THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA; AT KAMPALA

(LAND DIVISION)

MISC. APPLICATION No. 650 OF 2011
(Arising from HCCS No. 221 of 2009)

DAVIS NDYOMUGABE..... PLAINTIFF/APLLICANT

VERSUS

TILE WORLD LIMITED..... DEFENDANT/RESPONDENT

BEFORE: - THE HON. MR. JUSTICE ALFONSE CHIGAMOY OWINY – DOLLO

RULING

The Applicant herein seeks an interlocutory order of this Court restraining the Commissioner Land Registration from vacating the caveat lodged on the 22nd, February 2010, under Instrument KLA 445825 in the Register Book with regard to land comprised in Kyaddondo Block 272 Plot 34 at Nakabugo, Mutungo Makindye, Ssabagabo. He pleads with Court to make the order sought, to last until the final disposal of H.C.C.S. No. 221 of 2009 (the head suit herein) by this Court. He also seeks provisions for costs of the application. The grounds for the application, which are further set out in the affidavit the Applicant deposed to in support of the application, are briefly that: –

1. The Applicant is a bonafide occupant of bibanja on land comprised in Kyaddondo Block 272 Plot 34 at Nakabugo, Mutungo, Makindye, Wakiso District.

2. In the head suit herein, the Applicant is urging Court to adjudicate on the issue of his bibanja interests on the aforestated land.

3. The Applicant has lodged the caveat in issue to protect his said bibanja interests.

4. The Respondent has, instead of applying to Court, illegally written a letter to the Commissioner Land Registration to vacate the said caveat; and yet the head suit herein is still pending before this Court.

5. The Respondent has, through its directors, evicted the Applicant from the suit land; in an act of abuse of Court orders, which had only granted it right of access to the suit land.

6. The Respondent has maliciously damaged the Applicant's property, destroyed, and illegally sold off the Applicant's property; for which one of the Respondent's directors is standing criminal trial at Entebbe Chief Magistrate's Court.

7. The Applicant has a genuine interest as kibanja owner, and has accordingly lodged the caveat in issue pending the determination of the head suit herein.

In its affidavit in reply, the Respondent first challenges the procedure under which the Applicant has brought this application, then it blames the Applicant for rejecting all proposals by the official of the Respondent for an amicable resolution of the dispute between the parties. It also faults the caveat for not complying with the law regarding what a registrable interest is. In rejoinder, the Applicant, and the two persons who are alleged to have conveyed the Respondent's desire for a negotiated settlement, each swore an affidavit denying that they had ever been approached to do so. With regard to the procedure taken by the Applicant, I have to say that the application, in effect, only seeks an interlocutory relief; pending the determination of the main suit. It would be improper to bring it by an originating summons, which is itself designed to originate a suit.

Even if the procedure the Applicant has used were wrong, I think it would not be fatal; as it would not go the substance of the case. In ***Boyes vs Gathure [1969] E.A. 385***, where the Respondent applied to Court by a Chamber Summons, instead of Originating Summons, for an order extending the life of a caveat, and was challenged for having proceeded wrongfully, Sir Charles Newbold P., stated at p. 389 as follows: –

> *"In my view, the concept of treating something which has been done and acted upon as a nullity is a concept which should be used with the greatest caution. May I repeat some words I used in* ***Nanjibhai Prabhudas & CO. Ltd. vs The Standard Bank Ltd., [1968] E.A. 670****. I said in that case (at p. 683 B):*
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> > *'The Courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless the incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.'*
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> *Using an incorrect form of procedure which has, in fact, brought the parties before the Court and has, in fact, enabled the parties to present their respective cases to the Court is not an incorrect act of such a fundamental nature that it should be treated as if it, and everything consequent upon it, did not exist and never had existed."*

At p. 390, Sir Clement de Lestang V.–P., stated as follows: –

> *"It is not always easy to differentiate between a nullity and an irregularity. In* ***Macfoy vs United Africa Co. Ltd., [1961] 3 All E.R. 1169****, at p. 1773, LORD DENNING delivering the opinion of the Privy Council said:*
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> > *'No Court has ever attempted to lay down a decisive test for distinguishing between the two; but one test which is often useful is to suppose that the*

other side waived the flaw in the proceedings or took some fresh step after knowledge of it. Could he afterwards, in justice, complain of the flaw?'

Applying this test to the present case ... the Sppellant wasable to argue his case fully ... he was clearly not prejudiced by the erroneous procedure adopted by the Respondent. It seems to me that the proceedings were merely irregular and not null and void ...'"

The instant matter, before me, is in the same category with the authority cited above. The arguments of their Lordships therein still provide good law. I should also point out that it accords with the provisions of Article 126 of the 1995 Constitution of Uganda, which urges Courts to strive to render substantial justice and not be held captive to rules of technicalities; unless to ignore rules of technicalities would, itself, occasion injustice. I am clear in my mind that in the instant matter, the Respondent would suffer no injustice due to the procedure by which this application has been brought. I therefore find the objection devoid of merit; and so I overrule it.

The other point of contention by the Respondent is that owing to the provision of the Land Reform Decree, kibanja interest in land is not known to law. Accordingly, the Applicant does not have either an estate or interest in the Respondent's land to enable him to lodge a caveat on it. Counsel for the Respondent relies on the Australian case of ***Municipal District of Concord vs Coles [1906] 3 CPR 96***, where Griffith C.J., in affirming the holding of the lower Court that *'only a person having, or claiming to have, some legal or equitable interest in the land partaking of the character of an estate, or of an equitable claim upon the land, can be a caveator'*, stated at p. 107 that: –

"For myself, I confess I can see no way of escaping from the reasoning in that case, and I am therefore of opinion that it is only a person who has a legal or

equitable interest in land, partaking of the character of an estate in it or equitable claim to it, who can lodge a caveat."

In my understanding, the term *'kibanja'* is used in common parlance, in certain parts of Uganda, to refer to an unregistered beneficial interest in land, which is inferior to but comprised in a registered land (superior title) such as freehold, mailo, or leasehold, estate. On kibanja interest in land as a tenure, the Court of Appeal in ***Marko Matovu & 2 Others vs Mohammed Sseviiri & 2 Others, CACA No. 7 of 1978***, ***[1979] HCB 174***, and this was affirmed by the Supreme Court in ***Kampala District Land Board & Anor. vs Venansio Babweyaka & 3 Others, SCCA No 2 of 2007***, stated as follows: –

"There is no definition of customary tenure perhaps because it is so well understood by the people. Where a person has a kibanja, it is generally accepted that he thereby established customary tenure on public land. ..." (**emphasis added**).

Accordingly then, *kibanja* is a proprietary interest in land; akin to an estate in land. It may be comprised in the whole, or part, of the titled land; and is characterized by the kibanja holder having physical possession of the land, while the registered owner of the superior title retains only legal possession. It would appear this is what Griffith C.J., meant in the ***Municipal District of Concord vs Coles*** case cited above, when he referred to *'a legal or equitable interest in land, partaking of the character of an estate in it or equitable claim to it,'* conferring on the owner the right to lodge a caveat. It therefore follows that a kibanja holder has an interest in land, which can rightfully be protected by the lodgment of caveats. (**emphasis added**).

The second point of contention by the Respondent is that the caveat is bad in law since it forbids the Respondent's dealing with the whole of the registered land; and yet the Applicant's kibanja interest comprises only a portion of the Respondent's

registered land. The contested caveat states that the Applicant claims interest as a kibanja holder in the Respondent's registered land; and then he adds that: –

> *"I forbid the registration of any person as transferee or proprietor of the above land or any interest until after Notice of such registration is given to me ... or unless the instrument is expressed to be subject to my consent or unless such consent is in writing thereto."*

The affidavit in supporting of the caveat is worded very much like the caveat itself. On the face of it, the Applicant's kibanja interest is comprised in the whole of the Respondent's land. It only transpired in the course of the proceedings in this application that the Applicant's kibanja interest in issue covers only about three quarters of the Respondent's land. This, the Respondent contends, makes the Applicant's unqualified caveat bad in law. In the ***Boyes vs Gathure*** case (supra), where the facts were similar to the instant one before me, Sir Charles Newbold, P., had this to say at p. 389: –

> *"In the result there is a caveat entered against property in respect of which there is no claim; and the wording of the caveat makes it impossible to ascertain even generally that part of the property in respect of which a claim exists from that part in respect of which no claim was made. Before a caveat can be entered against a property, a claim to an interest in the property must exist. In this case no claim exists as to part of the property, yet the caveat refers to the whole and prohibits any dealing with the whole. The result is that the entry of the caveat has prohibited dealing with property over which no claim is made.*
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> *This surely is not merely an irregularity which can, in an appropriate case, be cured – it must be fundamental to the whole basis on which caveats are entered, and the rights and duties which flow from the entry of the caveat. The fact that the position was only disclosed later is immaterial. There is no right*

to enter a caveat over property in respect of which no interest is claimed and if erroneously it is entered and the mistake subsequently comes to light, surely the entry must be struck out. As it is not possible to distinguish even generally that part of the property against which a claim is made from that part against which no claim is made, the entry of the caveat as a whole must be struck out."

The rationale behind the provision of the law that a caveat must not be lodged for property which the caveator has no claim of interest, is founded in good sense. Land is a key factor of production; and for this, a person who has no reason to interfere with another's land should not be allowed to do so, and thereby interfere with the use of that land as a factor of economic development. In the light of the incurable defect in the caveat in issue, the caveat is certainly bad in law; and the Registrar of Titles would not have lawfully lodged it if the Applicant had disclosed that his claim to the kibanja did not cover the whole of, but only part of the Respondent's titled land. For this reason, the Registrar of Titles has no alternative; but to vacate it.

However, and to the relief of the Applicant, any dealing with the Respondent's land in issue is subject to the Applicant's kibanja interest therein. This position has been bolstered by the Court's earlier interlocutory order, allowing the Respondent access to its land, but prohibiting its alienation. In the result then, I dismiss this application with costs to the Respondent.

Alfonse Chigamoy Owiny – Dollo
JUDGE

05 – 02 – 2016