

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil jurisdiction)

2017/HP/1556

BETWEEN:

MARGRET KATUNGU MWENYA

FRANK KATUNGU

JOYCE KATUNGU

AND

RICHARD KATUNGU



1ST APPLICANT

2ND APPLICANT

3RD APPLICANT

RESPONDENT

Before the Hon. Mr. Justice M.D. Bowa on 13th April 2017

For the Plaintiff: Mr. J. Mulenga Messrs Isaac and Partners

For the Defendant: No appearance

JUDGMENT

Cases referred to

1. *Sobek Lodges Ltd vs. Zambia Wildlife Authority (2011) 2 ZR p235*
2. *Lenton Holdings vs. Moyo 1984 ZR p55*

Legislation referred to:

1. *The Lands and Deeds Registry Act Cap 185 of the Laws of Zambia*
2. *The Intestate Succession Act Cap 59 of the Laws of Zambia*

This is the Applicants application for an order to lift the caveats placed on plot LUS/6268, LUS 6267, F 215a/D/127, F, 215a/D/29, F/215a/D/30, F/215a/D/31, and LUS /286.The

matter was commenced by originating summons supported by an affidavit dated 8th August 2016 sworn by Margret Katungu Mwenya the 1st Applicant, on behalf of the other 2 Applicants. It was her evidence that the Applicants are beneficiaries and duly appointed personal representatives of the estate for the late Daniel Katungu who was also their father. Further that the late Mr. Katungu died without living a will on how he intended the estate to be distributed. She contended that the Respondent, who is also the Applicants brother and beneficiary to the estate, has been interfering with the administration of the estate. That in or about the year 2007 the Respondent commenced an action against the Applicants for alleged failure to properly administer the estate under cause No 2007/HP/1646. The court dismissed the action and ordered that the Applicants proceed to distribute the estate in accordance with the provisions of the Intestate Succession Act.

The court learnt that the said ruling was delivered on the 9th of December 2013 and that the Respondent has not appealed against it. It was the deponent's further contention that the Applicants have been unable to distribute the estate due to the continued

interference by the Respondent who has placed caveats on all the properties making up the estate hence making it difficult to dispose of the property to the detriment of the other beneficiaries of the estate. The Respondent has been requested to remove the caveats but he has refused or neglected to do so hence prompting the Applicants to seek the courts intervention to remove the caveats placed through this action.

The Respondent filed in an affidavit in opposition dated 23rd August 2016. He denied interfering with the administration of the estate as alleged by the Applicants. He claimed that the correct position is that the ruling of court referred to by the Applicants dated 9th December 2013 delivered by the Deputy Registrar, did not dismiss the matter but instead ordered the administrators of the estate to distribute the estate as provided for under the relevant law and further condemned the Applicants in this cause in costs which they have since paid.

He stated further that the ruling was to a large extent in his favour hence his decision not to appeal. It was his contention that the Applicants have not complied with the courts direction in that

ruling and that they have continued to plunder the estate thereby depriving him and other beneficiaries of their inheritance.

The Respondent contended further that on the 18th May 2016, the Applicants fraudulently sold subdivision D of subdivision No. 16 of form No 215a Rosadale which forms part of the estate to Willanda Investments Limited at a consideration of K700, 000. He claimed that the Applicants have not given him his share of the proceeds of the sale. He further disclosed that the alleged fraudulent sale was reported to the Drug Enforcement Commission who is investigating the matter. The Respondent thus decided to place caveats on all the remaining properties to protect his interest.

The Respondent further contended that sometime in November 2015, the 1st and 2nd Applicants were convicted by a Magistrate Court for the offence of depriving beneficiaries of their entitlement to the estate for the late Daniel Katungu. They were also ordered to render an account to the probate register but have not done so to date. The Respondent thus concludes that the Applicants have a propensity for not complying with court orders.

The Respondent asserted further that he only proceeded to place caveats on all the remaining properties of the late Katungu upon discovering that the Applicants had sold the named property before rendering an account as directed by the Deputy Registrar. He reasserted his belief that he was justified to place the caveats on the properties because the Applicants in his view were resolved to plunder the part of the estate the courts had directed them to render an account on two different occasions.

The Applicants filed in an affidavit in reply dated 27th September 2016, and sworn by Margret Katungu Mwenya. She stated that the Applicants have convened meetings with the family and beneficiaries on various occasions to give an update and inventory of the deceased assets and outstanding liabilities. The Applicants have also provided an update on how they have handled the estate. According to the Applicants, the Respondent has adamantly refused to attend or be a part of these meetings.

They do not dispute having sold sub division No D of subdivision no.16 of Farm No. 215a Rosedale Lusaka at the sum of ZMK 700,000 and acknowledge it was part of the deceased estate. It was

further deposed that after the sale of the property the Applicants paid off all disbursements owing from the sale including legal fees and paid off the balance to the beneficiaries of the estate. It was further deposed that the Respondent was duly notified about his share of the money but that he has refused to collect his cheque amounting to K44, 000.00.

The Applicants maintained that they have been unable to distribute the estate due to the continued interference by the Respondent who they opine has been unreasonable and made it practically impossible to effectively administer the estate. That the Respondent had gone as far as commencing proceedings against the Applicants in different courts where they subsequently proved that they acted according to the law and were even discharged of the criminal allegations in one matter. Finally, it was the Applicants position that the Respondent had failed neglected and refused to reasonably co-corporate with them to ensure that the estate was well administered to the detriment of the beneficiaries by placing caveats on all the properties of the estate.

On the return day for the hearing of the originating summons, neither the Respondent nor his advocate was in attendance. I proceeded to hear the matter in their absence upon being satisfied that the Respondents advocate was served with the notice of hearing.

Learned counsel for the Applicants miss Mulenga relied on the affidavit in support of the originating summons. She also relied on the skeleton arguments filed into court on the 17th February 2017. She stressed that the Deputy Registrar ruled that the personal representatives were in effect carrying out their duties as per legal requirement and expectation. In addition that the court sought closure to the matter by calling on the parties to ensure the administration of the estate was carried out. Counsel submitted that in spite of this, the Respondent went ahead and placed caveats on all the properties making it impossible for the Applicants to sell off the immovable property and share off the monetary value to all the beneficiaries of the estate. She asked that the court grants the application as prayed.

I have considered that affidavits and arguments presented before me, the question for my determination is simply whether I should grant the application before me to lift the Caveats placed in the various named properties in this matter. The application is made pursuant to section 81 of the Lands and Deeds Registry Act Cap 185 of the Laws of Zambia making provision for removal of caveats. To have an appreciation of the relevant legal regime on caveats under the Act, a useful starting point would be section 76 which provides that:

“Any person:-

- a) Claiming to be entitled to or be beneficiary in any Land or any estate or interest therein by virtue of any unregistered agreement or other instrument or transmission, or of any trust expressed or implied, or otherwise howsoever; or***
- b) Transferring any estate or interest in Land to any other person to be held in trust; or***
- c) Being an intending purchaser or mortgagee of any Land;***

May at any time lodge with the Registrar a caveat in form 8 in the schedule”

Section 81 of the Act provides that:

“81 (1) such registered proprietor or other interested person, may if he thinks fit, summon the caveator, or the person on whose behalf such caveat has been lodged, to attend before the Lands tribunal, court, or judge thereof to show cause why such caveat should not be removed.

(2) Such Lands Tribunal court, or Judge upon proof that such person has been summoned, may make such order in the premises, either ex parte or otherwise, as to such Lands Tribunal, court, or Judge seems just”

Finally, section 82 of the Act provides:

82 (1) “Any person lodging any caveat without reasonable cause shall be liable to make to any person who may have sustained damage thereby such compensation as may be just.”

(2) Such compensation shall be recoverable in an action at Law by the person who has sustained damage from the person who lodged the caveat.”

From the above provisions of the law therefore, it is evident that the law seeks to protect a party with an interest in land as defined in section 76 from adverse claimants registering an interest in the Land, through the placement of the caveat. An aggrieved party such

as the registered proprietor or other interested person may challenge the placement of the caveat through an application to the High Court for its removal. Lastly a malicious caveator is not absolved from liability in damages if it can be established on the facts that he had no reasonable cause or basis on which to place the caveat and some damage may have been sustained by an innocent aggrieved interested party in the process.

In **Sobek Lodges Ltd vs. Zambia Wildlife Authority**¹, Matibini J duly observed that although the originating proceedings in an application for the removal of a caveat is at the instance of an applicant, section 81 of the Lands and Deeds Registry Act shifts the burden of showing why a caveat should not be removed on to the Respondent. Further, In the case of **Lenton Holdings vs. Moyo**², the Supreme Court held that to be effective a caveat must disclose the interest claimed. In other words, the Respondent must be able to demonstrate the interest he has in the property as defined under section 76 of the Act and then go further to show cause why the caveat should not be removed.

Based on the facts before me, it is not in dispute that the Respondent is a beneficiary of the estate of the late Daniel Katungu. He like the administrators of the estate is one of the deceased's children. The parties to this action are therefore siblings. There is as such, no question that he has an interest as beneficiary and hence qualified to place the caveats in terms of section 76 of the Lands and Deeds Registry Act.

To justify the placing the caveats and in making a case for why they should not be removed, the Respondent contends that the caveats were necessary to protect his interest. His action was necessitated by the failure by the Applicants to account for the proceeds of the sale of subdivision D of subdivision 16 of farm 215/a. He further contends that the Applicants have demonstrated a propensity to disregard court orders that have previously directed them to distribute the estate in accordance with the law. He argues that the Applicants were resolved to plunder the part of the estate the courts had directed them to render an account on two different occasions and prays the caveats remain on the properties for this reason.

The Applicants see things differently. They contend that their efforts to distribute the estate are being impeded by the Respondent who has not only refused to co-operate with them but also dragged them to court in matters that were subsequently dismissed. They pray for the removal of the caveats so that they can distribute the estate.

Both parties make reference to the matters previously before court to advance their respective positions. Firstly on proper construction of the ruling by the Learned Deputy Registrar dated 9th December 2013, I conclude that the court did make a finding at page 14 that the Applicants had been in breach of section 19 of the Intestate succession Act which spells out the duties of Administrators. It was on this basis that the court also ruled that the Applicants should proceed to administer the estate according to the provisions of section 5 of the Intestate succession Act.

Secondly the pronouncement of an absolute discharge by the magistrate court in a subsequent matter in its order dated 7th November 2015 and exhibited at "RK 4", did not necessarily imply the Applicants were absolved from criminal liability for the offence

they were facing. An absolute discharge is a lawful sentence imposed by a court of law for convicted persons subject to criminal proceedings for all intents and purposes. The magistrate court hearing the matter also ordered that the estate be distributed according to the law.

Reference was made to what the Respondent considered to be the questionable sale of the named subdivision. Further that the sale was done even after the Ruling and order referred to above were pronounced. I find that the Applicants have given an explanation of the sale of the land in question which was done in line with their duties as administrators to administer the estate.

I also find that contrary to the Respondents assertion, the Applicants have exhibited proof of the steps they have taken to render an account on the administration of the estate to the beneficiaries by way of minutes of meetings. There is further proof that the proceeds of the sale of sub division D of Subdivision 16 of Farm 215/a Rosedale were duly distributed to the beneficiaries of the estate. I am also satisfied that a cheque representing the Respondents share was issued which he has refused to collect.

Importantly, I find that there is no evidence before me that the Applicants are not distributing the estate according to the law as ordered by the Deputy Registrar and the learned Magistrate in their Rulings. In the premises I find that the Respondent has no basis on which to insist that the caveats remain in place and their existence are in fact preventing the Applicants from completing their task to administer the estate.

Section 19 of the Intestate succession Act gives recourse to the beneficiary of an estate who is unhappy with the manner of management of an estate to demand for an account of such estate.

Section 19(1) (i) (c) provides that:

“19 (i) The duties and powers of an administrator shall be.

(c) When required to do so by the court, either on the application of an interested party or on its own motion-

(i) To produce on Oath in court, the full inventory of the estate of the deceased; and

(ii) To render to the court an account of the administration of the estate.

It was indeed pursuant to these provisions that the Respondent earlier took an action against the Applicants. Nothing stops him

from doing the same after the disposal of the remaining assets by the administrators of the estate.

For the avoidance of doubt therefore, I order that the caveats placed on plot LUS/6268, LUS/6269, LUS/6267, F/215a/D127, F/215a/D/31, F/215a/D29, F/215a/D/30, and LUS 286 be removed by the Registrar of Lands and Deeds forthwith. It is of course expected that the Applicants will proceed to administer the estate in accordance to the law as earlier ordered by Ruling dated 9th December 2013 and court Order dated 07th November 2015.

I make no pronouncement on compensation pursuant to section 82 of the lands and Deeds Act as no claim in damages or compensation was pleaded in this matter. I however award costs to the Applicants to be taxed in default of agreement.

Leave to appeal is granted.

Dated at Lusaka this 7th day of September 2017



Hon. Justice M.D Bowa
Judge

