

**IN THE HIGH OF UGANDA AT KAMPALA
LAND DIVISION
MISCELLANEOUS CAUSE NO. 34 OF 2012**

**MARIE PINTO
(THE ADMINISTRATOR OF THE ESTATE OF
THE LATE MANUEL PINTO) APPLICANT
VERSUS**

- 1. DENISE WALTER**
- 2. SHARIF MOHAMMED OMAR..... RESPONDENTS**
- 3. JOSEPH KIGANDA**
- 4. THE COMMISSIONER FOR LAND REGISTRATION**

RULING

BEFORE HON. LADY JUSTICE EVA K. LUSWATA

The applicant brought this application by Notice of Motion under the provisions of Section 140 and 188 RTA Cap 230, Section 8 Judicature Act Cap 14, Section 98 CPA and Order 52 rule 1 CPR SI 71-1 seeking for orders that:-

1. Court summons the respondents who lodged caveats in respect of land comprised in Block 20 Plot 526 at Busega to show cause why their respective caveats should not be removed and directions and orders be made for vacation of the orders and issue of a vesting order and special certificate in favor of the applicant.
2. Costs of this application be provided for.

The motion was supported by the affidavit of the applicant Marie Pinto the administrator of the estate of the Late Manuel Pinto (hereinafter referred to as the deceased). She stated that the deceased purchased land styled as Block 20 Plot 526 at Busega (hereinafter called the suit land) at a consideration of 10m/= on 22/11/1999 from Manuela Walther in her capacity as the legal guardian of the 1st respondent then the registered proprietor. That the payment was duly accepted through the vendor's legal representative, M/s Mulenga Kalemera & Co. Advocates and the vendor executed transfer forms in favor of the deceased. That it was later discovered that the original certificate of title was missing and could not be traced by the vendor or her advocates. That the applicant occupied the suit land with the deceased before his demise and is still in

occupation thereof. That the applicant applied to the 4th respondent through her lawyers, for a vesting order in respect of the suit land and to date, such order has never been granted. That the respondents lodged caveats on the suit land on 14/1/99, 14/3/05, and 28/4/2009 respectively, thus preventing the applicant from its use.

The 2nd respondent Shariff Mohammed Omar in his affidavit in reply contended that he was approached by a one Suzan Kabazaire widow to Winfried Walther and mother to the 1st respondent with a proposal to sell to him the suit land which at that time was registered in the names of the 1st respondent, then an infant. He confirmed that the said Suzan Kabazaire had been granted powers by the Chief Magistrate's Court of Mengo to sell the suit land for the benefit of the 1st respondent. That after such confirmation, he purchased the suit land on 21/12/1995, and upon fulfillment of the payment, transfer forms were signed in his favor and the duplicate certificate of title was handed to him.

That he embarked on the process of transferring the suit land into his name and upon lodgment of the certificate of title with the lands registry, he was advised that the court order upon which the sale had been affected, was one which could only be granted by the High Court and was then advised by the same office, to apply to the High Court to have the same ratified. That he caveated the suit land to protect his interests and later wrote to the Registrar High Court Land Division to ratify the court order. Therefore it is just and equitable that his caveat is maintained to protect his interests until the High Court ratifies the court order granted by the Magistrates Court of Mengo.

The 1st respondent Denise Walther in an affidavit in reply contended that in 1992 while still a minor, her late father Winfried Adam Walther gifted and registered the suit land in her name as the proprietor. That her late father in his Will appointed Manuela Walther, her older sister to be the sole trustee and executor of his Will and guardian of the 1st respondent until she attained majority age. That a one Didas Nkurunziza then a lawyer, working with Mulega & Karemera Advocates, her late father's lawyer lodged a caveat on the suit land to protect and safe guard her interests following attempts by unscrupulous people to appropriate the same. That the purported sale of her land in the past was a nullity, since the individuals who attempted to conduct the sale

did so outside the law. That Manuela Walther's powers under executing their late father's will, did not include disposing of the suit land and the order by the Chief Magistrate's Court of Mengo that was purportedly granted to the Administrator General to dispose of the suit land allegedly for her benefit, was granted by a Court which lacked jurisdiction to grant such an order, making it an illegality. And that the purported purchase of the suit land by the applicant whilst a caveat forbidding the same was in force, is also a nullity.

Manuela Van De Broek Walther (the 1st respondent's sister and trustee) also deposed an affidavit where she contended among others that she entered into a contract of sale of the suit land with the deceased. That the sale was subject to her obtaining permission to sale the suit land from the Child Welfare Board of the Netherlands (hereafter referred to as the board) since the registered proprietor of the suit land was a minor at the time. That she never managed to get that permission because the deceased failed to pay the agreed purchase price to her. She denied receiving any payment from the deceased and asserted that the contract collapsed following a failure by the deceased to pay consideration for the suit land.

Didas Nkurunziza also filed a witness statement where he stated that his firm handled the transaction through which the 1st respondent became the registered proprietor of the suit land. That after such registration, on 11/8/94, Susan Kabazaire, the 1st respondent's mother, requested for and was given the original certificate of title and on 14/1/99, upon instructions of Manuela Walther (through her representative J.H.J Jagers) he lodged a caveat on the suit land in order to protect the interests of the 1st respondent. That during July 1999, Nkurunziza received Walther's instructions (again through J.H.J Jagers) to draw up an agreement to sale the suit land to the deceased for a sum of Shs 10m/=. That he was aware and did fully explain to both Walther and the deceased that the sale of the land would have to be contingent upon Walther obtaining permission from the Board. That both Walther and the deceased signed the agreement and the transfer deed but the original copies were retained by him awaiting the written permission of the Board which he has never received to date. That during September 2002, the deceased effected payment of the purchase price to Nkurunziza, the latter who accepted the same but after reminding the deceased of the condition in the sale agreement. He still retains the original documents and the purchase dues to date although he has ceased to represent Ms. Walther.

The 3rd and 4th respondents neither filed affidavits in reply nor appeared in court despite having been served with hearing notices. The application thus proceeded ex parte against them under **Order 9 rule 20 (1)** and **Order 17 rule 3 CPR**. It is therefore taken that the 3rd and 4th respondents agree to the applicant's contentions and prayers.

Both counsel were ordered to file written submissions which order they complied with.

The caveats which are the basis of this Application were lodged under S.140 (1) RTA now S.139 (1) RTA which provides as follows:-

“Any beneficiary or other person claiming any estate or interest in land under the operation of this Act ... may lodge a caveat with the commissioner ...forbidding the registration of any person as transferee or proprietor of and of any instrument affecting that estate or interest until after notice of the intended registration or dealing is given to the caveator, or unless the instrument is expressed to be subject to the claim of the caveator as is required in the caveat, or unless the caveator consents in writing to the registration.” (Emphasis mine).

The orders sought in the application are for removal of the caveats, a vesting order and issuance of a special certificate of title in respect of the suit land in favour of the applicant. The applicant and 1st respondent's counsel submitted and I do agree, that, S.139 (1) RTA basically deals with rights that can be protected by caveats. Therefore, my deliberations and findings should be confined to confirming whether the respondents have interests to protect in the suit land that should merit subsistence of the caveats, I must constantly remind myself of those confines as I write this decision.

The applicant contests the caveats on several grounds. Firstly that a sale of the suit land was concluded between the 1st respondent's guardian and the deceased and secondly that, the deceased acted upon the contract by taking possession, and she as his predecessor in title, has remained so in possession unchallenged since 1999. Thirdly, that the caveats of the 2nd and 3rd respondents were registered after the deceased obtained an equitable interest in the land and that their interests are therefore not superior to that which she holds.

Conversely, counsel for the 1st respondent argued that the claims in the motion go beyond what Section 139 (1) RTA allows. He further argued that the sale to the deceased was a nullity, it being conducted after the 1st respondent's caveat was lodged. He and counsel for the 2nd respondent also argued strongly that the contract of sale was one which fell under sections 22 and 28 of the Contract Act in that, the contract had a written, unambiguous and fundamental term which the deceased knew and agreed to (at the time he agreed to purchase the suit land) that the vendor first had to obtain permission of the Board before going ahead with the purchase which she failed to do. That according to S.28 Contract Act, this was an event precedent and important to the contract which was rendered impossible.

Counsel for the 2nd respondent argued that there had never been any objection to the order of the court at Mengo, which allowed the 1st respondent's mother to sell the suit land to his client. That on the other hand, the applicant did not show that she rejected the sale proceeds received from the applicant, and therefore, she should not be allowed to benefit twice from the land. He also questioned the bonafides of the purchase by the applicant on the grounds that there was an existing caveat on the land at the time of purchase and also that the consent of the Board and that of Suzan Kabazaire the caretaker was never sought.

In rejoinder, counsel for the applicant disputed the fact that this was a contingent contract. He agreed that the requirement to obtain the consent of the Board was a fundamental term of the agreement but that upon breach by the vendor, the deceased chose to consider it a mere breach of warranty and proceeded to perform the contract by taking possession and assumed an equitable interest. He therein also argued further that the contingent requirement did not become "impossible", because the vendor reneged to obtain permission of the Board after she wrongly thought that the deceased had failed to pay the purchase price which was not the case.

With respect, I consider the detailed arguments of whether there was a breach of the contract of the sale of the suit land between the 1st respondent's benefactor and the deceased are misplaced in these proceedings. As his opening statement, counsel for the applicant rightly stated that this being an application under Section 140 (now 139 RTA), the submissions or ownership of any category of interest in the suit land cannot be accommodated under this application. In my considered opinion, and in addition, even arguments on the validity of the agreement or its

breach, and the allegations that the 2nd respondent attempted to procure registration of the suit property through fraud, fall under that category. In my view, those are issues that would require framing of issues and testimonies, that are open to be contested in cross-examination, which cannot be achieved in an application, brought under a notice of motion. I would equate the present facts to a similar situation that was presented to the Supreme Court in **Sanyu Lwanga Musoke Vs Yakobo Ntale Mayanja S.C.C.A.59/95** where the Supreme Court rejected a request to consider allegations of fraud against a party who had been sued on a notice of mention seeking orders similar to those sought before this court.

I therefore decline to consider those arguments. Instead, I revert to my earlier caution of the confines of Section 139 (1) RTA. The issue therefore is whether the caveats on the suit land bear no merit and ought to be vacated from the suit land.

In the case of **Sentongo Produce Vs Coffee Farmers Ltd & Rose Nakafuma Muiyisa HCMC 690/99** that was cited by the 1st respondent, it was held that for a caveat to be valid, the caveator or must have a protectable interest legal or equitable to be protected by the caveat otherwise the caveat would be invalid.

It was never in dispute that the 1st respondent was and as still the registered proprietor of the suit land. With or without a certificate of title, in law, she would, until otherwise proved, be recognized as the owner of the most superior interest in that land. Therefore, hers is understood to be a competing interest with that of the applicant who claims to have purchased the suit land from the 1st respondent's benefactor when she was still a minor. A registered proprietor is by all means in law entitled to protect her interest in land for example where she contests a sale as was the case here. However, I have already found that the bonafides of that purchase can only be conversed in a full suit. I thus find that the caveat lodged on behalf of the applicant on 14/1/99 is valid and will for now be maintained on the certificate of title.

The 2nd respondent claimed to have purchased the suit land in 1995 from one Susan Kabazaire, the 1st respondent's mother who it is alleged to have had the required powers to sale. It was for that reason he caveated the land. Again this creates a parrarel albeit unregistered interest in the

suit land against the interests of the applicant and 1st respondent. The 2nd respondent produced sufficient proof to show on a balance of probabilities that he purchased an interest in the suit land. To my mind that is enough to entitle him to lodge a caveat. As I have already held, also the bonafides or legality of his purchase also, can only be investigated in a suit. Accordingly, I also hold that the caveat of the 2nd respondent shall also be maintained on the suit land.

The 3rd respondent did not contest the application and thereby failed to appear and show cause why his caveat should not be removed. He is taken to have submitted to the application. Also, it is trite that caveats are not to be maintained on land with no sound reason or in perpetuity. Therefore, I hold that the caveat filed by the 3rd respondent on the suit land on 26/4/09 shall be vacated. This order is directed against both the 3rd and 4th respondents

Having declined to issue an order to remove the caveats of the 1st and 2nd respondents, it follows that a vesting order in respect of the suit land cannot be issued in favour of the applicants.

Further, the 2nd respondent in his affidavit in response to the application, stated that he received the duplicate certificate of title from Susan Kabazaire at the time of purchase and that it is still in his possession. His averments seem credible as Didas Nkrunziza to whom the title was handed by Manuela Van De Broek confirmed those facts. The 1st respondent's benefactor, mentioned that she had at some point handed over the title to Didas Nkrunziza's firm and the latter admitted to have handed it over to Suzan Kabazaire who is now deceased. In those circumstances, therefore, the duplicate certificate of title is traceable. I accordingly decline to grant the order to issue a special certificate of title.

In summary, the application substantially fails and I hold as follows:-

1. The caveats lodged by the 1st and 2nd respondent on Block 20 Plot 526 Busega shall not be removed.
2. The caveat lodged by the 3rd respondent on Block 20 Plot 526 Busega shall be removed forthwith.
3. No order is given with respect to the prayer for a vesting order in favour of the applicants.
4. No special certificate shall be issued in respect of Block 20 Plot 526.

The applicant shall meet only the costs of the 1st and 2nd respondents. Since the 3rd and 4th respondents did not respond to this application they shall not be entitled to costs.

I so order.

EVA K. LUSWATA
JUDGE
12th December 2014