REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

CIVIL APPEAL NO. 82 OF 2012

(An appeal from the Judgment of the Principal Magistrate, Siakago in Civil Suit No. 44 of 2011 dated 14/6/2012)

NEBART NJERU MUNYI…….....APPELLANT

VERSUS

NICHOLAS MURIITHI ZAKARIA……..... RESPONDENT

J U D G M E N T

This an appeal against the Siakago Principal Magistrate in Civil Suit No.44 of 2011 delivered on 14/6/2012. The respondent had sued the appellant claiming 1 acre out of land parcel No. Evurore/Nguthi/2576 and in the alternative a refund of KShs.288,000/= plus costs and interests. The court entered judgement in favour of the respondent for refund of KShs.288,000/= plus costs of the suit and interests. The cause of action arose out of a land sale agreement between the parties dated 28/6/2011 in which the respondent alleged breach on part of the appellant.

In his memorandum of appeal the appellant presents five grounds as follows:-

1. T*he magistrate erred in law when he failed to consider that the appellant and the respondent entered into an agreement of the sale of parcel of land in issue under the mistaken belief that the size of land was 1¾ .*
2. *The magistrate erred in law and in fact when he failed to consider that the agreement for sale was entered into under false and fundamental assumption going to the root of the agreement.*
3. *The magistrate erred in law and in fact in finding that the mistake was one of fact and it rendered the agreement void ab initio.*
4. *The magistrate erred in law and in fact when he failed to consider that the only recourse available would have been to restore the parties as much as possible to the position that they were at the time of getting into the agreement.*
5. *The magistrate erred in law and in fact when he ignored the fact that the appellant had attempted to make amends after the mistake was discovered.*

The appellant was represented by Victor Andande & Co. Advocates while the respondent was represented by Mugambi Njeru & Co. By consent the parties agreed to dispose the appeal by way of written submissions.

The appellant argued that the parties entered into a land sale agreement on the 28/6/2011 for the sale of a portion of land measuring one (1) acre out of LR. Evurore/Nguthi/2576. It was agreed that any party who breached the agreement would pay the other 25% of the purchase price and in the event that it was the vendor, he was to refund the amount already paid to him plus 25%. The appellant submitted that upon

engaging a surveyor, he realized that the total acreage of the land was less than he thought at the time of writing the sale agreement. This meant that if he gave the purchaser the agreed portion of one acre he would remain with a portion smaller than ¾ of an acre on which his family resides.

The appellant communicated his predicament to the respondent in writing and gave him an option of taking ¾ of an acre and a refund of the extra amount plus the 25% damages as per the agreement. The respondent declined the offer and filed this suit.

The appellant faults the magistrate for ignoring his willingness to comply with the agreement despite the mistake on the size of the land. He argues that he was always ready and willing to refund the purchase price but was not given a chance. He contends that the court ought to have restored the parties to their original position before executing the agreement. The appellant further contended that the court failed to consider that the agreement was entered into under a mistaken belief as to the total acreage of the land. Further that it was very clear from the agreement that the appellant was to remain with ¾ of the land.

The appellant relied on the case of ***ALFRED M.O. MICHIRA VS GESIMA POWER MILLS LITED Civil Appeal No. 197 of 2001*** where the case of ***PURPLE ROSE TRADING COMPANY LIMITED VS BHANOO SHASHIKANT JAI [2014] eKLR*** was cited with approval. The court in the case of ***PURPLE ROSE TRADING CO. LTD*** held that *"where there is no meeting of the minds of the contracting parties the contract is incapable of performance"*.

The court in the case of ***PURPLE ROSE TRADING CO. LIMITED (supra)*** cited the case of ***BELL VS LEVER BROS LTD [1931] ALL ER 1*** where the court held that:-

"a mistake of both parties as to the existence of some quality of the subject matter of a contract, which makes the subject matter of the contract without the quality essentially different from the subject matter as it was believed to be, rendered the contract void ab initio".

The appellant argues that there was no meeting of minds as the appellant thought his land measured 1¾ acres while it measured less. He also cited the case of ***GURDEV SINGH BIRDI & ANOTHER VS ABUBAKAR MADHBUTI [1997] eKLR*** where it was held that time will not be considered to be of essence unless the parties expressly stipulated that conditions as to time must be strictly complied with.

The appellant relying on the foregoing authorities argues that the agreement did not stipulate that time must be strictly complied with. According to him, the magistrate ought to have found that time was not of essence and given the appellant time to remedy his mistake. The respondent wrote a demand letter one month prior to the completion of the agreement. He then rushed to court with a view of enriching himself unjustly.

The respondent in his submissions stated that the agreement of the parties dated 28/6/2011 was to be completed on or before October 2011 and that any party in breach was to pay the aggrieved party 25% of the purchase price as liquidated damages. He argued that after the appellant realized that the acreage was less than he thought, he ought to should have refunded the deposit paid to him plus 25% interest as per the agreement. The appellant breached the agreement the moment he decided to sell the respondent ¾ of an acre instead of 1 acre as agreed. The appellant had a duty to survey his land before he decided to sell a portion of it. The appellant should not be protected for his mistake because the agreement did not contain any clause for alteration for the size. The agreement was binding upon both parties and no party could unliterary alter it unless by consent of the parties.

The respondent states that he filed the suit before the expiry of the six months expiry period, to avoid being statutorily barred. The transaction was to be completed on or before the end of October hence time was of essence. The appellant in his correspondences indicated that he was willing to refund the amount paid plus 25% interest but later requested for more time to be able to process the payment. It is not correct that the appellant offered to sell ¾ of an acre instead of 1 acre to the respondent. It is argued that this is a court of equity which should not aid a man for his wrong doing and urges the court to dismiss the appeal.

The duty of the first appellant court was explained in the case of MWANGI VS WAMBUGU [1984] KLR 453:-

"A Court of Appeal will not normally interfere with a finding fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding; and an appellate court is not bound to accept the trial Judge's finding of fact if it appears either that he has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

The issues for determination in this case are two-fold:-

1. *Whether the magistrate erred in failing to find that there was a mistake in the agreement which affected the subject matter of the contract thereby rendering it void ab initio.*
2. *Whether the finding and order for refund of Kshs.288,000/= plus interests was wrong.*
3. *Which party shall bear the costs.*

The evidence of the respondent was that he entered into an agreement with the appellant on 28/6/2011 for sale of one acre out of LR. Evurore/Nguthi/2576. He paid a deposit of KShs. 201,000/= on execution of the agreement and later paid KShs.24,000/= making a total of KShs.225,000/=. The appellant informed the respondent that he had a loan with Agricultural Finance Corporation (AFC) and instructed the respondent to deposit the funds with AFC. The appellant later refused to transfer the land to him asking the respondent to accept ¾ of an acre instead of one acre. The appellant later offered to refund the money plus interest but failed to do so which lead to the filing of the suit by the respondent.

The appellant testified that there was an agreement between him and the respondent for sale of one acre of land from LR. Evurore/Nguthi/2576. The appellant having received a deposit of KShs.225,000/=. He argues that he was unable to effect transfer to the respondent due to a mistake on the land which was not within his knowledge at the time of executing the agreement. The respondent was offered a portion ¾ of an acre but he declined to take it. There is evidence that the Land Control Board had already given consent for transfer of the respondent's portion. The appellant later agreed to refund the deposit paid plus 25% interest. However, he only had KShs.150,000/= and the respondent refused to accept it, part of the amount that was due to him.

The agreement dated 28/6/2011 between the parties indicates that the appellant agreed to sell and the respondent to buy one ace out of LR. Evurore /Nguthi/2576 measuring 1¾ acres at a consideration of KShs.240,000/=. The completion date was to be end of October 2011. The agreement contained a clause that any party in breach shall pay the other 25% interest on the deposit paid as liquidated damages. In the event that the vendor was in breach, he was required to pay the amount paid to him plus 25% interest.

In a letter dated 26/9/2011 the appellant wrote to the respondent indicating that the land he intended to sell to him was much smaller than expected. The appellant requested that the respondent accepts to buy ¾ of an acre instead of 1 acre which request was declined. The respondent opted to be refunded his deposit plus 25% interest.

It is presumed that at the time of making a contract the parties are like-minded and that their bargain is motivated by commonality of purpose. However, if a mistake arises in the course of the contract, the court shall determine whether the mistake goes to the root of the agreement and whether it was a mistake of both parties. In the *General Principles of the Law of Contract* by K. Laibuta, common mistake is described as follows:-

"A mistake is said to be common where both parties operate under the same mistake which is fundamental and not merely collateral to the attainment of the main object of the contract."

A mutual mistake is described in the same book of *K. Laibuta* as follows:-

"Mistake is termed as mutual where parties misunderstand one another and are at cross-purposes. Purported acceptance of something different from what was actually offered is ineffectual and does not bind the parties in contract".

A unilateral mistake is described in the same literature as follows:-

"Mistake is unilateral where only one party is mistaken while the other is clear minded as to the terms of the contract".

Certain factors which reverse the legal effect of a transaction and render it unenforceable in law or inequity are recognized by common law. The contract may be rendered void at the onset or voidable at the instance of the aggrieved party depending on the fundamental nature and effect of the particular factor. Their overall effects are to negate one or more of the essentials of a valid contract, such as mutual consent or intention to create legally binding relations.

A mistake can only vitiate a contract if it is on the part of either or both parties in respect of either the subject matter or some fundamental term that goes to the root of the contract. The Black Law Dictionary defines "subject matter" as *"the issue presented for consideration; the thing in which a right or duty has been asserted; the thing in dispute"*. The same dictionary also defines "material facts" as *"a fact that is significant or essential to the issue or matter at hand".*

The appellant's case of ***PURPLE ROSE TRADING CO. LIMITED (supra)*** had different facts from this case. The court found that there was uncertainty as to the terms of contract and that the other party was unable to perform his part due to the said uncertainty that was beyond his control.

It was held in the case of ***SAPRA STUDIO VS KENYA NATIONAL PROPERTIES LIMITED [1985] eKLR*** where the case of ***BELL VS LEVER BROS [1932] AC 1*** where the court held:-

"The common mistaken assumption of both parties was as to the existence of a fact which formed an essential and integral element of the subject matter of the agreement and I think it was sufficient fundamental to avoid the contract".

In the case of ***LOLE VS BUTCHER [1949] ALL ER 1107*** where Lord Denning, LJ considered factors which may render a contract a nullity. The court held that:-

The correct interpretation of the case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their innermost state of mind have to all outward appearances agreed with sufficiently certain in the same terms on the same subject matter, then the contract is good unless and until it is set aside for breach of some conditions expressed or implied in it or for fraud or on some equitable ground".

The appellant alleges that there was a mistake as to the subject matter of the contract which should render the contract void. From the evidence of the parties the subject matter of the agreement was the sale of one acre out of Evurore/Nguthi/2576 by the appellant to the respondent. The fact that the size of the land in which the appellant says he realized was less than he thought, was not a subject matter of the contract. Neither did it feature in the contents or I the terms of the agreement. The portion which was to be left with the appellant after selling one acre to the respondent was not a fundamental issue and did not go to the root of the contract. The appellant had not demonstrated that there was a mistake as to the sale and to the existence of one acre. From the onset both parties were clear in their minds on the subject matter that one acre was to be sold to the respondent at an agreed consideration.

It is my considered opinion that the mistake on part of the appellant on the size of the land did not affect the contract. The magistrate correctly held that there was no basis of restituting the parties to their original position. It was irrelevant that the appellant tried to make amends after the breach of the agreement.

The appellant argued that time was not of essence since the relevant clause had not been included in the agreement. He relied in the case of ***GURDEV SINGH BIRDI & ANOTHER VS ABUBAKAR MADHBUTI (supra)*** where it was held:-

Time will not be considered to be of essence unless:

1. *The parties expressly stipulate the conditions as to the fact that time must be strictly complied with; or*
2. *The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence; or*
3. *A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence.*

The appellant is right that the agreement did not contain a clause making time of essence. Clause 5 stipulated that the transaction shall be completed on or before the end of October 2011. In this case, the party affected by the breach would be required to give notice to rescind if it related to the completion date. The claim of the respondent was not pegged on time. He was aggrieved by the appellant who declined to sell to him one acre of the land as stipulated in the agreement. In his letter dated 10/10/2011, the appellant clearly stated that he was not willing to sell one acre to the respondent and requested him to accept ¾ of an acre. This communication amounted to breach of the agreement and the respondent was entitled to sue for damages. The respondent did not have to wait for the completion period of the agreement. The appellant requested to be given more time to refund the money in his letter dated 10/10/2011. He stated that he wished to sell the ¾ of an acre to get funds to refund to the respondent.

The facts of the case of ***GURDEV SINGH BIRDI (supra)*** are not relevant to this case.

The judgment of the magistrate was based on cogent evidence and was in compliance in the law. It is accordingly upheld.

This appeal has no merit and it is hereby dismissed.

Costs to the respondent.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF OCTOBER, 2015.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Muriiuki for Mugambi for respondent

Appellant present