

Background;

2. The applicant purchased land comprised in LRV 4556 Folio 11 Block 13 Plot 1311 at Najjanankumbi from Mary Nakayiza in 2020. The said land was subject to a mortgage arrangement between Mary Nakayiza (now deceased) and her son Kiragga Samuel and the 1st respondent as mortgagee. Mary Nakayiza and her son defaulted on the credit facility which prompted the bank to commence action to recover the outstanding sum. In order to avert the negative effects of foreclosure, the late Mary Nakayiza requested the 1st respondent to sell the property by herself and clear the facility. An agreement of sale was executed between the applicant and the late Mary Nakayiza for a consideration of UGX 500,000,000 (Five hundred million Uganda shillings). The total purchase price was paid by the applicant however Mary Nakayiza died before she could execute transfer forms in favour of the applicant. The credit facility was cleared but the late Mary Nakayiza at the time of her death had not instructed the 1st respondent to release the certificate of title of land comprised in LRV 4556 Folio 11 Block 13 Plot 1311 at Najjanankumbi. It is against this background that the applicant brings this application.

Applicant's evidence.

3. The application is supported by two affidavits deponed by the applicant ***Mr. Rashid Ndawula*** and ***Mrs. Nabbuto Eva Sebba*** which set out the grounds of the application but briefly includes the following;
 - i) That the late Mary Nakayiza was the registered proprietor of the land comprised in LRV 4556 Folio 11 Plot 1311 at Najjanankumbi.

- ii) That the late Mary Nakayiza mortgaged the land to the 1st respondent to secure the joint credit facility obligation of her and her son Kiragga Samuel.
- iii) That the late Mary Nakayiza and her son Kiragga Samuel defaulted on the payment of their credit obligations to the 1st respondent and that the certificate of title is still in the custody of the 1st respondent.
- iv) That the late Mary Nakayiza offered to sell the suit land to the applicant who accepted the offer.
- v) That the price of UGX 500,000,000 was supposed to be paid onto the bank account of the late Mary Nakayiza and her son Kiragga Samuel.
- vi) That the applicant completed the purchase price and started developing the property.
- vii) That the late Mary Nakayiza died in September 2022 before she executed transfer forms in the applicant's favour.
- viii) That it is in the interest of justice that the application be granted.

1st Respondent's evidence;

4. An affidavit in reply to the affidavits in support of the application affirmed by **Mr. Bamweyana Asuman** the Head of Legal and Compliance department of the 1st respondent which briefly states as follows;

- i) That the respondent stands in neutral position in this application and it shall seek guidance from the court for purposes of adding a 3rd party to the proceedings.
- ii) That the late Mary Nakayiza and her son Kiragga Samuel obtained a credit facility of UGX 428,000,000/= from the 1st respondent on the 8th day of August 2019.

- iii) That late Mary Nakayiza and Kiragga Samuel pledged land comprised at LRV 4556 Folio 11 Block 13 Plot 1311 at Najjananakumbi as security for repayment.
- iv) That the late Mary Nakayiza requested the 1st respondent to sell her property in order to avert the negative effects of foreclosure.
- v) That the 1st respondent agreed to her request and informed the 1st respondent that she had found a purchaser the applicant at a purchase price of UGX 500,000,000.
- vi) That a sale agreement was signed between the applicant and the Late Mary Nakayiza but the 1st respondent declined to sign the same since the property was being exclusively sold by the late Mary Nakayiza.
- vii) That the applicant started paying the money to the 1st respondent who utilized it to clear the credit obligations of both the late Nakayiza and her son.
- viii) That the late Mary Nakayiza died before she instructed the bank to release the title.
- ix) That the person who would be instructing the 1st respondent in absence of the late Mary Nakayiza would be the son Kiragga Samuel who has not been willing to.
- x) That it would be proper for court to add the son Kiragga Samuel to these proceedings.
- xi) That the 1st respondent be granted costs for the application.

2nd respondent's evidence;

- 5. The application was responded to by an affidavit affirmed by *Mr. Moses Ssekitto* the Senior Registrar of Titles in the office of the 2nd respondent which briefly states as follows;
 - i) That the instant application is barred in law and is does not disclose a cause of action against the 2nd respondent.
 - ii) That the Late Mary Nakayiza is the registered proprietor of the suit land.

- iii) That the suit land was mortgaged to Tropical Bank Limited.
- iv) That there is no evidence that the applicant first applied to the 2nd respondent for vesting orders under section 166 and 167 of the Registration of titles Act before applying to court.
- v) That the applicant is seeking for costs against the 2nd respondent which greatly prejudices the 2nd respondent who does not have any interest in the said land.

Representation.

6. The applicant was represented by **Mr. Sengendo Eric** of M/s Richard Kabazzi & Partners Advocates whereas the 1st respondent was represented by **Mr. Kiwalabye Enos** together with **Mr. Ibrahim Semwogerere**. Both parties filed their affidavits and only the applicant filed submissions which I have considered in the determination of this application.

Issues for determination.

- i) Whether the affidavits in reply should be struck out for non-service?
- ii) Whether the application is properly before this court?
- iii) Whether there are sufficient grounds to warrant the grant of a vesting order?

Resolution of the issues;

Issue 1; Whether the affidavits in reply should be struck out for non-service?

7. Learned counsel for the applicant in his introductory remarks in his submissions brought it to the attention of court that the respondents' affidavits in reply were not served on to the applicant and he stumbled on the same affidavits in reply when he was uploading his submissions on eccmis where the affidavits in reply were filed on the 6th and 5th of October

respectively, these were indeed the set timelines set by court for the respondents to file their affidavits in reply.

8. I concur with the position of my learned sister Hon. Justice Anna B Mugenyi in **Mwesigwa Nicholas Vs P&A Credit Investments Limited, Misc. App No.1677 of 2022** where it was observed that it is the duty of the party who files their suit to follow up on the same until it;s logical conclusion where the applicant and his lawyer's fail to access the ECCMIS system for the follow up of their case it becomes outright negligence on their part.
9. In the premises I find no merit in the first issue and this issue is determined in the negative.

Issue 2; Whether the application is properly before this Court?

10. It is incumbent on this court to determine the appropriateness of actions brought before it to avoid proceeding in futility. It is trite law that before an applicant invokes the inherent jurisdiction of court; he or she must have applied first for a vesting order to the Commissioner Land Registration who for some reason must have declined to exercise his or her powers under Section 167 of the Registration of titles Act Cap 230. (*See; Mutyaba Vs Kayimbye & Anor Misc.Cause No 40 of 2018*)
11. I will reproduce the provisions of Section 167 of the Registration of Titles Act under which the application is brought which provides as follows; *"If it is proved to the satisfaction of the registrar that land under this Act has been sold by the proprietor and the whole of the purchase money paid, and that the purchaser has or those claiming under the purchaser have entered and taken possession under the purchase, and that entry and possession have been acquiesced in by the vendor or his or her representatives, but that a transfer has never been executed by the vendor and cannot be obtained by reason that the vendor is dead or*

residing out of the jurisdiction or cannot be found, the registrar may make a vesting order in the premises and may include in the order a direction for the payment of such an additional fee in respect of assurance of title as he or she may think fit, and the registrar upon the payment of that additional fee, if any, shall effect the registration directed to be made by Section 166 in the case of the vesting orders mentioned there, and the effecting or the omission to effect that registration shall be attended by the same results as declared by section 166 in respect of the vesting orders mentioned there.”

12. In the instant case, it is undisputed that the applicant did not apply to the Registrar before bringing this application to court as required by the above section. On perusal of the all the affidavits in support of the application, it is not indicated anywhere that the applicant made efforts to apply to the Registrar for a vesting order.
13. The applicant submitted in his submissions that yes, it is true he did not apply for the vesting order first from the Commissioner Land Registration before bringing this application to court because of the peculiar facts of this application.
14. The applicant further in his submissions referred to the decision in **Mutyaba Tom Vs James Kayimbye Sebinene Musajjalumbwa & Anor, Misc.Cause No.40/2018** before learned **Justice Henry Kawesa** where court in determining whether the application for a vesting order was properly before court, In dismissing the said application on grounds that the applicant had to first exhaust the available avenue which is applying for the vesting order from the commissioner land registration, the learned Judge ordered that the applicant should apply to the commissioner land registration for the said vesting order with in 60 days of the said order.

15. Under paragraph 7 of the affidavit in reply affirmed by Moses Ssekitto it is stated that there is no evidence that the applicant first applied to the Commissioner Land Registration for a vesting before proceeding to court.

Determination of court;

16. Upon resolving the first and second issues, this honorable court will proceed to determine the same issues.

17. Learned counsel for the applicant prays to court to have the affidavits in reply struck out on grounds for non-service upon him stumbling on the said affidavits as he was uploading his submissions on ECCMIS.

18. It appears to me that learned counsel did not make any efforts to check the notifications on ECCMIS regarding his case, this being the applicant's case I believe it places a heavy duty on the applicant or their counsel to follow up on much of the aspects that concern their case and any developments on the same.

19. Further in situations where counsel and the applicant ignore notifications from ECCMIS is a breach of that duty and a party cannot even plead a defence that it has been long since they last checked on the ECCMIS system or on any platform where they receive such notification.

20. In determining the second issue in this matter, am alive to the provisions of **Article 139 (1) of the 1995 Constitution as amended** that confers unlimited jurisdiction to the High court in all matters. However, **Section 167 of the Registration of Titles Act Cap.230** makes it a procedural requirement that applications of this nature must be made to the commissioner Land Registration before coming to court. This has been the longstanding position of the law. (*See; Edward Babigumira Vs Commissioner for Land Registration Misc. Cause No 76 of 2012.*)

21. In my view, it is in applications or actions of this nature that court is enjoined to exercise prudence and good judgment. It would not have been the intention of the framers of the constitution to divest the 2nd respondent of his or her powers. Allowing parties to bring actions before utilizing the available avenues under the law would encourage noncompliance with the said section and thereby render the office of the Commissioner for land registration redundant as regards vesting orders. In times where courts are combating the problem of case backlog, I believe it is the proper approach.
22. Be it as it may, I agree with the learned counsel for the applicant by adopting the approach by Hon. Justice Henry Kaweesa in **Mutyaba Vs James Kayimbe Sebinene Vs Commissioner Land Registration(supra)** where the learned judge dismissed the said application but with directory orders issued.
23. In the premises, I need not proceed to determine the third issue in this application having found that the application is not properly before this court.
24. The application is dismissed and parties to bear their costs.
25. I do order that the applicant follows the provisions of Section 167 of the Registration of Titles Act Cap.230 and have the matter before the commissioner land registration within 60 days of this order.
26. If the registrar declines or fails to do so and evidence of such failure is provided, this court shall be pleased to automatically grant the said orders upon such proof.

I SO ORDER.



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NALUZZE AISHA BATALA

JUDGE

27th /10/2023