IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, M'INOTI & MURGOR, JJA)

CIVIL APPEAL NO. 262 OF 2013

BETWEEN

BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....APPELLANT

AND

JUDY WAMBUI MUIGAI.....RESPONDENT

*(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (**Mbogholi Msagha, J.**) delivered on 15th December, 2010 in* **H.C.C.C. No. 203 of 2006)**

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JUDGMENT OF THE COURT

The dispute in this appeal concerns the property known as **Tassia – Nairobi/ Block 97/16** originally owned by the appellant. On or about 26th February 2002 the appellant offered to sell to the respondent the property under the tenant purchase scheme for the sum of kshs.862,000/-. The respondent duly made good her part of the bargain by paying in total a sum of kshs.875,445/- to the appellant, on the basis of a letter of offer. The additional sum of kshs.13,445/- above the purchase price aforesaid was default interest on the instalments. Thereafter, the respondent took possession of the property and proceeded to erect thereon temporary structures in which she carried on hardware business. As the business grew she incorporated a company, Subati Timber and Hardware Limited in which she and her husband were the sole shareholders. After possession aforesaid, it soon came to the respondent's knowledge that in fact the property had been sold by the appellant to another person, **Nasteho Abdi Mohamed** "*the third party*", way back on 14th March 2001. Upon discovering the presence of the respondent on the property, the third party immediately filed **HCCC No 684 of 2002** against the appellant and the respondent jointly and severally, praying that an injunction be issued against the respondent to bring to a halt her trespass, specific performance of the agreement as against the appellant, and damages for breach of contract and trespass.

However according to the appellant, on or about 20th June 2000, it had offered to sell the property to **Embakasi Islamic Welfare** but the property was later surrendered back to the appellant when the welfare and its members were unable to pay for the same. As a consequence, the appellant in good faith and believing that the property was available for sale then offered the same to the respondent at kshs.862,000/=. The respondent accepted the offer, paid the purchase price and took possession. Upon the respondent taking possession, the third party took out a suit against the appellant and the respondent details of which we have set out elsewhere in this judgment. When the appellant investigated the matter, it

dawned on it that in late 2002, due to lack of computerisation and proper records at the time the property was sold to the respondent, the same had already been sold by the appellant to the third party who had fully paid the purchase price and therefore, the appellant neither owned the property nor did it have capacity to enter into tenant purchase agreement with the respondent. In the circumstances, the appellant, through a letter dated 10th March 2003, cancelled the tenant purchase agreement with the respondent and processed her refund of kshs.875,445/ = but the respondent declined the refund. Instead, the respondent lodged a case against the appellant claiming special damages in the aggregate of kshs 5,042, 575/= for breach of contract detailed as follows:-

> Refund of the purchase price of kshs 875, 445/= together with interest at 15% per annum from 22nd May 2002 until payment in full.
>
> Professional fees: architectural and engineering kshs 430, 000/= Valuation fees kshs 30,000/=
>
> Accounts and audit fees kshs 83, 520 /= Costs of improvements kshs 1,500,000/= and, Loss of bargain kshs 2,124,055 /=

The appellant filed a statement of defence and denied the respondent's assertions, pleading that both parties were subject of a mutual mistake because the property was not available for sale because at the time of the agreement, it had been sold to a third party who had fully paid the purchase price. The appellant further denied that the respondent has suffered any special damages.

In support of her case, the respondent called a total of five witnesses including herself. In her evidence, she reiterated her pleadings. Suffice to add that at the time of her eviction from the suit property by the appellant, its value had risen to kshs.3,000,000/=. As a result, she had suffered loss of bargain and claimed the difference, in addition to the purchase price paid bringing her total claim to kshs.2,124,055/=. She had also caused a valuation to be carried out on the property for which she paid kshs.30,000/= and also had the accounts compiled for her business at a fee of kshs.83,520/=. She also testified as to why the appellant should be held culpable for exemplary damages, contending that it had initially confirmed that she was the rightful owner of the property and that depriving her of the same was deliberate, malicious and insensitive, and calculated to destroy her and or resulted in the destruction of her business.

The respondent thereafter called **Pauline Njeri Mbote**, a Land Economist as a witness. She testified to the value of the property and produced a valuation report as well as payment of the valuation fees. Next was **George Munyui Kigathi,** an auditor who on the instructions of the respondent prepared audited accounts of her business which he tendered in evidence. He was followed by **Benson Wambugu Kimiti**. He is the one who prepared the architectural plans on the instructions of the respondent. The cost of preparing them was put at kshs.430,000/ =.

The appellant called one witness, **Mr Harun Muthua Mwangi**, an accountant by profession and the appellant's branch manager at Nyeri. He testified that the suit was prompted by a mutual mistake of fact. He admitted though that the respondent had paid the full purchase price for the property but that, the mistake was attributable to both parties because the respondent was aware of the mistake before she concluded the payment of the purchase price. Further, that the respondent's development of the property was not authorised by the appellant and the business in the name of Sabuti Timber and Hardware Limited was unknown to the appellant. Upon discovering the mistake, the appellant drew a cheque in favour of the respondent to refund the purchase price but the respondent declined to accept the same.

Having considered the evidence, the written submissions of respective counsel and the law, **Mbogholi Msagha,** J. in a judgment delivered on 15th December 2010, found that the respondent had fully justified her claim for kshs.5,042,575/=, entered judgment in her favour as summarised in the resultant decree. The respondent was also awarded kshs.500,000/= as exemplary damages. As regards interest the judge specifically awarded interest at the rate of 15% per annum on the kshs.875,445/= from the date of filing the suit, while the rest of the damages would attract interest at the rate of 12% per annum similarly, from the date of filing the suit.

The appellant was dissatisfied with the judgment and decree and lodged the appeal now before us, initially on seven grounds. However, at the hearing of the appeal, the appellant abandoned grounds 1, 2 and 3, which challenged the holding by the judge that the appellant was liable in damages to the respondent. Accordingly, the appellant only challenged the quantum of damages awarded in respect of:

- professional fees; architectural engineering kshs.430,000/=,
- Costs of improvements kshs.1,500, 000/=
- Loss of bargain kshs.2,124, 055/= and,
- Exemplary damages of kshs.500, 000/=.

The appeal was canvassed by way of written submissions. The appellant urged that the trial court erred in awarding damages kshs1,500,000/= as value for the improvements of the respondent to the property. This was because the alleged structures required the approval of the City Council under section 30 of the Physical Planning Act which was not obtained and to that extent, the judgment was contrary to law. The appellant relied on the case of **Patel v Singh (2) KLR 585** and submitted that the Court should not be seen to aid an illegality. If further contended the valuation report was fundamentally flawed as it did not have methodology attached to it, comparative basis, or breakdown as to how the amount was arrived at.

On professional fees for architectural and engineering services, it was submitted on behalf of the appellant that the trial court erred in law and fact in awarding damages under this head based on its remoteness and unforseeability. In any event, it was urged, the award was extremely high and based on an entirely erroneous estimation of the damage.

On the question of loss of bargain, it was the appellant's case that the trial court relied heavily on the valuation report tendered in evidence by **Pauline Njeri Mbote** to make the award yet the report did not have any probative value. Further, the opinion of an expert witness is not binding on the court, which must consider it alongside other relevant facts in reaching a final decision and is not bound to accept the evidence of an expert if it finds good reason for not doing so. In this case, it was urged, there was more than sufficient reason not to accept the same on account of methodology and lack of direct comparisons.

Lastly on the issue of exemplary damages, the appellant submitted that the award amounted to double compensation because the respondent was awarded compensatory damages. In addition, the appellant contended that exemplary damages had not been pleaded with sufficient particularity. Finally, it was contended that in any event, exemplary damages are intended to punish a defendant rather than compensate a claimant where the defendant has calculated that the amount to be made from his wrongdoing will probably exceed the damages payable. This was not the case here because the appellant ended up being condemned to pay special damages amounting to more than five times the purchase price of the property it had received.

Opposing the appeal the respondent submitted that contrary to the appellant's submissions that the loss pleaded by the respondent was too remote, the same was the actual loss suffered by the respondent as at the time of her eviction from the property.

On the ground that the learned judge erred in failing to consider at all the appellant's submissions and erroneously finding for the respondent, it was submitted that the complaint was ludicrous because the learned judge extensively considered the appellant's submissions before he awarded the damages as pleaded. That the special damages had been specifically pleaded and proved at the hearing.

On loss of bargain it was submitted that the valuation report tendered by the respondent was the only material or evidence tendered before court upon which to base the value of the property as at the time of the eviction of the respondent. The appellant did not bother to file a valuation report of its own to assist the court. Accordingly the appellant could not be heard to complain about the court's reliance on the respondent's valuation report in arriving at its decision.

The respondent further submitted that the assertion that the trial court erred in awarding the respondent damages that were not supported by any or sufficient evidence was bereft of merit because the respondent

did prove all the damages that she pleaded by way of receipts and valuation reports. On exemplary damages, the respondent submitted that they were merited since the appellant had no plausible reason to terminate the tenant purchase agreement or why it transferred and registered the property in the name of third party on 29th August 2003 despite its averment in its statement of defence in HCCC 684 of 2002 that the respondent was the bona fide purchaser. The appellant's conduct, it was submitted, was full of malice and highhanded and the appellant was unapologetic in its subsequent actions and behaviour.

This is a first appeal which is limited to quantum of damages. As stated in the case of **Gicheru vs Morton & Another** (**2005) KLR 333;**

> ***"In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damages to which the appellant was entitled to".***

Was the trial court right in awarding the respondent damages under the four heads already stated elsewhere in this judgment? Save perhaps for one head, we do not think that the trial court can be faulted with regard to the other awards. The trial court was alive to the fact that there was a breach of contract by the appellant, which it admitted but advanced mutual mistake as its basis for not honouring the terms of the agreement. A mutual mistake as correctly observed by the trial court can only be assigned to the parties to an agreement if they both contributed to the state of affairs that ensued thereafter as to make the honouring of the agreement well nigh impossible. This was not the case here. The respondent had no access to the records of the appellant. How could she have known that the property had already been sold to a third party by the time she executed the agreement? The appellant was in possession of the information that it had already sold the property by the time it was enticing the respondent to enter into the agreement. Indeed the appellant's only witness, **Harun Muthua Mwangi** conceded to the mistake but attributed it to the haphazard and poor manner the appellant's records were kept. Nowhere does this witness blame the respondent for having known that the property had already been sold to someone else and still went ahead to enter into the agreement. That being the case we cannot fault the trial court for holding that there was no mutual mistake because the respondent played no role whatsoever in what transpired.

Another piece of evidence that discredits the appellant's reliance on the issue of mutual mistake is its own defence filed in HCCC 684 of 2002. In the said defence the appellant claimed that there had never been an agreement between itself and the third party which fact was reiterated in the testimony of the appellant's sole witness in the proceedings leading to this appeal. It is the height of dishonesty for the appellant to hold two contradictory positions over the same matter and on the same set of facts. Small wonder that the trial court did not find any merit in that line of argument, and we agree with the court.

The damages were specifically pleaded and proved at the hearing by way of receipts and valuation report which the appellant never objected to. The appellant also did not endeavour to procure and present to court its valuation report to counter that of the respondent. Thus the belated criticism of the valuation report by the appellant on grounds of lack of any methodology or comparative analysis, among others, is neither here nor there. It does not at all advance the appellant's case. Those concerns should have been raised and canvassed before the trial court. They were not.

The appellant laments that the awards that were made were too remote to the subject matter and indeed not within the contemplation of the parties at the time of the execution of the agreement. Is that the case really? Remoteness of damages was the subject of extensive discourse in the case of **Hadley & Another vs Baxendale & Others [1843-60] ALL ER 461** where it was observed that;

> ***"... Now we think the proper rule in such a case as the present is this:.....Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such***

breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.....Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said that other cases such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule"

As correctly submitted by the respondent, going by the above extract, the damages to be awarded in matters where a vendor has refused to make a good title to the purchaser; as in this case, are the actual damages suffered by the purchaser. In our view, the damages awarded, save for exemplary damages were losses incurred by the respondent and which were foreseeable considering the terms of the agreement, the fulfilment of part of her bargain, the assurances given by the appellant that she was the bona fide owner of the property and given the terms of the agreement that the respondent was at liberty to utilize the property either as a residence or commercial. This holding also settles the appellant's submissions regarding the unlawful nature or otherwise of the business carried on the property by the respondent. The issues of the structures put up on the property by the respondent being illegal and contrary to the physical planning act, the nature of the improvements undertaken on the property by the respondent and the authenticity of the respondent's business permits were never part of the appellant's defence or attack. They were only raised in the appellant's submissions and in our view, the trial court was right in ignoring them.

Our point of departure with the trial court is however to do with exemplary damages. It is our understanding that exemplary damages are damages awarded to punish a defendant and seek retribution, as well as being aimed at deterring the defendant from repeating the outrageously wrongful conduct and others from acting similarly, and to convey the disapproval of the court, mostly in tort and constitutional cases. (See "**The Law Commission, Item 2 of the sixth programme of Law Reform, Aggravated, Exemplary and Restitutionary Damages, page 53.)**

Such damages are in our view called for in situations of oppressive, arbitrary or unconstitutional actions by servants of the Government; or wrongful conduct which has been calculated by the defendant to make a profit for himself which may well exceed the compensation payable to the plaintiff; and finally, where such an award is expressly authorised by the statute. See the case of **John Vs MG Ltd (1966) 1 ALL E.R. 35** where the court held that exemplary damages go beyond compensation and are meant to punish the defendant. They will be ordered against a defendant who acts out of improper motive or where he is actuated by malice. This court in the case of **Ken Omondi Odondi & 2 others v James Okoth Omburah T/A Okoth Omburah & Company Advocates (2013) eKLR** adopted a similar approach. In the circumstances of this case, none of the above is easily discernible. Thus in our view the trial court acted on wrong principle in making the award.

Having therefore reviewed the whole case that was before the trial court on the question of quantum of damages and all the relevant factors that go into the award of damages, we are satisfied that the appellant's complaints with regard to the other heads of awards save for exemplary damages are bereft of merit. The award of exemplary damages was wholly unjustified and thus we are entitled to interfere with it. To that end, we set aside the award of kshs.500,000/= as exemplary damages and the appeal succeeds to that very limited extent. The appellant shall have ¼ of the costs of this appeal. The respondent on the other hand shall have ¾ of the costs of this appeal as well as in the High Court.

For avoidance of doubt, interest on damages and costs in the trial court shall be from the date of judgment.

Dated and delivered at Nairobi this 29th day of September, 2017.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

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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