

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT MASAKA
MISC. CAUSE NO. 14 OF 2018

1. SULAIMAN MWANJE
2. SSESSAZI SIRAJE APPLICANTS

VERSUS

1. ALI MUWANDA
2. MALE HUSSEIN
3. IBRAHIM MUSOKE KATEGAYA
4. AIDAH NANTEGE KAYONGO
5. AISHA NAMALE KAYONDO
6. HAJATI NAKALEMA HAFSA KAYONGO RESPONDENTS

Before; Hon. Lady Justice Victoria Nakintu Nkwanga Katamba

RULING

BACKGROUND OF THE APPLICATION

The background to this application is that the Respondents instituted Civil Suit No. 56 of 2015 against the Applicants challenging the Will of the late Muhammed Kayongo (to whose estate they are beneficiaries) and the suit was determined on 18th May, 2018, in favor of the Applicants. The Respondents lodged an appeal in the Court of Appeal and it is pending determination. They also filed an application for stay of execution, Miscellaneous Application No.100 of 2018 pending determination of the Appeal. At the time of the Appeal, the Respondents had lodged caveats on land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17 to protect their interests as beneficiaries of the estate of the late Muhammad Kayongo, until disposal of the application for stay and the appeal.

The Applicants brought this is application under Section 140 (1) of the Registration of Titles Act Cap 230, Section 33 of the Judicature Act Cap 13, Section 98 of the Civil Procedure Act Cap 71 and Order 52 Rules 1 and 2 of the Civil Procedure Rules SI 71-1, seeking orders that; the caveats on the Certificates of Title for land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17 be vacated, and costs of the application be provided for.

The grounds of the application as contained in the affidavit of the first Applicant, Sulaiman Mwanje are that;

- i) The Applicants are executors of the estate of the late Muhammad Kayongo formerly of Kalongo Kasabale in Kalungu District vide Probate and Administration Cause No. 041 of 2014;
- ii) The Applicants discovered that the Respondents lodged caveats on land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17;
- iii) That whereas the Respondents are beneficiaries of the estate of the late Muhammad Kayongo, the caveats lodged are misconceived, frivolous, vexatious and a waste of time to complete the process of distribution of the estate in accordance with the Will the deceased;
- iv) That it is in the interest of justice that the application be granted.

In his affidavit in reply, the 2nd Respondent opposed the application and stated that the caveats were lodged to protect the interests of the beneficiaries (Respondents) pending determination of the application for stay and the appeal and that it is just and equitable that the application for stay and the appeal be determined before the caveats can be vacated.

In rejoinder, the 1st Applicant stated that this application was brought independently from Civil Suit No. 56 of 2015 and that execution proceedings in Civil Suit No. 56 of 2015 have never commenced, therefore there is nothing to stay. The suit property is estate property and not private property and the Applicants are simply using court processes to their advantage and making it difficult to have the estate distributed in accordance with the Will.

While Civil Suit No. 56 of 2015 was still pending in court, the Applicants cut down eucalyptus trees for timber on land comprised in Block 221 Plot 17 forming part of the estate of the late Muhammad, for their own benefit. The intention of the Applicant is to file several court matters and continue to benefit from the estate at the detriment of other beneficiaries.

Both Parties filed written submissions and they are on court record.

Counsel for the Applicant stated that this application is distinct from Civil Suit No. 56 of 2015 as it raises a distinct cause of action of removal of caveat. Counsel sought indulgence of court to take note of the minor errors in the Applicant's affidavit in rejoinder as he mistakenly referred to the Respondents as Applicants. Counsel prayed that the errors relating to Hussein as the Applicant be treated as minor since they do not go to the root of the instant application.

Counsel raised two issues for determination as follows;

1. Whether the Respondents have any caveatable interest in land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17
2. What remedies are available.

In arguing the first issue, Counsel for the Applicants cited Section 140 of the Registration of Titles Act governing removal of caveats and MA No. 081 of 2016 Ssegirinya Gerald Vs Mutebi Innocent in which Justice Henry Kaweesa noted that the primary objective of a caveat is to give the caveator temporary protection and that the respondents must have reasonable cause why they filed the caveat. Counsel further submitted that the Respondents have not demonstrated any reasonable cause why the caveats lodged on the suit land should not be removed. Counsel averred that the grounds relied on by the Respondents are not reasonable as the interests in the Will are well stipulated and the Grant of Probate was never challenged in Civil Suit No.56 of 2015. The Respondents are only interested in delaying the distribution of the estate and the Applicants have no beneficial interest in the estate but rather exercising their powers as executors under the late Muhammad's Will.

Other than the Respondents, the rest of the beneficiaries of the estate stand to lose if the properties are not distributed and the Respondents do not clearly state the particular interest they are seeking to protect by the continues existence of the caveat. The Respondents have no caveatable interest in the suit land and the caveat should be removed and or vacated.

In reply, Counsel for the Respondents relying on the grounds contained in the affidavit in reply, submitted that the Respondents have filed an appeal against the decision in Civil Suit No. 56 of 2015 with a high chance of success. The Respondents have also filed an application for stay of execution which should also be heard and determined by this court before this application can be heard and determined. The grant of this application would cause execution of the decree and the 6th Respondent would suffer irretrievably as she would be deprived of her livelihood. The execution of the decree will render the application for stay and the appeal nugatory thus this application should be stayed pending hearing and determination of the aforementioned application and appeal.

In rejoinder, Counsel for the Applicants invited this court to disregard the assertion that the 6th Respondent will suffer irretrievably if the application is granted as her entitlement is expressly catered for and she never deponed an affidavit indicating that she would be interrupted by her co-wife in any way. The Applicants have never initiated execution proceedings in Civil Suit No. 56 of 2015 and it cannot be used as a basis for delaying this application.

Determination of this Application

1. Whether the Respondents have any caveatable interest in land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17

The law governing **beneficiary caveats** as established under *Section 139 of the Registration of Titles Act* provides that; “*Any beneficiary or other person claiming any estate or interest in land under the operation of this Act ... may lodge a caveat with the commissioner ...forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until 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.”

In the case of *Sentongo Produce Vs Coffee Farmers Ltd & Rose Nakafuma Muiiisa HCMC 690/99* cited in *Hunter Investments Ltd vs Simon Lwanyaga & Anor HCMC No. 034 of 2012*, it was held that for a caveat to be valid, the caveator or must have a protectable interest legal or equitable to be protected by the caveat otherwise the caveat would be invalid.

Counsel for the Applicants submitted that the Respondents have not demonstrated reasonable cause why the caveats lodged on the suit land should not be vacated. The 2nd Respondent in his affidavit states that the caveats are intended to protect the Respondents` interest as beneficiaries of the late Muhammad`s estate. To this averment, Counsel for the Applicants argues that the Respondents` interests are well stipulated in the Will and also, does not dispute the fact that the Respondents are indeed beneficiaries to the estate of the late Muhammad.

The 1st to 5th Respondents being children of the late Muhammad, and the 6th Respondent being a widow to the late Muhammad, makes them beneficiaries to the estate with an interest therein and have every right to protect by caveat or otherwise.

A caveat is lodged to protect the caveator`s interest and since the Respondents are beneficiaries the late Muhammad`s estate, they have an equitable interest in the property which is caveatable interest in the suit land.

2. Whether the caveats should be removed

A beneficiary caveat unlike other forms of caveats does not lapse and can only be withdrawn by the caveator, or removed on an Order of Court. (see S.140(2) of the Registration of Titles Act). In the instant case, the Applicants challenge the caveats lodged

by the Respondents and for that reason, the Respondents have to show cause why the caveats should not be removed, failure of which would result into an order for vacation of the caveats by this Court.

It is the 2nd Respondent`s averment that the caveats are intended to protect the Respondent`s interest pending determination of an application for stay of execution of proceedings in Civil Suit No. 56 of 2015 and an appeal of the same suit. The Applicants aver that this application is independent of the said application for stay and the appeal, and that the caveats are meant to delay the process of distribution of the estate.

The gist of this application is to have the caveats on the suit land vacated to enable the Applicant`s fulfill their duties as executors of the late Muhammad`s Will. I have not had the benefit of perusing the pleadings of Civil Suit No. 56 of 2015 but I have perused the judgment of the learned Judge and it is clear in his judgment that the suit sought to contest the Will of the late Haji Muhammad Kayongo which the Respondents (Plaintiffs therein) challenge.

Although the causes of action in this application and in Civil Suit No. 56 of 2015 and the reliefs sought are different, it is important to note that they both arise from the same subject matter which is the Will of the late Hajji Muhammad Kayongo. The Respondents (Plaintiffs) sought to challenge the Will in Civil Suit No. 56 of 2015 and have lodged an appeal in the Court of Appeal against the decision in the said suit in which they are still challenging the validity of the Will. The Applicants in the instant application seek to have the caveats on the suit land removed so that they can fulfill their duties of executing the Will of the late Muhammad.

Granting this application would indeed enable the Applicants to perform their duties as executors of the Will. However, the Will has been challenged and although the suit was determined in favor of the Applicants, by lodging an appeal, the Validity of the Will from which the Applicants derive their powers is still in contention.

Counsel for the Applicants submitted that the Respondents while prosecuting Civil Suit No. 56 of 2015 never challenged the Probate and thus, the Applicants` role as Executors is not disputed. Executors named in a Will can only exercise their powers with a Grant of Probate from a competent court. (*See Sections 244 and 258 of the Succession Act cap 262*). The effect of a Grant of Probate as stated in Section **189 of the Succession Act is that ;** “Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor, as such.” As such, the Executors of the Will derive their power to administer the estate from the Will which power can only be exercised with a Grant of Probate from a competent Court.

Since Section 189 on the effect of a Grant of Probate provides that, the Grant of Probate establishes the Will of the testator (as contained in Will), if the validity of the Will is in contention, then the Grant is automatically under contention as well. Therefore, learned Counsel is misguided to assume that since the Civil Suit only seeks to challenge the Will, the Grant remains undisputed.

In the foregoing, I find that although the causes of action in the instant application and the civil suit are different, both matters arise from the Will of the late Hajji Muhammad Kayongo and his estate. Determining this application and allowing the caveats on the suit land to be removed to enable the Applicants deal in the suit land by distributing the same would render the appeal and the application for stay of proceedings lodged by the Respondents, nugatory.

The existence of an appeal in which the Respondents intend to challenge the Will from which the Applicants claim to derive their powers, is sufficient cause for the caveats on the suit land to be maintained. According to the authority of *Boynes Vs Gathure (1969)EA 385*, one primary objective of a caveat is to give the caveator temporary protection. It is important that the beneficiaries` interest in the suit land remains under protection of the caveat until a Grant of Probate or Letters of Administration to administer the estate has been obtained from a competent court, in this case until the appeal is determined.

I therefore resolve that the caveats on the suit land should be maintained pending determination of the appeal which seeks to challenge the validity of the Will from which the Applicants would derive powers to obtain a Grant of Probate and deal in/distribute the estate of the late Muhammad.

3. Whether the instant application should be stayed pending determination of application for stay of execution and the appeal

In his affidavit in reply to the application, the 2nd Respondent states that his lawyers lodged a notice of appeal in the Court of Appeal and are preparing a Memorandum of Appeal. It is the Applicants' submission that the Respondents have not taken steps to prosecute the intended appeal. According to the record, the notice of appeal was filed in this Court on the 18th day of May 2018 and lodged in the Court of Appeal on the 23rd day of May 2018. There is no record however as to whether a letter requesting for the record of proceedings was filed in this court. I will not go into determining the competence and merits of the appeal which is before a higher Court. As observed, determining this application would render the appeal nugatory.

Also, the Will from which the Applicants derived their powers to obtain a Grant of Probate is being challenged, and therefore, they do not have locus to sustain this application before this Court. According to **Black's Law Dictionary 9th Edition**, the term *locus standi* is defined as referring to the right to bring an action or to be given the forum to bring an action.

Unless and until the decision of this court is upheld the Court of Appeal, the Applicants do not have a right to institute a cause of action arising from the Will that is being challenged. Therefore, since they do not have a right to prosecute this application I will disallow it.

4. What remedies are available to the Parties

Having found that the Applicants do not have power to deal in and, or distribute the estate of the late Hajji Muhammad Kayongo as the Will that appoints them as Executors is being

challenged, and having disallowed the application, I will not grant the reliefs sought by the Applicants. The Applicants can file a fresh application upon determination of the appeal of Civil Suit No. 56 of 2015.

In the result, I disallow the application and instead order that the caveats lodged by the Respondents on land comprised in Buddu Block 222 Plot 280 and Buddu Block 221 Plot 17 be maintained on condition that the Respondents take the necessary steps to prosecute the intended appeal within a period of 10 days from the date of this Ruling. Nevertheless, the caveats lodged by the Respondent in respect of the said land shall be maintained until the appeal of Civil Suit No.56 of 2015 is determined by the Court of Appeal.

Each party shall meet their costs in respect of this application, the parties being closely related, whose matters should be settled amicably.

I so order.

Dated at Masaka this 29th day of January, 2021

Victoria N. N. Katamba
Judge