

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
MISCELLANEOUS APPLICATION NO. 140 OF 2013**

**BERNARD TUMWESIGIRE..... APPLICANT
VERSUS
MIRIA TUSHEMEREIRWE..... RESPONDENTS**

BEFORE: HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA

RULING

This Application is for Orders that the caveat lodged by the Respondent on the certificate of Title for land comprised in Block 306-310 Plot 1894 be removed and costs of the Application be provided. The Application was brought under Section 140(1) Registration of Titles Act (R.T.A); Section 38A Land Act (as amended) and Section 98 Civil Procedure Act.

The facts that gave rise to this Application will be stated in the course of the Ruling. However, the brief grounds in support of the Application which were substantiated upon by the Affidavit dated 24th February 2013 of Mr. Bernard Tumwesigire, the Applicant, are that: the land comprised in Block 306-310 Plot 1894 Busiro situate at Bira in Wakiso District does not form part of family land of the Applicant, Respondent and their children. They stated that neither the Parties to this Application nor their family ordinarily reside or derive sustenance on the subject land. Additionally, the Applicant averred that the land is not subject of spousal consent and that the Respondent's caveat on the certificate of title is therefore misplaced. He contends that it is in the interests of justice that the caveat be removed.

In her Affidavit in Reply dated 29th January 2014, the Respondent attested that she is the legal wife of the Applicant. She states further that on the 8th August 2008, she and the Applicant solemnized their marriage at St. James Cathedral Ruharo. She attached a copy of a marriage certificate as “Annexure MT 1.” In her Affidavit, she explains that during the subsistence of the marriage, the Parties acquired various properties including land comprised in Busiro Block 306 - 310 Plot 1894 situate at Bira which the subject matter of this Application. The suit property was purchased by the Applicant for the sole purpose of constructing a residential home for both the Respondent and their children but not for sale at a profit.

About May 2012, the Applicant threatened to sell off their matrimonial home situate at Nyakanoni Sheema District. This action by the Applicant prompted the Respondent to write a letter to the Applicant through her lawyers, M/s Mukiibi & Kyeyune Advocates to restrain him from executing his intentions. However, the Applicant continued with his threats. This prompted the Respondent to lodge a Caveat on Certificate of Title in order to protect her interests and those of the children. She denied ever deserting her matrimonial home. The Respondent stated that the Applicant’s Affidavit contained material falsehoods.

In Rejoinder, the Applicant filed an Affidavit in Reply. He reiterated the grounds set out in the Affidavit in support of the Notice of Motion and maintained that Block 306 - 310 Plot 1894 Busiro at Bira does not constitute family land and neither is it subject of a requirement of spousal consent.

The Applicant was represented by Counsel Aruho Raymond of Raymond Aruho & Co Advocates whereas the Respondent was represented by Counsel Lwanga Richard who held brief for Counsel Paul Mukiibi of Mukiibi & Kyeyune Advocates. Both Parties filed written submissions.

I have addressed myself to the Applicant's submissions and evidence on the file. Both Parties raised different issues in their Written Submissions but the relevant issues for determination of this Application are:

- 1) Whether land comprised in Block 306-310 Plot1894 constitutes family land within the definition of Section 38A Land Act as amended;
- 2) Whether the suit land is subject of the requirement of spousal consent;
- 3) What remedies are available to the Parties in the circumstances.

ISSUE NO. 1 Whether land comprised in Block 306-310 Plot1894 constitutes family land within the definition of Section 38A Land Act as amended.

The Applicant avers that the land comprised in Block 306-310 Plot 1894 Busiro at Bira in Wakiso District does not constitute family land within the definition of Section 38A Land (Amendment) Act. In Paragraph 2 of the Affidavit in support of the Chamber summons, the Applicant deposed that he purchased the plot of land from Dr. Ssenyondo Kalemera. A copy of the Sale Agreement was attached and marked Annexure "A1". The sale Agreement was executed on the 2nd February 2010 and it is made between Mr. Benard Tumwesigire as the purchaser and Dr. Ssenyondo Kalemera Emmanuel as the "Vendor". I will not delve into other particulars of the sale because they are not in issue. Paragraph 4 of the Affidavit shows that on the 16th November 2012, the Applicant's business associate, Mr. Edward Kakande conducted a search on the subject land. This revealed that the Respondent had lodged a caveat on the Certificate of Title. Copies of the search on the title of the suit land and the Caveat were attached as Annexures "C1" and "C2" respectively. Furthermore, in Paragraph 6 the Affidavit, the Applicant refuted claims that the caveated land is matrimonial home of the Parties. He deposed that their matrimonial home is instead in Nyakanoni LC1 Mabaare Parish Masheruka Sheema District. He attached a copy of LC1 letter as Annexure "D".

The Applicant also adduced Annexure "F" which is a letter dated 7th December 2012 from the Minister of State for Finance, Planning and Economic Development (General Duties) addressed to the Under Secretary Ministry of Finance, Planning and Economic Development. It relates to payment of Salary Arrears to the Applicant. Annexures "G" are copies of the various bank slips. There is also Annexure "H" which is a Tenancy Agreement dated 11th July 2010 in respect of the Applicant. I find both Annexures irrelevant to this Ruling. Therefore I will not rely on the same.

Section 38A and 39 Land Act of 2004 as amended is particular. It does not matter whether the either party is maintaining the other. What is of importance is proof of the fact that the land in question constitutes '*family land*' within the premise of Section 38A (4). It provides:

"Family land" means land -

- a) *On which is situated the ordinary residence of a family;*
- b) *On which is situated the ordinary residence of the family and from which the family derives sustenance;*
- c) *Which the family freely and voluntarily agrees shall be treated to qualify under paragraph (a) or (b);*

Or

- d) *Which is treated as family land according to the norms, culture, customs, traditions or religion of the family;*

"Ordinary residence" means the place where a person resides with some degree of continuity apart from accidental or temporary absences; and a person is ordinarily resident in a place when he or she intends to make that place his or her home for an indefinite period;

"Land from which the family derives sustenance" means-

- a) *Land which the family farms ; or*

- b) *Land which the family treats as the principal place which provides the livelihood of the family; or*
 - c) *Land which the family freely and voluntarily agrees, shall be treated as the family's principal place or source of income for food.*
- 1) *For the avoidance of doubt, this section shall not apply to spouses who are legally separated."*

Counsel for the Respondent in his Written Submissions was confused about the import of Section 38A Land Act which is on "*family land*". Counsel constantly referred to the subject land as family land. It seems Counsel mixed up the phrase "*matrimonial property*" with "*family land*." According to him, the fact that the land constituted matrimonial property obviously made it to be family land within the definition of Section 38A.

I find that Section 38A of the Land Amendment Act has a limited scope of application. "*Family land*" is restricted to the instances specified under Section 38A (4). However, the word '*Matrimonial property*' is wider in scope and applicability. Whereas some property acquired by a married couple can be excluded from the definition of family land *per* the Section, the reverse is true for the properties which are deemed to be "*matrimonial property*." Therefore "*family land*" is a subset of "*matrimonial property*."

According to the Court of Appeal decision of ***Julius Rwabinumi vs. Hope Bahimbisomwe Civil Appeal No. 30 of 2007*** in the late A. Twinomujuni, JA's decision, It was held by his Lordship that all the property that a couple acquires during the subsistence of their marriage is "*matrimonial property*." However, this decision was overturned on Appeal by the ***Supreme Court by the same case. (See Civil Appeal No. 10 of 2009).***

There is evidence of existence of a valid marriage between the Parties. This was deponed to in paragraph 3 of the Respondent's Affidavit in Reply. There is also cogent evidence through a Marriage Certificate dated 9th August 2008 between Bernard Tumwesigire and Tushemerirwe Miria marked as Annexure "MT 1" on the Respondent's pleadings.

The basic principle is in regard to the existence of a marriage is that a marriage cannot be terminated by an action of the Parties. Rather, it will be legally upheld until the death of either of the Parties or divorce proceedings. In the UK, which is a pace setter for Uganda, its former Protectorate, the parties are warned that no assurance can be given that the divorce, or the marriage they are about to contract, would be recognized by the courts in this country or elsewhere. It is also clear that the marriage between the Parties is still subsisting since there is no evidence that it has been determined under the law.

In accordance with the facts, it is clear that both the Respondent and the Applicant are still legally married. Therefore, in accordance with the Supreme Court decision in ***Julius Rwabinumi vs. Hope Bahimbisomwe supra***, land comprised in Block 306-310, Plot 1894 situate at Bira, though acquired during the subsistence of the Parties' marriage, does not form part of matrimonial property of the couple. This is because it was acquired by the Applicant after the Parties had separated. The Respondent failed to prove on the balance of probabilities that indeed the Parties ever formed the intention of constituting the suit property as their family home.

The other issue for determination is whether the Caveat was validly lodged on land comprised in Block 306-310 Plot 1894 situate at Bira. Counsel for the Applicant submitted that premised upon Section 38A of the Land Act, the subject land does not fall within the ambit that Section. He

argued that the land does not constitute “*family land*.” Therefore, the Respondent has no caveatable interest.

With due respect, I think Counsel for the Applicant failed to address his mind on the whole issue of a Caveat. There are various Caveats recognized under both the Land Act and the Registration of Titles Act. It is true that *Section 38A (7) Land Amendment Act, authorizes a spouse who is not the owner of land to lodge a Caveat on the certificate of title, certificate of occupancy or certificate of customary ownership as the case may be to indicate that the property is subject to the requirement of consent.*

The above Section does not exclude the Applicability of the Registration of Titles Act (“R.T.A”). Section 139 R.T.A authorizes any person who claims an interest in land under the Act to lodge a Caveat with the Registrar forbidding the registration of any person from transacting in the same to the prejudice of the Caveator’s interests or upon consent of the Caveator. I take cognizance of the Form for Caveats, which is under the fifteenth Schedule of the R.T.A. Therefore, there was no basis upon which Counsel for the Applicant would insist that the Caveat was lodged under Section 38A of the Land Amendment Act in clear absence of evidence to that effect.

However, notwithstanding the above, I have already held in my resolution of issue 1 that the land in issue does not form part of “*family land*” and neither is it “*matrimonial property*.” Therefore, the Respondent has no caveatable interest in the property. In lodging a Caveat on the Certificate of Title, the Respondent did so in the capacity of a legal wife. This is seen from Annexure “C2” attachment on the Applicant’s pleadings, which is a copy of the ‘Caveat Forbidding Registration or any dealing with the suit land’. It was drawn under the R.T.A and the Land Act Cap 222 (as amended). Further, in paragraph 2 of the Affidavit in support thereof, the Respondent deposed the same in the capacity of a legal wife to the Applicant herein. In paragraph 12

of the Affidavit, the Respondent/ Caveator swears '*that I claim both legal and equitable interests on the above described land as family property and in the capacity of a legal wife to the purchaser herein*'.

Therefore, in the premise, the Applicant has proved on the balance of probabilities, through error that the suit land is not "*matrimonial property*" and therefore the Respondent has no interest to caveat the same.

Issue No. 2 whether the suit land is subject of the requirement of spousal consent

In my resolution of issue No. 1 of whether the subject land falls within the premise of "*family land*", I observed that it is obvious that the land does not constitute "*family land*." This should dispose off the issue on the basis that section 39 is subject to Section 38A of the land Amendment Act.

Therefore, it is not subject of the requirement of spousal, consent. The definition of "*family land*" pursuant to Section 38A of the Land Amendment Act, which has a bearing on Section 39 of the Land Amendment Act. The former Section is limited in application to the instances defined under the proviso. Section 38A (3) states;

For the purpose of subsection (2), the spouse shall in every case have a right to use the family land and give or withhold his or her consent to any transaction referred to in section 39, which may affect his or her rights.

In conclusion, the Respondent had the onus of proving, on the balance of probabilities, that the land in question is "*family land*" within the definition of the Land (Amendment) Act. She failed to discharge this burden. Therefore, this issue is answered in the negative.

Issue No. 2 what remedies are available to the Parties in the circumstances

Relating to this issue, Counsel for the Applicant submitted that the Caveat lodged by the Respondent on the Certificate of Title of the subject land has prejudiced his rights to deal in it. Counsel prayed that the Caveat lodged on the Certificate of Title be removed and that Court awards costs to him.

Finally, I make the following Orders;

1. The Caveat lodged by Miria Tushemereirwe on land comprised in Block 306-310 Plot 1894 be vacated;
2. Costs are awarded to the Applicant.

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HON. LADY JUSTICE ELIZABETH IBANDA NAHAMYA.

J U D G E

12th March, 2014