

THE REPUBLIC OF UGANDA

AT THE HIGH COURT OF UGANDA AT KAMPALA

(LAND DIVISION)

MISCELLANEOUS APPLICATION NO.752 OF 2023

(Arising from Miscellaneous Cause No.10 of 2023)

NAMUTEETE HENRY:.....APPLICANT

VERSUS

NDIWALANA GEORGE WILLIAM:.....RESPONDENT

Before: Lady Justice Alexandra Nkonge Rugadya.

Ruling.


The applicant by notice of motion brought this application under the provisions of **Section 10 & 33 of the Judicature Act cap.13, Sections 82 & 98 of the Civil Procedure Act cap.71, and Order 46 (1) (a) (b) (4) & (8) of the Civil Procedure SI 71-1** seeking orders that the orders of this court vide **Miscellaneous Cause No.10 of 2023** be reviewed owing to an apparent error on the face of the record. It also seeks that costs of the application be provided for.

Grounds of the application:

The grounds of the application are contained in the affidavit in support thereof deposed by Mr. Namuteete Henry Mugwanya, the applicant herein. He states that he instituted **Civil Suit No.32 of 2022** against the respondent for trespass on land comprised in **Busiro Block 542 plot 24 & 25** and that the respondent was found to be a trespasser.

That when the respondent disobeyed the decree and judgment of this court by selling of the suit land which had already been decreed to belong to the applicant, the applicant instituted **Miscellaneous Application No.154 of 2021** against the respondent who was found to be in contempt of court.

That the respondent then instituted **Civil Appeal No.72 of 2022** arising from **Miscellaneous Application No.104 of 2020**, and also proceeded to lodge a caveat on the suit land knowing that court had already found him to be in contempt.



That the applicant instituted **Miscellaneous Cause No.10 of 2023** seeking an order of removal of the respondent's caveat and when this court gave its ruling, it held that the issues arising therefrom would be considered and determined in **Civil Appeal No.72 of 2022**. However that this court in its judgement in **Civil Appeal No.72 of 2022** did not consider the merits of **Miscellaneous Cause No.10 of 2023**.

That there is an error apparent on the record warranting a review of the ruling and orders of this court in **Miscellaneous Application No.10 of 2022**, and that this court is vested with the jurisdiction to grant the prayers herein for the ends of justice to meet and it is in the interest of justice that this application is granted.

The respondent was duly served with court process as per the directives of this court, but he did not file an affidavit in reply. In consequence, this application stands unchallenged.

The applicant through his lawyers, **M/s John F. Ssenkooba & Co. Advocates** and **Sebanja & Co. Advocates** filed written submissions which I have considered in the determination of this application.

The main issue for consideration is whether there is justification for a review of the orders of this court.

Consideration by court:

Section 82 Civil Procedure Act Cap. 71, reinforced by **Order 46 rule 1 of the Civil Procedure Rules SI 71-1** which provides that:-

"Any person considering him/her self-aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or by a decree or order from which no appeal is hereby allowed and who from the discovery of new and important matter of evidence which after the exercise of due diligence was not within his or her knowledge or could not be produced by him or her at the time when the decree was passed or order was made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason desires to obtain a review of the decree passed or order made against him or her may apply for a review of the judgment to the court which passed the decree or made the order."

The court in **Re: Nakivubo Chemists (U) Ltd [1979] HCB 12** while interpreting **Order 46** held that an applicant in order to succeed in a claim for review has to show



first, that there is discovery of a new and important matter of evidence previously overlooked by excusable misfortune.

Secondly, that there is discovery of some error or mistake apparent on the face of the record; and thirdly, that review ought to be made by court for any other sufficient
5 reason.

In ***Yusuf vs. Nokorach [1971] EA 104***, it was held that any other sufficient reason ought to be read as meaning sufficiently of a kind analogous to the first two grounds.

In the present application, the applicant seeks orders that the ruling and orders of this court be reviewed on grounds that there is an error apparent on the face of the
10 record.

The applicant avers that he instituted ***Miscellaneous Cause No.10 of 2023*** seeking an order of removal of the respondent's caveat and when this court gave its ruling, it held that the issues arising therefrom would be considered and determined in ***Civil Appeal No.72 of 2022***. Court in its judgement in ***Civil Appeal No.72 of 2022***
15 however did not consider the merits of ***Miscellaneous Cause No.10 of 2023***.

In the application the prayers were:

- a. That the respondent should show cause why the caveat lodged on the applicant's land comprised in Busiro Block 542 plots 24 & 25 should not lapse;***
- b. The caveat lodged by the respondent be removed;***
- c. The respondent be found in contempt of court orders;***
- d. The respondent be ordered to pay exemplary damages of Ugx 10,000,000/=;***
- e. The respondent be fined Ugx 20,000,000 as sanctions for his contemptuous conduct;***
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- f. Costs of the application be provided for.***

In the short ruling delivered by this court on 28th February, 2023 this is what court had to say:

The possibility has been considered by this court that orders sought in this application may or may not have impact on the pending appeal:
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Civil Appeal No. 72 of 2022 which was filed before this application and in respect of which appeal directives have now been issued.

5 ***Accordingly, the consideration of this application and all arguments as raised for or in objection to that appeal, including the competence of that appeal as raised by counsel for the applicant in MA No. 1777/2022, is pending and shall be made after perusal by court of the submissions made by both parties in respect of the pending appeal.***

Costs shall await the outcome of the decision in Civil Appeal No. 72 of 2022.

10 The judgment dismissing the appeal was delivered on 17th April, 2023. This court declared that since the orders granted by the Registrar in ***Miscellaneous Cause No.29 of 2022*** were a nullity, and of no legal effect.

Court therefore set aside the said appeal: ***Civil Appeal No. 72 of 2022*** which had been based on an illegal order having been filed without obtaining leave of court to
15 appeal.

It is worth noting that under those circumstances there was no error on the record as the court merely stood over the hearing of the application. What is clear is that the dismissal left the prayers sought in ***Miscellaneous Cause No. 10 of 2023*** hanging in balance and remained unresolved.

20 Against that backdrop, this court was under obligation to deal with the merits of ***Miscellaneous Cause No. 10 of 2023***.

Section 33 of the Judicature Act, Cap.13 empowers this court to grant such remedies as are lawful to enable the final determination of all matters of controversy between parties.

25 As noted earlier, in ***Miscellaneous Application No.10 of 2023*** the applicant herein sought among other orders that the respondent should show cause why the caveat lodged on the land comprised in ***Busiro Block 542 plots 24 & 25*** should not be removed.

30 That the respondent be found in contempt of court orders; the respondent be ordered to pay exemplary damages of ***Ugx 10,000,000/= (Uganda shillings ten million)***; and be fined ***Ugx. 20,000,000 (Uganda shillings twenty million)*** as sanctions for his contemptuous conduct; and that costs of the application be provided for.

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The brief background to that application as contained in the affidavit in support was that the applicant was the plaintiff in **Civil Suit No.32 of 2020** which he filed against the respondent at the **Chief Magistrates Court of Kajjansi**.

The court declared that the applicant was the lawful owner of the suit *kibanja*, and the respondent was found to be a trespasser and ordered therefore to vacate the suit *kibanja*.

That the respondent who was well aware of the decree of court against him has never appealed the said order and has chosen to defy the same by selling the suit *kibanja* to a one Nabirye Sharon.

That the applicant filed **Miscellaneous Application No. 154 of 2022** against the respondent for contempt of court and court in that application indeed found that the respondent was in contempt of court.

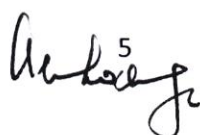
He was ordered to apologize and also surrender the suit *kibanja* by 18th October, 2022. The respondent however did not comply with the same, nor did he appeal the order.

In addition, that the respondent instead lodged a caveat on the suit land comprised in **Busiro Block 542 plots 24 & 25**. That the affidavit in support of the caveat was however tainted with falsehoods and illegalities, which could not support the caveat.

That the *kibanja* which is the subject of the caveat in issue is found in Kajjansi Sub-county Wakiso district whereas the applicant's land is located in Kasanje town council and it is the applicant's belief that not only does the respondent lack caveatable interest on the applicant's land, he also acted in contempt of court.

The respondent on his part stated that he was born and raised on the land at Bukwe/Bogogo Village Kasanje Sub county Wakiso district and that on 24th April 2014, he purchased a *kibanja* at Bukwe/Bogogo Village Kasanje Sub county Wakiso district from a one Sawulo Wayita, one of the beneficiaries of the estate of the late Leubeni Sebulindya and that ever since purchasing the same, he has been in possession and utilization thereof by building a residential house, planting coffee, bananas, and avocados thereon.

That on 16th March 2019, the respondent was approached by the applicant who introduced himself as the owner of the land comprised in land comprised in **Busiro Block 542 plots 24 & 25** where the respondent's *kibanja* is located.



The applicant demanded that he be paid for the mailo interest in the land, or the *kibanja* be shared between them in exchange for the mailo interest on part of the *kibanja* since he, (the respondent) did not have money to purchase the mailo interest.

That the applicant and his family then entered into a memorandum of understanding with the applicant to equally share the *kibanja* giving the applicant 0.34 cares/34 decimals. A certificate of title was to be issued in the names of the respondent's son's names, which was never done.

That instead the applicant had sued the respondent for trespass in **Civil Suit No.32 of 2020 in the Chief Magistrates Court of Kajjansi at Kajjansi** wherein the applicant obtained an *ex-parte* judgment in his favour and that he has since attempted to evict the respondent.

The applicant then filed **Miscellaneous Application No.104 of 2020** seeking to set aside the trial magistrate's judgement, but the same was dismissed. The applicant then filed **Civil Appeal No.72 of 2022** challenging the dismissal of the application to set aside the trial magistrate's judgement, and as noted, the same was also dismissed.

According to **Segirinya Gerald versus Mutebi Innocent H.C.M.A No.081 of 2016**,

"The primary objective of a caveat is to give the caveator temporary protection. It is not the intention of the law that the caveator should relax and sit back for eternity without taking positive steps to handle the controversy, so as to determine the rights of the parties affected by its existence."

It is trite law that for a caveat to be valid, the caveator must have a caveatable interest, legal or equitable, in the land (**Section 139(1) of the Registration of Titles Act; Sentongo Produce & Coffee Farmers Ltd versus Rose Nakafuma Muiise H.C.M.A No.690 of 1999; Hunter Investments Ltd versus Lwanyanga & Anor H.C.M.C. No.0034 of 2012.**

In the case before this court, it is not in dispute that the applicant herein was declared the lawful owner of the suit land vide **Civil Suit No.32 of 2020**, while the respondent was declared a trespasser thereon.

It follows therefore that in the absence of an order setting aside, or turning over the trial magistrate's decision in **Civil Suit No.32 of 2020**, the applicant is the lawful



owner of the suit land, and the respondent has no interest therein thus cannot sustain a caveat on the land.

It is also not in dispute that the respondent who did not file a reply to this application by implication therefore admitted that he did not comply with the orders of the lower court and in defiance of the orders he sold the *kibanja* to a third party.

A party who fails to comply with a court order without proper explanation does so at his/her own peril. Whether unclear, null or irregular a party, it cannot afford or be permitted to disobey an order for as long as it remains undischarged. (***see also: Attorney General vs Kiruhura District Local Government & 2 others HCMA No. 35 of 2012***). Court frowns upon any acts in violation of its orders.

The above therefore justify the granting of this application, in the terms below:

1. The caveats lodged by the respondent on land comprised in Busiro Block 542 plots 24 & 25 be vacated immediately;

2. The respondent is ordered to pay Ugx 20,000,000/=-, for contempt of court orders.

3. No orders as to costs.

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Alexandra Nkonge Rugadya

Judge

4th August, 2023

*Delivered by email
Arkhadya
4/8/2023*