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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS CAUSE NO. 0015 OF 2022

MOSES MAKUMBI BANALYA YAWE-----APPLICANT

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-VERSUS-

FREDRICK MAWEJJE YAWE-----RESPONDENTS

Before: Hon. Lady Justice Olive Kazaarwe Mukwaya

**RULING**

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The Applicant, Mr. Moses Makumbi Banalya Yawe brought this motion under **Section 140, 142 of the Registration of Titles Act Cap 230, Section 98 of the Civil Procedure Act Cap 71, Section 33 of the Judicature Act Cap 13 and Order 21 rule 19 (3) and Order 52 Rule 2** of the Civil Procedure Rules seeking orders that;

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1. The Respondent shows cause why the caveats he lodged on the Applicant's land comprised in Block 8 Plot 864 land situated at Namirembe /Mengo should not be removed.
2. The Respondent's caveat be dislodged from the Applicant's land.
3. The Respondent pays compensation/damages to the Applicant for wrongful lodgment of the caveat without lawful or reasonable cause.
4. The Applicant makes a setoff with the Respondent in respect of the damages and costs awarded in Civil Suit No. 299 of 2014 with the damages and costs awarded herein.
5. The Respondent pays costs of this application.

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**Grounds for the Application**

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According to Mr. Moses Makumbi Banalya Yawe the Applicant herein, he is and has been at all material times the Registered proprietor and lawful owner of land developments comprised in Block 8 Plot 864 Namirembe/Mengo (herein referred to as the suit land). A copy of the certificate was attached and marked annexure "A".

5 The Respondent without a caveatable cause or interest lodged a caveat on the suit land on the 11<sup>th</sup> December 2013. A copy of the search report, Respondent's application for the caveat and statutory declaration are attached and marked B1, B2 and B3 respectively.

The Applicant averred that he was building a 3 storied commercial building at that time and was stopped in 2013 when the said caveat was lodged. It remains uncompleted up  
10 to now because of the uncertainty in ownership of land. A copy of the approved building plan was attached and marked annexure C. Additionally, the Applicant averred that the caveat has affected his dealing on the suit land as an owner including a failure to sell it off or obtain a loan to facilitate his businesses from the bank using it as collateral. And as a result he has suffered grave damages.

15 As a background to this application, the Applicant averred that he was sued by the Respondent as the 1<sup>st</sup> Defendant in Civil Suit No.299 of 2014 for wrongful lodgment of a caveat on land comprised in Block 10 Plot 917 Bukesa/Nakulabye wherein the Respondent is the registered proprietor thereof. He added that the reason for lodging that caveat was because the Respondent was registered thereon as beneficiary and not the  
20 owner. A copy of the Plaint was attached and marked annexure D.

In his defence to the suit, the Applicant contended that he was the registered proprietor of the suit land in this instant matter and that the Respondent had also lodged a caveat on his land claiming that he was registered as beneficiary and not an owner. A copy of the defence was attached and marked annexure E. In her judgment therein, the learned  
25 Judge found for the Respondent. A copy of the Judgment was attached and marked annexure F.

Pursuant to the decree, the Applicant averred that he has to pay to the Respondents damages amounting to Ugx. 25,000,000/= and costs of the suit. A copy of the decree was attached and marked G. However, because the Respondent also wrongfully lodged  
30 a caveat on his land, the Applicant contended that he has also suffered colossal loss for which it is just and equitable that they make a set off since they would both be in equal fault. Hence this application.

The Applicant therefore prayed that this Court allows this application.

5     **Respondent's Reply**

Mr. Fredrick Mawejje Yawe swore an affidavit in Reply to the Applicant's application in which he denied all his claims. He averred that he admitted that he registered a caveat on the suit property herein but this was done to protect his equitable interest in the property. He further averred that the suit land is part of the estate of his late father, Erieza Sebbowa Yawe. He added that in his will at page 3 to 4 of the English translation, his late father made it clear that he purchased the property for his children but chose to register it in the name of the Applicant. A copy of the will along with its English translation was attached and marked annexure A.

The Respondent further averred that there is no evidence presented by the Applicant to remotely suggest that this property was ever gifted to him by his father while he was still alive. He explained further that the said property was bequeathed to his sisters, Perusi Nankabirwa and Alice Kisakye along with the Applicant and himself. Further to that, the Respondent stated that the Applicant admitted the same when in a letter dated 28<sup>th</sup> February 2019, through his then Counsel, he proposed a settlement of Civil Suit No.299 of 2014 in which he sought to have his sister Alice Kisakye and himself give up their share in the property to the Applicant and his wife. A copy of the letter was attached and marked annexure B. The Applicant made similar admissions in his defence to that case under paragraph 5(b).

The Respondent went on to state that the Applicant has never previously challenged the bequests to him or the other beneficiaries but he has alienated the property to his own use as evidenced by his admission that he attempted to sell and mortgage it off without the consent of the rest of the beneficiaries.

In regard to Block 10 Plot 917, the Respondent averred that neither the Applicant nor his wife were listed as beneficiaries to the same in the will at pages 2 to 3 of the English translation. And therefore it was upon those grounds that judgment was passed against the Applicant in that suit because the Respondent was at fault in lodging a caveat on the same. The Respondent further stated that in any event, the Applicant has since filed an appeal of the said decision in Civil Suit 299 of 2014 vide Civil Appeal No.16 of 2022 seeking to set aside the orders and awards of damages and costs and that appeal is still

5 pending. A copy of the memorandum of appeal and notice of appeal were attached and marked annexure C1 and C2 respectively.

The Respondent further contented that the resolution of the issue as to whether or not he had a right to lodge a caveat on the property will not be possible without a full trial of the issue which cannot happen under the current application. He thus prayed that the  
10 application be dismissed with costs.

### **Rejoinder**

The Applicant in his affidavit in rejoinder reiterated his earlier averments. He further stated that the claims by the Respondent were rejected by the learned Judge in her judgment in  
15 Civil Suit 299 of 2022 where she stated that once a testator registered the land at Bukesa in the names of the Respondent, he ceased to be the owner. Therefore, that land was not part of the testator's estate. He thus averred that the same therefore applied to the suit land in the instant matter since it was registered in his names as the Applicant therefore the Respondent no longer has any caveatable interest in the same.

20 The Applicant further stated that besides claiming that their father registered the property at Bukesa, the Respondent produced no other evidence that the land was gifted to him and should therefore not point accusations at the Applicant on this ground.

### **Representation**

The Applicant was represented by M/S Rem Advocates while the Respondent was  
25 represented by M/S Musiime, Muhebwe and Co. Advocates. Both Counsel filed written submissions which have been considered by this Court.

### **Issue**

- 1. Whether the impugned caveats should be removed?**
- 2. Whether the Applicant is entitled to the remedies sought?**

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5    **Resolution**

**Issue 1**

**Whether the impugned caveats should be removed?**

Before I commenced on the resolution of this issue, I took note of the submissions by Counsel on late or failure in service of court process, I did not dwell on it. In my view since  
10    all the parties were on board, the justice of the matter required the application be heard and determined without undue regard to technicalities.

This Application arises out of ***Civil Suit No. 299 of 2014, Fredrick Mawejje versus Moses Makumbi Banalya Yawe & Anor.*** Judgment in that matter was delivered by the Hon. Lady Justice Cornelia Kakooza Sabiti who held that the Defendants have no  
15    caveatable interest in the suit land comprised in Block 10 Plot 917 at Bukesa Nakulabye; registration of the caveats lodged by the Defendants and general damages of UGX. 25,000,000/=

Similarly, in the application before me, the Applicant Mr. Moses Makumbi Banalya Yawe, seeks that the Respondent Mr. Fredrick Mawejje Yawe, show cause why the caveats he  
20    lodged on the Applicant's land comprised in Block 8 Plot 864 at Namirembe should not be removed.

He further prayed for compensation, damages to the Applicant for wrongful lodgement of the caveat without reasonable/lawful cause. And that the Applicant makes a set off with the Respondent in respect of the damages and costs awarded in Civil Suit no. 299 of  
25    2014 with the damages and costs awarded in this application.

In reply, the Respondent argued that the removal of the caveat in question is not a matter that can be handed by Notice of Motion without calling evidence. And secondly that, there is a pending appeal to Civil Appeal No. 16 of 2022 where the Applicant seeks orders setting aside the awards of damages.

30    Without lingering long over this matter, I must agree with the Respondent. The two parties are biological brothers and the subject matter of this application is land comprised in Block

5 8 Plot 864 which the Respondent, according to the caveat, claims as a beneficiary under the will of the late Erieza Yawe, the biological father of the parties.

Therefore, a determination of the rightful owner of the land is imperative. This decision can only be made by way of ordinary suit between the parties.

10 Before that decision is made, the Respondent has a right to lodge the caveat to protect his perceived interest in the land which right is protected under section 139 of the Registration of Titles Act.

The question of set-off as a possible remedy cannot therefore arise in my view before the substantive dispute between the parties is duly resolved. Instead, since the Applicant has lodged an appeal with respect to Civil Suit no. 299 of 2014, he ought to await its outcome.

15 Alternatively, the Applicant may file an ordinary suit against the Respondent as the most feasible avenue for remedy to address the question of the impugned caveat.

**This application is dismissed with costs.**

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20 **Olive Kazaarwe Mukwaya**

**JUDGE**

**1<sup>st</sup> December 2022**

**Delivered by email to Counsel for the parties.**