IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

MISC. CIVIL CAUSE No. 01 OF 2022

(Arising from a caveat entered on 7th day of October, 2021 by the Registrar of Titles, Geita)

MAKOYE ATHUMANI SHIYUNGA
MAKOYE HOSPITAL LIMITED ..... **APPLICANTS**

VERSUS

BERTHA CHARLES MAGANDULA ..... **RESPONDENT**

RULING

24th February & 14th April, 2022

ROBERT, J.

In a joint application instituted by the applicants herein, the court is moved under section 78(4) of the Land Registration Act, Cap. 334 (R.E.2019) to grant the following orders:-

1. *That this Honourable Court be pleased to issue an order for removal of a caveat to the Registrar of Titles for Geita Region in respect of land with Title No. 21485, PLT NO. 121 BLOCK "A" TAMBUKARELI, in Geita Urban Area.*
2. *Costs of this application to follow the event*
3. *Any other order(s) or/and relief(s) as this Honourable court may deem fit and just to grant.*

The application is made on the grounds set forth in the affidavit sworn by one Makoye Athuman Shiyunga, the first applicant and the

principal officer of the second applicant and stoutly opposed by the respondent through her counter-affidavit filed on 7th February, 2022.

At the hearing of this application, the applicants were represented by Messrs Anthony Nasimire & Steven Muhoja, learned counsel whereas the respondent enjoyed the legal services of Mr. Deya Outa, learned counsel.

Highlighting on this application, Mr. Nasimire submitted that, the objective of this application is to remove a caveat presented by the respondent on Plot No. 121, Block 'A' Tambukareli, Geita Urban, registered with Certificate of Title No. 21485. He maintained that, in this application the following matters are not disputed: The first applicant and respondent are husband and wife in a polygynous marriage; the land in dispute is registered in the name of the first applicant alone; on 7th October, 2021 the respondent presented a caveat on the land in dispute which is the basis of this application; at one point in 2016 the first applicant and respondent intended to transfer the disputed property from the first applicant to the second applicant and when all this was happening the respondent was the managing director of the second respondent.

He submitted that, the respondent presented the caveat because there is a pending matrimonial dispute between her and the first applicant as indicated in paragraph 8 of the counter-affidavit and annexure B1 collectively (petition of appeal). Unfortunately, the proceedings of the lower court are not attached to the counter affidavit to indicate if the land in dispute in this application is part of the properties in dispute in the said appeal. He maintained that, even if the land in disputed is also part of the properties in dispute in the pending appeal, the respondent cannot use a caveat as a substitute for stay of execution.

He submitted further that, the respondent's allegation in her counter-affidavit that she was not consulted about the transfer of the disputed property from the first applicant to the second applicant is not true as the disputed land appears in the second applicant's financial report of 2016/2017 as the property of the second applicant, which was signed by the respondent.

He objected to the contention at paragraph 9 of the counter-affidavit that the transfer of the disputed property to the second respondent is intended to defraud the interest of the Respondent and maintained that, the respondent having consented to the transfer of the

disputed property from the first applicant to the second applicant should be estopped from going around what she had consented previously by presenting a caveat on the disputed property.

Submitting further, he argued that, the respondent has no registrable interest in the disputed land which can justify placing of caveat on the disputed property. To support his argument, he cited the case of **Nestory Kabumbire Rwechungura Vs Gibson Kabumbire** followed in the case of **Alois Benedicto Rutaihwa vs Martin Moruta Rutaihwa & 2 others, Misc Land Application No. 45 of 2017** where it was decided that a person who places caveat in landed property can justify it by indicating that he has registrable interest in that property.

He maintained that, the caveat was not presented in good faith as things claimed in paragraphs 7, 8 and 9 of the counter-affidavit are not true and should be ignored. He prayed for the application to be allowed and the respondent to be ordered to remove the caveat placed on the disputed property.

It was further submitted by Mr. Muhoja that, even if the caveat is removed the rights of the respondent are intact because she is still the director in the second applicant company and the land in dispute is no

longer the property of the 1st applicant. Lastly, he prayed for the application to be granted with cost.

In response, Mr. Outa, opposed the application and submitted that, in deciding this matter the central issue for consideration by the Court is whether the respondent has an interest in the disputed property which can be protected by caveat.

He maintained that, the respondent's interest in the disputed land stems from the fact that the disputed land was bought as a matrimonial property when the respondent was the only wife of the first applicant. It was further improved substantially by the efforts of both the first applicant and respondent. He explained that, although the disputed land was bought at the value of TZS 8,000,000/=, currently it has been used to borrow from the bank at the tune of TZS 700,000,000/=.

He submitted further that, given the looming dispute in the marriage between the first applicant and the respondent as well as disputes within the second applicant company, the respondent's interest in the disputed property is in danger of being mislaid. Hence, he maintained that the respondent has the right to protect her interest in that property.

With regards to marriage dispute between the first applicant and the respondent, he clarified that, there is a pending Matrimonial Civil Appeal preferred by the respondent to the High Court against the first applicant which, as required by the law, was lodged at the District Court of Geita in order to be forwarded to this court. The exchequer receipt was attached as proof of payment for the appeal.

As for the dispute in the second applicant company, he referred the court to the letter written by the first applicant (husband) to the respondent (wife) through a lawyer after the respondent was allegedly kicked out of the company (annexure B2 collectively) which shows that the relationship between the said parties in the company is not good and therefore the respondent's interest in the disputed property are in danger if the said property is transferred to the second applicant.

He submitted further that, although the search conducted at the Business Licensing and Registration Agency (annexure B2 collectively) shows that the first applicant and respondent are the Directors of the company, yet the respondent was not consulted about the Company's decision to file this case. He maintained that, if the property in dispute belongs to the company, the proper applicant would have been the second applicant alone.

He denied allegations by the applicants that the respondent consented to the alleged transfer of land from the first applicant to the second respondent. He maintained that, the affidavit referred to by the applicants to establish that he consented to the transfer was sworn by the second wife of the first applicant and not the respondent.

He implored the Court to protect the rights of parties over the disputed land as they pursue their rights through proper forums and dismiss the application.

In a brief rejoinder, Mr. Nasimire reiterated that the respondent had consented to the transfer of the disputed property and maintained that, even if the property has not been transferred technically to the second applicant that does not remove consent already given by the respondent.

On the argument that, the disputed property has been substantially improved, he maintained that the respondent did not provide proof to that allegation.

He prayed for the application to be allowed with costs.

In the course of determining this matter, the Court pondered on the propriety of determining this matter without joining the Registrar of

Titles given that the applicant's chamber summons moved this Court to *"issue an order for removal of a caveat to the Registrar of Titles for Geita Region"*. I therefore asked parties to address the Court on the propriety of this application not joining the Registrar of Titles.

Submitting on the issue, Mr. Nasimire argued that, going by the decision of the Court of Appeal in the case of **Ngerengere Estate Company Limited vs Edna William Sitta, Civil Appeal No. 2019 of 2016** delivered on 11th April, 2019, it is necessary for the applicants to join the Registrar of Titles in an application for removal of a caveat. However, he maintained that, in the case of **Juliana Francis Mkwabi vs Laurent Chimwaga, Civil Appeal No. 531 of 2020** (unreported) held on 4th November, 2021 the Court of Appeal decided that a necessary party would be added in a suit even though there is no distinct cause of action against him where his proprietary rights are directly affected by the proceedings and to avoid a multiplicity of suits his joinder is necessary so as to have him bound by the decision of the Court in the suit.

He maintained that the two cited judgments of the Court of Appeal are conflicting. Therefore, the way forward under the circumstances is to follow the more recent decision between the two conflicting decisions

(See **Ardhi University vs Kyondo Enterprises (T) Ltd, Civil Appeal No. 58 of 2018** (unreported)). Based on that principle, he argued that since the case of **Juliana Francis** (Supra) was decided after the Ngerengere Estate case (supra), the principle in the case of Juliana Francis case is the one to be followed.

He argued that, while in the **Ngerengere Estate** case the Court of Appeal nullified the proceedings of the High Court on grounds that non-joinder of a necessary party is a fundamental error occasioning miscarriage of justice, in **Juliana Mkwabi**'s Case the Court decided not to quash the proceedings but to remit them down so that a necessary party may be joined.

Submitting further, Mr. Nasimire was of the views that, in the circumstances of the present case, non-joinder of Registrar of Titles has no any effect because the Registrar has no proprietary interest in the matter which needs to be protected and he cannot be affected by an order for removal of the caveat. However, he prayed that, if the Court finds the Registrar of Titles to be a necessary party, the applicant should be allowed to join him.

In addition to Mr. Nasimire's submissions, Mr. Muhoja argued that, according to Order 1 Rule 9 of the Civil Procedure Code, Cap. 33 (R.E.

2019), a suit is not affected by reason of a non-joinder or misjoinder of the parties as the Court is directed to deal with the matter in controversy with regards to the right of the parties in the case.

In response, Mr Outa argued that, the case of **Ngerengere Estate** is more relevant in the circumstances of this case compared to the case of **Juliana Francis** which is distinguishable from the **Ngerengere Estate**. He explained that the **Ngerengere Estate** case was directly related to the issue of removal of caveat as it is in the present case while the **Juliana Francis** case dealt with trespass of land whereby the Dodoma Municipal Council had no hand in trespassing to the land of Juliana and therefore no relief could be claimed from Dodoma Municipal Council.

Submitting on the appropriate relief for non-joinder of Registrar of Titles, he argued that it is untenable at this stage for the Court to order for the applicants to join the Registrar of Titles unless the Applicants had submitted to the relevant Government Departments a notice of not less than ninety days of their intention to sue the Government under Section 6(2) of the Government Proceedings Act, Cap. 5 (R.E.2019).

With regards to Order 1 Rule 9 of the Civil Procedure Code, Mr Outa argued that the said provision must be read together with section

6(2) of the Government Proceedings Act. He prayed for the application to be struck out with cost for being incompetent.

In a brief rejoinder, Mr. Nasimire maintained that the **Ngerengere Estate** case is not distinguishable from the **Juliana Francis** case. The common denominator in the two cases is on what the court is required to do where there is a non-joinder of a necessary party. He argued that, although the issue in Ngorongoro Estate case was removal of caveat as it is in the present case, the matter at issue boils down to non-joinder of a necessary party. He maintained that, a necessary party is described in the **Juliana Francis** case as a party whose non-joinder may compel the Court to make necessary orders. In the present case, the Registrar of Titles is not a necessary party because he has no interest in the land caveated by the Respondent. The Registrar played a role in registration of caveat but that does not give him any proprietary interest capable of being protected.

He prayed for the Court to grant the application.

At the outset, it should be noted that this is not a dispute on land ownership where the Court is required to determine the right of parties in the disputed land. As noted in the pleadings, the applicants filed this application seeking ***"removal of a caveat to the Registrar of Titles***

for Geita Region in respect of land with Title No.21485, PLOT No. 121 BBLOCK A TAMBUKARELI, in Geita Urban Area".

There can be no dispute that issues to be framed by the Court need to arise from the pleadings. Considering the substance and reliefs sought in the pleadings, despite the fact that the owner of a caveated land or a person with interest in the said land may summon the caveator under section 78(4) of the Land Registration Act to show cause why such a caveat may not be removed, it appears that in the pleadings of this application, the applicants sought an order of the Court against the Registrar of Titles for Geita region in respect of the caveat registered against the disputed land. Since the Registrar of Titles is not impleaded, in this application, this Court finds it desirable to consider first the propriety of not joining the Registrar of Titles in the circumstances of this application before deliberating on the merit of the application.

I have heard the arguments of the learned counsel for the parties on this issue. I am in agreement with Mr. Outa that issues involved in the case of Ngerengere Estate are directly related to the present application as they both involve removal of a caveat and non-joinder of the Registrar of Titles in the circumstances similar to the present case.

It should be noted that, in the case of Ngerengere Estate the Court of Appeal did not decide on whether the Registrar of Titles is a necessary party in an application for removal of a caveat. The decision of the Court was based on the findings that the applicant's pleadings at the High Court sought an order against the registration of the caveat by the Registrar of Titles, thus, the Court made a decision that the Registrar of Titles ought to have been joined in order to be heard on the matter in view of the settled law on the right to be heard. Let the words of the Court of Appeal at page 11 of the said decision speak on that. It said:-

> *"We understand that, under section 78(4) of the Act the owner of the estate can move the High Court to summon the caveator as to why the caveat should not be removed. However, in the case under scrutiny, since before the High Court the appellant pleaded to be seeking an order against the registration of the caveat by the Registrar of Titles in respect of the landed properties in question, the appellant ought to have joined the Registrar as one of the Respondents so that the Registrar of Titles could initially be heard by the High Court on the matter."*

Guided by the cited decision of the Court of Appeal, this Court finds that, based on the pleadings of this application, the applicant should have joined the Registrar of Titles in order for him to be heard on the matter. Unfortunately, that was not done.

As a consequence, this Court will not have the luxury of considering the well-argued points by the learned counsel for both parties in determining the merit of this application but to decide on the appropriate relief in the light of the findings and decision of this Court.

This Court is in agreement with Mr. Nasimire that based on the two decisions of the Court of Appeal in the case of Ngerengere Estate and Juliana Francis Mkwabi, this Court having decided that the Applicant should have joined the Registrar of Titles is now faced with two options, either to direct for the Registar of Titles to be joined and the application to proceed or to strike out the application and direct the applicants, if they so wish, to lodge another application and implead the Registrar of Titles as one of the parties. However, this Court finds it difficult to resist the argument made by Mr. Outa with regards to the effect of making an order to join the Registrar of Titles and proceed with this application in the absence of the 90 days notice of intention to sue the Government as required under section 6(2) of the Government Proceedings Act.

That said, this court has no option but to strike out this application and direct that if the applicants are still interested to pursue this matter against the Registrar of Titles, they may take the necessary steps needed to implead the Registrar of Titles as one of the parties.

I give no order as to costs since the matter is largely decided on issues raised by the court suo motu.

It is so ordered.

K.N.ROBERT
JUDGE
14/4/2022