**IN THE COURT OF APPEAL**

**AT NAKURU**

**CIVIL APPEAL NO. 144 OF 2017**

**(CORAM: KARANJA, OKWENGU & GATEMBU, JJ.A)**

**BETWEEN**

**ANN WAIRIMU WANJOHI.....APPELLANT**

**AND**

**JAMES WAMBIRU MUKABI.....RESPONDENT**

***(Being an appeal arising from the Judgment of the Environment and Land Court***

***(Waithaka, J) delivered on the 30th January, 2015 in Nakuru ELC 318 OF 2013)***

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**JUDGMENT OF THE COURT**

[**1**] This appeal arises from a suit that was filed by the respondent **James Wambiru Mukabi (Mukabi),** against the appellant **Ann Wairimu Wanjohi** (**Wairimu**). The suit was anchored on an agreement of sale entered into between Mukabi and the administrators of the estate of **Charles Njuguna Njau**, who were **Monica Njoki Ngotho** and **Nicholas Njau Njuguna,** for sale of a property in Nyahururu Municipality, which property was eventually registered in the name of Mukabi as Nyahururu Block 4/182.[**2**] Mukabi's claim was that he purchased a property which was identified as "A" (suit property), on the subdivision plan and believed that the suit property was transferred to him as Nyahururu Municipality Block 4/182. He was alarmed when in September, 2010 Wairimu commenced developing the suit property and he discovered that the suit property was registered in the name of Wairimu as Nyahururu Municipality Block 4/184.

[**3**] In his original plaint, Mukabi sought an order of injunction restraining Wairimu, her servants or agents from wasting, developing, selling, or in any way interfering with the suit property. In his amended plaint dated 3rd October, 2011, Mukabi sought, *inter alia*, a declaration that the suit property which was registered as Nyahururu Municipality Block 4/184 belonged to him, while Nyahururu Municipality Block 4/182 belonged to Wairimu; an order directing the Chief Land Registrar to effect the change of Register to reflect him (Mukabi) as the owner of Nyahururu Municipality Block 4/184 and Wairimu as the owner of the property registered as Nyahururu Municipality Block 4/182 and the lease certificates previously issued to Mukabi and Wairimu cancelled.

[**4**] Wairimu filed a defence to Mukabi's claim in which she contended that she was not privy to the sale agreement between Mukabi and 3rd parties, and therefore, was not bound by that agreement. She maintained that she entered into a valid agreement with **Monica Njoki Ngotho (Monica**), for purchase of Nyahururu Municipality Block 4/183 and Block 4/184 at a consideration of Kshs. 3,900,000, and took possession of the two properties. She maintained that her plot Nyahururu Municipality Block 4/184 is the same plot directly opposite Telkom Kenya gate in Nyahururu while Mukabi's plot is Nyahururu Municipality Block 4/182 next to Nyahururu law courts. She denied that she was developing Nyahururu Municipality Block 4/182 and maintained that she was developing her property, Nyahururu Municipality Block 4/184.

[**5**] The learned Judge having heard the evidence adduced by Wairimu and Mukabi, found that there was a "mismatch" between the titles issued to Wairimu and Mukabi, and the actual properties that they had bought on the ground. This was because the property marked "A" on the Partial Development Plan (PDP) was eventually registered as Nyahururu Municipality Block No. 4/184, and this was the title issued to Wairimu, while the property marked "C" in the PDP plan which was registered as Nyahururu Municipality Block No. 4/182 was the title issued to Mukabi. The effect was that Mukabi was registered as owner of Block 4/182 instead of the suit property.

[**6**] The learned Judge found that Monica did not intend to sell to Wairimu the property marked "A" which she had already sold to Mukabi, and therefore, the transfer of Block 4/184 (which was the property marked "A" on the PDP Plan) to Wairimu, was a mistake, and that mistake was rectifiable. The learned Judge therefore allowed Mukabi's suit and gave orders declaring that Block 4/184 belongs to Mukabi, while Block 4/182 belongs to Wairimu. The learned Judge also gave an order directing the Chief Land Registrar to effect the changes in the

Register so as to reflect Mukabi as the owner of Block 4/184 and Wairimu as the owner of Block 4/182 and issue land certificates accordingly.

[**7**] In her memorandum of appeal, Wairimu has raised eleven (11) grounds in which she faults the learned Judge as having erred in relying on parol evidence when there was a clear written agreement; in departing from the general rule of pleadings that issues for determination in a suit flow from the pleadings; in determining Mukabi's claim relying on the issue of mistake, when Mukabi had not pleaded the issue; in rewriting the contract entered into between Mukabi and the vendors to the detriment of Wairimu; in disregarding the evidence produced by Wairimu's witnesses; in disregarding the fact that Wairimu was occupying block 4/184 in accordance with the sale agreement; and in rectifying the agreements entered into between Wairimu and Monica in the absence of any claim against Monica.

[**8**] This appeal was heard through the GoToMeeting video link online platform, where **Mr. Waitindi** was in attendance for Wairimu, **Mr. Njogu** for Mukabi, and **Mr. Chemitei** for the interested party. Both Wairimu and Mukabi had filed written submissions through their respective counsel, which were duly highlighted during the hearing of the appeal.

[**9**] Wairimu submitted that the trial Judge placed little or no regard to the evidence which was before her. She urged us as a first appellate Court to reconsider the evidence, evaluate it and draw our own conclusions. She stated that she entered into an agreement for the purchase of Block 4/184; that she was a *bona fide* purchaser of the suit property; that her registration as the owner of the suit property took priority over any other equitable claim; and that there was no evidence of her having any knowledge of Mukabi's equitable claim to the suit property.

[**10**] Further, Wairimu submitted, that under **section 80(2)** of the **Land Registration Act,** a litigant seeking cancellation of a proprietor's title to land on account of mistake had to specifically plead mistake and allege knowledge of the mistake on the part of the registered proprietor.

Wairimu drew the Court's attention to the amended plaint urging that no issue of mistake was raised. She submitted that in the absence of a mistake having been pleaded, the learned Judge should not have considered any evidence that sought to establish the same. In this regard, Wairimu relied on a High Court decision, **Daniel Otieno Migore – vs - South Nyanza Sugar Company Limited [2018] eKLR**.

[**11**] Wairimu posited that in using the authority of **Kiplangat Arap Biator vs Estar Tala Chepyegon [2006] eKLR** (**Biator's case**), the learned Judge applied the wrong principle in law as that authority relates to rectification in relation to a contract between two parties only, and that the authority could not be applied for rectification of a mistake that vitiates a third parties' contract unless the third party had knowledge of the mistake. In addition, Wairimu maintained that her title to the suit property is supreme over Mukabi's equitable claim to the suit property.

[**12**] Mukabi asserted in his submissions, that the learned Judge was entitled to address the issue of mistake and make a determination thereon as the issue was raised in evidence and left for the court's determination. He relied on **Odd Jobs vs Mubia [1970] EA 476**, where it was held that the court can base its decision on an unpleaded issue if the parties had left the issue to the court for determination.

[**13**] Mukabi noted that according to the evidence, he bought the property marked "A" on the PDP plan, but this property was subsequently registered and given title as No. Block 4/184 while he was registered as the owner of Block 4/182. He maintained that although he did not plead the issue of mistake, the issue came out in his evidence and Wairimu had the opportunity to controvert the evidence; and that the issue of mistake was fully addressed by the parties in their respective submissions. He urged that the High Court only corrected the mistake in accordance with the issues addressed by the parties.

[**14**] Mukabi pointed out that his evidence before the trial court and that of Monica, was that they visited the grounds and Monica showed Mukabi plot No. 'A' in the subdivision plan. That plot "A" is what Mukabi bought, while the other 2 remaining properties which were plot 'B' and 'C' on the subdivision plan, is what Monica later sold to Wairimu. Mukabi submitted that although the agreement between the vendor and Wairimu was for sale of Nyahururu Municipality Block 4/183 and 4/184, what Monica intended to sell to Wairimu and actually sold, was Nyahururu Municipality Block 4/182 and 4/183 and therefore Nyahururu Municipality Block 4/184 was included in the agreement and the conveyance by mistake, as the property had already been sold to Mukabi.

Consequently, the title issued to Wairimu was issued by mistake.

[**15**] Mukabi cited several authorities on the issue of mistake urging that the court had power to correct and rectify the mistake to ensure justice is done. The authorities referred to included, ***Chitty on Contract 31st Edition at paragraph 5 - 110 to 114*** wherein, it is stated:

> ***"Rectification only applies to contracts which have been reduced in writing. It is a process by which the document is made to conform to what was actually agreed between the parties. The remedy of rectification is permitted by the court not for the purpose of altering the terms of an agreement entered into between 2 or more parties, but for that of correcting a written instrument which by mistake in verbal expression does not accurately reflect the true agreement. … In deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and the context must always be taken into consideration."***

[**16**] In highlighting the written submissions, **Mr. Waitindi** for Wairimu reiterated that since Mukabi did not specifically plead mistake, it was not open to the court to consider the issue. In addition, **section 80** of the **Land Registered Act,** provides for rectification of the register in case of a mistake, where there is proof that the mistake was based on fraud or contributed to by the neglect of the Registrar, and no such proof was established. Counsel argued that there was nothing to connect Wairimu to the alleged mistake. In addition, Mukabi ought to have joined Monica who sold the properties as a party to the suit. Counsel faulted the learned Judge for making orders that were not appropriate.

[**17**] **Mr. Njogu** for Mukabi conceded that mistake was not pleaded, but urged that the learned Judge was alive to that fact, and ruled that

there was no prejudice to Wairimu, as she had the opportunity to respond to the issue. Moreover, the issue of mistake was extensively addressed in the submissions made by both parties. He reiterated that in accordance with the decision in **Odd Jobs -vs- Mubea** (supra), the Court could base its decision on an unpleaded issue. He pointed out that both Wairimu and Monica gave evidence regarding the mistake, and it was clear that there was a contradiction in the numbering of the property resulting in Wairimu getting title for a property that she had not purchased. The Court was therefore urged to dismiss the appeal as the order for rectification was proper.

[**18**] In reply, Mr. Waitindi urged that the authority of **Odd Jobs –vs-Mubea** (supra), was distinguishable; that in Mukabi's case there was no nexus as there was no common mistake between Mukabi and Wairimu; and that the parties were joined together by a common vendor who was not a party in the proceedings before the trial court.

[**19**] We have carefully considered this appeal, the written and oral submissions and the authorities cited. We are alive to our obligation as a first appellate court to reconsider and re-evaluate the evidence as stated in ***Selle -vs- Motor Boat Co. Limited (1968) EA 123***.

[**20**] We discern four pertinent issues for consideration. These are: whether the learned Judge erred in determining the respondent's claim based on the issue of mistake which was not pleaded; whether there was actually a mistake in both the agreement involving Wairimu and Mukabi for sale of properties known as Nyahururu Municipality Block 4/184 and 4/182; if there was a mistake, whether the mistake was rectifiable; and finally, whether the learned Judge violated the common law principle regarding parol evidence.

[**21**] Mukabi's claim as presented to the Court, was anchored on the amended plaint dated 3rd October, 2011. Apart from the original plaint wherein Mukabi had pleaded that Wairimu's actions amounted to wanton wasting, trespass and unlawful interference with his peaceful and quiet occupation of the suit property, and claimed general damages for trespass, Mukabi added several more prayers in the amended plaint.

These were: a declaration that Block 4/184 belongs to him while Block 4/182 belongs to Wairimu; an order directing the Chief Land Registrar to effect the change in the Register so as to reflect Mukabi is owner of Block 4/184 and Wairimu as owner of Block 4/182; and an order for Wairimu to clear all outstanding rates in regard to Block 4/184 while Mukabi clears any outstanding rates and rents in regards to Block 4/182. It is instructive that no mistake or particulars of mistake were pleaded in Mukabi's original plaint or the amended plaint.

[**22**] In her statement of defence, Wairimu denied Mukabi's claim contending that she purchased plot Block 4/184 from Monica and that she was not party to the agreement between Monica and Mukabi, nor was she aware of the allegations made by Mukabi. She maintained that she was developing her own plot, which was Block 4/184, and not Mukabi's plot, which as Block 4/182. Again, there was no pleading in the defence regarding mistake.

[**23**] From the record of appeal, it is apparent that Mukabi filed a list of 20 issues, while Wairimu filed a list of 11 issues. In Mukabi's list of issues, the issue of mistake is central and forms the subject of several of the issues. These include:

> **"10. Whether the registration of the plot marked A in the said subdivision plan as land title No. Nyahururu Municipality Block 4/184 instead of land title No. Nyahururu Municipality Block 4/182 was done by mistake.**
>
> **11. Whether the registration of the plot marked C in the said subdivision plan as land title No. Nyahururu Municipality Block 4/182 instead of Nyahururu Municipality Block 4/184 was done my mistake.**
>
> **12. Whether the sale of all that parcel of land known and described as land title No. Nyahururu Municipality Block 4/184 to the defendant is tainted by mistake and vitiated by mistake.**
>
> **13. Whether the sale of all that parcel of land known and described as land title No. Nyahururu Municipality Block 4/184 to the defendant is valid.**
>
> **…**
>
> **16. Whether the said mistakes should be corrected by this honorable court so as to reflect the proper owners of land titles numbers Nyahururu Municipality Block 4/184 and 182.**
>
> **17. Whether the registers of land titles No. Nyahururu Municipality Block 4/184 and 182 should be rectified or changed so as to reflect the plaintiff as the owner of land title No. Nyahururu Municipality Block 4/184 and the defendant as the owner of land title No. Nyahururu Municipality Block 4/182."**

[**24**] Likewise, in Wairimu's list of issues, the issue of mistake featured as issue No. 6. That is, whether the agreement between Mukabi and Monica is vitiated by uncertainty or mistake over the subject matter.

[**25**] Both Mukabi and Wairimu submitted extensively on the issue of mistake in their written submissions that were filed in the trial court. The learned Judge having considered the list of issues and the submissions, identified 3 broad issues for determination. These were:

> **"1. Whether there is a mismatch between the titles issued to the parties herein and the actual parcels they bought or owned on the ground? If yes;**
>
> **2. whether the defect or mistake can be rectified. If yes;**

**3. what orders should the court make?"**

[**26**] As we have endevoured to demonstrate above, the issue of mistake was not pleaded by Mukabi. However, from the issues identified by the learned Judge, it is evident that the issue of mistake was central to her analysis and determination. The question is whether the learned Judge erred in addressing and determining the suit on the unpleaded issue of mistake.

[**27**] In **Odd Jobs vs Mubia** (supra), the Eastern Africa Court of Appeal held that a court may base its decision on an unpleaded issue, if it appears from the course followed at the trial that the issue has been left to the court for determination. In **Vyas Industries vs Diocese of Meru** [**1976] eKLR,** the Eastern Africa Court of Appeal applied and approved **Odd Jobs vs Mubia** (supra), holding that, as the advocate for the appellant had led evidence during the trial and addressed the court on the unpleaded issue, the trial court could base its decision on the unpleaded issue, as the issue had been left for the court's decision during the trial.

[**28**] In **Nairobi City Council vs Thabiti Enterprises Limited [1995-98] 2EA 231**, Thabiti Enterprises had filed a suit in the High Court seeking, *inter alia*, damages for trespass against Nairobi City Council (NCC) for trespassing onto the Thabiti Enterprises' property LR. No. 209/10466 Nairobi (suit property), and erecting certain structures thereon. Upon Thabiti Enterprises' application, the High Court struck out NCC's defence and counterclaim. Thereafter there was some negotiations between the parties regarding the property being surrendered to NCC, but the parties did not agree on the purchase price. The matter was listed for formal proof for assessment of damages, during which Thabiti Enterprises called a valuer who assessed the value of the suit property at Kshs. 80 million. The learned Judge of the High Court in his judgment awarded Thabiti Enterprises Kshs. 80 million being the value of the suit property. Thabiti Enterprises had not amended their original claim, which was for trespass.

[**29**] The Court of Appeal in a majority decision (***Akiwumi & Tunoi, JJ.A***), set aside the judgment of the High Court, holding that the learned Judge erred in determining the issue of compensation which had not been pleaded; that as there was no claim for compensation/purchase price, it was irrelevant that the parties had agreed to the learned Judge determining the purchase price or compensation payable for the suit property; and that the unpleaded issue determined by the learned Judge being the purchase price/compensation was a claim for special damages, that should have been specifically pleaded. It is apparent that this was not simply a question of the learned Judge considering an unpleaded issue, but making an award that was neither pleaded nor sought).

[**30**] It is noteworthy that the Court in **Nairobi City Council vs Thabiti Enterprises Limited** (supra), considered **Odd Jobs vs Mubia** (supra), but followed **Sheikh vs Sheikh & Others [1991] LLR 2219 (CAK)**; and **Sande vs. Kenya Cooperative Creameries [1992] LLR 314 (CAK**) in holding that:

> ***"A Judge had no power or jurisdiction to decide an issue which had not been pleaded unless the pleadings were suitably amended."***

[**31**] In **Sheikh vs Sheikh & Anor** (supra), the following passage from **Bullen & Leake on pleadings, 12th Edition** was relied upon:

> ***"The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It does serve the twofold purpose of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time, informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial, and which we the court will have to determine at the trial."***

[**32**] The following passage by this Court in **David Sironga ole Tukai vs Francis Arap Muge & 2 Others (Civil Appeal No. 76 of 2014) [2014] eKLR** is also instructive:

> ***"It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense."***

[**33**] We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.

In accordance with the Civil Procedure Rules, the parties should also either provide a list of agreed issues, or if there is no agreement, each provide their own list of issues so that the court can settle the issues. Although it is desirable that where necessary the pleadings should be amended to bring in all the issues, **Odd Jobs vs Mubia** (supra) remains good law, that in limited circumstances where an unpleaded issue is crucial to the matters in issue the court may determine a suit on the unpleaded issue, provided both parties have clearly addressed the unpleaded issue in their evidence or submissions, and left the matter for the determination of the court. However, such determination will not extend to determining or awarding a relief that was not specifically sought in the pleadings.

[**34**] The issue of mistake was central to the dispute between Mukabi and Wairimu, and featured prominently in the list of issues and the written submissions. In **G.K. Macharia & Anor vs Lucy N. Mungai [1995] eKLR,** this Court held that:

> ***"It is the duty of the court to frame issues as may be necessary for determining the matters in controversy between the parties….In this respect, a trial court may***
>
> ***frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties."***

[**35**] In her judgment, the learned Judge was alive to the fact that Mukabi had not pleaded mistake. Nonetheless, she directed herself as follows:

> ***"On whether the plaintiff can rely on the alleged mistake when he had not pleaded it, whereas ordinarily a party is required to plead mistake before he can rely on it, in the circumstances of this case, I find that the defendant did not suffer any prejudice because of the plaintiff's failure to plead mistake. In fact she did get an opportunity to controvert the alleged mistake in her sale agreement."***

[**36**] The learned Judge did not properly direct herself on the issue of failure to plead mistake to the extent that she relegated its relevance to whether or not this caused prejudice to Wairimu. It was not simply a question of whether Wairimu suffered or did not suffer prejudice by the failure to plead mistake. The issue that the learned Judge ought to have addressed herself to, was whether on the facts before her, including the course followed at the trial, the parties had left the issue of mistake that had not been pleaded in the pleadings, to be determined by the court.

[**37**] It is trite that where a party seeks to anchor a claim on mistake, the issue should be pleaded and particulars of the mistake given. Where this is not done, the opposite party has the right to move the court under the Civil Procedure Rules to have the pleadings struck off. Should the application for striking out of pleadings not be made, and it is followed by the issue of mistake being addressed in evidence at the hearing and in submissions, it is assumed that the party has opted to forgo his right to challenge the pleadings, and acquiesced to the issue being determined by the court.

[**38**] Given the fact that the issue of mistake was raised in the list of issues filed by each of the parties, and that during the hearing witnesses gave evidence that touched on the issue of mistake, and that in the written submissions the issue was extensively addressed by each of the parties, it is clear that the issue was left for the determination of the court. Wairimu cannot now turn around and blame the court for addressing and determining the issue.

[**39**] In **G. K. Macharia & Anor vs Lucy N. Mungai** (supra), the facts were almost similar to the present situation. Lucy who was registered as the owner of **Plot No. 133R Ongata Rongai** through purchase of that plot from one Orumoy, sued Macharia and his wife (the Macharias), who occupied **Plot No. 330 Ongata Rongai**, which was adjacent to Lucy's plot. Lucy claimed that the Macharias had trespassed onto her land and were erecting a house thereon. The Macharias filed a defence denying having trespassed on Plot No. 133R and claimed to have been in lawful occupation of **Plot No. 337 Ongata Rongai**, which had been renamed **Plot No. 133B**. It appeared from the pleadings that while the Macharias were the owners of the plot adjacent to that claimed by Lucy, they were in effect denying that the plot was Lucy's Plot No. 133R Ongata Rongai, and asserting that the plot was theirs, and that its description was not Plot No. 133R Ongata Rongai, but Plot No. 133B Ongata Rongai. The issue was then "who is the owner of Plot No. 133B Ongata Rongai? And is Plot No. 133R Ongata Rongai the same piece of land as Plot No. 133B Ongata Rongai?" The learned Judge held that Plot No. 133B had been allocated by the Council to Orumoy, who had transferred it to Lucy, and that when Lucy purchased it from Orumoy, it was described as Plot No. 133R Ongata Rongai. The learned Judge therefore granted possession of Plot 133R to Lucy and restrained the Macharias from the land.

[**40**] In an appeal to this Court, the Macharias argued that the question whether Plot No.133R Ongata Rongai was the same as Plot No. 133B Ongata Rongai, was not made an issue for trial and the learned Judge could not therefore determine the issue. The Court held that although that question was not settled as an issue for trial, its determination could not be avoided during the trial because the evidence at the trial upon which the Macharias relied, raised the issue whether the two plots were the same. Therefore, the issue though unpleaded, was left to the learned Judge for determination.

[**41**] In the circumstances before us, it is not disputed that the property transferred to Mukabi by Monica was Block 4/182. However, Mukabi's evidence was that this was a mistake as what was to be transferred to him on the ground was the plot marked as 'A' which in the understanding of both Mukabi and Monica, was Block 4/184. On the other hand, the plot transferred to Wairimu by Monica was block 4/184 which Wairimu maintains is what she purchased from Monica, but Monica testified, should have been Block 4/182. The issue of mistake was therefore a pertinent issue, the question being whether the suit parcels transferred to Mukabi and Wairimu as Block 4/182 and Block 4/184 respectively, were inadvertently interchanged and transferred by mistake. Though unpleaded, the issue as to whether the description of the parcel numbers was a mistake was one that had to be determined, and must therefore be construed as having been left to the Judge for determination, and the learned Judge did not therefore err in determining this unpleaded issue.

[**42**] The next issue that we must address is whether there was actually a mistake in the respective transfers to Wairimu and Mukabi. The agreement involving Wairimu and Mukabi was for sale of Block 4/184 and 4/182 respectively. Mukabi maintained there was a mistake, as what was actually transferred to him as Block 4/182 is not what he had agreed with Monica to purchase. Mukabi's evidence was supported by Monica, the vendor. It is not disputed that Mukabi was the first person to buy land from Monica. Although he claimed that the land he was buying was identified on the PDP as plot 'A' which in his understanding is what translated in the PDP as Block 4/184, the agreement of sale dated 4th May, 2006 that he signed with Monica shows that the agreement was for Block 4/182, and that he was buying the plot No. 'A' which was known as LR. No. Nyahururu Municipality Block 4/182. This means that as at the time when Mukabi was buying the land, the subdivision plan had already been finalized and the subdivisions had specific numbers.

[**43**] The agreement dated 5th March, 2007 that Wairimu signed with Monica, which was also produced in evidence, showed that Wairimu was purchasing LR. No. Nyahururu Municipality Block 4/183 and Block 4/184 and there is no mention of either plots, 'A' 'B' or 'C'. Wairimu called **Gibson Wahome Wahuhia** (**Gibson**), a licensed government surveyor as a witness.

[**44**] Gibson explained the procedure that once the PDP is approved; the Land Surveyor visits the site and places the beacons as approved in the PDP; the surveyor draws another plan and carries out the calculations, places the beacons on the site and submits the computation together with the plan, PDP and approvals to the Director of Survey; the Director of Survey then checks whether the survey agrees with the PDP; if satisfied, he will give fresh title numbers for the subdivisions and amend the RIM removing the original number.

[**45**] Gibson stated that the original parcel Block 4/154 was subdivided in 3 parcels following a PDP that was approved on 3rd June, 1994 and the 3 parcels were given plot numbers 182,183 and 184, as reflected on the RIM for the area. He conceded that according to the PDP the owner of the property had marked 'A' to correspond with 182, 'B' to correspond with 183, and 'C' to correspond with 184, but explained that according to the RIM map 'A' corresponds to 184, 'B' to 183 and 'C' to 182. As far as he was concerned, the PDP was approved and the RIM is the official document identifying the plots.

[**46**] Wairimu maintained that she entered into an agreement with Monica for purchase of Plot No. 183 and 184, and that she was shown the plot on the ground and this is what was transferred to her and the titles issued in her name. She even produced a letter from the Municipal Council approving her development plan for Plot No. 4/184. It is apparent that Monica may have intended to transfer plot No. 4/184 to Mukabi, but this is not what she did, as she actually transferred plot No. 4/182 to Mukabi, and subsequently transferred Plot No. 4/184 to Wairimu. There may have been a mutual mistake between Mukabi and Monica regarding the subject of their transaction, but this mistake can only vitiate the transaction between Mukabi and Monica. It cannot affect Wairimu who was not party to the agreement between Mukabi and Monica.

[**47**] In her judgment, the learned Judge appeared to have accepted that there was a swapping of the numbering when the "PDP" was being amended, so that what the parties were being shown on the PDP ended up being different from what was actually on the ground, and that these amendments also affected the titles issued to the parties, so that the titles issued do not reflect what the parties bought. However, according to the evidence of Gibson, the amendments were not done on the PDP, but on RIM after the PDP was approved, and this was done on 3rd June, 1994. From this date, the original parcel No. 4/154 was replaced with the 3 subdivisions, i.e. 4/182; 4/183 and 4/184. If there was a swapping of the numbers, that should have been apparent on the RIM, and if Monica opted to sell the subdivisions more than 10 years later using the PDP instead of the amended RIM, then she is the one who is to blame for the mistake.

[**48**] The mistake can vitiate the transaction involving Mukabi, but not the one involving Wairimu, who is an innocent purchaser for value, and not party to the transaction between Mukabi and Monica. In this regard this case is distinguishable from **Biator's case** (supra), which was relied upon by the trial Judge. In Biator's case Maraga J (as he then was) found that there was a mistake regarding the transfer of **Nakuru/Olenguruone/Cheptiech/3** (Plot3) to Biator as the parties had intended to transfer **Nakuru/Olenguruone/Cheptiech/500** (Plot 500) and not plot 3.

[**49**] **Maraga, J** ordered rectification of the register and directed Biator to retransfer plot 3 to Estar, and Estar to transfer plot 500 to Biator. Unlike Mukabi's case in which Wairimu was not party to the agreement between Mukabi and Monica, in Biator's case the mistake was mutual between Biator and Estar as the intention of the parties was to transfer plot No 500 to Biator and not plot 3. Secondly, plot 3 and plot 500 were still in the name of Biator and Estar respectively and Estar had sued seeking relief from Biator. Mukabi on the other hand has sued a third party Wairimu, the current registered proprietor who was not party to the agreement between Mukabi and Monica.

[**50**] In addition, Section 80 of Land Registration Act states as follows:

> **"80. Rectification by order of Court –**
>
> **(1) Subject to subsection (2), the court may order the rectification of the register by directing that any registration be cancelled or amended <u>if it is satisfied that any registration was obtained, made or omitted by fraud or mistake</u>.**
>
> **(2) The register shall not be rectified to affect the title of a proprietor, <u>unless the proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by any act, neglect or default</u>."** (Emphasis added)

[**51**] The effect of Section 80 of the Land Registration Act is that even where the court is satisfied that there is a mistake in the register relating to a title to land, the person who is registered as proprietor as per the title is protected to the extent that the court can only order rectification of the register if it is satisfied, that the registered proprietor either had knowledge of the mistake, or caused the mistake, or substantially contributed to it through any act, neglect or default.

[**52**] Assuming for the sake of argument that the registration of Mukabi and Wairimu as registered proprietors of 4/182 and 4/184 was obtained by mistake, the burden was upon Mukabi to establish that Wairimu had knowledge of the mistake, or had caused the mistake, or substantially contributed to it. There was no proof that Wairimu had knowledge of the mistake or that she contributed to the mistake. She bought and took possession of 4/184 which was transferred to her by Monica, and there was nothing on the ground that could have alerted her of Mukabi's interest in the title. To the contrary the mistake was caused by the negligence of Monica while transferring 4/184 in relying on the PDP instead of the RIM map. The learned Judge therefore erred in ordering rectification of the register without the requirements of section 80 of the Land Registration Act being met.

[**53**] We believe we have said enough to lead to the conclusion that although the learned Judge did not err in entertaining the issue of mistake which was not pleaded, the learned Judge erred in finding that there was a mistake in the sale of Block 4/184 to Wairimu, and further erred in holding that the mistake was rectifiable, and ordering Chief Land Registrar to rectify the register to reflect Mukabi as the owner of Nyahururu Municipality Block 4/184, of which Wairimu is the registered owner.

[**54**] Accordingly, we allow this appeal, set aside the judgment of the High Court and dismiss Mukabi's suit with costs. We award costs of the appeal to Wairimu. Those shall be the orders of the Court.

**DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JULY, 2021.**

**W. KARANJA**

**.....**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU (FCIArb.)**

**.....**

**JUDGE OF APPEAL**

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

***Signed***

***DEPUTY REGISTRAR***