



REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 384 of 2012

ALLAN GEORGE NJOGU RESIDENCES LIMITED..... PLAINTIFF

VS

NATIONAL BANK OF KENYA LTD..... DEFENDANT

(Suit by plaintiff for orders of removal of caution, return of title documents and damages for unlawful caution; plaintiff company having tendered title to suit land for the same to be charged in the year 1999; defendant registering caution as intended chargee in the year 2001; no charge registered upto and even after filing of suit in the year 2007; whether caution as intended chargee is maintainable; whether plaintiff is entitled to return of title documents and removal of caution; whether plaintiff is entitled to damages for wrongful caution).

JUDGEMENT

A. INTRODUCTION

This suit was commenced by way of plaint filed on 14 September 2007. In the said plaint, the plaintiff has sought the following orders against the defendant :-

- (a) Return of its title for Eldoret Municipality Block 6/308.
- (b) Removal of the caution lodged against Eldoret Municipality Block 6/308.
- (c) Damages pursuant to the provisions of S. 135 of the Registered Land Act.
- (d) Costs of this suit.
- (e) Interest at court rates.
- (f) Any other or further relief as this court may deem just to grant.

The plaintiff is a limited liability company incorporated under the Companies Act (CAP 486) Laws of Kenya whereas the defendant is one of the largest banks in Kenya having several branches one of which is situated in Eldoret.

B. PLAINTIFF'S PLEADINGS

The plaintiff has in its plaint pleaded that one of its directors, Allan George Njogu Kamau (AGN Kamau or Mr. Kamau), operated an account with the bank being Account No. 401***** (redacted). It is pleaded that on the 4th August 2000 the defendant wrote a letter to the said AGN Kamau, that he owed the bank Kshs.960,000/= and that it would advance to him a further sum of Kshs. 500,000/= pursuant to a request made by the said AGN Kamau. It is further pleaded that the said letter required AGN Kamau to pay the principal amount then owing and the proposed additional sum of kshs. 500,000/= by monthly instalments of Kshs.41,000/= for 36 months. The plaintiff avers that at that time, the bank was holding as securities the properties Eldoret Municipality Block 6/111 registered in the name of AGNES WAMBUI KAMAU (AGNES) as guarantor to AGN Kamau, and the property Uasin Gishu/ Kimumu/79 registered in the personal name of AGN Kamau. It is pleaded that to secure the monies intended to be advanced, the bank requested AGN Kamau to provide a further security, whereupon he provided the defendant with the title deed to the land parcels Eldoret Municipality Block 6/354 registered in the personal name of AGN Kamau and the title deed to the land parcel Eldoret Municipality Block 6/308 registered in the name of the plaintiff company, Allan George Njogu Residences Company Limited (AGN Residences Ltd).

The plaintiff has pleaded that AGN Kamau commenced payments and had paid 3 installments totaling Kshs.216,000/= when the defendant without justifiable cause purported to sell Agnes' property Eldoret Municipality/ Block 6/111 which prompted Agnes to pay the bank the sum of Kshs.1,353,659.60/= and her title was discharged and she was released from any further liability with the bank. It is further pleaded that the defendant bank again without justifiable cause advertised the property Uasin Gishu/Kimumu/79 owned by AGN Kamau which prompted Mr. Kamau to file suit to stop the intended sale. The suit is Eldoret High Court Civil Suit No. 95 of 2003. An interim injunction was obtained pending the hearing of the suit.

It is also pleaded that the defendant did not advance to AGN Kamau the further advance of kshs.500,000/= because it claimed that the amount of land rents and land rates on the two properties Eldoret Municipality Block 6/308 and Eldoret Municipality Block 6/354 were excessive. The bank then proceeded to file a caution against the property of the plaintiff company i.e Eldoret Municipality Block 6/308 (the subject matter of this suit) claiming interest as an intended chargee.

The plaintiff company has pleaded that it never passed a resolution for its said property to be used as a security and that there was no privity of contract between itself and the defendant bank. The plaintiff has further pleaded that the caution so placed purportedly as an "intended chargee" is foreign and not known or provided for by the provisions of the Registered Land Act. It has pleaded that the lodged caution is unlawful, oppressive and unjustified in all circumstances as neither the plaintiff nor its director borrowed any money from the defendant and there was thus no consideration for the defendant to illegally retain the plaintiff's title and lodge the offending caution.

The plaintiff has further contended that the purported caution offends the provisions of Sections 131, 132 and 133 of the Registered Land Act. It has pleaded that the defendant has held the plaintiff's title for 7 years (2000 to 2007 when the suit was filed) thereby causing untold pecuniary loss to the plaintiff as both the Commissioner of Lands and the Eldoret Municipal Council will not allow it to pay both the land rent and rates without him presenting the title to them with the result that the amounts now owing by way of interest and penalties on top of the principal amounts have derogated the value of its property gravely. The plaintiff has further pleaded that it does not owe the defendant any money and even if it did, such money cannot be recovered as the period for such recovery has already expired under the provisions of the Limitation of Actions Act.

It is for the above reasons that the plaintiff has sought the prayers in the plaint.

C. DEFENDANT'S PLEADINGS

The defendant upon being served filed its defence to the plaintiff's claim. In its defence, the defendant has pleaded that in the course of its relationship with AGN Kamau, it advanced to him various financial facilities and as at 21st November 1998, the said Mr. Kamau owed it a sum of Kshs.3,757,249.30/=. It is pleaded that the defendant agreed to reschedule his payments upon request by Mr. Kamau which led to

the signing of a loan agreement on 21 November 1998. It is pleaded that it was a term of the said agreement that Mr. Kamau would provide securities sufficient to cover the said indebtedness which led to Mr. Kamau availing the title deeds to the properties Eldoret Municipality/ Block 6/354, Uasin Gishu/Kimumu/79 and Eldoret Municipality Block 6/308 to the defendant. It is further pleaded that Mr. Kamau was to pay all rates and rents on the properties so that they can be charged but that he declined to pay the same and the defendant was therefore unable to create a charge over the land Eldoret Municipality Block 6/308.

The defendant in its pleadings has denied that what Mr. Kamau has stated that he owed the bank. It has pleaded that what Mr. Kamau owed was Kshs. 6,116,862/= as at 4/8/2000 and that the amount of Kshs.960,000/= and the additional Kshs.500,000/= pleaded by the plaintiff was a proposal by Mr. Kamau which was subject to the defendant's decision on waiver of interest and other charges. It has further pleaded that its decision to waive interest was conditional upon the registration of a charge upon the properties Eldoret Municipality Block 6/354 and 308 which was never done. It has further pleaded that the payments made by Agnes were the product of a separate agreement between her (Agnes) and the defendant bank which did not affect the outstanding debt owing from Mr. Kamau.

It has denied that there was no resolution by the plaintiff company and has pleaded that by a Directors resolution made on 15th February 1999 the plaintiff company resolved to have title to the land parcel Eldoret Municipality Block 6/308 charged in favour of the defendant. It has pleaded that the title to the suit land having been placed into their hands and the plaintiff's director having failed to obtain the necessary clearance certificates and consents, the defendant placed a caution over the suit land to preserve and protect their interests. The defendant has pleaded that the said caution is lawful.

They have asked that the plaintiff's case be dismissed with costs.

D. THE PROCEEDINGS

The parties herein filed their lists of documents and agreed on the issues as required by Order 11 of the Civil Procedure Rules, 2010. The issues for determination as agreed by the parties are as follows :-

1. Whether or not the defendant herein wrongfully and without any lawful cause filed a caution against the plaintiff's property designated as Eldoret Municipality Block 6/308.
2. Whether or not the caution lodged against the above parcel of land is provided for under any provisions of Registered Land Act Chapter 300.
3. Whether or not there is any term as intending chargee under any law or order Registered Land Act Chapter 300 (sic).
4. Whether or not the lodged caution is unlawful, oppressive and unjustified.
5. Whether or not the plaintiff or its directors borrowed any money from the defendant at any particular time.
6. Whether or not the purported caution offends the provisions of Section 131, 132, and 133 of the Registered Land Act.
7. Whether or not the defendant is illegally retaining the title for the land parcel Eldoret Municipality Block 6/308.
8. Whether or not there is any privity of contract between the defendant and the plaintiff.
9. Whether or not the plaintiff's suit is bad in law or an abuse of the court process.
10. Whether or not the plaintiff is entitled to the reliefs sought in the plaint.

11. Whether or not the plaintiff is entitled to costs.

This matter was eventually heard before me on the 5/12/2012, 30/01/2013, and 5/2/2013.

E. THE PLAINTIFF'S EVIDENCE

The plaintiff called Mr. AGN Kamau as its only witness. AGN Kamau is an advocate of the High Court of Kenya, practicing in the name and style of AGN Kamau Advocates in Nairobi. Previously, he used to practice in Eldoret under the same name. He stated that he was one of the defendant's first customers when it opened its branch in Eldoret in 1980. A business relationship ensued between the two and the firm of AGN Kamau Advocates was even included in the defendant's panel of advocates. Mr. Kamau was variously granted financial facilities including overdraft facilities to assist him in running his law firm. On 24th February 1994, Mr. Kamau incorporated the plaintiff company AGN Residences Limited. The shareholders of the company and directors are AGN Kamau and his wife Anne Wanjiku Kamau. Before the year 2000, Mr. Kamau borrowed some money from the defendant which were secured by a guarantee from Agnes Wambui who is Mr. Kamau's mother. This was the property Eldoret Municipality Block 6/111. He had also offered his own land as additional security. This land is Uasin Gishu/Kimumu/79. At that time the bank rates were high but he still needed to borrow a further sum of Kshs. 500,000/=. He stated that on 4th August 2000, the bank wrote to him to the effect that the principal amount owing to the bank was kshs. 960,000/= and agreed to lend him the additional Kshs. 500,000/=.

He testified that in the meantime, the bank threatened to sell by public auction his mother's property Eldoret Municipality Block 6/111 and Agnes opted to pay the defendant Kshs. 1,353,659/= in full settlement of the amounts that Mr. Kamau owed to the bank at that time. Despite this payment, the bank still wanted to sell the property Uasin Gishu/ Kimumu/79 which prompted him to file a suit being Eldoret HCCC No. 95 of 2003. The court allowed him an injunction and restrained the selling of the property until the final determination of the suit.

He testified that because of the extra amount of kshs. 500,000/= requested and the other amounts being subject of negotiations, the bank requested for additional securities. He offered the bank his own property Eldoret Municipality Block 6/ 354. The plaintiff company passed a resolution to offer the suit land , which is Eldoret Municipality Blok 6/308, as additional security for Mr. Kamau. The resolution is dated 15 February 1999 and was produced as an exhibit. The title deeds to these two properties were handed over to the law firm of M/s Nyairo & Company Advocates, who were acting for the defendant bank, for them to register the requisite charges in the said titles. On 3 August 2000, the law firm of M/s Nyairo & Company wrote to the defendant bank and requested for the sum of Kshs.783,711.50/= as land rates payable to the Eldoret Municipal Council and a further kshs. 250,484/= as land rent payable to the Commissioner of Lands being the combined land rates and rents for the two properties. These amounts had to be paid before the Commissioner of Lands issued consent to charge. He testified that the amount of land rent and rates was far in excess of the kshs. 500,000/= that he intended to borrow and therefore he did not avail to himself the amount of Kshs. 500,000/= that was offered to him by the defendant. He averred that no charge instruments were ever drawn and he never signed any security document.

Mr. Kamau further testified that he later asked the bank to release to him the two title deeds, the one in his personal name (plot No.354) , and the second (plot No. 308) in the name of the plaintiff company, but the branch manager, one Mr. Yego, informed him that the bank had placed a caution over the two properties with the defendant claiming an interest as an "intending chargee." The certificate of official search was produced (plaintiff's exhibit No. 5) which indicates the said entry. These cautions were registered on 3 August 2001. To date they have not been removed.

Mr. Kamau testified that he has been a legal practitioner of over 34 years and he is not aware of any interest in land known as "intended chargee". He stated that the caution has been detrimental to the interests of the plaintiff company. The company intended to sub-divide and develop the land but they have been unable to do so because the title deed is with the defendant and because of the caution. They have thus been unable to access financing.

On cross-examination, Mr. Kamau agreed that for a number of years he had been provided with financial facilities from the bank. However, the amount owing by him as at 1998 was not clear hence the suit

Eldoret HCCC No.95 of 2003. A letter of offer dated 21 November 1998 was put to him. He accepted that it was a letter of offer to convert his then outstanding overdraft of kshs. 3,757,249.30/= into a term loan. He stated that this was conditional upon the securities being perfected but since none was perfected, the overdraft was never converted into a term loan. He disputed the figure of kshs. 3,757,249.30/= which he reiterated was the subject matter in Eldoret HCCC No. 95 of 2003.

He was categorical that the plaintiff company gave the bank the title deed to the suit land Eldoret Municipality Block 6/308 to secure the proposed Kshs.500,000/= additional security. He insisted that this property was to be charged for the requested further facility of kshs.500,000/=. He however agreed that the letter of offer also referred to the suit land as one of the additional securities. He contended that no charge instrument over the suit land was ever signed but on being pressed and on being shown a letter written by himself dated 24/8/1999 (which is a letter forwarding signed charge instruments for the suit land) stated that it is possible that he could have signed a charge instrument but he is not aware whether the bank executed its part.

He clarified that the reason why the charge instrument was never signed was because of the high amount of rents and rates in comparison to the amount being borrowed which to him was only Kshs. 500,000/=. He asserted that there was no interest known as "intended chargee" which could be the subject matter of a caution. Several letters touching on the indebtedness of Mr. Kamau were put to him including one dated 1/8/2000 showing the amount of kshs. 6,116,862/= and another dated 6/6/2001 indicating an amount of Kshs. 7,494,080.50/=. He was also shown several bank statements ending with a statement of 15/11/2003 which shows an amount of kshs. 12,453,579.40/= as overdraft. Mr. Kamau disputed these figures and indeed denied owing the bank any money.

In re-examination, Mr. Kamau stated that the plaintiff company is a separate entity that was never advanced any money. He testified that for the charge to take effect, it had to be executed by the two parties and be registered. It is only then that it can take effect. He stated that the title to Eldoret Municipality Block 6/308 was offered to secure the intended amount of Kshs.500,000/=.

F. THE DEFENDANT'S EVIDENCE

The defendant called one witness, Ms. Emma Neondo who is an officer of the defendant bank working at its credit department in its Eldoret Branch. The witness stated that she is familiar with the plaintiff company and is aware of its directors and shareholders. She affirmed that AGN Kamau had a personal account with the defendant and that he was offered overdraft facilities. According to her, as at 21/11/1998, Mr. Kamau had an outstanding amount of kshs. 3,757,249.30/= . The account was not being properly serviced and an offer was given to Mr. Kamau to have the amount restructured into a loan.

The condition was for Mr. Kamau to procure additional securities. The witness stated that two properties were offered, the first being Eldoret Municipality Block 6/354 in the name of Mr. Kamau and Eldoret Municipality Block 6/308 in the name of the plaintiff company. The former land was to be charged for a sum of Kshs. 600,000/= and the latter land was to be charged for an amount of kshs. 1.2 Million. At that time the bank was also holding the title to Uasin Gishu/Kimumu/79 in the personal name of Mr. Kamau which was to be charged for the sum of Kshs. 2 million. She explained that the bank required additional security for it only held security for Kshs. 2 million (the Kimumu property) yet the amount owing was Kshs. 3,757,000/=.

She stated that Mr. Kamau agreed to the offer and signed the letter of offer. She stated that Mr. Kamau also signed the charge instruments and referred to the letter dated 24/8/1999 in which Mr. Kamau was forwarding the signed instruments. This letter was produced as Defence Exhibit No. 2. The defence witness affirmed that the charge instruments were never registered for both of the properties because the land rents and rates were never paid by Mr. Kamau. She stated that the bank opted not to pay the rents and rates because the sum was in excess of Kshs. 1 million, yet the undersecured amount was about Kshs. 1.8 million. It did not make sense for the bank to pay the rents and rates as the two figures were too close and the payment by the bank would overburden the account. She affirmed that the title documents are still held by the law firm of M/s Nyairo & Company Advocates as agents of the bank.

She testified that the plaintiff company was to guarantee the amount owing to Mr. Kamau and she referred to the resolution of the plaintiff company that was produced as plaintiff's exhibit No. 2. Since the securities were never perfected she stated that the account was never restructured as intended in the letter of offer. She averred that as at 31/01/2003 Mr. Kamau owed the bank kshs. 11,354,798.50/=. She agreed that Agnes paid a sum of kshs. 1,353,659.60/= but stated that this was not enough to offset the outstanding amount owed by Mr. Kamau.

The witness affirmed that the bank has placed cautions on the two properties because the charge instruments are yet to be registered. She stated that the charge instruments are still with the bank pending registration as Mr. Kamau's debt is still uncleared.

In cross-examination, the witness affirmed that the plaintiff company does not have an account with the bank. She testified that the overdraft of Mr. Kamau was secured by two titles, Uasin Gishu/Kimumu/ 79 and Eldoret Municipality Block 6/111 in the names of Mr. Kamau and Agnes Wambui respectively. She confirmed that the latter title was discharged and agreed that it would be abnormal for the bank to discharge a title if the amount is still owing. She also affirmed that the Kimumu property is still charged to the bank. Questioned on why the bank is still holding the titles to the the suit land (Block 6/308) and to to Block 6/354 the witness stated that the bank is holding the title deeds because the charge has not yet been registered. She stated that the charge instruments were signed by Mr. Kamau, but questioned whether she has ever seen them, she stated that she has never seen them. She confirmed that the instruments were never registered because of the outstanding rents and rates. She also affirmed that the bank has never sued Mr. Kamau to pay the rents and rents nor had it sued Mr. Kamau for any money whatsoever. She was not aware whether the debt of Mr. Kamau was written off. She did not have the latest bank statement for Mr. Kamau's account, the last being the statement of 31/5/2003.

She agreed that when a company borrows money, ordinarily the directors would sign a guarantee. She confirmed that the bank does not have any guarantee signed by the directors of the company. She also confirmed that the plaintiff company has not signed any guarantee as guarantors to the debt of Mr. Kamau. She agreed that the effect of not having a guarantee signed is to make the company not liable for the personal debt sought to be guaranteed. She stated that ordinarily, the guarantor had to execute a guarantee before the charge is executed and that without a guarantee, the charge would not be accepted. She confirmed that AGN Residences Limited does not owe the bank any money but that it is AGN Kamau himself who owes the bank.

She affirmed that the bank has now held the title deed for 13 years. She testified that the overdraft was never restructured and the effect would be to revert back as if the titles were never availed in the first place. She however stated that the bank has a right to hold the titles until the issue of the debt with Mr. Kamau was resolved. She confirmed that there is no counterclaim to order the plaintiff company sign the guarantees or pay the rents/rates to enable the charge be registered. She also affirmed that by filing this suit, the plaintiff company was making it clear that they do not want to proceed with the transaction. However, she stated that the bank is reluctant to remove the caution as it is apprehensive that Mr. Kamau will not pay his debt to them.

G. SUBMISSIONS OF THE PARTIES

The parties having closed their cases, I invited them to make submissions. The parties agreed to make written submissions and highlight the same through oral submission. Only Mr. J.M. Kimani for the plaintiff filed submissions. The defendant's counsel did not file any written submissions and did not attend court to present any oral submissions.

In his submissions, counsel for the plaintiff has made three points.

First, he has argued that there is no privity of contract between the plaintiff company and the defendant. He has contended that the only way the defendant would show a nexus was to demonstrate that the plaintiff company signed instruments to guarantee the indebtedness of Mr. Kamau.

Secondly, counsel has argued that there is not instrument designated as "intending chargee" which would support the caution. He has averred that if the defendant bank intended to charge the property, then it could have paid the land rents/rates and claimed the same from the defendant as chargor. He argued that the defendant has wrongfully been holding the plaintiff's title for the last 13 years.

Mr. Kimani referred me to the cases of *Ali Athman Mawiya v Maria Chausiku Msechu (2004) eKLR* and *Boyes v Gathure (1969) EA 385* to support his argument that unless the instrument is capable of registration, a caution ought not to be registered to cover it.

Finally, Mr. Kimani asked for damages in the sum of Kshs .5,000,000/= against the defendant plus costs and interest.

H. DECISION.

I have considered the pleadings, the evidence on record, the submissions of the parties and the issues to be decided. Without necessarily being specific on which issue is being addressed, I have coalesced all issues in the decision that follows. I trust that at the end of this decision, it will be appreciated that all issues have been addressed.

At the outset, it must be understood that the plaintiff company AGN Residences Limited, being a limited liability company registered under the Companies Act (CAP 486) Laws of Kenya , is a separate entity from the person of AGN Kamau. This is a principle that is now well settled following the decision in the case of *Salomon v Salomon* and I do not see the necessity of elaborating on it. Both plaintiff and defendant gave forth a lot of evidence touching on whether or not AGN Kamau owes money to the defendant. I am not sure how much importance the parties have to this point. That said, I do not think that it is my task to determine whether or not Mr. Kamau at the moment owes any money to the defendant, and if so, how much. That is a matter to be determined at another forum.

However, it is not in doubt that the plaintiff company was called forth at some point by Mr. Kamau to act as guarantor for money that he owed the defendant. According to Mr. Kamau, sometime in the year 2000 he needed some financial accommodation to the tune of Kshs. 500,000/= and so far as he was concerned, he at that time owed the bank a sum of Kshs.960,000/=. This of course is disputed by the defendant who asserts that the defendant's account was at November 1998 overdrawn to the tune of Kshs.3,757,249.30/= and as at November 2000 the same was overdrawn to the tune of Kshs. 6,551,664.50/=. There appears to have been a proposal to convert the overdraft into a loan and a letter of offer to that effect was written to Mr. Kamau on 21 November 1998 (Defence Exhibit No. 1). The securities that Mr. Kamau was to provide were three properties being, Eldoret Municipality/ Block 6/ 354 (to be charged for the sum of Kshs.600,000/=), Uasin Gishu/ Kimumu/79 (to be charged for the sum of Kshs.2,000,000/=) and Eldoret Municipality/ Block 6/308 (to be charged for the sum of Kshs.1,200,000/=).

I cannot say with certainty whether the charge instruments were drawn and executed, because none were availed in evidence, but I have seen the letter dated 24/08/1999 (Defence Exhibit No. 2) whereby Mr. Kamau through his letterhead (AGN Kamau Advocate) was forwarding Charge Documents over the three properties and the letter states that the charge documents are enclosed "duly executed". It is also not in contention that the Certificates of Title to the three properties were delivered to the bank. The defendant's witness has stated that the charge instruments and the Certificates of Title were forwarded to their lawyers M/s Nyairo & Company Advocates for them to register the charge instruments. Nyairo & Company on 3/8/2000 wrote to the bank requesting for an amount of Kshs. 783,711.50/= as land rates and Kshs.250,484.00/= as land rent in total kshs.1,034,195.50/=. This amount had to be paid for the defendant to obtain the necessary consents to charge, but it was never paid, for the figures were rather high. The reason given by the defendant for failure to register the charge instruments is that the amounts demanded for rates and rents were too high.

In the meantime on 3/8/2001 the defendant registered the Caution which is the subject matter of this suit. The caution as registered reads as follows :-

Caution by Musa K. Yego - The Branch Manager National Bank of Kenya Box 3111 Eld Claiming an Intending Chargee.

The first attack that the plaintiff has made is that the caution is invalid as there is no such interest known as "intended chargee". I do not agree with the plaintiff on this point.

Cautions under the Registered Land Act (CAP 300) (now repealed) regime were covered under the provisions of Section 131. The said section provided as follows :-

131. (1) Any person who –

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, that is to say, some defined interest capable of creation by an instrument registrable under this Act; or

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same.

The above provision set out the interests that would entitle one lodge a caution under the RLA regime under which the suit land was registered. Under Section 131(1)(a) any person claiming a right to obtain an interest in land, lease, or charge, or some defined interest capable of creation by instrument which could be registered under the Act, could lodge a caution. A charge is an interest in land and is also a defined interest capable of creation by instrument which could be registered.

If an entity is intending to register a charge over land, I do not see any bar to such person registering a caution because a charge is an instrument capable of registration. He is not a chargee at the time of registering a caution, and all that he can register at that time is his interest as an intended chargee. Indeed there would be no point to lodge the caution if the charge has already been registered. This situation with regard to the charge is different from other interests, such as one of purchase or lease; for by the time the purchaser or lessee is registering a caution, he has already entered into a sale or lease agreement and is perfectly entitled to be termed a "purchaser" or "lessee". He is a "purchaser/lessee" irrespective of registration of his interest. It is different from a charge for the chargee only becomes chargee upon registration and not before. Before, he is only an "intended chargee" or "potential chargee". There is nothing to prevent him from registering a caution as an intended chargee.

This case is distinguishable from the cases of **Boyes v Gathure** and **Mawiya v Msechu** (relied upon by the plaintiff.) The subject matter in **Boyes v Gathure** was land registered under the Registration of Titles Act, CAP 281, (now repealed). The respondent lodged a caveat (the RTA regime recognized caveats which are more or less similar to cautions in the RLA and present Land Registration Act regimes) which forbade the registration of all interests and claimed a "beneficial interest". The statute required one to disclose the nature of registrable interest claimed in land. It was held that the description "beneficial interest" was not a sufficient compliance with this requirement. The caveator gave no indication of what interest he was claiming or how it was acquired. It was also stated obiter that it is proper and desirable for one to disclose the basis of the claim. For example, if the caveator was claiming an interest by virtue of a contract of sale, state the specific contract of sale and its date (at p388). It was held that "beneficial interest" is not an interest that is capable of registration because such "beneficial interest" unless defined as an interest such as a purchase, lease, charge etc, cannot be said to be an "interest capable of registration". The same principle was applied in the case of **Mawiya v Msechu**. The court basing its decision on **Boyes v Gathure** also held that the respondent did not disclose any interest capable of registration.

In these two cases cited by the plaintiff, the interests claimed were incapable of registration but in our instance it cannot be argued that a charge is not an instrument that is incapable of registration.

It was not necessarily unlawful (in the description of it being an illegality) to register the caution but its

another question whether it was proper in the circumstances to register the same. The alternative to the registration of the caution was either for the defendant to register the charge instrument or to return the title documents back to the plaintiff company for the reason that the borrower (in this instant Mr. Kamau) had failed to take an essential step towards perfection of the security (in this case, the payment of the rents and rates). It was apparent to the defendant that the charge was never going to be registered for the reason that the rents and rates were not forthcoming from Mr. Kamau.

The position of the plaintiff in this scenario must be appreciated. The plaintiff was not the borrower and it was never indebted to the defendant. It only came in to provide security for the indebtedness of Mr. Kamau. If the charge was never going to be registered, then it was incumbent upon the defendant to return the title documents to the plaintiff and pursue the borrower by use of other means in order to recover its money. It cannot be right and proper for an intended chargee to hold onto title documents of the chargor indefinitely unless it is going to register or create the interest within a reasonable time. Holding such documents indefinitely is tantamount to interfering with the rights of the proprietor of the suit land and denying him enjoyment and use of his proprietary rights. I am unable to find any lawful basis that would entitle the defendant to hold onto the plaintiff's certificates of title and maintain a caution for such a long time, when it is apparent from the evidence, that it was never going to register the charge. This position is made worse because the plaintiff was not the customer of the defendant and was only coming in as a guarantor.

It is also in doubt whether indeed the defendant has any charge instrument that is still capable of registration. No charge instrument was displayed to court that was ready for registration. The only connection between the plaintiff and defendant is the charge instrument. Without the charge instrument, there is absolutely no nexus between the plaintiff and defendant. The defendant's witness conceded that there was no instrument of guarantee in which the plaintiff bound itself to pay the moneys owed by Mr. Kamau. The only contract was therefore the one contained in the charge instrument. The banking practice which was acknowledged by the defence witness is to first have a guarantee instrument which binds the guarantor to pay the money owed, and which further provides for what the intended guarantor is supposed to do to perfect the security, before the charge instrument is drawn, executed and registered. There is no instrument of guarantee and therefore there is nothing, apart from the charge instrument, if one exists, that bound the plaintiff to pay the money owed by Mr. Kamau to the defendant.

If at all there was an instrument of guarantee then we could say that there was a contract between the plaintiff and defendant which bound the plaintiff to charge its property. There is no such instrument of guarantee and therefore there is no contract between the plaintiff and defendant and thus no terms between the two parties that would permit the defendant to hold onto the title documents from the year 1999 till 2007 when this suit was filed. If at all there was any contract permitting the defendant to charge the suit land, then by 2007 when this suit was filed, such contract would have been caught up by limitation of time; the limitation period for contracts being six years.

The only document that the defendant can hang on is the charge instrument which we have not seen. I am therefore unable to hold that there is any contract between the plaintiff and defendant as the contract in a charge instrument only becomes effectual on registration. But even assuming that the charge instrument though unregistered was a contract, which I certainly do not hold, such contract (assuming it existed as at 24/8/1999, when Mr. Kamau forwarded the executed instruments) will again have been caught up by limitation of time by 2007 when this suit was filed. By stating this, it should not be taken that I am saying that a charge instrument can remain unregistered for 6 years, the duration of the limitation of time for contracts.

The fact of the matter in our instance is that there was no contract of guarantee and nothing that bound the plaintiff company to charge its property to the defendant. Neither was any charge instrument displayed and I find it difficult to assume that there is one.

If there is none, and that is the only import, then there is nothing to register and hence no reason to keep holding onto the plaintiff's Certificate of Title. If there exists a charge instrument that is capable of registration, then we must ask ourselves whether the defendant is still entitled to hold on to the Certificate

of Title of the plaintiff seven or so years after the charge instrument was apparently executed by the plaintiff. I have pondered whether there is any limitation of time given within which one must register a charge instrument. I have not seen any. My position is that a charge instrument needs to be registered within a reasonable time and if not so registered within such reasonable time, the registration must be abandoned and the title documents must be returned to the property owner.

The plaintiff has of course made clear its intentions to be no longer interested in the tribulations, if I may call them so, of Mr. Kamau. Given this intention, is the defendant still entitled to hold onto the plaintiff's title? My answer to this is No ! and this answer is informed by the fact that there is no law that permits the defendant to continue holding the plaintiff's certificate of title.

From the foregoing I find no reasonable basis which would have entitled the defendant to hold onto the plaintiff's title documents for a duration of almost 8 years to the time this suit was filed. I also find no basis upon which the defendant could maintain a caution in excess of 6 years from the time the same was registered to the time this suit was filed. It is indeed now 13 years after the charge instruments were apparently executed by the plaintiff and close to 12 years since the caution was registered. By withholding the certificate of title from the plaintiff and by continuing to maintain the caution for such a long time, the bank acted irrationally and in total disregard to the interests of the plaintiff who was never even indebted to the bank.

I do not hesitate to order the bank to return the title document to the land parcel Eldoret Municipality Block 6/308 to the plaintiff forthwith. I also do not hesitate to order the removal of the caution lodged by the defendant on the register of the land parcel Eldoret Municipality Block 6/308. To this end I hereby order the Lands Registrar, Uasin Gishu District to forthwith deregister the said caution.

The last item that I need to deal with is the claim for damages by the plaintiff. The RLA under S. 135 allowed damages for a person affected by a wrongful caution. The provision was to the following effect :-

S.135 *Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has thereby sustained damage, to pay compensation to such person.*

This provision has been taken up under S. 75 of the Land Registration Act, 2012 (which repealed the Registered Land Act.) which provides as follows :-

S. 75. *Any person who lodges or maintains a caution wrongfully and without reasonable cause shall be liable, in an action for damages at the suit of any person who has sustained damage, to pay compensation to such person.*

I have already held that the bank acted unreasonably by holding onto the title documents of the plaintiff and by maintaining the caution for such a long period. It should have been obvious to the bank that their actions are causing loss and damage to the plaintiff company. It cannot be said that the bank was not alive to the fact that for one to access capital security is required. That indeed is their business. The bank cannot claim to have been ignorant to the fact that without the caution being removed and the title documents being released to the plaintiff, the plaintiff could not do much on the suit land.

Holding of the title documents for a period of 8 years before this suit was filed was a long time already. No overtures were made by the defendant to return the title deeds and deregister the caution even after this suit was filed. I may never know whether the defendant's lackadaisical attitude was due to lack of legal advice, insensitivity or sheer stubbornness. It should have been very clear to the bank, at least once this suit was filed, that the plaintiff company was no longer interested in getting involved with the issues between the defendant and Mr. Kamau. No signal could be clearer, and without having an instrument of guarantee, or any other sort of contract, the bank could not legitimize any further holding of the title documents and maintenance of the caution. The plaintiff has been denied meaningful use of his land for a period of about 13 years now. It is a long time. It was unfair and insensitive for the defendant to continue holding the plaintiff's title documents and maintain the caution for all this time. The plaintiff must have

suffered loss because of the actions of the defendant. I think the plaintiff is perfectly entitled to some compensation in the form of general damages.

In his submissions, Mr. Kimani asked for general damages in the sum of kshs. 5 million. The defendant never bothered to file submissions and has not contested the plaintiff's quantification of general damages. Although I am not sure why Mr. Kimani asked for Kshs. 5 million and his basis for this quantification, for no authorities on damages were availed to me, I think it is more than a reasonable figure if not on the lower side. I would probably have been inclined to award much more considering that the plaintiff has been commercially hamstrung for a duration of 13 years. However, if the plaintiff is happy with kshs. 5 million in damages and it feels that it will be adequately compensated with this amount, I can do no better than to award the 5 million claimed. I therefore award the plaintiff a sum of Kshs. 5 million as general damages. The same will attract interest at court rates from the day of this judgment.

Finally costs. Costs ordinarily follow the event, unless for good reason, and I see no reason to disentitle the plaintiff to the costs of this suit. The plaintiff shall have the costs of this suit.

In summary I make the following orders :-

- (a) The defendant is hereby ordered to forthwith return to the plaintiff through its counsel on record the certificate of Title and any other title documents that it may be holding for the land parcel Eldoret Municipality Block 6/308. This must be done forthwith and not later than 7 days from today.
- (b) The caution registered by the defendant in the register of the land parcel Eldoret Municipality Block 6/308 is hereby ordered to be removed. To this effect I direct the District Lands Registrar, Uasin Gishu District to forthwith remove the caution upon being served with this Judgment and/or decree.
- (c) I award the Plaintiff damages in the sum of Kshs.5 million to accrue interest at court rates from the date of this Judgment till settlement in full.
- (d) I award the plaintiff the costs of this suit.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 16TH DAY OF APRIL 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

Mr. J.M. Kimani of M/s J.M. Kimani & Co Advocates.

No appearance on the part of Ms Tom Mutei & Company Advocates for the defendant.