



**IN THE COURT OF APPEAL  
AT NAIROBI  
CORAM: KWACH, SHAH & BOSIRE, JJ.A  
CIVIL APPEAL NO. 168 OF 2000**

**BETWEEN**

**WILLIAM MATHEKA WATHOME.....APPELLANT**

**AND**

**JACKSON MUNYAO.....RESPONDENT**

**JUDGMENT OF THE COURT**

The appellant, **William Matheka Mathome**, was the plaintiff in H.C.C.C. No. 6 of 1996 which suit was filed at Machakos registry on 9th January, 1996. He sought the following reliefs:

***"(a)An order compelling the Defendant to withdraw the caveat and consequently the same be removed.***

***(b)General damages.***

***(c)Costs of this suit.***

***(d) Any other relief that this Honourable Court may deem just to grant. "***

He had sought general damages, as per his pleading under Provisions of Section 57(12) of the **Registration of Titles Act** (Cap 281) Laws of Kenya (the Act). We will revert to that provision later, during the course of this judgment.

The respondent Jackson Munyao, filed, in the superior court, his defence and counterclaim on 2nd February 1996. By the counterclaim he sought orders, inter alia, for specific performance of an agreement, which he averred was partly written and partly oral, for sale of 41 acres of land known as L.R. 7815/4 (formerly L.R. 7815/2). His version of events as regards the agreement for sale was that the appellant agreed, in writing, on 6th December, 1990, to sell to the respondent 37 acres out of the said parcel of land, at an agreed price of Shs.370,000/= and that by an oral agreement made on 25th November, 1991 the appellant agreed to sell 4 more acres out of the said parcel of land at a price of Shs.40,000/= making a total of Shs.410,000/=. The consent of the relevant Land Control Board, approving the said transaction(s) was given by the Board on 13th December, 1991, that is more than six months after the date of the agreement(s) in question.

Soon after the close of pleadings in the superior court the appellant lodged an application seeking orders to strike out the defence and counterclaim. That application was stated to be brought under **Order 6 rules 7 and 13(a)** of the **Civil Procedure Rules** and S.3A of the **Civil Procedure Act**. The learned Judge whilst putting the respondent on guard as to his eventual position on his defence and counterclaim dismissed the application with no order as to costs saying that the respondent ought to have his day in court. The

appellant did not appeal against that decision and eventually set the suit down for hearing.

On 13th October, 1995 the respondent lodged a caveat against the title of the appellant claiming a purchaser's interest. The caveat so lodged encompassed the whole of the land the appellant owned, that is about 80 acres. It was not restricted to the 41 acres the respondent was claiming. The appellant was notified of the lodgment of the caveat. He called upon the Registrar of Titles, in writing, to remove the caveat. The Registrar, in obedience to the procedure set out in section 57(6) of the Act called upon the respondent to withdraw the caveat and informed the respondent that unless the life of the caveat was extended by court he would remove the caveat.

The respondent moved the superior court, by an originating summons brought under **Order 36 rule 3B** of Civil Procedure Rules and **section 3A** of the Civil Procedure Act (the latter probably having been inserted for good measure), for extension of the life of the caveat. That was in **Civil Misc. Application No. 24 of 1996** filed in the superior court. Mwera, J who heard the summons declined to extend the life of the caveat on basis that the consent of the relevant Land Control Board not having been obtained within 6 months of the date of the agreement(s) the caveat was based on an unenforceable and void contract. The learned Judge said that the agreement was no longer valid. He also declined to extend the life of the caveat as, in the absence of a court order extending the same, the life thereof had ended on 7th March, 1996. The caveat, therefore, remained in force for about five and a half months.

We revert to the appellant's suit in the High Court. As the life of the caveat was not extended in the said **Miscellaneous Cause** the appellant's prayer in the suit for removal thereof became otiose. What was left thereafter was primarily the issue of damages. We will go into this issue at a later stage in this judgment.

During the course of the hearing of the suit in the superior court the respondent abandoned all prayers in his counterclaim save the one for Shs.370,000/= he was claiming by way of refund, for failure of consideration. He was quite right in doing so as he had with him only a void and an unenforceable contract on the strength of which he was claiming other reliefs.

The learned Judge declined to grant any general damages to the appellant for wrongful lodgment of caveat on the basis that no such damages were properly proved. The learned Judge dismissed the suit with costs and ordered that the respondent was entitled to a refund of Shs.370,000/= with costs and interest. The appellant was dissatisfied with those orders and has therefore filed this appeal. His main complaints are that the learned Judge ought not to have awarded costs of the suit to the respondent as the respondent did not succeed on his defence and counterclaim; and that in addition to the costs of the main suit he got an order for refund **with costs and interest** thereon. He also complains that he ought to have been granted costs of the suit as the transaction in question was void for all intents and purposes.

We come now to the procedure adopted by the appellant. In the plaint he lodged he sought the removal of the caveat as well as damages for wrongful lodgment of caveat. In claiming damages prior to the removal of the caveat he put the cart before the horse. Section 57(6) of the Act provides for a simple and effective remedy for removal of a caveat. The procedure for such removal is mandated by Order 36 rule 3B of the **Civil Procedure Rules**. It is mandatory. The plaint insofar as the prayer for removal of caveat was concerned was out of place. Not only that, but it must be remembered that damages crystallize after a finding that caveat in question was wrongly lodged and therefore should be removed. It is only after the removal of the caveat that the caveatee can claim damages. The appellant having adopted the wrong procedure cannot be heard to say he ought to get costs. He ought to have, first, applied for removal of caveat in the manner prescribed, that is, by use of the procedure provided in Section 57(6) of the Act, before making a claim for damages. What the learned judge should have done was to strike out the appellant's suit as it was incompetent. The learned Judge was however quite right in awarding costs in regard to the refund of Shs.370,000/= to the respondent, as the appellant had not tendered the payment of Shs.370,000/= to the respondent.

We must however, deal with the issue of damages. Mr. Mulwa, for the appellant, argued that his client lost the benefit of a contract to sell the land in question (80 acres) to another party at a price or sum of Shs.51,000,000/=. There is only some flimsy evidence of an offer for purchase of the land in question

made by M/s Waruinge & Waruinge Advocates on behalf of their clients Ng'esango Enterprises. There is no evidence that the agreed purchase price of Shs.51,000,000/= was available. Besides there was no credible evidence that the land was worth Shs.200,000/= to Shs.300,000/= per acre. There was no evidence that the caveat (whose life was five and a half months only) interfered with the right of the appellant to sell the land during the currency of the life of the caveat. There was nothing until 13th October, 1996 to stop the appellant from selling the land in question. Section 57(12) of the Act reads:

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

The wording of the above sub-section in our view does not cater for general damages 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.

However, at the end of the day, the learned Judge came to correct decision. This appeal is therefore dismissed with costs.

**Dated and delivered at Nairobi this 25th day of May, 2001.**

**R.O. KWACH**

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**JUDGE OF APPEAL**

**A.B. SHAH**

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**JUDGE OF APPEAL**

**S.E.O. BOSIRE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR.**