PROPERTIES LIMITED:.....APPELLANT

AND

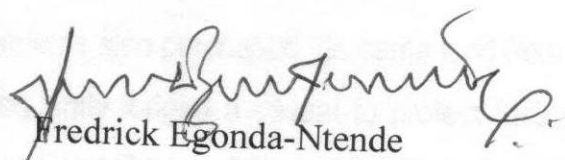
1. LINDA HARRIET CARRINGTON
2. HARRIET KABAGENYI:.....RESPONDENTS

*(Arising from the decision of the High Court of Uganda at Kampala
(Murangira, J.,) dated 05th August 2010)*

Judgment of Fredrick Egonda-Ntende, JA

1. I have had the benefit of reading in draft the judgment of my sister, Obura, JA. I agree with it and having nothing useful to add.
2. As Musoke, JA., agrees this appeal is allowed with the orders proposed by Obura, JA.

Dated, signed, and delivered at Kampala this 21st day of Nov. 2019


Fredrick Egonda-Ntende
Justice of Appeal