



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA)

CIVIL APPEAL NO. 290 OF 2013

BETWEEN

NATIONAL BANK OF KENYA LIMITED.....APPELLANT

VERSUS

ALLAN GEORGE NJOGU RESIDENCES LTD.....RESPONDENT

(Being an appeal from the Judgment/Decree of the Environment and Land Court

at Eldoret (Munyao, J.) delivered on 16th April, 2013

in

ELC No. 384 of 2012)

JUDGMENT OF THE COURT

INTRODUCTION

1. This appeal is mainly against an order by the High Court, (Munyao, J.) that the appellant pays to the respondent a sum of Kshs. 5 million in damages for lodging an unlawful caution against its property known as **Eldoret Municipality Block 6/308**, hereinafter referred to as “*the suit property*”. The appellant had opposed the claim and contended that it was entitled to lodge the caution.

This being a first appeal, this Court is under an obligation to re-evaluate, re-assess and re-analyze the evidence tendered before the trial court and drawn its own conclusions. See **Kenya Ports Authority Versus Kuston (Kenya) Limited [2019] 2EA 212**.

RESPONDENT’S PLEADINGS BEFORE THE HIGH COURT

2. **Allan George Njogu Kamau**, (Allan) an advocate of the High Court of Kenya, is a director of Allan George Njogu Residences Company Limited, the respondent. Allan operated a personal account with the appellant. Prior to November 1998, he had been accorded banking facilities and other financial accommodation by the appellant. The aforesaid facilities had been secured by a charge over a parcel of land known as **Eldoret Municipality Block 6/111** registered in the name of **Agnes Wambui Kamau** guarantor, and another charge over a property known as **Uasin Gichu/Kimumu/79** registered in the name of Allan.

3. Allan defaulted in the repayment of the advanced sums and the appellant threatened to sell by public auction the two charged properties to realize the outstanding sums. Agnes Kamau paid a sum of Kshs. 1,353,659.60 and the charge over her property was discharged. Allan filed a suit against the appellant to challenge the intended auction of his property and obtained an injunction to restrain the sale.

4. In order to regularize the repayment of the aforesaid banking facilities, at Allan’s request, the appellant agreed to reschedule the outstanding debt. The parties entered into a loan agreement, vide which Allan was to provide additional securities. The additional securities that he availed to the bank for purposes of creating and registering charges over were certificates of lease for the suit property, registered in the name of the respondent; and **Eldoret Municipality Block 6/354** registered in his name. For various reasons as shall be seen later, the intended charges were not registered; and neither were the two certificates of lease returned to Allan.

5. The respondent averred that it did not pass a resolution that the suit property be used as a security and there was therefore no privity of contract between it and the appellant; that notwithstanding, the appellant proceeded to file a caution against the title to the suit property claiming interest as **“an intending charges, which according to the respondent is foreign and not known or provided for by the provisions of the Registered Land Act.”**

6. The respondent argued that the caution was unlawful, oppressive and unjustified, as neither itself nor Allan (its director) had borrowed any money from the appellant, and there was thus no consideration for the appellant to retain the title to the suit property and lodge the caution; that it had been deprived of the use of its title; that the value of the suit property had been derogated by accumulation of land rent and rates, which could not be paid without the title.

7. The respondent prayed for return of the title to the suit property; removal of the caution; damages pursuant to the provisions of **section 135** of the **Registered Land Act** (now repealed); costs of the suit and interest thereon at court rates.

APPELLANT’S DEFENCE

8. In its statement of defence, the appellant stated that prior to 21st November 1998, it accorded Allan banking facilities and other financial accommodation in accordance with material agreements between the parties; that Allan continuously defaulted in the repayment and/or servicing of the said facilities; that as at 21st November 1998 Allan’s outstanding debt to the bank was Kshs. 3,757,249.30; that the appellant agreed to reschedule Allan’s indebtedness and they entered into a loan agreement on 21st November, 1998.

9. It was a term of the said agreement that Allan would provide sufficient securities to cover the said indebtedness, which would be charged to secure the same. Allan provided certificates of lease to three properties, among them, the suit property that is registered in the respondent’s name; that by a resolution made on 15th February 1999, the directors of the respondent had resolved that the suit property be charged in favour of the appellant to secure the financial accommodation availed to Allan.

10. The appellant then instructed its lawyers to perfect the securities but Allan failed to pay outstanding land rent and rates in respect of the three properties and therefore the appellant’s lawyers were unable to register the charges over the suit land.

11. The appellant further contended that the title to the suit property, having been legally availed to them by Allan, and the latter having failed to obtain the necessary clearance certificate and consent to charge, it placed the caution over the suit property to preserve and protect its interests. The caution was therefore lawful, the appellant added, and urged the court to dismiss the suit.

THE RESPONDENT’S EVIDENCE BEFORE THE HIGH COURT

12. Only Allan testified on behalf of the respondent. He told the court that when the appellant opened its branch in Eldoret in 1980, he became one of its customers and his law firm, AGN Kamau Advocates, was included in the appellant’s panel of advocates; that thereafter he was granted overdraft facilities to assist him in the running of his law firm; that in 1994 together with his wife, **Anne Wanjiku Kamau**, they incorporated the respondent company; that he requested for an additional sum of Kshs. 500,000/= and offered as security certificates of lease of Eldoret Municipality Block 6/354 registered in his name and the suit property, that was registered in the name of the respondent.

13. Allan conceded that the respondent passed a resolution dated 15th February 1999 to have the title to the suit property availed to the bank for purposes of charging it to secure banking facilities granted to him; that he forwarded the two certificates of lease to the appellant’s advocates, M/S Nyairo & Company; that on 3rd August 2000 the said advocates wrote to the appellant with a copy to him requesting that a sum of Kshs. 783,711.50 be paid to them on account of Municipal rates and a further sum of Kshs. 250,484/= for land rent.

14. As the amounts that he was required to pay for the additional banking facilities were far in excess of the Kshs. 500,000/= that he wanted to borrow and pay lump sum, he chose not to avail himself of thenegotiated additional facility; that he requested the appellant to return the two certificates of lease to him but the appellant told him that it had registered a caution against each of the titles claiming interest as an *“intending chargee”*, which he argued does not exist in law.

15. Allan urged the court to order removal of the caution and return the certificates of lease to him and the respondent. He told the trial court that the money that was intended to be secured by the charge over the said properties was the subject of **HCCC No. 95 of 2003** that was still pending before the same court.

THE APPELLANT’S CASE

16. The appellant’s defence was tendered by one **Emma Neondo**, a credit officer. She testified that as at 21st November, 1998, Allan’s overdraft stood at Kshs. 3,757,349.30, that Allan requested that the overdraft be restructured into a term loan; it was agreed that the repayment schedule would be a lump sum payment of Kshs. 500,000/= and thereafter the balance be paid by monthly instalments of Kshs. 90,480/= plus interest over a period of 36 months; that the additional facility would be secured by a charge over the suit property and a charge over Eldoret Municipality Block 6/354.

17. The appellant’s witness produced the letter of offer that had been duly signed by Allan. She also produced Allan’s letter dated 24th August 1999 addressed to the appellant enclosing the duly signed charge documents. The charges were however not registered because Allan failed to pay land rent and municipal rates that were outstanding in respect of the two properties. The witness added that the respondent had passed a resolution to permit Allan to use its title to the sit property to secure the agreed facility. The caution against the title to the suit property was registered on 3rd August 2001, and up to the date of the hearing, sometimes in February, 2013 it had not been removed.

THE TRIAL COURT'S DECISION

18. Regarding the respondent's argument that there is no such interest known as "*intended chargee*" that could justify registration of a caution, the learned judge disagreed. He cited **Section 131** of the repealed **Registered Land Act** which states 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."

19. The learned judge held:

"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 a 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."

20. Regarding the continued holding of the title to the suit property, the High Court held that 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."**

21. The learned judge found that by withholding the respondent's certificate of title and by continuing to maintain the caution, the bank acted irrationally and in total disregard of the interests of the respondent. He therefore ordered the appellant to return the title document to the respondent.

22. On the issue of damages, the High Court cited **section 135** of the repealed **Registered Land Act** which states:

"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."

23. Although the respondent's advocate in his submissions urged the learned judge to award damages in the sum of Kshs. 5 million, he did not base that figure on any proven loss or case law. The trial court however was satisfied that it was a reasonable sum and proceeded to award the same. The appellant applied to the High Court for stay of execution of the judgment. The application was dismissed, but the court ordered the appellant to pay the judgment sum against the respondent's bank guarantee to repay the same if the appeal were to succeed.

APPEAL TO THIS COURT

24. Being aggrieved by that decision, the appellant preferred an appeal. In its memorandum of appeal, the appellant stated, *inter alia*, that the learned trial judge erred in law and fact by: failing to find that the title to the suit property was voluntarily given to it by the respondent in compliance with the terms of the agreement signed between itself and Allan on 21st November 1998; failing to hold that the caution it lodged was lawful and justifiable; failing to find that part of the reason for continued holding of the title to the suit property was the ruling of the court (Azangalala, J., as he then was) of 5th October, 2011; and for awarding the respondent damages of Kshs. 5 million without any proof of damage suffered.

25. **Mr. R.P. Onyango**, learned counsel for the appellant, filed submissions and orally highlighted them. We shall not delve into the submissions as that would amount to rehashing of the facts which we have already summarized.

26. **Mr. Kigamwa**, learned counsel for the respondent, submitted that the respondent was not a party to its director's borrowing; that there was no guarantee executed by the respondent; that Allan, though a director of the respondent, the respondent was a separate legal entity; that the appellant was not justified to continue holding the respondent's title to the suit property after Allan failed to pay land rent and rates; and that the award of damages in the sum of Kshs. 5 million was justifiable.

DETERMINATION

27. We have carefully perused the record of appeal and considered the submissions by counsel. There are two main issues for determination in this appeal. The first one is whether the appellant was justified in law to register a caution against the title to the suit premises. The second one, though related to the first, is whether the High Court was right in awarding damages of Kshs. 5 million because of the appellant's act of registering and maintaining the caution and retaining the title document in respect of the suit property.

28. In determining the first issue, we must go back to the letter of offer dated 21st November, 1998 between Allan and the appellant because it is the agreed terms therein that caused the appellant to end up having in its possession the title to the suit property, which belonged to a

company that was not its customer and upon which it registered the impugned caution.

29. As per the letter of offer, the overdraft facility that Allan had requested the appellant to convert into a term loan stood at Kshs. 3,757,249.30 as at 21st November, 1998. The amount was to be repaid within 36 months. A lump sum of Kshs. 500,000/= was to be repaid before 31st December, 1998 and the balance by monthly instalments of Kshs. 90,480/=.

30. The appellant was to hold the following as security:

- i) Charge for Kshs. 600,000/= over title No. Eldoret Municipality/Block 6/354.
- ii) Charge for Kshs. 2,000,000/= over title No. Uasin Gishu/Kimumu/79 valued at Kshs. 2,200,000/=, and
- iii) Charge for Kshs. 1,200,000/= over the suit property valued at Kshs. 2,400,000/=.

31. The suit property is registered in the name of the respondent, whose sole shareholders and directors were Allan and his wife.

The charge over the suit property could not be registered without a Board resolution so permitting. Consequently, on 15th February, 1999 the appellant's two directors passed a resolution that was worded as follows:

CERTIFIED TRUE COPY OF THE MINUTES OF THE BOARD OF DIRECTORS OF ALLAN GEORGE NJOGU RESIDENCES LIMTIED HELD AT ELDORET THIS 15TH DAY OF FEBRUARY, 1999

IT IS RESOLVED:

That the company's two certificates of Lease Numbers ELDORET MUNICIPALITY/BLOCK 6/308 and BLOCK 6/304 be handed over to one of the directors, MR. ALLAN GEORGE NJOGU KAMAU, for the purposes of charging the same to National Bank of Kenya Limited for facilities to be granted to himself."

33. The above Board resolution was duly executed by a director and secretary of the respondent and forwarded to the bank by Allan.

34. It is not disputed that the appellant's advocates prepared the charge documents; that the same were duly executed and returned to the appellant's advocates; but they could not be registered because Allan and/or the respondent were unable to pay the outstanding land rent and rates, without which the necessary clearance certificates could not be issued.

35. According to the appellant, it registered the caution against the title to the suit property so as to protect its interests, and the certificate of official search that was produced as an exhibit by the respondent, the bank was claiming interest as "*an intending chargee.*" Was that a recognizable interest that could warrant registration of a caution?

36. The learned judge analysed the issue by examining the provisions of **section 131** of the repealed Registered Land Act, and, in our view, arrived at the right conclusion that if an entity is intending to register a charge over land it could register a caution against the title or lease because a charge is an instrument capable of registration. Under that section, any person who claims a right to obtain an interest in any land, lease or charge or who has some defined interest capable of creation by an instrument that is registrable under the Act may lodge an appropriate caution with the Land Registrar.

37. We are therefore satisfied that the caution was lawfully registered by the appellant. The respondent's submission that since there was no privity of contract between it and the appellant, having not executed any document of guarantee in favour of the bank, the latter had no capacity to register the caution, cannot be accepted. This is simply because the respondent willingly agreed to give its title to the suit property to Allan, its director, to assist him in sorting out his financial affairs with the appellant.

38. Turning to the second issue regarding the award of Kshs.5 million as damages, **section 135** of the repealed Registered Land Act stipulates that any person who lodges or maintains a caution wrongfully and without reasonable cause is liable to pay compensation to any person who sustains damage as a result. To succeed in a claim for damages under that section, the respondent had to prove:

- (i) that a caution was wrongfully lodged or maintained against title to the suit property;
- (ii) that there was no reasonable cause for lodging or maintaining the caution, and
- (iii) that it suffered damage as a result of lodging or maintaining the caution.

39. We must therefore examine whether the respondent satisfied the three conditions above. The learned judge found that the caution had not been wrongfully lodged and that there was a reasonable cause for so doing. He however faulted the appellant for maintaining the caution, even after it became clear that the intended charge was not going to be registered. The court held:

"It cannot be right and proper for an intended chargee to hold onto documents of the chargor indefinitely unless it is going to register or create the interest within a reasonable time....."

I am unable to find any lawful basis that would entitle the defendant to hold onto the plaintiff's certificates of title and maintain caution for such a long time when it is apparent from the evidence that it was never going to register the charge."

40. What was the appellant's explanation for maintenance of the caution? The appellant explained that it was because Allan had failed to comply with the terms of the letter of offer dated 21st November, 1998 and that he was not servicing his overdraft facility, which had grown to Kshs.5,640,019/= as at 30th April, 2000.

41. In September, 2007 when the respondent filed the suit in the High Court, it also filed an interlocutory application seeking removal of the caution and release of the certificate of lease in respect of the suit property. The court, (Azangalala, J as he then was) dismissed the application vide a ruling delivered on 5th October, 2011. The natural implication of that ruling was that the issues of maintenance of the caution and release of the certificate of lease had to await final determination of the suit, which was eventually done on 16th April, 2013 when the High Court delivered its judgment.

42. The respondent prosecuted its case through Allan, the appellant's debtor. The respondent did not specifically deny that he had been granted an overdraft facility by the appellant, save that in respect of the amount repayable, Allan had filed HCCC No.95 of 2003.

43. In our view, given the circumstances as explained herein above, we think that there was a reasonable cause for maintaining the caution, even if the suit property was registered in the name of a company that was not the appellant's customer. This is because, the respondent had voluntarily handed over to Allan the title to the suit property for purpose of registering a charge to secure Allan's indebtedness to the appellant, and that is what led to the retention of the certificate of lease and registration of the caution. Nothing prevented the respondent from pursuing its director (Allan) to get back its certificate of lease free from any encumbrance. Pending finalization of the two suits that related to the suit property, we are satisfied that there existed reasonable cause for lodging and maintaining the caution.

44. Having come to the above conclusion, the issue of award of damages for wrongful lodgment or maintenance of the caution is moot. If there was a reasonable cause for lodging or maintaining the caution, as we have found there was, no damages are payable at all. But even if that was not so, a party can only succeed in such a claim if there is proof that he suffered damage as a result of the unlawful lodging or maintenance of a caution.

45. We are not satisfied that the respondent discharged that burden of proof. In its plaint at paragraph 18, the respondent pleaded:

"The defendant has now held the plaintiff's title for over 7 years thereby causing untold pecuniary loss to the plaintiff as both the commissioner of lands and the Eldoret Municipal Council will not allow him to pay both the Land Rent and Rates without him presenting the title to them with the result that the amounts have derogated the value of its property gravely."

46. No evidence at all was adduced in support of that pleading. Secondly, in his evidence in chief, Allan stated that *"the caution placed is detrimental to the interests of the company. The land is a large parcel of land in Eldoret Municipality which the company intended to subdivide and develop"*. That is all he stated regarding the claim for damages. No proposed subdivision plan was presented to the court; the court was not shown that there was any attempt to pay land rent and rates and that the payments could not be received in the absence of the certificate of lease.

47. In William Matheka Wathome versus Jackson Munyao [2001] e KLR, the appellant's claim against the respondent was for an order to compel the respondent to withdraw a caveat and general damages for registering that caveat against the title to his parcel of land. The suit was premised on the provisions of **section 57 (12)** of the **Registration of Titles Act** which reads as follows:

"(12) Any person, other than the registrar, lodging or continuing any caveat wrongfully and without a reasonable cause shall be liable to make compensation to any person who may have sustained damage thereby."

This Court upheld the High Court's finding that the appellant had not specifically pleaded and proved his claim for damages. The Court held that:

"The wording of the above sub-section in our view does not cater for general damage claims. Compensation for wrongful lodgment of a caveat can only relate to special damages. The party suffering damage must plead and prove such damages. The appellant had not pleaded such damages."

48. In this appeal, the respondent provided no basis at all for asking the High Court to award Kshs.5 million. It had not even pleaded any special damages. It is trite law that special damages must be specifically pleaded and proved. In awarding that sum, the learned judge remarked:

"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."

49. We are satisfied that no damages were payable to the respondent because the respondent had not pleaded and proved that it had suffered any loss.

50. For the foregoing reasons, we hereby allow this appeal, set aside the High Court judgment delivered on 16th April, 2013 and order that the sum of Kshs.5 million together with interest be repaid to the appellant in terms of the High Court's ruling dated 28th May, 2013. The appellant shall have costs of the appeal.

Dated and delivered at Nairobi this 20th Day of July, 2017.

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.

DEPUTY REGISTRAR