

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

MISCELLANEOUS CAUSE NO. 86 OF 2011

AFRIKANO BAKAIHAHWENKI.....APPLICANT

VERSUS

SAMUEL PATRICK NGANDA.....RESPONDENT

BEFORE HON. LADY JUSTICE PERCY NIGHT TUHAISE

RULING

This was an application by Notice of Motion brought under sections 140, 142 and 188 of the Registration of Titles Act (RTA), section 98 of the Civil Procedure Act (CPA), and Order 52 rules 1,2 & 3 of the Civil Procedure Rules (CPR) for the following orders:-

- 1. *That caveat instrument. No. 291264 dated 16/12/1991 lodged by the respondent on land comprised in Kibuga Block 7 Plot 627 Kampala LRV 1177 Folio 12 be removed.***
- 2. *The costs of this application be provided for***

The grounds of the application are contained in the affidavit of **Africano Bakaihahwenki** the applicant, but briefly, are:-

- i) *The applicant and his family bought land from Non Performing Assets Recovery Trust (NPART) which was the mortgagee on 17th April 2003 and has been in physical occupation of the said property.***
- ii) *The land was in the names of Velentine Birikadde and George William Sentalo as registered proprietors but the seller (NPART) signed the transfer form in***

favour of the applicant as a mortgagee and handed over the duplicate certificate of title to the applicant.

- iii) When the applicant tried to effect the transfer into his names he discovered that the respondent had lodged a caveat on the said land in bad faith and there was then and now no jurisdiction for the lodging and/or maintaining the caveat from the register.***
- iv) It is in the interests of justice the caveat be removed.***

The respondent did not file any affidavit in reply. The affidavit of service filed in this court indicates that, as per the court order of 10th February 2012, the respondent was served by substituted service by advertising the application in The Monitor newspaper of 14th February 2012, and affixing a copy of the same on the court's notice board and the gate of the LC 1 Chairperson where the property is situated. A copy of the advertised notice of motion is also on the court record. The respondent was also not present when this suit was called for hearing. The hearing therefore proceeded *ex parte* against him on the application of the applicant's Counsel.

In his submissions, Mr. Tumwesigye Louis, Counsel for the applicant, relied on the affidavit evidence as deponed to in the applicant's affidavit. The evidence, as can be gathered from the said affidavit and its annexures, is that the applicant acquired land comprised in Kibuga Block 7 Plot 627 Kampala LRV 1177 Folio 12 from NPART who were the mortgagees of the land. NPART signed a transfer as mortgagees in their favour and gave him the duplicate certificate of title to enable the applicant effect the transfer in their names. The said land was at the time registered in the names of Velentine Birikadde and George William Sentalo who had mortgaged the land to the then Uganda commercial Bank City Hall Branch. NPART also gave vacant possession of all the land and the buildings and he has been in physical occupation of the same. There has never been any adverse claimant to the applicant's ownership and possession of the land. When he tried to transfer it into his names, he discovered that the respondent had lodged a caveat instrument no. 291264 on 16/12/1997. That the respondent in his affidavit supporting the caveat admitted that the said land had been mortgaged by the proprietors and so cannot contest the sale after 8 years of the applicant's effective occupation as transferee and undisputed owner. The applicant believes the caveat was lodged in bad faith and there was no justification for lodging or maintaining it on the register. He avers that the applicant was on several occasions

assured by the respondent that he was going to withdraw the caveat but he failed to do so. The applicant also believes the respondent is not a beneficiary of the registered proprietors who mortgaged the property to NPART. His Counsel submitted that the respondent has no lawful interest to warrant his caveat being sustained. He argued that the applicant's affidavit evidence had not been challenged by the respondent and ought to be believed as the truth.

On the issue of not filing a defence, in this case, affidavits in reply to the application and its supporting affidavit, Order 9 rule 11(2) of the CPR provides that:-

“Where the time allowed for filing a defence...has expired and the Defendant(s) has failed to file his or her defences, the Plaintiff may set down the suit for hearing ex parte.”

Order 9 rule 10 of the CPR also provides that where the Defendant has not filed a defence on or before the date fixed in the summons, the suit may proceed as if he had filed a defence.

There are court decisions to the effect that in such circumstances, the defendant will not be allowed to participate in the proceedings though he or she may be present in court. In **Kubibaire V Kakwenzire [1977] HCB 37**, court held that since the appellants had been served with summons and failed to enter appearance, they had by that failure put themselves out of court and had no *locus standi*. Also see **Musoke V Kaye [1976] HCB 171**. This was the reason the suit proceeded ex parte.

It is evident from the applicant's affidavit and its annexure C that the respondent's claim of lodging the caveat was as administrator of the estate of the late Valentine Birikadde.

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 facts as stated on oath by the applicant have neither been denied nor rebutted by the respondent who did not file an affidavit in reply to the application. Thus the respondent is deemed to have admitted the applicant's allegations. It is the applicant's affidavit evidence that he does not believe the respondent is a beneficiary of the registered proprietors Velentine Birikadde and George William Sentalo who mortgaged the property to NPART. This affidavit was not challenged by the respondent. 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**.

The applicant's unchallenged affidavit evidence is strengthened by the annexed copy of the transfer form Annexure **A** which indicates that NPART as mortgagees of the suit land transferred it to the applicant under the Mortgage Act on 17th April 2003; and annexures **A1** showing that the applicant paid property rates for the same for the year 2010. So, even it were true that the respondent entered the caveat as beneficiary or representative of the estate of the registered proprietors the suit land no longer formed part of their estate once it legally reverted to the mortgagees under the Mortgage Act.

In this respect I find that the applicant has proved his claim that the respondent had no legal basis to lodge the caveat on the suit land within the meaning of section 139 of the RTA.

The application is allowed with the following orders:-

- i) The caveat lodged on the suit land by the respondent should be removed.
- ii) The applicant will bear his own costs of this application.

I so order.

Dated at Kampala this 8th day of November 2012.

Percy Night Tuhaise

JUDGE.

