



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

Civil Suit 84 of 2005

PENAZZI LIVIO.....PLAINTIFF

VERSUS

**MARIO CIBRA ROMANINI
LUGHANJE K.
KENYA FRIENDS MALINDI LIMITED
MALINDI FLAMINGO LIMITEDDEFENDANTS**

J U D G M E N T

Penazzi Livio (the plaintiff) filed this claim against Mario Cibrario Romanini, (1st defendant) Lughanje K. (2nd defendant), Kenya Friends Malindi Ltd (3rd defendant) and Malindi Flamingo Ltd (4th defendant) seeking;

- (a) A declaration that the Title Deeds issued to the 3rd and 4th defendants in respect of Title No. Kilifi/Kivulini Block 1/15, Title No. Kilifi/Kivulini Block 1/30, and Title Kilifi/Kivulini Block 1/31 are null and void.
- (b) An order directed at the Chief Land Registrar, Kilifi District for the cancellation of Title Deeds held by the 3rd and 4th defendant in respect of Title No. Kilifi/Kivulini Block 1/15, No. Kilifi/Kivulini Block 1/30 and Title No. Kilifi/Kivulini Block1/31.
- (c) A declaration that the 3rd and 4th Defendants have no title or colour of right or interest in the plaintiff's parcels of land known as Title No. Kilifi/Kivulini Block 1/15, Title No. Kilifi/Kivulini Block 1/30 and Title No. Kilifi/Kivulini block 1/31.
- (d) A permanent injunction to restraint the defendants, by themselves, their servants and/or agents from interfering with the above mentioned parcels.
- (e) General damages for trespass.

The background to these prayers is that the plaintiff was the registered owner of the aforementioned parcel of land and never conferred any power of attorney to the first or second defendants in relation to the said parcels of land and specifically in relation to sale or disposal thereof.

On or about February 2002, the first and second defendants, knowing very well that there was no such power of attorney purported to fraudulently misrepresent the existence of such power and in exercise thereof purported to sell and transfer the parcels to the third defendant.

In the alternative and on a with-prejudice basis, it is pleaded that the first and second defendants fraudulently and illegally purported to sign the transfers of lease of the parcels of land representing the signatories appended to the said transfers of lease to be that of the plaintiff. It is the plaintiff's contention that he did not sign the said transfers of lease as he was not in Kenya. Further that in perpetuation of the said fraud, 1st and 2nd defendants incorporated the third defendant for purposes of transferring the parcels of land to the 3rd defendant, and on February 2002 the first and second defendants did actually fraudulently transfer the parcels of land to the third defendant.

Thereafter the second defendant incorporated the fourth defendant on or about September 2003.

The particulars of fraud and misrepresentation are pleaded as:-

- (a) Plaintiff never granted 1st and 2nd defendant a power of attorney in relation to the said parcels.
- (b) The transfers of lease signed by the first defendant in collusion with the second defendant, should have indicated the registration number of the said power of attorney.
- (c) The second defendant, in the verification clause of the transfers of lease, in relation to the transfer of the parcels of land to the third defendant, states that the plaintiff appeared in person before him and executed the said transfers of lease yet at the time, plaintiff was not in Kenya.
- (d) The third defendant is a limited liability company incorporated by the second defendant with the first defendant at all material times as a shareholder and director thereof.
- (e) The fourth defendant is a limited liability also incorporated by the second defendant with the first and third defendants holding shares in its capital.

Owing to this fraud by the defendants, the plaintiff's proprietary rights over the parcels have been interfered with, and the plaintiff has been denied possession and use of them and has suffered damage.

The defendants deny liability – 1st, 3rd and 4th defendant in their joint statement of defence deny that plaintiff is the owner entitled to possession of the named parcels of land or that he has ever had use of the suit premises.

They also deny being trespassers on the suit property and insist that plaintiff issued a power of attorney to first defendant authorizing him to deal with the suit premises in any manner of his choice.

The alleged fraud is also denied further that 1st defendant relied on the professional advice of the 2nd defendant with regard to the power of attorney and the preparation, execution and registration of the transfer of those parcels of land and so any loss or damage which may be precipitated by the completion of the said transactions must be met by the second defendant – a notice to second defendant to contribute or indemnify the first, third and fourth defendants was issued under Order 1, Rule 21(a) and 2 of the Civil Procedure Rules.

In his statement of defence, the second defendant maintains that plaintiff did donate a power of attorney to the first defendant in respect of the said parcels of land and specifically power and authority to sell or dispose of the said parcels of land.

He denies the alleged fraud or misrepresentation and maintains that plaintiff is not entitled to the prayers sought.

On a without prejudice basis, it is pleaded that he simply acted as an advocate for the parties to attest the execution of the

power of attorney donated to the first defendant and also to attest the execution of the transfers of the parcels of land by the donee, the first defendant, to the third defendant and ultimately to the fourth defendant.

It is also pleaded on a without-prejudice basis that if there was any misrepresentation to him, by the first, third and fourth defendants with regard to the execution of the Power of Attorney instrument, and the transfer forms, then he is not personally liable and is entitled to contribution and/or indemnity from the first, third and fourth defendants in respect of the plaintiff's claim against him. He prays that plaintiff's suit be dismissed with costs.

At the hearing, Livio Penazzi (PW1) told this court that he had known the first defendant for twenty two (22) years when they lived and worked in Italy.

In the year 2001, Livio and his family decided to sell the villas which they had in Malindi and give the proceeds to a charitable organization in Kenya. The villas were in Kivulini area, South of Malindi. So Livio asked Mario (1st defendant) whether he would be interested in buying the villas – first defendant did not have an answer, by then plaintiff had acquired the villas in 1990 and he produced the sale agreement dated 20-4-91.

Upon buying the property, he was not given the title documents immediately. He and Mario (first defendant) had jointly bought property i.e No. 1/31/

Since plaintiff was only using one villa when he came for holidays, first defendant approached him and requested to use the villas to create a tourist resort. The pair agreed that first defendant could use all the four villas (including the one plaintiff was using, whenever he was not in Kenya).

First defendant was to maintain the villas and also sell the holidays abroad.

So plaintiff gave first defendant the villas in 1996 and in 1998 – defendant asked plaintiff to sign a letter as he needed to show that he was running the whole complex of villas so as to get a licence to operate as a tourist resort. That is when plaintiff gave him a power of attorney and it is plaintiff's evidence that he clarified to first defendant that the power was not for selling the property without his consent, but just so that he could obtain a licence to operate the resort. Two years later, plaintiff asked first defendant about the power of attorney, but he said it was destroyed. When he asked the first defendant about the titles to the property, first defendant told him the villas belonged to another firm.

He denies selling the villas to anyone and he does not know Kenya Friends Malindi.

On being shown transfer documents which indicate that he appeared before Mr. Lughanje advocate on 22- 2- 02 and signed the transfer documents, he denies and produced his passport No. 773027 which showed that on 22-2-02 he was in Italy.

He also does not know Malindi Flamingo Ltd nor did he transfer any property from Kenya Friends Malindi to Malindi Flamingo Ltd and he never received any payment for those transactions. It was his testimony that he had only met Mr. Lughanje once, and even then it was not for purposes of doing business at all. He disowned a letter dated 28th March 2002 written to the Lands Officer by Mr. Lughanje advocate, purporting that he was acting for the plaintiff saying he never instructed Mr. Lughanje nor did he pay him any fees.

So when he realized all the mess that seemed to surround his property, and not being able to trace Mario (1st defendant) in Kenya, the plaintiff reported the matter to police and recorded a statement which has been produced as exhibit.

Mario Cibrario's (DW3) evidence is that they (i.e he and plaintiff) liked a portion of land in Kivulini, which they got at a very good price and the owner of that land constructed for them a house. They made a private agreement for five (5) portions of land – two for him, two for Pennazi and one jointly.

Four houses were built, but one portion of land remained without a house – each one of them had two houses constructed (one on each portion) and they were intended for their private holiday.

At this time neither plaintiff nor first defendant had a title in their name – the same being in the name of Kivulini. There followed a spell of insecurity in Malindi, and the pair did not take any active role in the property and the houses got really run down.

Plaintiff had no interest in the property in Kenya, so first defendant had a set off payment deal with the plaintiff in exchange of the parcels owner by plaintiff. The plaintiff gave first defendant a power of attorney in 1996, which authorized him to do all he could on his behalf i.e to effect all the transactions regarding the transfer of his titles on the parcel. First defendant explained that he needed the power of attorney because selling land which was not his would require that. It was his evidence that plaintiff signed the power of attorney before a Notary who drew and witnessed it, and as far as he is concerned the same was not revoked nor has he been notified of any revocation. He further explained, that he needed the power of attorney so as to transfer the land to his company and construct a hotel. So he went to Lughanje Advocate and explained to him that the parcels of land (both in his name and in the name of plaintiff) were to be sold to a company in Kenya where he (first defendant) was a shareholder and there was 25% of the shares or plaintiff's managers in Italy, (i.e Giampiero Manzire and Roberto Tedesco.) So the company first defendant formed in Kenya became known as Kenya Friends Malindi Ltd and Tedesco and Giampiero became shareholders. On 21st May 1996, the Title No. Kilifi- Kivulini Block1/15 was issued in the name of Pennazzi Livio. On the same date, Title for Parcel 1/31 was issued in their joint names.

Title No. 1/30 was issued on 22-5-96 to Cibrario Mario (1st defendant). The previous owner of the property was shown as Kivulini Village Beach Hotel Ltd.

So when he went to Lughanje Advocate and expressed the desire to transfer the parcels into the name of Kenya Friends, he was advised to submit a copy of his passport and that of Penazzi Livio plus the power of attorney.

He thereafter went before Mr. Lughanje and signed the transfer documents – appending his signature in two parcels – one for himself and one on behalf of Penazzi and thereafter he was issued with certificates of lease in the names of Kenya Friends Malindi Ltd.

First defendant was subsequently advised by an accountant that he needed to separate the property and administration, by having a holding company, so he went back to Mr. Lughanje and made a transfer to Flamingo Malindi Ltd, and the Titles were transferred to Flamingo Malindi Ltd. – and the transfers showed the same was being transferred from Kenya Friends Ltd. to Malindi Flamingo Ltd.

It is his contention that when he had discussed about the property with Penazzi in 1998, they were in a state of disrepair, the walls were cracked and grass overgrown, yet currently the same is a small but very nice hotel with staff houses, restaurant and a reception – it is not the same as when Penazzi gave it to him.

The second defendant, Henry Kazungu Lughanje (DW1) is an advocate of the High Court of Kenya practicing in Malindi. It was his evidence that sometime in April 2001, Penazzi Livio and Mario Cibrario went to consult him in his office as they wanted to transfer some property. Penazzi said that if he did not come to Kenya in December of that year, then he would send to Mr. Lughanje a power of attorney so as to do the transfers. In December 2001, Mario (the first defendant) went to Mr. Lughanje's office with a power of attorney which had been prepared in Italy. Mario also had the original Title documents for the property. The power of attorney was in Italian, and had to be translated it showed the donor as Penazzi Livio who was donating the power to Cibrario Mario of Malindi to enable him effect all transactions of transfer regarding his property. The power of attorney was registered on 20-12-09 – it was produced in court along with the English translation. Mr. Lughanje then compiled the transfer of deeds and presented the forms to the Lands Office – there being three properties which were being transferred. He confirms that Cibrario Mario signed the documents on the strength of the power of attorney and he witnessed the same. He then applied for and obtained consent to transfer the leases – still on the strength of the power of attorney and subsequently presented them for registration.

It was Mr. Lughanje's evidence that he had no reason to cast doubt on the power of attorney because Penazzi and Livio had earlier on been to his office and told him of their intentions.

He subsequently facilitated or processed the transfer of the leases from Kenya Friends Malindi Ltd to Malindi Flamingo Ltd and the directors of Malindi Flamingo i.e Balozi Charo and Cibrario Mario signed the transfer in his presence and he attested to their signatures, then he presented the documents for registration.

Later on he was summoned by CID Kilifi and shown the documents which he confirmed as having signed. He denies misrepresenting the power of attorney to the District Lands Registrar and insists there was no fraud, it was a normal transaction.

It is not in dispute that plaintiff bought two plots and constructed two villas on them whilst the third plot was jointly owned by himself and the first defendant. It is also not in dispute that first defendant had expressed an interest in plaintiff's property as he wished to operate a Tourist Resort.

It is also not in dispute that the plaintiff had donated a power of attorney to the first defendant. What is in dispute is what this power of attorney authorized the first defendant to do.

Secondly whether the actions taken by first defendant and Mr. Lughanje, and the subsequent transfers to third and fourth defendants were fraudulent and a misrepresentation of the plaintiff's intentions? Did Mr. Lughanje make a misrepresentation when he purported to act for the plaintiff in the transfer transactions?

On cross-examination plaintiff stated that first defendant was only to manage the villas for his (first defendant) own use because the Resort belonged to him – he was to take care of them, commercialize them and take the profit, whilst plaintiff would only use them when on holiday in Kenya – they were dealing as friends and he trusted the first defendant.

On being shown the power of attorney which first defendant relied on, plaintiff confirmed it was the one which he had given to the first defendant and also confirmed that the English translation was correct and that he had not revoked it nor

did he write to Mario to cancel the powers of attorney.

What does the document state?

The relevant portion reads as follows:

“The undersigned Penazzi Livio ...designates and appoints as his special attorney Mr. Cibrario Romanini Mario ...so that on his behalf and in his stead as well as on his own behalf, he can effect all the transactions regarding the transfer of the Titles of his property (the so called Title Deeds)...”

However, according to plaintiff – the authority was really not intended for transactions such as transfer of his property and he is horrified that he now does not own the property in Malindi and he had never authorized for their disposal and according to him it was all fraud and misrepresentation. All this, despite his own confirmation in court that he was shown the English translation of the power of attorney and that it was correct. On further cross-examination plaintiff stated:

“According to the document, I donated the power to effect transactions regarding the transfer of titles of property. However our understanding was that he was not to sell. I signed the document voluntarily but now I realize it was under the wrong impression – at that time, I trusted Mario as a friend.”

Plaintiff also confirmed to this court that the power of attorney referred to power to transfer title and not power to obtain licences or to run a tourist resort.

He also confirms that at the time of the transfer of lease was signed, the power of attorney was still valid.

Upon being re-examined by his counsel, plaintiff says that what he understood by the word “transfer” was that it was to show the authority that the donee had power and control of the property i.e to deal with the property.

Then he says:

“To me, transfer means sell i.e, there must be money. I did not authorize Mario to transfer the property i.e to sell it”

Harrison Musumia (PW2) the District Lands Officer in Kilifi testified that on the face of the transfer documents, there was nothing to indicate that transfers were made under power of attorney. He explained that if the same had been transacted by way of power of attorney then the transfer would have shown the power of attorney number against the signature of the transferor and that one holding a power of attorney cannot sign without indicating the number of the power of attorney. It was his evidence that the Registered Lands Act (RLA) provides for a specific form for power of attorney known as form RL17 – (which is a prescribed form BUT under the RLA section 1116, there is reference to other forms which can be approved by the Registrar). He faults the special power of attorney produced and which first defendant relied on saying it does not have a reference to indicate approval by the Chief Lands Registrar nor does it indicate any specific title number and that on the face of it, he cannot point out that the said Power of Attorney relates to the three transfer documents referred to here.

On cross-examination PW2 confirms that the Special Power of Attorney under reference, was registered and there is no notification of cancellation of the same, so that as matters stand that Power of attorney remains valid with effect from 20th December 2001, and that infact the transfer of leases were registered when the power of attorney was still valid, and that on the face of it, there is nothing wrong with the transfers.

He further confirms on cross-examination that section 108 of the RLA refers to the Registrar and not Chief Registrar, and that the special power of attorney herein, was registered by the Registrar

However on re-examination he was adamant that under section 108 RLA, Registrar means the Chief Lands Registrar and he was not aware of anyone else who could approve the form and so because the one in issue was not approved by the Chief Lands Registrar, then it cannot be used for disposal of land.

Mr. Lughanje (D1) who heavily relied on the power of attorney to effect the transaction confirmed on cross-examination that he incorporated Kenya Friends Malindi Ltd and also acted as the Company Secretary for some time.

As to the assertion that he falsely made entries in the transfer documents to the effect that Pennazzi Livio appeared before him to execute the documents, Mr. Lughanje denied that it was a misrepresentation. He confirmed that he certified that Penazzi Livio appeared before him although he didn't, and actually the person who appeared before him was Mario Cibrario but he justifies this saying that since he was preparing transfer under power of attorney, he could enter the name of the owner plus the name of the holder of the power of attorney, but in this instance he did not.

There is also the sum of Ksh. 50,000/- mentioned as consideration for the transfer and which Mr. Lughanje confirms that he is the one who inserted although he never saw or received the money, but that he inserted the same on instructions from Cibrario Mario. Mr. Lughanje also confirms that he incorporated the 4th defendant. He confirmed that the power of attorney relied on is not the one found under Cap 300, it was prepared in Italy, and which is why he presented it to the Registrar for approval and the Registrar approved the same by registering it – the registrar was Mary Kai.

Since the power of attorney was authenticated by a notary, Mr. Lughanje was satisfied that it was a genuine document – it did not mention any of the property by number. He confirms that first defendant relied on the information that he gave then, as did the plaintiff.

It was his further evidence that at the time of effecting the transfer, the buildings on the land had collapsed and it was just a portion of land.

Mr. Lughanje also explained on cross-examination that he had initially presented the transfers to the Lands Registry but was told that he had to limit the letters (which are dated 28th march) before he could do anything and that is why it appears as if the letters were written days after the presentation. The then Land Registrar Mary Dane Kai (DW2) told this court that in 2001, she was the land registrar at Kilifi Land Registry and she confirmed signing the special power of attorney No. 743A - - donating power from Pennazzi Livio to Cibrario Romanini Mario. She confirms that the power of attorney was not in the prescribed form, but under section 108 of Cap 300, a registrar is allowed to approve any form submitted and that is why she approved and registered signing the transfer of lease documents and explains that each transfer document had the phrase

“certify that the stamps were embossed on 21-02-02”

Explaining that this was normal as one can pay stamp duty at an earlier stage and go for registration later.

On cross-examination DW4 stated that Land Registrars simply use the powers donated under section 108 Registration of Lands Act to accept and register documents which are not in the prescribed form.

Mario Cibrario Romanini (DW3) testified that indeed two houses were built on his portion of land, and two others on the

plaintiff's portion. These houses were to be used as holiday homes by the now warring parties. However certain events in Kenya led to a fear of foreign nationals coming to Kenya to invest at the coast and so between 1998 – 2001, they kept off the property and the houses were vandalized and what remained collapsed and became uninhabitable.

Meanwhile he and plaintiff had been involved in other business deals ending up with plaintiff owing him some money. Plaintiff no longer had interest in Kenya, and so when 1st defendant expressed an interest in carrying on business in Kenya, the plaintiff suggested the parcels of land be used to set off the debt. By then plaintiff had already given the first defendant the power of attorney which authorized first defendant to do all what he could on behalf of plaintiff i.e to effect all the transactions regarding the transfer of titles. He explains that, he needed the power of attorney so as to transfer the land to his company and construct a hotel. That's how he ended up going to second defendant's office for legal guidance. He explained to Mr. Lughanje, that the lands, (which were both in his name and that of the plaintiff's) were to be sold to his company in Kenya, where he was a shareholder and there were two other shareholders.

The company was known as Kenya Friends Malindi Ltd and the parcels were to be transferred to that company – that is how his two signatures appear on the transfer document – one being on behalf of himself, and the other on behalf of the plaintiff, courtesy of the power of attorney.

Thereafter, an accountant advised first defendant, that he needed to incorporate a holding company so as to separate the property from administration and he returned to Lughanje Advocate and made a transfer of the titles to Flamingo Malindi Ltd and all the properties are now registered in the name of Malindi Flamingo Ltd.

At the moment the property houses a small hotel known as Flamingo built by the first defendant – it has staff houses, a reception and a restaurant and first defendant says he does not understand why after so many years, plaintiff has instituted this case.

On cross-examination first defendant told this court that he never told plaintiff that the power of attorney had been destroyed, saying that power of attorney cannot be destroyed, it can only be revoked.

In the written submissions filed by the plaintiff's counsel, it is stated that plaintiff was the legal and beneficial owner of the parcels which are the subject of this suit. It is also not disputed that the plaintiff executed a special power of attorney in favour of the first defendant. However Mr. Ibrahim submits that the said power of attorney did not comply with the provisions of Cap 300 (Registered Land Act) and was not in respect of the suit property.

Further that the said power of attorney did not authorize the defendants to dispose of the suit property. Mr. Ibrahim refers to section 108 of the Registered Land Act which he says provides in mandatory terms that every disposition of land shall be effected by an instrument in the prescribed form or in such other form as the registration may in any particular case approved. He argues that the prescribed form for power of attorney is as provided for in form RL 17, and the Special Power of Attorney that was registered by the first and second defendants was not in the prescribed form. He points out that, the prescribed form specifically provides for Title Number to which the power is being donated for whereas the Special Power of attorney record upon by the defendants does not indicate the title number it relates to and thus cannot be held to have been prepared and/or met the requirements of the Registration of Lands Act (RLA). It is his submission that the special power of attorney was only registered as a document, and nothing else.

Further that since the same was not in the prescribed form, then it needed the approval of the Chief Land Registrar, and that to date, DW2 has not received authorization of the Chief Land Registrar under section 108 and so she had no power to approve the Special Power of attorney in its presented form.

Mr. Ibrahim points out that the power of attorney was executed on 9th January 1996, at a time when the plaintiff and first defendant had plot number for the parcels of land, as indicated in the agreement of sale and in the event that the parties were dealing with the same they would have indicated such an intention to specify the plot numbers. He also takes issue with the content of the power of attorney (PA) saying it states that:

“He can effect all the transactions regarding the transfer of titles of his property (the so called title deeds) as the undersigned was licensed by Wood promotions Ltd.”

Mr. Ibrahim argues that the company known as Wood Promotions was formed for purposes of supervising the construction of the four villas that the plaintiff and first defendant were constructing and plaintiff had simply requested first defendant to sign the document in order to show authorities in Kenya that first defendant had authority to obtain licences for purposes of the four villas into a tourist resort and that this position has not been controverted.

The defence does not dispute that the disputed Power of Attorney is not in the prescribed form. However Mr. Ole Kina for the first, third and fourth defendants argues that the same was duly registered by the Registrar of Lands at Kilifi on 20-12-01 and has not been revoked to date. He urges this court to examine that special Power of Attorney in the light of provisions of section 108 and 116 RLA as well as section 97 of the Evidence Act.

The special Power of Attorney reads as follows:

“The undersigned PENAZZI LIVIO, born in Bolzano on 18th of March 1943, and resident in Verma, in Via Leoncino No. 9, hereby designates and appoints as his special attorney, MR. CIBRARIO ROMANIN MARIO, born in Verma (TO) on 25th of August 1953 and resident in Roma, Hamtet Acilia in Via Prato Cornelio No. 144, so that on his behalf and in his stead as well as on his own behalf, he can effect all transactions regarding the transfer of the titles of his properties (the so called Title Deeds) as the undersigned was licenced to do by “WOOD PROMOTIONS LIMITED where headquarters is in Nairobi, Kenya”

It is Mr. Ole Kina’s argument that DW2 properly exercised powers donated to her under section 108 RLA which provides that:

“Every disposition of land, a lease or a charge, shall be effected by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approved and every person shall use a printed form issued by the Registrar unless the registrar otherwise permits”

He argues that once the Registrar (DW2), exercised her powers and entered the document into the Register of Powers of Attorney, the form was approved, became Power of Attorney donated in the prescribed form.

He further draws this court’s attention to section 97(2) (b) of the Evidence Act (Cap 80) which provides

“(b) when a public officer is required by law to be approved in writing, and when it is shown that any particular person has acted

as such officer, the writing by which he is approved need not be approved”

In relying on this provision, Mr. Ole Kina submits that it was not necessary for DW2 to produce her letter of appointment proving that her appointment by the Chief Land registrar as Registrar of Lands Kilifi and Malindi.

He also points to section 72 of the Interpretation and General Provisions Act (Cap 2) that deals with deviation from form and which recognizes that save as otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead. Mr. ole Kina invites the court to consider the case of **Mayfair Holdings Ltd v Ahmed (1990 – 1994) 1EA 340 (CK) at page 343** which stated:

“...it would seem that the Registrar is obliged to enter a power of attorney in the register thereof if the donor or the donee makes an application for that purpose, but it doesn’t seem, on the plain wording of section 116(1) of the RLA that the donor or the donee is obliged to apply for it to be registered, though I respectfully agree with the learned judge that before it can be registered, it must have attached to it a certificate in the form prescribed in section 110(4) of the same Act, and it must be in the form set out at RL 17 in the third schedule of the RLA or such other form as is approved by the Registrar. By registering the power of attorney, the registrar must be taken to have approved the united Kingdom form in which it was expressed.”

It is pointed out that in the Mayfair case, the provisions of section 110 (4) (a) in that document was executed before a Notary Public who authenticated the signature as required.

Mr. Ole Kina submits that the words of the Power of Attorney were clear in the initial and effect and plaintiff understood that he had donated powers, authorizing the first defendant to sell or transfer plaintiff’s titles.

As regards the Power of Attorney merely being registered as a document, Mr. Ole Kina submits that the Registrar of Lands Kilifi, does not have jurisdiction exercisable under the Registration of Documents Act.

On this point regarding the Power of Attorney and its registration – I make a finding that:

- (a) The Power of Attorney was not registered in the prescribed form. However the defendant, on advice from his lawyer DW2 endeavoured to have the same registered under the provisions of section 108 of the RLA – DW2 have so exercised her powers. As to her capacity to have the same validly registered, I think the answer must be obtained from (a) considering the definition of Registrar under the RLA.

Section 3 of the RLA defines Registrar to mean:

- (a) The Chief Land Registrar or the Deputy Chief Land Registrar appointed under section 7 or
- (b) Where a Land Registrar or an Assistant or an Assistant Land Registrar has been authorized under section 7(4) to exercise or perform any particular power or duty, that Land Registrar or Assistant Land Registrar so far as concerns that power or duty.

Does DW2 fit in with these definitions?

This ushers in the issue of Registration districts, as provided in section 5 to the effect that “for purposes of this Act, the Minister may by order, constitute an area or areas of land, a land registration district, or land registration districts and

may at any time vary the limits of any such district.”

Mr. Ibrahim argues that even if DW2 fits in with the definitions given regarding who is a Registrar, DW2 obtained no authorization to register special power of attorney. Mr. Ole Kina has drawn this court’s attention to section 7 of the RLA regarding appointment of officers, which is to the effect that:

“3(4) The Chief Land Registrar may in writing authorize a Land Registrar or Assistant Land Registrar to exercise or to perform duties conferred on the Chief Land Registrar to exercise or perform all or any of the powers or duties conferred on the Chief Land Registrar by this Act or by any rules made thereunder, and may at any time revoke or vary such authorization. Provided that no such authorization shall be deemed to direct the Chief Land Registrar of his power or duties and he may, if he thinks fit exercise and perform all his powers or duties notwithstanding any such authorization”

DW2 confirmed that she has not received any authorization in writing from the Chief Land Registrar giving her powers to register documents other than in the presented form. How then does this fit with the provisions of section 108(1)? If section 3 accommodates DW2 in its definition of who is a Land Registrar, and section 108(1) gives such a Registrar power to approve prescribed forms or any other form as may be approved by the Registrar, then where does that leave section 7(4) of the RLA? I think one must consider the general rules of construction – I think subsection (4) must be read in the light of section 3(b) – to my mind the requirement for authorization to be in writing is with regard to a specific duty or power and that is why it is phrased as

“to exercise or perform any PARTICULAR power or duty”

and this is then catered for by Section 7(2) regarding appointment of officers which recognizes Land Registrars appointed for purposes of carrying out provision of the Act – the special power envisaged by subsection 4 is where the Chief Land Registrar requires a land registrar to perform duties or exercise powers that would ordinarily only be vested in the Chief Land Registrar.

Has the evidence satisfied that DW2 properly exercised her powers and duly registered the Power of Attorney which met the conditions set out in section 110 RLA? PW2 Harrison Musuma, the current District Lands Officer in Kilifi disagrees with the position taken by his predecessor i.e DW2 saying that for such a document to be valid, it would have to be sent to the Chief Lands Registrar or approval and that this was not done. Further that on the face of it, there is nothing to show that it relates to the here transfer documents affecting plaintiff’s rights. Paradoxically, on cross-examination PW2 confirmed that the special R.A in question is registered and that:

“Yes as we stand here, the registered Power of Attorney is valid with effect from 20-12-2001.”

He even confirmed that the transfer leases which were registered, ere so registered when the Power of Attorney was valid. However he maintained his disapproval of the special Power of Attorney saying it does not have the authority of the Chief Lands Registrar, yet section 108 RLA does not refer to an approval by the Chief Land Registrar.

Does the RLA prescribe or define what the limited duties of a Land Registrar are? The same simply gives general duties which are indefinite – section 8 just gives an outline of some of the duties a Land Registrar may perform and section 7(4) is not specific as to what duties require authorization in writing, and it would be a contradiction in terms of the provision of section 108(1) to adopt the position proposed by PW2. Consequently I am satisfied that DW2 acted within the

mandate and provisions of section 108(1) of the RLA and the Power of Attorney was properly registered.... All those details prescribed by PW2 are administrative procedures not prescribed in the RLA and the omission cannot invalidate the Power of Attorney's registration.

Did that Power of Attorney authorize the first and second defendant to dispose of the plaintiff's proprietary rights and interest in the suit property?

Admittedly the Power of Attorney does not specify which properties are under reference but it states that defendant can effect ALL transactions regarding the transfer of the titles of his properties (the so called title deeds), as the undersigned was licenced to do by Wood Promotions – I think plaintiff is blowing hot and cold at the same time. While accepting that the Power of Attorney was in regard to the suit property, Mr. Ibrahim on behalf of the plaintiff submits that those powers were donated to the first defendant to obtain licences in order to construct the four villas as per the intention the parties had when forming Wood Promotions Ltd. With all due respect to Mr. Ibrahim, the Power of Attorney does not make specific reference to the intention of the parties nor does it limit the donee to construction of villas – it clearly states:

“effect ALL transactions”

Plaintiff says his understanding was that defendant was not to sell and in cross-examination says he realizes he was under the wrong impression. But perhaps the answer may lay in establishing who Wood Promotions is and what it had licenced the plaintiff to do. According to the plaintiff, Wood Promotions was supposed to supervise the construction of the four villas so as to be completed in time – plaintiff and defendant were the owners of that company. The plaintiff however had no document to confirm what it was that Wood Promotion have licenced him to do.

On the other hand, first defendant (Mario Cibrario) told this court that Wood Promotions Ltd. was a company which as registered in 1990 but it had done nothing at all, and he denies being a director of that company. From what is presented to this court, I am not able to determine what Wood Promotions had licensed plaintiff to do.

So what interpretation ought this court to give to the Special Power of Attorney presented here? A plain reading of that document clearly demonstrates that it gave the first defendant power to deal with the property in all transactions which to my mind would include transfers, sale and/or disposal of them. Mr. Ibrahim cited the case of **Succession Cause No. 31 of 2006 Matter of the Estate of Nicole Polcino (Deceased)** and **matter of Anne Wausi Polcino and Polcino Cosimo** where reference as made to Odgers Construction of Deeds and statutes 5th Edition by Gerald Dworkin (Sweet and Maxwell) 1967 at pg 23 which states in part:

“...what does the deed mean? It must be noticed that this is not necessarily the same as what did the parties intend to say that which they have in fact said, so their words as they stand must be construed. The question is not what did the parties intend to say, that is precluded by the presumption that they have said what they intended to say. The question to be solved is, what have they said. What meaning is to be attached to the expressions they have used?”

That is precisely the situation here – the intention of the parties must be discovered from the document they relied on. Indeed the views of **Byles J in Stagg v Elliot (1862)6 L.T. 433** apply here, to the effect that:

“...where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to show that on a fair instrument, the authority in question is to be found within the four corners of the instrument, either in express form or by necessary implication”

In this instance, the express term is clear – **“to effect all transactions,”** and this court cannot now begin to infer other intentions on the basis that plaintiff had misunderstood the weight of the contents of the Special Power of Attorney he signed – that authority as submitted by Mr. Shujaa for second defendant- was given in express terms.

Even though there is no specific title referred – both parties are agreed that the only properties/defendant was dealing with and for which plaintiff was directing the power are the very suit premises in issue. I find that plaintiff did by way of special Power of Attorney authorize first defendant to dispose off his proprietary rights and interest in the suit premises. Did the first and second defendant fraudulently deal in executing and attesting the transfers?

Mr. Ibrahim submits that there is no indication on the face of the transfer or by implication that the same were executed by the first defendant, by virtue of powers donated to him by the plaintiff. He argues that the transfer documents were shown as executed by Penazzi Livio in the presence of the second defendant, yet evidence available as per the plaintiff’s passport is that at the time of the transfer documents were duly executed, he was not in the country and is not the one who executed those documents.

Mr. Ibrahim urges this court to consider DW1 (Lughanje) own admission that plaintiff never appeared before him to execute the transfer documents and that the same were indeed executed by the first defendant. He submits that for second defendant to have indicated on the transfer documents that plaintiff appeared before him and executed the documents and for him to have attested the same amounted to fraudulently dealing with the plaintiff’s parcels.

Mr. ole Kina’s response to this is that none of the particulars of fraud were proved to the standard required and in any case, the first defendant presented the Power of Attorney to his advocate (the second defendant) who had it registered, before the instruments of transfer were drawn, having relied on the latter’s legal counsel. Further that first defendant was clear that he signed the transfer documents where the Power of Attorney was attached to it and if it is argued that the instruments of transfer were not in the prescribed form because they did not indicate the execution of the documents was based on the Power of Attorney, registration of the transfer by the Registrar of Lands ipso facto cured any defects as the Registrar is deemed to have exercised her powers under section 108 of the RLA, so the plaintiff is estopped from contradicting the contents of the Power of Attorney. He has cited section 117 RLA on the effects of a registered power of attorney which provides as follows:

“117 (1) A power of attorney which has been registered under section 116 and of which no notice of revocation has been registered under that section shall be deemed to be substituting as regards any person acquired any interest in land affected by the exercise of the power for valuable consideration and without notice of revocation and in good faith, or any person deriving title from such a person”

Did the advocate (2nd defendant) deal in a fraudulent manner. Mr. Shujaa submits that the Power of Attorney donated power and authority to transfer the suit properties – the whole case rests on the existence of the Power of Attorney and he argues that the role of the second defendant was to present the Power of Attorney to the Land Registry for registration and once it was approved and registered the transactions pegged on it were valid and second defendant was not fraudulent or negligent in the discharge of his duties.

DW1 (Lughanje) confirmed to this court he certified that Penazzi Livio had appeared before him and that he is the one

who inserted Penazzi Livio's name although in actual fact the person who appeared before him was Mario Cibrario. I have no doubt that this was improper – what Mr. Lughanje ought to have done was to enter the name of plaintiff as well as the name of the holder of the Power of Attorney, so as not to appear to be misleading. However it would be myopic and pretentious to term this omission as fraud in view of the existing Power of Attorney and my earlier observations about its content. In any event DW2 has explained that he was dealing with DW3 on the strength of the Power and earlier encounter where plaintiff had made his intentions known – I therefore detect no fraud and because of that then the subsequent transfers to the companies incorporated by 2nd defendant can't be said to have been unlawful or without authority – for as long as the Power of Attorney remained unrevoked and yes first and second defendant transferred a good title to the third defendant and the subsequent transfer to fourth defendant was lawful.

The interest of plaintiff was not unlawfully interfered with and he did not suffer loss and damage as he had authorized first defendant to deal with the property.

I decline to declare the titles issued here as being null and void or order for their cancellation.

The upshot is that the suit fails and is dismissed with costs to be borne by plaintiff.

Delivered and dated this 17th day of **May** 2010 at Malindi.

H. A. OMONDI
LADY JUSTICE