

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

MISCELLANEOUS CAUSE NO. 120 OF 2020

NAMAYANJA ROBINAH WASSWA:::::::::::::::::::::::::APPLICANT
(Administrator of the of the Late Nekemiah Nsubuga Wasswa)

VERSUS

KAGGWA NABAWANUKA HARRIET::::::::::::::::::::::::RESPONDENT

BEFORE HON. LADY JUSTICE CHRISTINE KAAHWA

RULING

Background

The Applicant is the registered proprietor of Private Mailo land comprised in Block 265 Plots 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Subcounty located at Mukono District formerly Block 265 Plot 8. The Applicant made an Application to the Registrar of Titles to remove the names of the co Administrators who had passed away and she remained the only Administrator of the estate of the late Nekemiah Nsubuga.

That the Respondent lodged caveats on private Mailo land comprised in Kyaggwe Block 265 Plot 200 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Subcounty located at Mukono District all registered in the name of Namayanja Robinah Wasswa without lawful authority.

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Applicant's Case

This Application is brought under sections 140 (1), 142, 145 and 188 of the Registration of Titles Act Cap.230, section 33 of the Judicature Act, section 98 of the Civil Procedure Act Cap 71 and Order 52 Rule 1, 2 and 3 of the Civil Procedure Rules SI No. 71- 1, seeking the following orders;

- a. The Respondent wrongfully lodged caveats on Private Mailo land comprised in Kyaggwe Block 265 Plot 200 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223
- b. The caveat lodged by the Respondent on Private Mailo land comprised in Kyaggwe Block 265 Plot 200 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 be removed by the Commissioner Land Registration.
- c. The Respondent be directed to compensate the Applicant for lodging the aforesaid caveat without lawful or reasonable cause.
- d. Costs of this Application be provided for.

The Application is supported by the Applicant's Affidavit wherein she deposed *inter alia*;

1. That she is the only surviving Administrator of the estate of the late Nekemiah Nsubuga Wasswa, having been granted Letters of Administration of the aforementioned estate together with Mariane Nansibo and Lovinsa Namubiru on the 24th day of April 2008 by Hon. Mr. Justice V.T Zehurikize, resident judge of the High Court of Uganda at Jinja who have since died.

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2. That on the 30th day of May, 2017, the Applicant made an Application to the Registrar of Titles to remove the names of the co Administrators who have since died and she remained the only Administrator to the estate of the late Nekemiah Nsubuga Wasswa.
3. That the Applicant is the registered proprietor of private Mailo land comprised in Block 265 Plots 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Subcounty located at Mukono District formerly Block 265 Plot 8.
4. That the Respondents lodged a caveat on private Mailo land comprised in Block 265 Plots 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Subcounty located at Mukono District registered in the names of Namayanja Robinah Wasswa as proprietor without lawful or reasonable authority.
5. That this Application will safeguard the rights of beneficiaries to the estate of the late Nekemiah Nsubuga Wasswa.

Respondent's Case

The Respondent opposed the Application through an Affidavit in Reply sworn by Ms. Kaggwa Nabawanuka Harriet. She deposed that she is the granddaughter of the late Nekemiah Nsubuga Wasswa and the Administrator of her later father's estate (Serwanga Patrick Nsubuga), a son and beneficiary of the late Nekemiah Nsubuga Wasswa.

1. That her late grandfather Nekemiah Nsubuga Wasswa left behind a will and that the late grandfather left behind several properties

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- including 20 acres and twenty-five decimals of land comprised in East Buganda Kyaggwe Block 265 Plot 8.
2. That in the said will, her grandfather bequeathed all land forming Plot 8 Block 265 to his children and the Respondent's late father who was the heir was bequeathed five (5) acres.
 3. That the Applicant who is the Respondent's Aunt illegally applied for Letters of Administration of the estate of the late Nekemiah Nsubuga Wasswa well knowing that there was a will.
 4. That the Applicant further applied for Special Certificate of Title for Block 265 Plot 8 at Bumbaja well knowing that the Respondent was in possession of the original Certificate of Title to defeat the interest of all the beneficiaries.
 5. That the Respondent received information from her Uncle who resides on the Suit land that the Applicant had subdivided Plot 8 Block 265 into several Plots and registered them into her names with intentions to sale without the knowledge and Consent of all the beneficiaries, namely Plots, 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265.
 6. That the Respondent did a search and discovered that the Applicant had applied for Special Certificate of Title in 2017, and later transferred it into her personal names subdivided and created Titles in her personal names and not as an Administrator.
 7. That the Respondent lodged a caveat on the mentioned Plots to protect the interests of her father's estate as the holder of Letters of Administration.
 8. That the Respondent justifiably and lawfully lodged a caveat on land comprised of Block 265 Plots 200, 191, 207, 195, 194, 199, 204,

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193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 to protect my interest in the land and the equitable interests of the beneficiaries of my father's estate.

9. That the Applicant all these as an Administrator has never filed an inventory in Court.

Rejoinder

The Applicant filed an Affidavit in Rejoinder and averred as hereunder;

1. That she was advised by her lawyers that the Respondent filed their Affidavit in Reply out of time and without seeking leave of Court to do so.
2. That the Affidavit in Reply is defective for not being dated. and the Applicant intended to raise preliminary objections in that regard.
3. That Applicant contends that the names of the Respondent who lodged the caveat are different from the names of the person who was granted Letters of Administration for the estate of the late Patrick Serwanga whose names are **Nabawanuka Harriet**.
4. The Applicant intends to raise preliminary objections before commencement of the Suit.
5. The Applicant contended that the Respondent illegally or fraudulently acquired Letters of Administration for the estate of her late father who was the Applicant's brother the late Serwanga Patrick who died testate instead of getting Letters of Probate.
6. The Applicant admits that her late father owned land comprised in Block 265 Plot 8 but upon his death on the 13th day of May 1989, the Certificate of Title and his will were hidden by unknown family members.

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7. That upon the death of the Applicant's brother, the late Serwanga Patrick in 2004, the Applicant and the rest of the family members never got access to the Title for the land comprised in Block 265 Plot 8 and the will of the Applicant's late father was hidden until this Application was filed in Court and photocopies of the will and Certificate of Title were attached to the Affidavit in Reply.
8. That upon perusal of the will both the Luganda and English version,
 - a. The Luganda version has no appointed Executor but only appoints the Applicant's late brother as the heir who is the father to the respondent but the English version appoints an heir who is Serwanga Patrick as the executor.
 - b. That the Luganda version of the will bequeaths 7 acres to all the 10 daughters of the late Nekemiah Nsubuga Wasswa whereas the translated version of the will gives Josephine Namutembi 5 acres and the remaining 2 acres to be shared amongst the 9 daughters.
9. That upon perusal of the Luganda version of the will of the late Nekemiah Nsubuga Wasswa, the contents contained in paragraph 6 is true but as an Administrator of the estate of her late father and having seen a photocopy of the will in 2023 upon being attached to the Affidavit of Reply to the Application for removal of caveat, the Applicant was not able to distribute the estate based on a will which had been hidden by the Respondent.
10. The Applicants further contended that the Letters of Administration of the estate of the late Nekemiah Nsubuga Wasswa were applied for in 2007 and granted on the 24th day of April 2008 to the Administrators.

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11. That at the time of applying for the said letters, the family members of the late Nekemiah inquired about the whereabouts of the Will inclusive of the Respondent who concealed information concerning the will and the Certificate of Title of Block 265 Plot 8 land at Bumbaja.
12. That the Applicant applied for a Special Certificate of Title several years after the grant of Letters of Administration of the estate of the late Nekemiah Nsubuga following guidance from the land office.
13. That the Applicant subdivided the land upon grant of special Certificate of Title to enable her distribute the estate since there was no will, that the Applicant intended to call for a Family Meeting to guide on how to distribute the estate and how to deal with the church which had been constructed on the estate land with the permission of the late Serwanga Patrick, the Respondent's father.
14. That before that Meeting could be held, the Respondent who lives abroad lodged a caveat on the estate and this has frustrated the management of the Estate.
15. That the delay to file an inventory was caused by the delayed process in securing a special Certificate of Title.
16. That upon perusal of the Luganda version of the will of the late Nekemiah with the guidance of her Lawyers, the alleged will is not dated or signed by any witness and did not appoint an Executor but appointed an heir who is the late Serwanga Patrick who passed away in 2004.
17. That the Letters of Administration for the Estate of the late

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Nekemiah Wasswa Nsubuga were applied for in 2007 approximately 3 years after the late Patrick Serwanga who had been appointed a heir to the estate of the late Nekemiah Wasswa Nsubuga had passed away.

18. That according to the will of the late Nekemiah attached to the Affidavit which the Applicant also contests, only five acres of land was apportioned to the late Serwanga Patrick from whom the Respondent derives interest as an Administrator but not the entire 20 (Twenty) Acres which the Respondent caveated.
19. The Applicant contends that the will attached to the Affidavit in Reply by the Respondent should be disregarded as it is clearly a forgery and the Respondent does not even demonstrate how it ended up in her possession as a grandchild to the late Nekemiah Nsubuga Wasswa.
20. That the Respondent does not have a caveatable interest to the entire 20 acres of land but instead five acres as it appears in the contested will.
21. The Applicant averred that if Court does not remove the caveats lodged by the Respondent, it will affect the distribution of the estate property to the beneficiaries of the estate hence will not be able to file an inventory in Court.

Representation

The Applicant is represented by **Ssemwogerere Samuel from Avrax Advocates** while the Respondents is represented by **Mr. Sendegeya Ernest from Sendegeya and Associated Advocates**. Both parties filed written submissions, as directed by this Court.

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Preliminary issues

1. Whether the time to file an affidavit in rejoinder should be enlarged?

The Applicant prayed that her affidavit contended that her affidavit should be validated since it was filed outside the time that the Court had directed her to file. It was contended that the Applicant, who is an elderly person was unwell and could not comply with the Courts direction, see paragraphs 2 and 3 of the Affidavit in Rejoinder. Counsel prayed that the Affidavit filed on the 31st March 2023 be validated by enlarging the time under Order 51 rule 6 of the CPR and section 98 of the CPA as this will serve the interest of justice.

These preliminary issues were raised in the Affidavit and submissions in Rejoinder by the Applicant. No rejoinder was made by the Respondent to the preliminary objections raised by the Applicant.

Resolution

The Applicant in paragraph 3 and 4 of the Affidavit in Rejoinder deposed that she had been unwell and was not able to file the Affidavit in Rejoinder in compliance with the directions of the Court. The Court accepts/or another word the reason given for the non-compliance and considers the said affidavit as part of its record.

2. **Whether the Affidavit in Reply was filed out of time and if it can be struck off the record?**

The Applicant contended that the Respondent was served electronically on WhatsApp on the 28th November 2022 as seen from the affidavit of service filed in this Court on the 31st March 2022, she filed the Affidavit in Reply/Defence on 15th February 2023 which is a period of 3 months out of time. The Applicant submitted that

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that Respondent therefore contravened the provisions of Order 8 rule 2 of the Civil Procedure Rules.

Resolution

This Court observes that the Affidavit in Reply was filed outside the time that is required by Order 8 rule 2. (i.e. 15 fifteen days for defence). As earlier opined by the Applicant the Respondent lives abroad and that is why in the first place personal service could not be effected upon her. This Court is of the view that the since the Respondent's Reply is on the Court Record, it is in the interest of justice that all the parties be heard on merit. This objection is overruled.

3. Whether the Affidavit of Service is defective for not being dated?

The Applicant contended that the affidavit in reply lodged on court record on the 15th February 2023 by the Respondent is not dated and therefore contravened the Commissioner for Oaths Act.

It was submitted that it was suspicious that the Respondent who lived abroad indeed appeared before the Commissioner for Oaths and failure to date the Jurat made the affidavit defective and this was evidenced in paragraph 5 of the Affidavit in Rejoinder.

The Applicant prayed that the Affidavit be struck off the record of the Court for being defective.

Resolution

Under Section 6 of the Oaths Act and Section 5 of The Commissioner for Oaths (Advocates) Act it is a requirement for that a commissioner for oaths or notary public before whom an oath or Affidavit is taken or made to state in the juratory or attestation at

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what time place and on what date the oath or Affidavit is taken or made.

The objection in the instant Application is to Affidavit in Reply bearing no date when the oath is taken. Upon perusal of the Affidavit in reply on Court record it is indeed true that the said Affidavit is not dated.

This Court is of the view that the failure of the Commissioner for Oaths to date the Affidavit render it incurably defective. This Court is buttressed in this finding by the case of **Saggu versus Roadmaster Cycles (U) Ltd [2002]EA 25** where in considering an Affidavit that was not dated, Justice Mpagi Bahigeine JA (as she then was) held that a defect in the jurat or any irregularity in the form of the Affidavit is not fatal because it is a mere lapse of or error that cannot be allowed to vitiate the Affidavit in view of Article 126 (2) (e) of the Constitution of the Republic of Uganda, 1995, which stipulates that substantive justice shall be administered without undue regard to technicalities. In that case then it was decided that the Judge had the power to order an undated Affidavit to be dated in Affidavit be re-sworn before putting on record and may penalize the offending party in costs.

As earlier observed the objections were raised in the Affidavit in Rejoinder and this Court directed that the parties file submissions together with the pleadings. This Court cannot at this stage in the proceedings order Respondent to re-swear the Affidavit or have it dated in Court. Counsel for the Applicant opined earlier that the Respondent lives abroad; it is not in the interest of justice therefore to require that another affidavit be sworn as this would be costly.

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Suffice to note that the irregularity does not go to the root of the matter.

This ground of objection is therefore overruled.

The Court also validates the undated Affidavit in Support of Application filed on the 17th August 2022.

Save for the preliminary points, two issues were raised for the determination of Court and they are.

1. Whether the caveats lodged on land comprised of Block 265 Plots 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Sub-county located at Mukono District can be vacated?
2. What are the remedies available to the Parties?

Consideration of the issues:

1. Whether the caveats lodged on land comprised of Block 265 Plots 200, 191, 207, 195, 194, 199, 204, 193, 201, 203, 192, 198, 205, 202, 206, 196 and 265 under instrument number No MKO-00110223 land at Bumbaja, Nakisunga Subcounty located at Mukono District can be vacated?

I have carefully read and considered the submissions by both Counsel, the details of which are on Court record and contents of which I have taken into account in addressing the issue of whether or not the Applicant merits the prayers sought.

For a caveat to be valid, the Caveator must have a protectable interest legal or equitable to be protected by the caveat otherwise the caveat

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would be invalid see (**Ssentongo Produce Vs Coffee Farmers Limited & Anor vs Rose Nakafuma Muiyisa HCMC 690/99**).

It is evident from the averments in the Affidavits that both parties are beneficiaries of the estate of the late Nekemiah Wasswa Nsubuga, the Applicant by virtue of grant of Letters of Administration in the estate of her father and the Respondent being a grand-daughter of the said Nekemiah and holding Letters of Administration of her father the late Serwan Patrick. Until the contrary is proved the parties are entitled to benefit from the estate of Nekemiya Wasswa Nsubuga. It is my finding therefore that the Respondent has a caveatable interest in the suit property and consequently the capacity to lodge the said caveats.

The fact that the caveator has a caveatable interest does not in itself mean that he or she had a reasonable cause to lodge the caveat. (**Hunter Investments Ltd Vs Simon Lwanyanga & Another Miscellaneous Cause No. 34 of 2012, See: Hooke vs Holland (1984) WAR 167**).

In the instant Application therefore the Court must establish if the Respondent has a reasonable cause to lodge the caveat.

Section 180 of the Succession Act, Cap 162 provides that an Administrator or Executor of a deceased person is his or her legal representative for all purposes and all property of the deceased person vests in him or her as such.

Under Section 192 and 193 of the Succession Act, Letters of Administration in the Administrator all rights and interests belonging to the intestate as effectively as if administration had been granted at the moment after his death, the same was mentioned in the case of **Khalid Walusimbi Vs Jamil Kaaya & Another (1993) I KALR 20**. At that

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point in time, the beneficial interest passes and all assets are held by the Administrator on bare trust for the beneficiaries, since the Administrator's role is merely distribution.

In this Application paragraph 5 of the Affidavit in Support shows that the registered proprietor of the land is the Applicant. Copies of the 15 land titles jointly marked as Annex "E" show that Wasswa Namayanja Robinah is the registered proprietor. These do not show that she was registered as an Administrator of the Estate.

In paragraph 4 of the same Affidavit the Applicant averred that on 30th May 2017 she made an Application for re-registration the two co-Administrators of the Estate to be deleted on the Title Register to enable her carry out the duties of the surviving Administrator. Perusal of Annexure "D" the Application for registration shows that the 2 deceased co-Administrators were formerly registered as joint proprietors. However, there is no evidence that the other two co-Administrators were registered in the land before the subdivision.

Section 234 (1) of the Succession Act provides that the Letters of Administration can be revoked or annulled for just cause; and in subsection 2 (d) provides lays out an instance where the grant becomes in operative. It is my opinion that the death of the two co-Administrators would render such grant inoperative. The cause of action for the Applicant as co-Administrator should have been for her to apply revocation of the grant to the same Court that had made the grant. The subsequent "re-registration" of the Applicant was therefore not within the ambit of the law.

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In the case of **Maureen Tumusiime v Macario & Anor. [2006] 1 HCB** Court declared that ownership of property of the deceased vests in the one being appointed Administrator or Executor, through a grant of Letters of Administration or Probate. Reading this case law with the provisions of the Succession Act cited above it is not in doubt that the Applicant can only hold in trust the land that has been caveated and after distribution she hold what is hers in her own right.

The Applicant argued that the Administration of the estate has been watered down by the caveats lodged by the Respondent, however, Court takes note that Letters of Administration was granted on 24th April 2008, the caveat was lodged in 2021, thirteen years later. Therefore, the caveats lodged September 2021 cannot be held to have occasioned any delay in the administration of the estate.

Therefore, it will not be equitable to allow the Applicant to continue with the Administration of the estate to the detriment of other beneficiaries given the circumstances surrounding her administration and what seems to be malafide.

In regard to the difference of the names of the Respondent being Harriet Nabawanuka Kaggwa named as Respondent and yet the person who lodged the caveat is Harriet Nabawanuka; it is observed that the caveat that was lodged by the Respondent is not on Court record and it is therefore difficult to ascertain this. However, the Respondent in her Affidavit states that she lodged the caveat in Court.

Careful perusal of the pleadings shows that the Applicant refers and writes her name as Robina Wasswa in the jurat of her Affidavit. I have no doubt

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that the Applicant is the who deponed. This contrast has been made in attempt to show that this objection may not be properly grounded.


In view of the above findings, it is my considered opinion that the Respondent had reasonable cause for lodging the said caveats and the caveat in my view may protect other beneficiaries of the estate of Nekemiah Wasswa who are not party to this Application.

The Court observes that this Application for removal has raised a number of issues regarding the will of the late Nekemiah Nsubuga Wasswa, the illegal or fraudulent acquisition of the Letters of Administration to the estate of the Late Patrick Serwanga among others. This Court is of the opinion that these matters cannot be fully interrogated in an Application such as this.

In the circumstances, I find that this Application cannot be granted. I accordingly make the following orders;

1. This Application is dismissed with costs to the Respondent.
2. The Respondent or Applicant if she so wish; should file a suit within six months from the date of this Ruling otherwise the caveat will automatically lapse.

DATED at **Mukono** this^{31st}.....day of **May 2023**.


Christine Kaahwa
JUDGE

