

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS CAUSE NO. 82 OF 2011

JULIET NABAGALA

(Executrix of the estate of the late Scholastic Nanteza).....APPLICANT

VERSUS

TEREZA MBIRO.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under sections 140(2) and 168 of the Registration of Titles Act (RTA), section 98 of the Civil Procedure Act (CPA), and Order 52 rules 1 & 3 of the Civil Procedure Rules (CPR) for the following orders:-

- 1. That a caveat lodged by the Respondent is removed and the Registrar of Titles be notified accordingly.***
- 2. The costs of this application be provided for.***

The grounds of the application are contained in the affidavit of **Juliet Nabagala** the applicant, but briefly, are that:-

- i) The caveator has no caveatable interest in the land.***
- ii) The caveat was overtaken by events in so far as it was lodged after the land had already been transferred into the names of Scholastica Nanteza.***
- iii) It is up to the respondents to show cause why the caveat should not be removed.***

iv) It is in the interests of justice that the caveat is removed and the applicant's application.

The application was opposed by the respondent who filed an affidavit in reply.

When the application came up for hearing, Counsel Mafabi Godfrey for the applicant informed court that the respondent's affidavit in reply, which they had just received, raised issues which require an affidavit in rejoinder. He prayed court to avail him time to reply and also prayed court to order that they file written submissions. This court granted his prayers and set time schedules within which the applicant was to file an affidavit in rejoinder and both Counsel to file written submissions. The applicant has however, to date, never filed any affidavit in rejoinder, neither has her Counsel ever filed written submissions on the application. Counsel for the respondent consequently, by letter dated 27th February 2012 addressed to the Registrar of this court, requested that the application be determined under Order 17 rule 4 of the Civil Procedure Rules (CPR).

Order 17 rule 4 of the CPR provides as follows:-

“Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”

It is on the basis of the foregoing legal provision that I will proceed to decide this matter despite the fact that the applicant never filed her written submissions as requested by court.

The applicant's evidence, as can be gathered from her affidavit in support of the application and its annexures, is that she is the executrix of the estate of the late Scholastic Nanteza who is the registered proprietor of land comprised in LRV 3089 Folio 23 Kyaggwe Block 193 Plot 773 (annexture **B**). She avers that the respondent lodged a caveat on the said leasehold title on 20th February 2007 under instrument no. 337070. She avers that the respondent has no caveatable interest whatsoever in the property in issue. She deponed that during the execution of her lawful duties, the title could not be seen or found forcing her to apply for a special certificate where she was informed that the lease certificate of title was with the respondent.

The respondent's affidavit in reply is that she lodged a caveat on 20th February 2007 on land comprised in LRV 3089 Folio 23 Kyaggwe Block 193 Plot 773. She averred that she is the duly appointed administrator of the estate of the late Samuel Mukungu together with other beneficiaries (annexture **A**), and that it is false for the applicant to say that she has no caveatable interest in the said land. She averred that the said suit land was purchased by the late Samuel Mukungu from Richard Lwegaba, the former registered proprietor who died before transferring the land (annexture **B**). That the late Scholastic Nanteza took advantage of the situation and got registered as the transferee. The respondent consequently sued the applicant as administratrix of the estate of the late Scholastic Nanteza in HCCS No. 08 of 2012 pending determination (annexture **P**). Before the said suit, she had filed another suit vide HCCS No. 21 of 2009 jointly against the applicant and Richard Lwegaba but it was terminated with a consent judgment between herself and Lwegaba while the one against the applicant was dismissed for her lack of capacity, she having been sued before being appointed executrix/administrator. She deponed that the applicant is aware of their beneficial interest in the suit land and has unsuccessfully tried various underhand methods of defeating the same. That the applicant twice tried to apply for a special certificate of title to the suit land and caused his arrest and detention at Mukono Police Station (annextures **C** and **D**). She averred that if the application is allowed and the caveat removed, their interests as beneficiaries will suffer irreparable damage let alone rendering the pending suit nugatory.

Section 139 of the RTA, in part, states as follows:-

“Any beneficiary or other person claiming any estate or interest in land under the operation of this Act...may lodge a caveat with the Registrar...forbidding the registration of any person as transferee or proprietor of any instrument affecting that estate or interest until after notice of the intended registration or dealing is given to the Caveator....”

The respondent's affidavit evidence is that she is administrator to the estate of the late Samuel Mukungu; that she has a caveatable interest in LRV 3089 Folio 23 Kyaggwe Block 193 Plot 773 the suit land on; that she and other beneficiaries lodged the caveat on the said land on 20th February 2007 as beneficiaries of the estate of the late Samuel Mukungu; and that the applicant's claims that she has no caveatable interest in the suit land are false. The respondent's affidavit

evidence is strengthened by the annexed copy of the letters of administration annexure **A** which mention her as such administrator; annexure **B2** an English translation of annexure **B** which is an agreement for sale of land between Samuel Mukungu and Richard Kagula.

The respondent's affidavit evidence has rebutted the applicant's affidavit evidence in the supporting affidavit. The applicant has not rebutted the respondent's affidavit in reply. This was despite the fact that her Counsel did request for, and was granted time to file an affidavit in rejoinder but failed to do so. The respondent's affidavit evidence therefore stands unchallenged by the applicant. As was held in **Tororo District Administration V Andalalapo Ltd [1977] IV KALR 126** by Kania J, the said affidavit is taken to be unchallenged and truthful, subject to whether the contents pass the test of evidence and is cogent and of probative value. Also see **Samwiri Massa V Rose Achieng [1978] HCB 297**, and **Eridadi Ahimbisibwe V World Food Programme & Ors. [1998] IV KALR 32**, Lugayizi J, where it was held that the facts as adduced in the affidavit evidence which are neither denied nor rebutted are presumed to be admitted.

In this respect I find that the respondent has rebutted with cogent evidence of probative value and proved that she had a legal basis to lodge the caveat on the suit land within the meaning of section 139 of the RTA.

The application is dismissed with costs.

Dated at Kampala this 1st day of November 2012.

Percy Night Tuhaise.

JUDGE.