

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(LAND DIVISION)

MISCELLANEOUS CAUSE NO. 30 OF 2022

JOMO MUSINGUZIAPPLICANT

VERSUS

1. DIANA KEISHIKI KEMANZI

2. MARK ENOTH KEMANZIRESPONDENTS.

BEFORE HON. LADY JUSTICE FLAVIA NASSUNA MATOVU

RULING

The Applicant brought this application under S.98 of the Civil Procedure Act and O.52 rr 1 & 3 of the Civil Procedure Rules, seeking for orders that;

- a) The 1st Respondent does not have a caveatable interest in respect to the Applicant's land measuring approximately 0.59 acres forming part of Kyaddondo Block 244 Plot 3736 at Kisugu;
- b) Registration of the 1st Respondent's caveat over the Applicant's land was unlawful, void and contrary to the law;
- c) The 1st Respondent's caveat be immediately removed/vacated with respect to 0.59 acres of the land comprised in Kyaddondo Block 244 Plot 3736 at Kisugu;
- d) Costs of this application be provided for.

The application was brought by Notice of motion which was supported by an affidavit sworn by the Applicant. The grounds of the application were laid out in the Notice of motion and affidavit in support and briefly they were that;

1. The Applicant is the lawful owner of a portion of land measuring approximately 0.59 acres comprised in Kyaddondo Block 244 Plot 3736 Kisugu developed with a storied building;
2. The Applicant bought the said land from Ida May Kwesiga, the registered proprietor and the 2nd Respondent on 14th July 2020;

3. The Applicant paid the agreed purchase price and immediately took vacant possession of the land which he possesses to date;
4. The 2nd Respondent retained a portion of Plot 3736 measuring approximately 0.323 acres developed with another storied building in which he resides;
5. The Applicant has since discovered that the 1st Respondent illegally registered a caveat over his interest in the land claiming it to be matrimonial property.
6. The 1st Respondent has no caveatable interest in the portion of the property belonging to the Applicant;
7. The 1st Respondent's caveat has prevented the Applicant from subdividing the land from the 1st Respondent's matrimonial home and obtaining a certificate of title;
8. The Applicant has been greatly inconvenienced in enjoying quiet possession of his land.

Each of the Respondents filed an affidavit in reply to the application in which they called upon this court to dismiss the application with costs.

The 1st Respondent did not deny having lodged the caveat. However, she maintained that the application was not proper before court, since it ought to have been brought before the Registrar of titles in accordance with the provisions of S.140 of the Registration of titles Act. Secondly that she lodged the caveat in her capacity as lawfully wedded wife of the 2nd Respondent with whom she has 4 children. That since 2014, she, together with the 2nd respondent and their four children have lived in their residential house which is located on land comprised in Kyaddondo Block 244 Plot 3736 & 3737 at Kisugu. That Plot 3736 has two residential houses one of which is owned by herself and the 2nd Respondent while the other house is owned by the Applicant. That plot 3737 comprises an access road and does not have any residential property.

That in 2021 the 2nd Respondent claimed that their marriage had irretrievably broken down and filed a petition for dissolution of marriage at the High court Family division. That the 2nd Respondent then threatened to sell their matrimonial home but failed to get her consent. That she lodged the caveat in order to protect her interest in the matrimonial home. That since the two houses (the matrimonial home and Applicant's house) are on the same plot number, the caveat was lodged on the entire plot in a manner that affects both houses.

That she whereas she did not challenge the capacity in which the Applicant owns the house on Plot 3736, she was opposed to vacating the caveat in absence of any guarantees to protect the matrimonial home.

The 2nd Respondent on the other hand maintained in his affidavit that he had been wrongfully sued since the Application did not show any cause of action against him. That it is true he sold a portion of land comprised in Block 244 Plot 3736 to the Applicant. That he had no hand in lodging the said caveat on the land and therefore the Applicant had no reason to drag him to court.

In his affidavit in rejoinder, the Applicant reiterated their averments in the previous affidavit but specifically noted that the 2nd Respondent had filed his affidavit in reply out of time and without leave of court and the same should accordingly be struck off the record. They further maintained that the application was brought under court's inherent powers after the Commissioner Land Registration had failed to remove the caveat.

I have carefully studied the pleadings on record, the submission of both counsel together with the relevant law.

I must note that it is true the 2nd Respondent filed his Affidavit in reply outside the required time and without leave of court. However, the said affidavit in reply raised an important point of law which this court cannot ignore. It was to the effect that the application does not raise any cause of action against him.

I have therefore found it prudent to consider this point of law and therefore the issues to be decided by this court are;

1. Whether the application discloses any cause of action against the 2nd Respondent.
2. Whether this application is proper before court.
3. Whether the 1st Respondent has a caveatable interest in respect of a portion of land measuring 0.59 acres forming part of Kyaddondo Block 244 Plot 3736.
4. What are the remedies available?

Issue 1

- 1. Whether the application discloses any cause of action against the 2nd Respondent.**

As rightly submitted by counsel for the Applicant, a cause of action in a plaint is said to be disclosed if three essential elements are shown i.e. existence of the plaintiff's right, violation of that right, and defendant's liability for that violation. See case of *Auto Garage vs. Motokov 1971 E.A 514*.

In the case before me the pleadings show that the Applicant enjoyed a right to the property that he bought and that right was infringed when the 1st Applicant lodged a caveat on the land. The pleadings do not disclose any role played by the 2nd respondent in the lodgment of the said caveat. Certainly the application does not disclose any cause of action against the 2nd respondent. The same is accordingly hereby struck off against him.

Issue 2

Whether the application is proper before court.

The 1st Respondent maintained that the application is not proper before court as the same ought to have been brought before the Registrar of Titles in accordance with the provisions of S.140 of the Registration of Titles Act CAP 230. The Applicant on the other hand maintained that the application was proper before court since it had been brought for court to exercise its inherent powers after the Commissioner, Land Registration had failed to dislodge the caveat.

It is true that S.140 of the Registration of titles Act provides for management by the Registrar of titles of any caveats registered on land.

Under S.140(2) the Registrar of titles can dislodge a caveat after giving 60 days' notice to the caveator that the proprietor has applied for the removal of the caveat.

However, under S.140(1) a caveat can be dislodged upon orders of court. The section provides that upon receipt of a caveat, the Registrar shall notify the person against whose application to be registered as proprietor, or to proprietor against whose title to deal with the estate or interest the caveat has been lodged, and that applicant, or proprietor or any person claiming under any transfer or other instrument signed by the proprietor may summon the caveator to attend before the court to show cause why the caveat should not be removed and the court may, make such order in the premises as it deems fit.

This section (140 (1)), therefore empowers court to order removal of any caveat, if the caveator fails to show cause why the caveat should not be removed. This application is therefore proper before court. The Respondent is accordingly expected

to show cause why the caveat that she lodged on land comprised in Kyaddondo Block 244 Plot 3736 should not be removed. I accordingly resolve the 1st issue in the affirmative.

Issue 3

Whether the 1st Respondent has a caveatable interest in respect of a portion of land measuring 0.59 acres forming part of Kyaddondo Block 244 Plot 3736.

S.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 the Act under any unregistered instrument or by devolution in law may lodge a caveat with the Registrar. Therefore, for a caveat to be valid, the caveator must have a caveatable interest, legal or equitable in the land. see case *of Sentongo Produce & coffee Farmers Ltd. Vs. Rose Nakafuma Muiise HCMA 690 of 1999*.

The Applicant maintained that he is the lawful owner of a portion of land measuring approximately 0.59 acres comprised in Kyaddondo Block 244 Plot 3736, Kisugu which land is developed with a storied building. That he bought the land from one Ida May Kwesiga the registered proprietor and the 2nd Respondent on 14/7/2020. That after payment of the full purchase price, he took possession of the land.

That the 2nd Respondent then retained a portion of plot 3736 measuring 0.323 acres developed with another storied building in which he resides.

The 1st Respondent stated that she did not dispute the Applicant's equitable interest in the land and was indeed aware that the Applicant had bought a portion of the land. She however maintained her matrimonial home together with the 2nd Respondent is located on the same land and she lodged the caveat on the entire piece of land to protect her interest in the same land. She specifically stated in paragraph 7 of her affidavit in reply that if this court is inclined to remove the caveat then court should see to it that her interests and those of her four children are protected.

S.38A (1) of the Land Act as amended confers upon spouses security of occupancy on family land and S.38A (3) is to the effect that a spouse may give or withhold consent to a transaction pertaining to family land. S.38A (7) authorizes a spouse who is not the registered owner of land to lodge a caveat on the certificate of title to indicate that the property is subject to the requirement of consent.

S.38A (4) further offers guidance on what amounts to family land i.e. It refers to 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).

The 1st Respondent stated in her affidavit in reply that she has lived with her husband and their children in a residential house located in Kyaddondo Block 244 Plot 3736 a fact which was not denied by the Applicant and the 1st Respondent. This property therefore falls within the ambit of family land within the meaning of S.38 of the Land Act. It should however be noted that her equitable interest is limited to only a portion of the said land.

I have had the opportunity to study the statutory declaration that was made by the 1st Respondent in support of the caveat that she lodged (Attached to the Application as N). It was sworn on 3/12/2020. In the said declaration the 1st Respondent did not disclose that the Applicant had already bought a portion of the land. She instead stated that she had received information from reliable sources that some people had expressed intentions of transferring and or dealing with the said land. In the said declaration, she made it appear as if the matrimonial home is on the entire plot of land and did not disclose that a portion of the land does not belong to her which was dishonesty on her part. On the basis of this averment, the caveat was lodged.

This case is on all fours with the case of *Davis Ndyomugabe vs Tile World Ltd . MA 650/2011 (Land Division)*. In that case the caveator who had Kibanja covering about three quarters of the land lodged a caveat on the entire piece of land. In the affidavit in support of the caveat, he did not disclose that his interest covered only a portion of the land. He made it appear like his interest covered the entire land. The court found that 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 subsequently comes to light, 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 court further noted that the rationale behind the provision of the law is that a caveat must not be lodged for property which the caveator has no claim of interest. That land is a key factor of production and for this reason 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.

Similarly, in the case before me, the 1st Respondent has clearly stated that she has no interest in the portion of land that is was sold to Applicant. On the one hand she admits that Applicant bought and is not challenging the sale and on the other hand she lodged caveat forbidding transfer of the land that was sold to the Applicant. In my view this is a contradiction since there is no way the transaction will be completed with the caveat still on the land.

I therefore find that the 1st Respondent has no caveatable interest in respect of a portion of land measuring 0.59 acres forming part of Kyaddondo Block 244 Plot 3736.

Issue 4

What are the remedies available?

Having found as above the caveat that was lodged by the 1st Respondent on Land comprised in Kyaddondo Block 244 Plot 3736 should be removed for purposes of subdivision of the said land to enable Applicant process his certificate of title.

The Applicant prayed that 1st Respondent should be ordered to pay compensation of 50 million to the Applicant for the inconvenience occasioned to him as a result of her lodging the caveat as provided under S.142 of the Registration of titles Act.

S.142 provides that any person lodging any caveat with the registrar ... without reasonable cause shall be liable to make compensation to any person who may have sustained damage by the lodging of the caveat.

In the case before court I note that the 1st Respondent lodged the caveat by virtue of the fact that she owned matrimonial home on a portion of the land in issue. She acted under the mistaken belief that this was the only way she could protect her interest in the land. It cannot therefore be said that she had no reasonable cause for lodging the caveat. This court will not therefore order 1st Respondent to pay compensation.

This application is therefore hereby allowed with the following orders.

- a) The Caveat that was lodged by the 1st Respondent, Diana Keishiki Kamanzi be immediately removed to enable the Applicant process transfer of a portion of the said land measuring 0.59 acres comprised in Kyaddondo Block 244 Plot 3736 into his names.

- b) The 1st Respondent shall then be at liberty to lodge a caveat on the remaining portion of the said land.
- c) Each party shall bear their costs for this application.

Dated at Kampala this^{20th}..... day of^{September}..... 2022


FLAVIA NASSUNA MATOVU
AG. JUDGE.