



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO.148 OF 2018

BETWEEN

ANNAH WAIRIMU MWANGI.....APPELLANT

AND

DAVID KAMAU KI.....RESPONDENT

(An appeal from the Judgment of the Environment and Land Court of Kenya at Malindi (Angote, J.) delivered on 17th July, 2015

in

E.L.C Case No. 45B of 2013.)

JUDGMENT OF THE COURT

1. The appellant filed a suit in the High Court of Kenya at Malindi, stating that she is the absolute proprietor of a parcel of land known as **Lamu/Hindi/Magogoni/386** (*“the suit property”*), which has since been sub-divided into four parts and allocated numbers 1200, 1201, 1202 and 1203 respectively.
2. On 9th February, 2011 the appellant entered into a sale agreement with the respondent for the purchase of 1 acre that was to be excised out of the suit property. However, the parties disagreed on some issues and also the appellant did not seek the area Land Control Board’s Consent for the transaction.
3. The respondent lodged a caution against the title to the suit property. This was before it was subdivided. The appellant claimed as a result of the respondent’s action she had suffered loss in that she was unable to complete other transactions with other people who were interested in some of the subdivisions.
4. The appellant sought an order to direct the Registrar of Lands, Mpeketoni Lands Registry, to remove the caution filed by the respondent. The appellant also sought general and exemplary damages.
5. In his defence, the respondent stated that he paid the appellant a deposit of Kshs.200,000/= towards the purchase price; that the appellant did not discharge the charge that had been registered against the title to the suit property; that the appellant failed to apply for consent to sell part of the suit property to him; and she also failed to refund the Kshs.200,000/=. As a result, the respondent filed the caution to protect his interest.
6. In his counterclaim, the respondent sought a refund of the Kshs.200,000/= together with interest at 18% p.a. from 9th February, 2011 until payment in full.
7. The Environment and Land Court, (**Angote, J.**) ordered the Land Registrar, Lamu, to remove the caution, and further ordered the appellant to pay the respondent Kshs.200,000/= together with interest at court rates from the date of filing the defence and counterclaim until payment in full. Each party was to bear its own costs.
8. The appellant, being aggrieved by the said judgment, preferred an appeal to this Court. The appellant argued that the learned judge erred in law by failing to award her damages as sought for the wrongful filing of a caution against the title to the suit property. The appellant further contended that the learned judge was openly biased against her.

9. When the appeal came up for hearing, **Mr. Marubu**, learned counsel for the appellant, relied entirely on his written submissions. In the submissions, the appellant faults the learned judge for failing to award general damages against the respondent for having wrongfully filed a caution against the title to the suit property.

10. The appellant cited **section 75** of the **Land Registration Act** which stipulates:-

“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.”

11. Mr. Marubu submitted that the appellant had pleaded general damages and proved that she had suffered loss because of the respondent’s action. The appellant had demonstrated that she was unable to sell 2 acres of the suit land at a price of Kshs.340,000/=. That was the loss she had suffered, counsel submitted.

12. On the ground that alleges bias, Mr. Marubu submitted that at the close of the hearing the appellant sought a chance to file written submissions to quantify the loss suffered but the learned judge declined the request.

13. On those grounds, the appellant urged this Court to allow the appeal and award damages to the appellant.

14. **Miss Gathoni**, learned counsel for the respondent, also relied entirely on her written submissions. She submitted that the appellant is not entitled to any damages because, having received from the respondent a deposit of Kshs.200,000/= towards the agreed purchase price, the appellant refused to apply for Land Control Board Consent, thus frustrating the contract of sale. The respondent was therefore justified in registering a caution against the title, since the appellant had failed to refund the said sum. She urged the Court to dismiss the appeal with costs.

15. In our view, the only substantive issue for determination in this appeal is whether damages are payable to the appellant because of the caution that was registered against the title to the suit property by the respondent.

16. As per **section 75** of the **Land Registration Act**, the answer to that question is dependent on whether the caution was wrongfully lodged.

17. The record of appeal reveals that the parties entered into the sale agreement on 9th February, 2011. At the time of the agreement the suit property had not yet been subdivided. The suit property had been charged to a financier.

18. According to the terms of the sale agreement, the appellant was to obtain the area Land Control Board Consent, which, by operation of the law, had to be done within six months, but she did not do so.

19. The appellant, having received a deposit of Kshs.200,000/= from the respondent, did not discharge the charge that had been registered against the title to the suit property.

20. In the circumstances, we do not think the respondent acted wrongfully in registering the caution. The appellant ought to have refunded the deposit of Kshs.200,000/= the moment the deal fell through, but she did not. It is the appellant who breached the contract of sale of the suit property.

21. In the circumstances, we find and hold that no damages are payable to the appellant. The learned judge cannot be faulted for failing to award damages to the appellant. We therefore dismiss the first ground of appeal.

22. Turning to the issue of alleged bias against the appellant, all we wish to say is that no evidence at all was adduced by the appellant to demonstrate that the learned judge conducted himself in a manner to suggest that he was biased in favour of the respondent. The record does not show that the learned judge ever refused parties from filing submissions as alleged by the appellant. That ground is without any basis.

23. All in all, we find this appeal devoid of merit. Consequently, we hereby dismiss the appeal in its entirety. The appellant shall bear the respondent’s costs of the appeal.

Dated and delivered at Nairobi this 24th day of April, 2020

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a

true copy of the original

Signed

DEPUTY REGISTRAR