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A. H. C. J.

Grounds of the application.

The grounds in support of this application are contained in the affidavit of support deponed by **Mr. Mukilibi Gasuza Yafeesi**, the applicant herein. He stated that he is the registered proprietor of the land comprised in **Kyadondo Block 192 plot 3138 land at Buwate on 17th October 2022** (hereinafter referred to as the 'suit land') having been registered thereon on 18th October 2018 at 1:44pm under instrument number **WAK00194459** and that on the 11th day of October 2022, he sold the suit land to a one Dianah Yesiga Ahabwe.

That although prior to the said sale of the suit land, conducted at the land registry indicated that the same was encumbrance free, when counsel for the said purchaser embarked on the transfer process, he discovered that the 1st, 2nd, 3rd, 4th & 5th respondents had with no reasonable cause whatsoever lodged a caveat on the suit land with the motive to frustrate the applicant from realising the full consideration of the land.

That upon reading the application and affidavit supporting the application to lodge the caveat, the applicant found that the same is full of blatant lies and material falsehoods in so far as it states that the respondents claim a beneficial interest in the land, to mislead the 6th respondent to lodge the said caveat, the existence of which has interfered with the applicant's attempts to realise full consideration from the purchaser of the land thereby inconveniencing the applicant.

That the respondents will not suffer any injustice nor will they be prejudiced if this application is granted thus it is just, fair, equitable and in the interest of substantive justice that this court orders the 6th respondent to vacate the caveat lodged by the 1st – 5th respondents from the land.

1st, 2nd, 3rd, 4th, & 5th respondent's reply.

The 1st, 2nd, 3rd, 4th, & 5th respondents opposed the application through the affidavit in reply deponed by **Mr. Serubiri James**, the 3rd respondent on behalf of the 1st – 5th respondents. He contended that the same ought to be struck out as it is an abuse of court process since it not only contains numerous falsehoods, but also lacks merit.

It was stated that the 1st, 2nd, 3rd, 4th, & 5th respondents are the beneficiaries to the estate of the late James Semakula and are equitable owners of the suit land comprised in **Kyadondo Block 192 Plot 3138 land at Buwate** which forms part of the estate of the 3rd respondent's father's estate.

That while the applicant, 1st, 3rd & 5th respondents are the biological children of the late Semakula James, the 2nd & 4th respondents are the brothers to the late Ssemakula James and that the suit land was part of a larger property that initially belonged to the late Aron Semakula, the 2nd, 4th & the late Semakula James' father.



That the suit land was later registered in the name of Lakeri Nabukalu, a daughter of the late Aron Semakula Kikabi, and a sister to the late Semakula James, who subdivided the same to take off her share, and that the beneficiaries together with the applicant executed an agreement for division of the property where the applicant was given 6.9 acres, while the other beneficiaries agreed to retain a residue of 0.50 hectares which is the suit land, under the estate of the late Semakula James and which also has the family house.

That while it was also agreed by all the beneficiaries that the applicant was not to deal with the suit land in anyway without the consent of the beneficiaries, the said 0.50 acres were fraudulently transferred into the applicant's name in total disregard of the 1st – 5th respondents' interests and that they only found out upon the same in October 2022 upon which they lodged the caveat in issue in their capacity as beneficiaries of the late James Semakula's estate.

In addition, that the applicant did not have the sole interest in the suit land since he was part of the beneficiaries of the estate of the late James Semakula, with no authority to deal with the land and yet he fraudulently, without the respondent's knowledge or title of the land engaged in the sale of the family land.

It was further averred through affidavit evidence that the applicant's buyer did not conduct any due diligence whether by a search at the land registry or the area local council to ascertain the ownership of the suit land since the applicant did not adduce any documentary evidence to prove the alleged search, and that because the suit land is family land, the applicant did not have any interest in the 0.50 acres except his beneficial interest therein which he held jointly with all the other beneficiaries to the estate of the late Semakula James thus he did not possess the sole title or right to pass the same onto a third party.

The deponent further emphasized the fact that the 1st – 5th respondents had an equitable interest in the suit land as beneficiaries of the estate of the late Semakula James and that the applicant was fraudulently registered on the suit land yet the same was family land on which they were raised, meant for the benefit of all the beneficiaries of the deceased's estate therefore he is not entitled to benefit from his illegal actions including the sale of property which he doesn't own.

That the 1st – 5th respondents shall not only be prejudiced, but will also suffer great injustice and irreparable damage if this application is granted because the suit land does not belong to the applicant and that granting this application will enable the applicant complete the land sale transaction which shall deprive the caveators of their property.

That it in the interest of justice, fair and equitable that this application is dismissed with costs.



Applicant's rejoinder.

The applicant also filed an affidavit in rejoinder to the averments in the affidavit in reply by the respondents, refuting their claim of equitable interest in the suit land. That he was bequeathed the same by his late father in his will.

- 5 That it is true that 1st, 3rd, & 4th respondents and the applicant himself are all children of the late Semakula James, but since the 2nd & 5th respondents are brothers to the deceased they are not direct beneficiaries of the late Semakula James' estate as alleged.

The applicant further emphasized that the respondents have no beneficial interest in the suit land owing to the fact that the late Semakula James who died testate left a will by which he distributed his estate to the beneficiaries and that the suit land stopped forming part of the deceased's estate at the time of the said bequest.

Additionally, that Mr. Serubiri James the 3rd respondent concedes that the suit land measuring approximately 0.70 hectares was the applicant's share as per the distribution list attached to his affidavit in reply, and that the land that forms part of the family land with the family house of the late Semakula James measures approximately 0.50 acres as indicated therein.

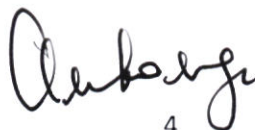
That the land alleged to be family land, and which the respondents describe as the suit land is clearly captured on *page 3* of the distribution list as measuring 0.50 acres as opposed to the suit land which measures 0.70 hectares.

- 20 That while the 4th respondent is not entitled to any beneficial interest in the suit land and the estate of the late James Semakula because he was excluded from benefitting therefrom by the deceased, the 3rd respondent's character and integrity were questioned by their late father as he has always been a controversial and conflict rooted person.

The applicant further emphasised that because the suit land had been bequeathed to the intended beneficiaries, it no longer formed part of the estate of the late James Semakula and that it forms part of his due share as his late father's heir to whom the same was bequeathed.

The applicant denied having sold the family land but admitted having sold the land forming part of his due share out of their late father's estate measuring approximately 0.71 hectares that had been bequeathed to him.

- 30 In rejoinder to respondent's averments that the buyer of the suit land did not conduct any due diligence prior to purchasing the land, the applicant stated that the buyer indeed conducted a search at the land registry as well as a physical inspection of the suit land, consulted the area local council and locals, all of whom confirmed that the land belonged to the applicant.



Representation:

The applicant was represented by **M/s Kaduho & Co. Advocates** while the 1st, 2nd, 3rd, 4th, & 5th respondents were represented **m/s Crimson Associated Advocates**. Both counsel filed written submissions in support of their respective clients' cases as directed by this court.

5 **Consideration of the application.**

I have carefully read and considered the pleadings, evidence, and submissions of both counsel, the details of which are on the court record, and which I have taken into account in determining whether or not this application merits the prayers sought.

10 It is now settled law that for caveat to be valid, the caveator must have a protectable interest, legal or equitable, otherwise the caveat would be invalid. (**See: Sentongo Produce V Coffee Farmers Limited & Anor vs Rose Nakafuma Muyiisa HCMC 690/99, Kiyingi Paul Bannada & others vs Rose Nabusso: Miscellaneous Cause No.163 of 2021**)

15 The caveat which is the subject of this application was lodged under the provisions of **section 139 of the Registration of Titles Act** by the 1st – 5th respondents who claim to be the beneficiaries of the estate of the late Aron Semakula.


It is not in dispute that the late Semakula James died testate, and that the will adduced in evidence was made by him. Neither the applicant nor the 1st, 2nd, 3rd, 4th & 5th respondents have since challenged the same, either through formal court process, or informally.

20 A will by its nature is ambulatory. In **Beatrice Asiire Malinga vs Jonathan Obukunyang Malinga Civil Suit No.13 of 2013**, the court observed that a will establishes the wishes of the testator at the time of his death and court is inclined not to interfere with the testator's wishes unless in circumstances where equity and justice requires.

25 The respondents in their affidavit in reply contend that the beneficiaries of the estate of the late Semakula James executed an agreement dividing the deceased's property and that by virtue of the said agreement, the applicant was given 6.9 acres of land, while the beneficiaries retained the residue of 0.50 acres which comprised the family house owned by the entire family.

30 It is settled law that a will can only be altered or revoked by its maker at any time when he or she is competent to dispose of his or her property by will. (**Refer to Section 48 of the Succession Act**). According to the will of the late James Semakula attached to the affidavit in reply, the family house which had stores was bequeathed to the late James Semakula's widow. The will also states that upon the demise of the widow, the said house would revert to the heir.

Section 188 of the Succession Act, Cap. 162 provides:


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No right as executor or legatee shall be established unless a court of competent jurisdiction within Uganda has granted probate of the will under which the right is claimed...

There is nothing on record to show in this present application that the probate was granted to the persons named in the will as executors of the deceased's will. With all due respect a will does not operate in the same way as a gift *intervivos* which upon issuance would take immediate effect. It thereupon ceases to constitute part of the estate of the giver and unlike a bequest made in a will, the transfer is complete when the deceased is still alive.

Furthermore, the testator in very clear terms stated on *page 2* of the translated version of his will, that no child of his should ever divide up or claim ownership of his land except as tenants.

It therefore struck this court as odd that in a meeting held on 15th December, 2000, the children, in collusion with some clan members and a handful of executors who knew or ought to have known the contents of that will; and without the authority of court had gone ahead to divid up the estate, under a distribution scheme agreement.

The said decisions and actions were of no effect as they were in contravention of both the law and wishes of the deceased.

Section 268 of the Succession Act takes any person who intermeddles with the estate of the deceased or does such act which belongs to the estate of the executor while there is no rightful executor in existence, as a mere executor in his/her own wrong.

In conclusion and in light of the above:

The following are the orders of court:

- 1. Any dealing with the estate of the late James Semakula without the grant of probate was unlawful. It amounted to intermeddling with the estate.***
- 2. The distribution scheme carried out contrary to the wishes of the deceased on 15th December, 2000 was irregular and therefore of no consequence.***
- 3. Accordingly, the caveat lodged by the respondents shall remain in force until after the due process of law is followed in obtaining the grant of probate from court for the proper and effective administration of the estate, and distribution is made in accordance with the wishes of the deceased; or until further orders are made by court.***

The application must therefore fail since the applicant did not come to court with clean hands.

Each party to meet its own costs.



I so order.

.....*Alexandra*.....

Alexandra Nkonge Rugadya

Judge

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16th January, 2023.

*Delivered by email
Alexandra
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16/1/2023*