IN THE COURT OF APPEAL

AT NYERI

(SITTING IN NAKURU)

CIVIL APPEAL NO. 38 OF 2012

(CORAM: WAKI, NAMBUYE, & KIAGE, JJA)

BETWEEN

KIPLANGAT ARAP BIATOR..........................…………. APPELLANT

AND

ESTHER TALA CHEYEGON..........………...……...……….. RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nakuru (Maraga, J.) dated on 25th day of June, 2008

in

H. C. C. C. No. 70 OF 2004)

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JUDGMENT OF THE COURT

1. The main factual and legal issue we are called upon to decide in this appeal is whether there was a mutual mistake made by the parties in a land purchase transaction concluded some 18 years ago, and if so, the consequences thereof. The purchaser was **Kiplangat arap Biator** (Biator) who is the appellant before us, represented by learned counsel **Mr. Steve Biko Osur,** instructed by M/S Odhiambo & Odhiambo Advocates. The seller was **Esther Tala Chepyegon** (Esther), the respondent herein who was represented by learned counsel **Mr. Gordon Ogola**, instructed by M/S Gordon Ogola & Associates. The two properties involved in the sale transaction are **Nakuru/Olenguruone/Cheptiech/3** (Plot 3) and **Nakuru/Olenguruone/Cheptiech/500** (Plot 500). So how did the issue of mistake arise?

2. According to the green card, other documents and testimony on record, plot 3 measuring 7 Hectares (about 17.5 Acres) was registered in the name of **Chesiegon Cheptoo** since 1978. Cheptoo was the husband of Esther and they had taken possession of the land and made some developments since 1970. Plot 500, measuring 9.2 Hectares (about 23 Acres) was similarly owned by Cheptoo but was undeveloped. Both were near each other, but in relation to each other, plot 500 was at the ***'lower end'***.

3. It is not clear when Cheptoo died, but during his lifetime he had taken a bank loan in 1983 which had not been repaid by the time of his demise. As security for the loan a charge was registered on plot 3. In 1998, the bank threatened to sell the plot to recover the outstanding loan but, according to Esther, who

had taken up the administration of the estate, she requested the bank for time to pay and she decided to sell the undeveloped plot to save the developed one. She informed the rest of the family and the information went out that there was land for sale in Olenguruone. That is how Biator came to know since he had also passed word around in Olenguruone that he was looking for land after selling his own in Litein.

4. Biator met a brother of the deceased, **Wesley Cheptoo** (DW3) through a Kisii lady who knew Biator was looking for land. Wesley lives 500 meters away from plot 500 and he testified that he took Biator to the site and showed him this piece at the lower end which was for sale. Wesley did not know the parcel number but the parcel was vacant and undeveloped. According to Wesley, Biator went round the piece of land and liked it. Another witness **Edward Kiloo Rotich** (DW2) confirmed that he also took Biator round the same parcel of land which had no houses at all. Earlier, another intending buyer and neighbor, **Leonard Ruto** (DW5) confirmed that he was taken to the plot at the lower end which was for sale but he was unable to raise the purchase price. Later he saw Biator on the land and learned that he had bought it.

5. After being satisfied with the plot, Biator asked Wesley to arrange for Esther to be called from Baringo where she was at the time, to conclude the sale. Esther was illiterate and did not know the plot numbers. She did not have the Titles either. She was taken before a lawyer in Nakuru where she signed some documents after agreeing to the terms which ensured that the bank loan was paid in full and her husband's plot was saved from auction. According to her, Biator took possession of the plot soon after and commenced development, building a house, toilet, fencing , digging a borehole and keeping cattle thereon. According to **Isaac Chirchir** (DW4), a son in law of Esther who was residing in plot 3 with his wife in February 1999, Biator found him there and praised Esther for selling him good land which goes up to the river. Biator expressed an intention to buy a cow from Esther but was not ready with the cash. He had already taken possession of the land he had bought at the lower end and built a house, kitchen, latrine, dug a well, paddocked and planted trees. Six months later, the people in the area started making applications for electricity connection and Biator was one of them. When the survey was done he was told that the plot he was occupying was not plot 3 and that is when he started harassing Esther.

6. He sued Esther before the Nakuru Land Disputes Tribunal in November 1999 claiming ownership and possession of plot 3 but the tribunal found that the intention of Esther was to sell plot 500 not plot 3 which was in her possession, and Biator was aware of this. Biator appealed the decision to the Rift Valley Provincial Land Disputes Appeals Committee which on March 2000 reversed the decision and declared plot 3 belonged to Biator. There were other skirmishes thereafter before Biator filed ***HCCC No. 70 of 2004*** seeking the eviction of Esther as well as damages for trespass, which suit gave rise to the decision the subject matter of this appeal. Esther in her defence to the suit pleaded that the parties were not *ad idem* as to the subject matter of the agreement, since both knew the parcel of land intended for sale but the sale agreement referred to a different parcel.

7. Biator's story was, of course, totally different. Yes, he had sold his land in Litein and was looking for land to buy in Olenguruone. And yes, he met Wesley, the brother of the deceased owner of the land but it was not Wesley who showed him the land but Esther. Esther told him it was plot 3 measuring 17 Acres. It was fenced with barbed wire and had a small house with no one living there. He agreed with her on the price of 1.2 million and she took him before a lawyer in Nakuru where they signed a sale agreement on 30th October 1998 and he paid the whole purchase price. From the lawyer's office they went to the lands office where they signed land control board application forms and transfer forms. The consent was subsequently given and he obtained his registered title in November 1998, but when he went to take possession of the plot, Esther refused and showed him another plot which he had not been shown before. He refused and went to rent a temporary residence in Cheptuech trading centre as he waited for the Land Disputes Tribunal to determine his complaint. He denied having taken possession or developing plot 500 at any time as it was never shown to him.

8. In cross examination, however, Biator admitted that Wesley showed him the land first but insisted it was not plot 500. He denied having seen any of the other witnesses who testified for Esther and further denied making any application for electricity supply. He also admitted that he took possession of plot 500 and built a small house but did nothing else, explaining that he did so when it became expensive to stay at

the trading centre.

9. His only other witness was the lawyer who drew up the sale agreement **Sally Njoki Mbeche** (PW1). She remembered drawing and witnessing the execution of a sale agreement between Esther, who had letters of administration for the estate of the registered owner of plot 3, and Biator, the purchaser. The sale price was agreed at 1.2 million and the whole amount was paid by banker's cheques in the name of the deceased to clear a bank loan. She was acting for Biator. The agreement was neither stamped nor registered and she did not see any map of the area. The parties then went away only for Biator to return to her in 1999 to tell her that he had been refused possession of the land he bought. The lawyer wrote a few letters to Esther but did not go further. According to the lawyer, there was no misdescription of the land the subject matter of the agreement.

10. The High Court, **Maraga J.** (now the Chief Justice) examined and evaluated the record before him and held, firstly, that the two land Tribunals which purported to hear and determine the issue of ownership of the plots had no jurisdiction to do so and the decisions were therefore null and void and of no legal effect. That finding has not been challenged in the appeal before us and it is therefore a non issue.

11. Secondly, the court assessed the credibility of Biator and was totally unimpressed by him as a witness of truth. We may quote the learned Judge verbatim:

> ***"The plaintiff did not impress me as a truthful witness. In his evidence in chief he said that he was never shown the lower piece of land (Parcel No. 500) and that he has never taken possession of or developed it. In cross-examination, however, he was forced, after hesitating, to concede that he took possession of it claiming that that was because it had become too expensive to stay at the Trading Center. Even then he was adamant that he has only built a small house on that land when the rest of the evidence including that adduced before the Olenguruone Land Disputes Tribunal was that he has paddocked Parcel No. 500, planted trees and even dug a well on it. Those are not acts of somebody taking temporary shelter on a piece of land as the plaintiff wants me to believe.***
>
> ***The plaintiff was also inconsistent in his evidence. Before the Land Disputes Tribunal he said that he was first shown Parcel No. 500 and actually surveyed it twice but he did not like it. Instead he preferred the suit piece of land. Later the defendant sent emissaries to him at his home in Bureti that she had decided to sell to him the suit piece of land and that it was after that that he entered into the agreement with her. Before that Tribunal his son, Livingstone K. Bore, said more or less the same thing. That evidence did not find mention in the plaintiff's evidence in this court. Whereas in this court the plaintiff said he never even heard of applications for electricity, before the Tribunal and even in this court that evidence featured prominently".***

12. On the other hand, the learned Judge was positively impressed by the evidence of Esther and her witnesses, stating thus:-

> "***The defence evidence on the other hand is consistent right from the Land Disputes Tribunal through to this court that it was the defendant's lower piece of land (Parcel No. 500) that was for sale. The defendant herself said that and her witnesses DW2, DW3 and especially DW5 who was interested in buying it, corroborated that evidence and were consistent on that fact. Those witnesses impressed me as honest people".***

13. Finally, the court upon full evaluation of the evidence on record and after consideration of the relevant law made the following finding:-

> "***It is clear from the evidence on record that the discussions leading to the agreement never mentioned the parcel number of the price of land that was the subject matter of the sale. The parties knew it simply as the lower piece of land. The defendant herself said she did not know the parcel numbers of her two pieces of land in Olenguruone as all dealing relating to them were***

> ***previously handled by her late husband. Having carefully considered the evidence in this case I am satisfied that the subject matter of the contract between the parties was Parcel No. 500. The plaintiff could not have taken possession of Parcel No. 500 and carried out extensive developments like digging a well and planting trees if he had not bought it and was only a sojourner on it. Consequently I find that when the parties went to have the agreement drawn, by a common mistake, they made the suit piece of land the subject matter of the agreement instead of Parcel No. 500. The mistake was therefore made in the drawing and not in the making of the agreement"***.

And with that, Biator's case was dismissed and an order for rectification made. Biator would transfer plot 3 to Esther and Esther would in turn transfer plot 500 to Biator.

14. Those are the findings and orders that gave rise to the appeal before us listing 7 grounds which **Mr. Biko** argued in two tranches. On the first broad ground he submitted that the learned Judge ignored hallowed principles of contract and forced the parties into a contract without ascertaining their intentions. In his view, the sale agreement, which was drawn up by a lawyer, was clear on the subject matter as plot 3 measuring 7 Hectares which was the only plot available for sale. According to counsel, plot 500 was not available for any transaction as no one knew its measurement or price. It only came to be mentioned at the tail end when possession of the purchased plot 3 was being taken. It was also clear from the evidence, counsel contended, that the seller was not the one who identified the plot to the purchaser. She was either negligent or was coming to a court of equity with unclean hands. In his submission, Biator's title could only be cancelled on the basis of fraud or mistake which he was part of but both were non-existent in this case. Mr. Biko cited several cases in support of that submission including: ***Livingstone Kunini Ntutu v Minister for lands & 4 Others[2014]eKLR***; ***Elijah Makeri Nyangwaera v. Stephen Mungai Njuguna & Another [2013] eKLR***; ***Central Bank of Kenya Ltd v. Trust Bank Ltd & 4 Others C.A No. 215/1996 (UR)*** and ***Evans Otieno Nyakwarna v. Cleophas Bwana Ongaro [2015]eKLR.***

15. On the second ground, counsel submitted that the learned Judge ignored the pleadings and decided the case on his own construction of the case instead of evaluating the evidence on record with impartiality. The parties had themselves agreed on the same terms on the same subject matter and that was all that was necessary for a binding and enforceable contract. Counsel cited in support the case of ***Solle v. Butcher [1949]2 All ER 1107*** which was quoted with approval in the case of ***Tropical Food Products International Ltd v. Eastern & Southern African Trade and Development Bank[2007]eKLR.***

16. Opposing the appeal, **Mr. Ogola** submitted that the offer and acceptance which were essential to the contract were inferred from the evidence on record because there was no correspondence between the parties. It was on record, counsel observed, that Biator himself admitted having taken possession and developed plot 500 despite his feeble attempt to deny it. The plot had all along been described as the one at the lower end. His case was destroyed by lack of candour on his part which the learned Judge was entitled to consider. According to counsel, the only reason why Biator realized the property he had occupied was not plot 3 was when he applied for electricity connection. Before then, the parties were *ad idem* that Esther was selling plot 500 to salvage plot 3 which was mortgaged and was in danger of alienation by the bank. That is why Biator issued banker's cheques for direct payments to the account of the deceased. He cited several decided cases to show that rectifications have always been made on account of mistakes including: ***Sapra Studio v. Kenya National Properties Ltd [1985]eKLR*** and ***Nebart Njeru Munyi v. Nicholas Muriithi Zakaria [2015]eKLR.***

17. As the first appellate Court, we have *reconsidered the evidence in some detail and re evaluated it in order to draw our own conclusions, but always bearing in mind that we neither saw nor heard the witnesses and should make due allowance in that respect.* See ***Selle v. Associated Motor Boat Company [1968] E.A. 123*** at ***p.126***. It was also stated in the case of **Mwangi vs. Wambugu [1984] KLR page 453** that:

> ***"A court of Appeal will not normally interfere with a finding of 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 principles in reaching the finding; and an appellate***

court is not bound to accept a 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."

18. With those principles in mind, we revert to the issue posed at the opening paragraph of this judgment : Mistake. The trial court relied for guidance on Paragraph 1670 of ***26 Halsbury's Laws of England, 3rd Edition*** where the law on the subject is stated thus:-

"Where there exists a real common intention between the two parties to a transaction, but mistake occurs in the expression of that intention, the court may correct the mistake in order to give effect to the real intention. To justify the court in so doing, it must appear that there has been a mistake common to both the contracting parties, and that the agreement purports to have been expressed in a deed or instrument in a manner contrary to the intention of both".

19. In the ***Tropical Food Products International Ltd*** case (supra), this Court had occasion to consider the same issue and we reproduce *in extenso* what the Court stated:-

"Mistake in its wider sense is of course a frequently used and abused English word. A graphic illustration was given in *Moynes v Cooper [1956] 1 All ER. 450, at page 453*, thus:

"'A' shoots at a pigeon and kills a crow 'by mistake': 'A' shoots at a crow believing it to be a pigeon and kills it 'by mistake': 'A', not intending to fire his gun, lets the gun off 'by mistake'. In the first case, the mistake was simply a bad shot, in the second, a failure to distinguish a crow from a pigeon, and in the third, gross carelessness."

Nevertheless, "mistake", in its legal sense, both in the common law and equity has availed relief to parties invoking it, either to declare a contract void or voidable. It is unnecessary to go into detailed learning about this subject as it has been amplified in numerous texts and court decisions over the centuries. Suffice it to cite the passage by Lord Denning, which was relied on by the respondent, in Solle v Butcher [1949] 2 All ER 1107 at page 1119:

"Let me first consider mistakes which render a contract a nullity. All previous decisions on this subject must now be read in the light of Bell v. Lever Bros., Ltd. (14). The correct interpretation of that case, to my mind, is that once a contract has been made, that is to say, once the parties, whatever their inmost states of mind, have to all outward appearances agreed with sufficient certainty 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 condition expressed or implied in it, is set aside or for fraud, or on some equitable ground. Neither party can rely on his own mistake to say it was a nullity from the beginning, no matter that it was a mistake which to his mind was fundamental, and no matter that the other party knew he was under a mistake. A fortiori if the other did not know of the mistake, but shared it..................................Let me next consider mistakes which render a contract voidable, that is, liable to be set aside on some equitable ground. While presupposing that a contract was good at law, or at any rate not void, the court of equity would often relieve a party from the consequences of his own mistake, so long as it could do so without injustice to third parties. The court had power to set aside the contract whenever it was of opinion that it was unconscientious for the other party to avail himself of the legal advantage which he had obtained. Torrance v. Bolton (19). This branch of equity has shown a progressive development. It is now clear that a contract will be set aside if the mistake of the one party has been induced by a material misrepresentation of the other, even though it was not fraudulent or fundamental, or if one party knowing that the other is mistaken about the terms of an offer, or the identity of the person by whom it is made, lets him remain under his delusion and conclude a contract on the mistaken terms instead of pointing out the mistake..A contract is also liable in equity to be set aside if the parties were under common misapprehension either as to facts or as to their relative and respective rights, provided that the misapprehension was fundamental and that the party

seeking to set it aside was not himself at fault."

> **So that, equity will come to the aid of a party pleading mistake without distinguishing, as the common law did, whether it was one of fact or law, or that it was common, mutual or unilateral."**

20. In this case, the evidence tendered by Esther and her witnesses was consistent, and was readily believed by the trial court, that it was the plot at the ***'lower end'*** which was for sale. Neither Esther nor her witnesses had any knowledge about the number of the plot at the time but it turned out to be plot 500. It was the same plot Biator was shown and taken round and he was aware that it was the plot he was buying. His denials that he was ever shown the plot or that ever settled thereon was justifiably dismissed as dishonest. He took possession of, and developed, the plot he knew he had bought.

21. The lawyer involved in the transaction (PW1) appears to have played the minimal role of drawing up the agreement and witnessing the signatures thereon. Nothing more. There seems to have been no due diligence carried out to identify the subject matter of the agreement with its physical situation on the ground or map. The lawyer was aware that plot 3 was in danger of being sold by the bank and that is why the agreement she drew up provided for direct payments to the bank to liquidate the indebtedness. It would have made little sense for Esther to save the family plot from the jaws of the bank only to give it away to someone else. The consistent logic was that plot 500 was being sold in order to save plot 3, and we accept it. A mistake occurred in the process of drawing up the agreement and that is why the equitable remedy of rectification is appropriate in this matter.

22. We find no error in principle in the manner the evidence was evaluated by the learned trial Judge and we find no merit in this appeal. We order that it be and is hereby dismissed with costs.

Dated and delivered at Nakuru this 17th day of November, 2016.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

……………........................

JUDGE OF APPEAL

P. O. KIAGE

…………..........................

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR