

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT FORT PORTAL**

**MISCELLANEOUS CAUSE NO. 002 OF 2018**

5 **TUMUSIIME CHRISTOPHER .....APPLICANT**

**VERSUS**

**1. KARUNGI GRACE TUMUSIIME }.....RESPONDENT**

**2. THE REGISTRAR OF TITLES, KABAROLE**

10 **BEFORE: HIS LORDSHIP HON. MR. WILSON MASALU MUSENE**

**Ruling**

This is an application by way of Notice of Motion brought under **Section 98** of the Civil Procedure Act and **Order 52 Rules 1 and 3** of the Civil Procedure Rules. The Applicant seeks to be heard for orders that; the Registrar of Titles (Fort Portal) be directed to remove  
15 the caveat the 1<sup>st</sup> Respondent lodged on Freehold Register Volume HQT 526 Folio 2, Block (Road) Market Street, Plot 17 at Kyenjojo Central, measuring approximately 0.0450 Hectares and costs of the Application.

The Application is supported by the affidavit sworn by Tumusiime Christopher and briefly the grounds are as follows;

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1. That the Applicant is the registered proprietor of property comprised in Freehold Register Volume HQT 526 Folio 2, Block (Road) Market Street, Plot 17 at Kyenjojo Central, measuring approximately 0.0450 Hectares.
  2. That the said property was subject to a mortgage with Centenary Bank Ltd and was about to be sold off by the bank for failure to honour the mortgage.
  - 25 3. That the Applicant has disposed of the said property to one Mugenyi Julius.
  4. That after the said sale, the 1<sup>st</sup> Respondent lodged a caveat on the said property.

5. That it is just and equitable that this Honourable Court directs the Registrar of Titles to remove the caveat the 1<sup>st</sup> Respondent lodged on Freehold Register Volume HQT 526 Folio 2, Block (Road) Market Street, Plot 17 at Kyenjojo Central, measuring approximately 0.0450 Hectares so that the Applicant can effectively transfer the same to the new owner.

The 1<sup>st</sup> Respondent opposed the application through a sworn affidavit in reply and inter alia stated that;

1. That the 1<sup>st</sup> Respondent is legally married to the Applicant and they have 6 children. (Marriage Certificate attached and marked Annexure "A").
2. That it is true the 1<sup>st</sup> Respondent lodged a caveat the subject of this application forbidding any dealing with property comprised in freehold Register Volume HQT 526 Folio 2 Plot 17 Market Street, Kyenjojo Central because she claims equitable interest in the said matrimonial and/or family property.
3. That the above property was illegally sold by the Applicant to one Mugenyi Julius without the 1<sup>st</sup> Respondent's knowledge and/or consent, reason why the 1<sup>st</sup> Respondent is challenging the illegal sale between the Applicant and the said Mugenyi Julius in this Honourable Court vide HCT – 01 – CS – LD – 0019 of 2017 and Divorce Cause No. 001 of 2018 both of which are pending determination in this Honourable Court. (Copies attached as Annexure "B").
4. That the allegation that the property the subject of the caveat was mortgaged with Centenary bank and was about to be taken is false as there is no evidence of any threats by Centenary to sell the said property and in any case the alleged mortgage if any was done without the 1<sup>st</sup> Respondent's knowledge or consent.
5. That the 1<sup>st</sup> Respondent is informed by her Advocate Augustine Bafaaki Kayonga which information she verily believes to be true and correct that if the caveat is removed, the matrimonial and/or family property in which the 1<sup>st</sup> Respondent claims an equitable interest as a wife of the Applicant will be transferred to third parties and her interest therein will be defeated and the above mentioned suits and divorce petition will be rendered nugatory.

**30 Background to application:**

The Applicant claims to be the registered proprietor of the property in issue and because of financial constraints, mortgaged the same with Centenary Bank where upon the 1<sup>st</sup>

Respondent was one of the guarantors and the said property became a subject of sale for not honouring the terms of the mortgagee. That a series of meetings were made between the Applicant and Centenary Bank whereof the bank advised the Applicant to get a potential buyer for the property as the bank could sell at any price in order to recover its monies.

5 On the 23<sup>rd</sup> June 2017, the Applicant entered into a land sale agreement with Mugenyi Julius for the sale of the suit property in order to clear the mortgage, however upon the said sale and on the 5<sup>th</sup> July 2017, the 1<sup>st</sup> Respondent through the 2<sup>nd</sup> Respondent lodged a caveat on the property.

10 On the 22<sup>nd</sup> August 2017, this Court made an order of vacant possession against the Applicant and the same was executed and the said Mugenyi Julius was handed the property which he has since developed with a commercial apartment ready to be rented. However, the said Mugenyi Julius cannot do any transactions on the suit property because of a caveat lodged over it.

**Resolution:**

15 Counsel for the Applicant submitted that the Applicant was the registered owner of the suit property which was lawfully sold and the 1<sup>st</sup> Respondent had no right to lodge a caveat. That the suit property did not constitute family land and/or matrimonial property of the Applicant and the 1<sup>st</sup> Respondent as their matrimonial and/or residential home is situate at Kyenjojo-Nyakabura, Kijuma Ward, Kyenjojo Town Council, Kyenjojo District. The parties did not  
20 derive sustenance from the said property as they derive sustenance from a commercial house with rentals at Kasiina, a business at Mukeye, and developed kibanja at Nyakabara among others.

Counsel for the Applicant went on to add that the registration of a caveat on the suit property was made in bad faith and explains why the 1<sup>st</sup> Respondent filed Divorce Petition HCT – 01 –  
25 CV – CS – DC – No. 001 of 2018.

In the alternative Counsel for the Applicant added that the 1<sup>st</sup> Respondent was a guarantor when the said property was mortgaged and in her affidavit in reply alludes to the fact that she is a legally married wife to the Applicant which fact is not disputed and by agreeing to being a guarantor, the 1<sup>st</sup> Respondent consented to any out come with regard to the said mortgage.

Further, that the terms of the mortgage were breached and the Applicant was supposed to pay an outstanding debt of UGX 90,000,000/= and the said property was subjected to sale. Thus, the said property was lawfully sold with the consent of the 1<sup>st</sup> Respondent when she signed as a guarantor to the mortgage. The said property was sold to repay the outstanding loan and  
5 which loan was eventually cleared. It is therefore surprising that a month after the said sale, the 1<sup>st</sup> Respondent lodged a caveat on the said property. Counsel prayed that the application be allowed with costs.

Counsel for the 1<sup>st</sup> Respondent on the other hand submitted that the property the subject of this application is family property from which the family used to derive its sustenance and  
10 was illegally sold. The 1<sup>st</sup> Respondent used to operate a general merchandise shop there on as a family business which was vandalised by the Applicant in connivance with one Mugenyi Julius who purports to have purchased the land/property.

Further, that it is not in dispute that the property was mortgaged however, the mortgage was done without the consent of the 1<sup>st</sup> Respondent and her signature was forged, reason why she  
15 filed Civil Suit No. 19 of 2017 and Divorce Cause No. 001 of 2018 challenging the illegal sale and mortgage of the said property.

Furthermore, that the claim that the mortgaged property would be sold by the bank is baseless because there were no threats by the bank to sell. Even then, the mortgage was executed between the bank and the Applicant without the consent of the 1<sup>st</sup> Respondent. Therefore  
20 Court cannot sanction an illegality once its brought to its attention and an illegality overrides all questions of pleadings including admission made there on as was held in **Makula International Ltd versus His Eminence Cardinal Emmanuel Nsubuga and Another [1982] HCB 11.**

Counsel for the 1<sup>st</sup> Respondent added that the order for vacant possession made by Court is  
25 false as the order granted by the lower Court was for distress for rent which was obtained fraudulently by the Applicant and the order was abused by the Applicant and the purported purchaser to demolish and vandalise the suit property and business merchandise of the 1<sup>st</sup> Respondent. That the development of the land and/or property by one Mugenyi Julius is also illegal as the same was done when there was a pending suit challenging the sale.

30 Counsel for the Respondent noted that it was not in dispute that the Applicant was the registered proprietor of the suit property, however, the 1<sup>st</sup> Respondent has an equitable

interest in the same as a wife, reason she lodged the caveat. Counsel cited **Article 31 (b)** of the Constitution of the Republic of Uganda, 1995 which is to effect that a married man and woman are entitled to equal rights at and in marriage, during and at its dissolution. That basing on that provision, all the properties acquired, developed at marriage, during marriage  
5 are matrimonial properties and therefore when they are being disposed of the consent of either party must be sought otherwise the sale and purchase are null and void as in the instant case. Hence, the property subject of this application is matrimonial property.

Further, that the said property is also family land/property since both parties and the entire family resides on the same and used to also derive their sustenance from the family business  
10 that was vandalised due to illegal eviction. That the argument that there are other family properties does not stand because the property subject of this application is one comprised in freehold Register Volume HQT 526 Folio 2 Plot 17 Market Street, Kyenjojo Town Council and not any other properties. That the caveat was lodged in good faith to protect the interests of the 1<sup>st</sup> Respondent in the disputed property pending the determination of Civil Suit No. 19  
15 of 2017 and Divorce cause No. 001 of 2018 filed by the 1<sup>st</sup> Respondent against the Applicant.

Furthermore, that there was no consent to mortgage and the purported consent is a forgery and in any case the illegal sale is between the Applicant and one Mugenyi Julius not the bank. Therefore, the application should be dismissed with costs as allowing it would be an injustice to the 1<sup>st</sup> Respondent since the property will be transferred to third parties.

#### 20 **Analysis of Court:**

I have carefully considered and internalised the submission of both sides. I have also studied the supporting affidavits on either side. Under paragraph (3) of the affidavit in support of the Application, the property in issue was subject to a mortgage with Centenary Bank Ltd, and was about to be sold off by the Bank in respect of the mortgage.

25 The Applicant was then advised that instead of the property being sold at a lower price to clear the mortgage, he would rather sell the property to a potential buyer which he did; Emphasis under paragraph (6) of the supporting affidavit was that the 1<sup>st</sup> Respondent was a guarantor to the mortgage in question.

So, while the 1<sup>st</sup> Respondent is challenging the sale on grounds that the land comprised in  
30 Freehold Register Volume HQT 526 Folio 2, Plot 17 Market Street is family property. The 1<sup>st</sup>

Respondent does not dispute the fact that the same property had been mortgaged. And having been a guarantor of the said mortgage is implied to consent on the part of the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent in such circumstances cannot turn around to state that her signature on the mortgage document was forged. A person who alleges must prove as provided under  
5 **Sections 101 and 102** of the Evidence Act. In this case, it was incumbent upon the 1<sup>st</sup> Respondent to prove the alleged forgery of her signature on the mortgage document.

Secondly, **Sections 38A and 39(7)** of the Land Act as amended in 2004 describes Family land. It means it is land on which is situated the ordinary residence of a family and from which the family derives sustenance.

10 In this case, Counsel for the Applicant has submitted that the matrimonial/residential home of the parties is situated at Kyenjojo-Nyakabura, Kijuna Ward, Kyenjojo Town Council. It was also submitted that the parties derive sustenance from a commercial house with rentals at Kasina, another business at Mukeye and a developed kibanja at Nyakabara. The 1<sup>st</sup> Respondent has not denied the existence of the above stated properties from which they  
15 derive sustenance.

I also wish to add that the provisions of **Section 38A** of the Land Act do not deprive a person from selling off any of his properties as long as there are other properties for family sustenance.

In the premises, I agree with Counsel for the Applicant that the property comprised in  
20 Freehold Register Volume HQT 526 Folio 2, Plot 17 at Kyenjojo Central, measuring 0.0450 hectares was sold with the consent of the 1<sup>st</sup> Respondent, having signed as a guarantor to the mortgage.

I accordingly do hereby allow this application and order the Registrar of Titles (Fort Portal) to remove the caveat the 1<sup>st</sup> Respondent lodged on Freehold Register Volume HQT 526 Folio  
25 2, Block (Road), Market Street, Plot 17 at Kyenjojo Central.

I also order that each party bears their own costs.

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**WILSON MASALU MUSENE**

**JUDGE**

**22/08/2018**

5 Mr. Musinguzi Bernard for the Respondent present.

Parties absent.

Counsel for the Applicant absent.

Beatrice Court Clerk present.

10 **Court:** Ruling read in open Court.

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**WILSON MASALU MUSENE**

**JUDGE**

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