

**CIVIL SUIT NO. 839-2017-AINOMUGISHA DOREEN VS SAAVA MICHEAL D KYAZZE
(JUDGMENT)**

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

LAND DIVISION

CIVIL SUIT NO.839 OF 2017

AINOMUGISHA DOREEN :::::::::::::::::::::::::::::::::::::::COUNTERCLAIMANT

VERSES

SAAVA MICHEAL DAVID KYAZZE:::::::::::::::::::::::::::::::::::::DEFENDANT

BEFORE: HON. MR. JUSTICE HENRY I. KAWESA

JUDGMENT

Civil suit No. 839 of 2017 was initially filed by Saava Michael David Kyazze the Defendant herein against the counter-claimant and the Commissioner Land Registration for orders that, the counter-claimant is not a bonafide purchaser having obtained the suit land fraudulently, that the counter-claimant's title is tainted with fraud and that the same be cancelled, that the counter-claimant's action of building a house on the suit land is an act of trespass and that the same to be demolished, a permanent injunction restraining the counter-claimant from trespassing to the suit property.

In her defence, the counter-claimant claimed to be a registered proprietor of land comprised in Bulemezi Block 124 Plot 10 land at Katugo measuring approximately 142.8 Hectares. Further in her defence, counter-claimed against the plaintiff/Defendant for this Court's declarations that;-

- a. An order removing the caveat lodged by the 1stDefendant in counter claim declaration on land comprised in Bulemezi Block 124 plot 10.

- b. Damages for lodging a caveat.

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- c. A permanent injunction restraining the Defendant/Plaintiff in counter-claim, his servants and or, agents from any further entry, and interference with the counterclaimant's quite possession of the suit land.

- d. Costs of the counter-claim.

When the matter came-up for hearing on 23rd January 2019, both the plaintiff/Defendant in the counter-claim and his Counsel did not appear and there was proof of service, Counsel for the counter-claimant moved Court to dismiss the plaintiff's claim and allow the 1stDefendant to/counterclaimant to proceed exparte on the counter-claim.

This Court accordingly dismissed the suit under Order 9 rule 22 of the Civil Procedure Rules with costs to the 1stDefendant/counter-claimant and the 1stDefendant was granted leave to formally prove her counter-claim exparte, hence this judgment.

In the counter-claimant's submissions, two issues were raised for determination by this Court, to wit;-

1. Whether the Defendant in the counterclaim has caveatable interest in the suit land,

2. What remedies are available to the parties

Resolution of the issues.

Whether the 1stDefendant in the counterclaim has caveatable interests

According to the counter-claimant's witness statement, she states that she is the registered proprietor of land comprised in Bulemezi Block 124 plot 10 land at Kisune and Kitugo having purchased it from Sil Investments Ltd, an agent of Nile River Acquisition that whom bank of Uganda sold assets and liabilities of the co-operative bank.

That before purchase, she did all the due diligence and discovered from ***Sil investments Ltd that in 1989***, the former registered proprietor of the suit land Elizabeth Nakabiri authorized Ms Nakabembe Enterprises Ltd to acquire a loan from the Co-operative bank Ltd and mortgaged the suit land as collateral to secure the loan. That the special certificate was surrendered to the bank

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which registered an equitable mortgage thereon as an encumbrance and later, that Elizabeth Nakabiri executed a formal mortgage with the bank.

That the borrower defaulted on the payment of the loan and that in 1999, the bank advertised the suit land for sale by public auction. That the loan and the mortgage remained in force until the bank went into liquidation and all her assets and liabilities were taken over by Bank of Uganda, which in-turn sold to a Mauritius Company called Nile River Acquisition Company. She stated further that the said company appointed Sil investments Ltd as her agent for the purpose of dealing with her affairs as regards assets and liabilities formerly of Co-operative Bank Ltd.

It was her case that Sil Investments wrote to the Defendant/Plaintiff informing him that the debt owing on the mortgage was 526,284,754/- only (*five hundred two hundred twenty six million, two hundred eighty four thousand, seven hundred fifty four shillings*) and that he was given chance to redeem the suit property since the then purchaser failed to complete the payment. That the Defendant and his co-administrator failed to make attempts to redeem their property and that the company was selling the same to a willing buyer.

That the counterclaimant then purchased the suit land from Sil Investments Ltd at 160,000,000/- only (*one hundred and sixty million shillings*) and that the special certificate of title for the said land was together with a mortgage release instruments were handed over to her and that she went ahead and transferred the suit land into her names.

Further, that she was surprised to discover that the Defendant, with full knowledge that the suit land was a subject of a mortgage and that the certificate of title was in custody of Sil investments Ltd, went ahead and forged a second special certificate of title in an attempt to cheat the mortgagee and that he started to confuse the equitable interest owners on the suit land; and that he was the rightful owner. That she reported the forgery to police in Luwero under SD47/9/3/2017 which wrote to the bank of Uganda and that the bank explained the circumstances under which Sil investments Ltd were exercising the power to sale the suit land.

That the Defendant without any reasonable cause other than his fraudulent intention lodged a caveat on the suit land. With that the counterclaimant claims to have suffered inconvenience and financial loss since she wanted to establish a commercial cattle farm.

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Counsel while relying on Section 139 of the Registration of Titles Act submits that any person to lodge a caveat must have a claim or interest in the land. That the caveator's claim or interest must be genuine.

Section 139(1) 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 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 or unless the interest 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 ”.

This section gives powers to a beneficiary to lodge a caveat to protect his or her interests. And also, a person need to have caveatable interests, a beneficiary to lodge a caveat, the property must form part of the deceased's estate.

In *Matex Commercial Supplies LTD and Another versus Euro Bank Ltd (in liquidation) [2008] 1 EA at PP 216* cited with approval from the case of *G.S Royal Hardware Industries Ltd & Anor versus Equity Bank (U) Ltd And Another HCMA No. 913/2015* where it was held that;

‘any property whether it is a matrimonial home or a spiritual house which is offered as security for a loan/overdraft is made on the understanding that the property stands at risk of being sold by the lender if default is made on the payment of the debt secured’.

From the facts on the record, the suit land was a subject of a mortgage given to the then registered proprietor, the mortgage was unsettled and the property was sold in exercise of power of default. I find that this property stood a risk of being sold upon default and the Defendant/Plaintiff's interests in the suit property came to an end the moment the property was sold to the counterclaimant by sil investments Ltd.

I also find that the same was lawfully transferred to counter-claimant. This can be evidenced by Annexure 'C', which is a copy of the mortgage deed signed by then registered proprietor Elizabeth Nakabiri, Annexure 'C', is a copy of a caveat lodged on the suit land by the co-operative bank Ltd, Annexure 'E' is a copy of an advertisement in the New Vision Dated

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February 8 1999. *Annexure F* is an agency agreement where in Nile River Acquisition Company appointed Sil investments Ltd as its agent. Annexure G is letter dated 16th October 2013 written to the administrators of the estate of the late Elizabeth Nakabiri to redeem their property.

According to the evidence availed still, a copy of a bank slip *marked 'F'*, shows that the counter-claimant paid sum of shs. 160,000,000/- only(*one hundred sixty million shillings*)on sil investments account in Barclays bank on 1st January, 2017,a copy of the special certificate of title shows that the counterclaimant got registered on the land on the 19th April, 2017 at 9:00 am and that was the same date and time the mortgage was also released. *See annexure A to the counter-claim.*

I note that annexure I is a 2nd special title which was issued to the Defendant (administrators) on the 22nd January, 2015 which the counter-claimant believes to was a forgery since the first special title was in existence but was with Sil Investments Ltd due to the subsisting mortgage.

The alleged caveat according to a search report dated 8th May, 2017 was lodged by the Defendant on 27th April, 2017 at 9:00 am where he was claiming to be a beneficiary, these were like 8 days after the counterclaimant had got registered. (*See. Annexure J of the trial bundle*).

As already noted *inter-alia*, the interests of the Defendant as a beneficiary extinguished at the time the property was sold to the counterclaim as thus, the land on which the Defendant lodged a caveat did not form part of the estate of the late Elizabeth Nakabiri and therefore, the caveat was erroneously lodged on the same.

In the case of **Sentongo Produce & Coffee Farmers Ltd versus Rose Nakafuma Thijusa HCMC 690/99** it was held that; *for a caveat to be valid, the caveator must have an interest legal or equitable to be protected.*

I also find that the 2nd special title issued to the Defendants was done in error since the 1st special title was still in existence.

Remedies.

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A certificate of title is conclusive evidence of ownership of title and can only be impeached where there is fraud. *See Section 59 of the Registration of Titles Act.*

- a) The counter-claimant prayed for an order to vacate the caveat. I note that the Defendant/ Plaintiff had all the opportunity to give reasons why the caveat was lodged and to show cause why the same should be maintained which suit was dismissed for non-appearance as such, in the interest of justice, the caveat is hereby vacated.
 - b) She also prayed for general damages for lodging a caveat without caveatable interest, these are awarded at the discretion of Court. Therefore this Court allows shs. 20,000,000/- only (*twenty million shillings*) as general damages,
- An order for cancellation of the special certificate of title.
 - Costs of the counter-claim.

I so order.

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Henry I. Kawesa

JUDGE

30/04/2019

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30/04/2019:

Rubezi Jacob for counter claimant

Doreen present.

Rubezi: Ruling on counter claim.

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Court: Judgment delivered to the parties above.

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Right of appeal explained.

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Henry I. Kawesa

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30/04/2019