

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT LUWERO
MISC. CAUSE NO. HCT -17-LD-MC-0006-2023
KATWESIGE WINSTON.....APPLICANT

VERSUS

- 1. KYEYUNE IBRAHIM**
- 2. GENUINE ESTATES (U) LTD**
- 3. THE COMMISSIONER LAND REGISTRATION..... RESPONDENT**

BEFORE LADY JUSTICE HENRIETTA WOLAYO

RULING

Introduction

1. By a notice of motion filed on 15.2.2023, the applicant Katwesigye Winston moved the court under Section 140 (1), 142, 145 & 188 of the Registration of Titles Act Cap 230; Section 98 of the Civil Procedure Act Cap 71; Section 33 of the Judicature Act and Order 52 rr.1 & 2 of the Civil Procedure Rules SI 71-1 for the following Orders; that: -
 - (a) The Respondents appear before this Court and show cause why their caveats in respect of land comprised in Bulemezi Block 37 Plot 60 situated at Kiyanda should not be removed or lapsed.
 - (b) The Respondents' caveats be removed from the above described land.
 - (c) The Respondents pay compensation/damages to the Applicant for lodging the aforesaid caveats without lawful or reasonable cause.
 - (d) The Respondents be blocked from caveating the above land.

- (e) A consequential order to issue directing the Commissioner Land Registration (herein referred to as the 3rd Respondent) to remove the caveats and effect changes in the Register Book and
- (f) Costs of this application be provided for.

2. The application is supported by the affidavit of Katwesige Winston. The second respondent, Genuine Estates (U) Ltd filed an affidavit in reply through their manager, Tumusiime John on 19.4.2023.
3. According to the affidavit of Kayondo Fred, a law clerk filed on 11.4.2023, the first respondent Kyeyune Ibrahim and third respondent the Commissioner Land registration, were duly served with the motion on 22.3.2023 but they did not file affidavits in reply.
4. When the matter came up for hearing on 26.4.2023, counsel for Genuine Estates Ltd informed court that he intended to raise a preliminary objection to the effect that the contents of the affidavit of Katwesige allude to forgeries and issues of ownership and the same could not be determined in an application of this nature, rather the issues in controversy could only be determined by a regular suit. As a result, I ordered the parties to file submissions on the preliminary objections instead of in the main application.
5. Both counsel complied with the schedule to file written submissions which I have carefully considered.

Background facts

6. On 14.9.2017, the applicant was registered on land comprised in Kayinda Bulemezi Block 37 Plot 60 measuring 4.0500 hectares under Instrument No. BUK 166761. Annexure A to the affidavit in support of Katwesige Winston refers.
7. The certificate of title for Bulemezi Block 37 Plot 60 shows one Mudde Sula Ssali was registered on 5.10.2016 by instrument No. BUK152363 as the first proprietor followed by Katwesige on 14.9.2017.
8. It is also a fact that Kyeyune Ibrahim, the first respondent lodged a caveat on Block 37 Plot 60 on 12.4.2022 while Genuine Estates (U) Ltd, the second respondent lodged one on 23.1.2023. Annexure B1 and D1 to the affidavit in support of Katwesige refer.

Resolution of the preliminary objections

9. The gist of the preliminary objection raised by counsel for the second respondent is that;
 - (a) The application raises matters of fraud and ownership which cannot be resolved in an application of this nature.
 - (b) The application is an abuse of court process as there is a pending suit between the applicant and Sula Mudde Ssali seeking to determine the ownership of the suit land.
- i) Whether the application raises matters of fraud and ownership which cannot be resolved in an application of this nature.

10. Counsel for the second respondent referred this court to paragraph 6 of the affidavit of Katwesige, the applicant. I will take the liberty to reproduce the paragraph verbatim:

‘While his caveat was about to lapse, the first respondent fraudulently conspired with his employer, the second respondent and concocted a back dated sale agreement allegedly with Mudde Sula Ssali in which he consented to the sale by affixing his signature as a witness thereon.’

11. Counsel for the second respondent submitted that these allegations impute fraud on Genuine Estates (U) Ltd as well as Mudde Sula Ssali and that it is trite law that fraud must not only be specifically pleaded but must be proved to a standard higher than that which is required for any other ordinary suit. He referred this court to **Yahaya Walusimbi v Justine Nakalanzi & 4 others M.A 386 of 2018**.

12. Counsel for the applicant submitted that Genuine Estates Ltd misunderstood the application as the same does not ask court to determine ownership of the said plot of land but it merely illustrated to court the discrepancies in the first and second respondent’s affidavits in support of their caveats and their attached sales agreements. Counsel for the applicant further submitted that the alleged sale agreement between Kyyune and Mudde Salli; and between Genuine Estates and Mudde respondents were made when the caveats were being lapsed.

13. As highlighted above, the evidence in support of the application reveals complaints of fraud and these matters require investigation by a formal suit rather than an application to remove the caveats.

14. In **Mubiakulamusa v Friends Estates Ltd (Civil Appeal No. 209 of 2013) [2014] UGCA 35 (5 September 2014) ulii**, the trial judge had made a finding of fraud on the basis of affidavit evidence attached to an application that sought to have immovable property released from attachment under Order 22 rules 55, 56 and 57 of the CPR. On Appeal, learned counsel for the appellant successfully argued that issues of fraud could only be determined in a regular suit arising from regular pleadings after the framing of issues. It was held:

“We agree with Mr. Kateeba, Counsel for the appellant, that the issues raised in the affidavit of reply could not have been properly resolved in an application of this nature. That they were serious issues of law and of fact that required proper pleadings upon which evidence would have been adduced.”

15. I do respectfully agree with the principle advanced in that case with regard to the need to have serious issues of law and fact properly investigated in a formal suit. I find it most applicable to the application before me.

16. Counsel for the applicant also argued that the application would firmly stand with some of its allegations of fraud as the some can be proved by affidavit evidence. He submitted that such affidavit evidence can even be tested through cross-examination and strictly proved

according to the nature of this cause, the facts and circumstances of this case. Counsel cited **Kogoro Epimac v Samalien Properties Ltd & 4 others Miscellaneous Application No. 90 of 2020 arising out of civil suit No. 59 of 2010** for this proposition.

17. I agree with counsel for the second respondent that the facts before court are distinguishable from those in **Kogoro Epimoc v Samalien Properties Ltd & 4 others**. The nature of the cause, the facts and circumstances of the above case allowed proof of fraud through affidavit evidence as Section 20 of the Companies Act 13 specifically allows a party to rely on fraud to seek lifting of the corporate veil.

18. The facts before me not only speak to alleged fraudulent sale agreements but also to the existence of a bigger dispute involving multiple parties that raises serious questions of law in contract and equity and questions of fact that must be determined in a formal trial. This objection is therefore sustained.

ii) The application is an abuse of court process as there is a pending suit between the applicant and Sula Mudde Ssali with respect to the suit land Bulemezi Block 37 Plot 60 land at Kiyanda , Luwero district.

19. Counsel for Genuine Estates Ltd submitted that there was a pending suit , formerly, **Land Division High Court Civil Suit No.548 of 2019 Katwesige Winston v Mudde Sula Ssali** (now **Luwero Civil Suit No. HCT-17-LD-CS-0138-2022** which was transferred to Luwero where the suit land is the subject of this application.

20. Counsel for the applicant submitted that the above suit was filed by Katwesige way back in 2019 against Mudde who through his written statement of defence admitted having sold the suit land to Katwesige and received the full purchase price. A copy of the defence was annexed to the submissions except that Mudde averred therein that Katwesige was still to pay him additional funds. More importantly, Katwesige's suit is in trespass by Mudde and he prays for permanent injunction etc. By 2019 when Katwesige sued Mudde, Katwesige was already the registered proprietor yet he sued the previous proprietor. Obviously, the dispute between the two is still alive as there is no order or judgment disposing of the case.

21. In light of the foregoing analysis, there is not only a pending dispute involving Katwesige and Mudde but also there is a dispute between Katwesige and the respondents who also claim to have bought from Mudde. While the application is not an abuse of the court process, it is not the proper procedure to determine the questions of law and fact arising therein.

22. Having found that the affidavit of Katwesige raised issues of fraud by the respondents and that the affidavit evidence of both parties disclose a bigger dispute involving questions of law in contract and equity and questions of fact, and a pending suit where the subject of the suit is the land in issue in this application, the preliminary objections are sustained and I make the following orders:

Orders

- a. The applicant Katwesige Winston should take necessary steps to pursue **Luwero Civil Suit No. HCT-17-LD-CS-0138-2022 Katwesige v Mudde Sula Ssali** to its logical conclusion.
- b. The respondents Kyeyune and Genuine Estates Ltd will commence their own suit against Katwesige and any other party within thirty (30) days from the date of this Ruling. In default, Katwesige will be free to move the court to remove the caveats without any further notice to the two respondents.
- c. The caveats by the Respondents Kyeyune Ibrahim and Genuine Estates (U) Ltd comprised in **Bulemezi Block 37 Plot 60 land at Kayinda measuring 4.0500 hectares** shall be maintained until further orders of this court.
- d. Each party shall bear their own costs.

DATED AT LUWERO THIS 14TH DAY OF NOVEMBER 2023

LADY JUSTICE HENRIETTA WOLAYO

Legal representation

Katongole & Co. advocates for the applicant

KRK Advocates for the second respondent

