

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

MISCELLANEOUS CAUSE NO.331 OF 2023

KIMBOWA JANE ::: APPLICANT

VERSUS

HENRY MUGABI ::: RESPONDENT

BEFORE: HON. LADY JUSTICE NALUZZE AISHA BATALA

RULING

Introduction;

1. The application is brought under Section 140 of the Registration of Titles Act Cap 230, Section 98 of the Civil Procedure Act Cap.71 and Order 52 of the Civil Procedure Rules(SI-71-1) seeking orders that:-
 - i) The caveat on land comprised in Busiro Block 383, Plot 9830 by the respondent be removed.
 - ii) Costs of the application be provided for.

Background;

2. The applicant is the administrator of the estate of the late Kimbowa Joseph and is registered on the title in that capacity. The respondent lodged a caveat on the land comprised in Busiro Block 383, Plot 9830 as a beneficiary of the estate of the late Kimbowa Joseph. It is upon

this background that the applicant brings this application for court to order for removal of the said caveat.

Applicant's evidence:

3. The application is supported by an affidavit deposed by **Mrs.Kimbowa Jane** the applicant, which sets out the grounds of the application including the following;

- i) That the applicant together with her late husband purchased the land in Busiro Block 383, Plot 9830 and took effective possession of the same as their matrimonial property till date.
- ii) That the applicant with the consent of the family applied for letters of administration for the estate of the late husband Joseph Kimbowa which were granted to her.
- iii) That the applicant transferred the certificate of title to the said suit land into her names as the administrator to the estate of the late Joseph Kimbowa.
- iv) That the respondent without any caveatable interest lodged a caveat over the suit land vide instrument No.WBU-00274724.
- v) The respondent claims that there are fraudulent transfers intended to be made on the suit land.
- vi) That the applicant is an elderly person with over eighty years and she does not intend to transact anything on her land as alleged by the respondent.

Representation:

4. The applicant was represented **Mr.Segamwenge Huduson** of M/S Luzige,Lubega,Kavuma & Co. Advocates whereas the respondent was not represented despite being served with the

application. The respondent did not file an affidavit in reply neither did he attend the hearing despite being served with the application and the hearing notice. There is an affidavit of service and if the respondent had any objection to this application, he would have filed an affidavit in reply to guide this court in reaching its decision therefore this matter stands unchallenged. The applicant filed her affidavit in support and the submissions which I have considered in the determination of this application.

Issues for determination;

5. Counsel for the applicant raised two issues for the determination by this court;-

- i) Whether there is any reasonable cause as to why the respondent's caveat on the property comprised in Mailo Register Busiro Block383 plot 9830 land at Bwebajja should be removed.
- ii) What other remedies are available to the parties?

Resolution of the issues;

6. In arguing the first issue, Counsel for the applicant submitted that court is empowered in applications of this nature, to make such orders as it deems fit, this includes the power to make an order for removal of a caveat where a party fails to show cause why a caveat should not be removed. Counsel cited the provisions of Section 140(1) of the Registration of Titles Act and Simon Kattabu Vs Richard Simbwa,HCMC No.121 of 2020
7. It is also the applicant's case that the respondent without any lawful justification lodged a caveat on the said plot of land under instrument Number WBU-00274724 stating that he had a beneficiary interest whereas not. It is also the applicant's case that the respondent and his mother were left with the property they call home at Ggaba which also legally belonged to

the late Kimbowa Joseph which the respondent and his family have gone on to utilize without any interference from the applicant as an administrator or as legal wife of the deceased. Counsel for the applicant submitted that for the aforementioned the caveat should be removed.

Determination of the application.

8. I have carefully perused the affidavit in support of the application and the submissions of Counsel for the applicant. I also have to emphasize the position that the respondent did not file an affidavit in reply therefore the application and affidavit of the applicant in the case stand uncontested. (*See; Samwiri Massa V Rose Achen, 1978 HCB 297*)
9. Before I proceed with the determination, it should be noted that affidavits in applications and in other actions where they are used are purely evidence. (*See the Court of Appeal decision in Mutembuli Yusuf V Nagwomu Moses Musamba & Anor EP Appeal No. 43 of 2016*).
10. Therefore, parties ought to rely on them for probative value to enable them establish their cases to the satisfaction of court to warrant judgment in their favor.
11. Taking into consideration that the burden of proof in civil cases is that “He who alleges must prove so” and the standard of proof is on the balance of probabilities. I am of the view that this position of the law is applicable in actions of this nature. (*See Section 101 of the Evidence Act Cap 6 and the Supreme Court in Kamo Enterprises Limited V Krystalline Salt Limited Civil Appeal No. 08 of 2018*).
12. The key issue for determination in this court is whether there is a reasonable cause to order for removal of the said caveat.
13. Counsel for the applicant submitted that the respondent lodged a caveat with Instrument No; WBU-00274724 as a beneficiary to the estate of the late Joseph Kimbowa whereas not. This

submission by counsel on the beneficiary interest of the respondent was not supported by evidence and therefore Counsel was giving evidence at the bar.

- 14.** The applicant in paragraph 2 of the affidavit in support clearly states that together with his late husband purchased land comprised in Busiro Block 383 Plot 9830 and took effective occupation as their matrimonial home. However, the copy of the title attached on the affidavit in support and marked “C” indicates the late Joseph Kimbowa was the registered proprietor on the said land and questions as to whether it is matrimonial property cannot be determined in this application.
- 15.** Furthermore, the applicant goes on to state in paragraph 4 of her affidavit that she transferred the title as holder of letters of Administration to the estate Late Joseph Kimbowa into her names and in the capacity of administrator to the estate. This is not contested and the evidence on record speaks to that.
- 16.** In this application, one thing is certain and that is the fact that the applicant is the Administrator of the estate of the late Joseph Kimbowa. However, the circumstances surrounding the caveat including its existence are not clear as per the evidence brought before this court.
- 17.** Counsel for the applicant should have taken the initiative to at least extract a search report from the registry indicating the encumbrances pertaining to the said land and attach it to the affidavit in support to establish the existence of the caveat. In other words, there is no solid evidence on record to suggest that the caveat even exists besides the Instrument Number which anyone can come up with. Should it be the case that the court should move to the registry and peruse the records to verify certain facts where the parties have laid no evidence before it in proof of their cases? In my opinion I believe the answer is no.

- 18.** Parties to a case and all court users should have it in mind at all times that when they bring matters to court for determination, the court hinges its decision on the evidence brought before it and in absence of such evidence especially the relevant pieces there is no case. A court of justice has to be backed by not only mere evidence but well-grounded evidence to avoid making purposeless orders.
- 19.** I am of the view that when it comes to affidavit evidence sworn by a party and the facts sworn are capable of being verified by some documents from the public records or from an authentic source, parties to the said affidavit ought to furnish proof of the same as an annexure to the said affidavit, mere statement of information contained in such documents that can be verified and presented before court does not suffice and will in most cases affect the party's case.
- 20.** Assuming the caveat exists, the applicant goes on to state in her affidavit in support under paragraph 9 that she is 80 years and does not have any intentions of transacting on the land. If this is the case, then one is left to wonder why the applicant is bothered by the said caveat lodged on an estate where she is administrator if indeed she does not intend to transact on the said land. The applicant also claims its matrimonial property that she purchased together with her deceased husband but she does not indicate anywhere in her affidavit that she desires to transfer the same in her names as the surviving spouse and that the caveat is frustrating her in that endeavor.
- 21.** Therefore, this court cannot make a decision when it is not even sure that indeed the caveat exists and even if it existed, the applicant has failed to establish any reasons for its removal. The affidavit of the applicant and its attachments are not convincing in this regard and court cannot proceed any further.

22. Accordingly, it is the finding of this court that the application lacks merit and it is hereby dismissed with no order as to costs of the application.

I SO ORDER.

A handwritten signature in blue ink, appearing to read 'Kandeguy', with a horizontal line extending from the end.

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NALUZZE AISHA BATALA

JUDGE

17th/10/2023