



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1229 of 2001

**ISAAC LAWIS MASENO MEKENYE..... PLAINTIFF**

**VERSUS**

**KENYA INDUSTRIAL ESTATES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MALI RAHISI WHOLESALERS ENTERPRISE..... 2<sup>ND</sup> DEFENDANT**

**DAVID ONYWERE.....3<sup>RD</sup> DEFENDANT**

**AGNES OMBOGO OBARE .....4<sup>TH</sup> DEFENDANT**

**EVANS ONYWERE .....5<sup>TH</sup> DEFENDANT**

**JAMES OKEROSI.....6<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the 1<sup>st</sup> to the 6<sup>th</sup> Defendants. However the 2<sup>nd</sup> the 6<sup>th</sup> Defendants did not enter appearance and judgment was entered in default. The 1<sup>st</sup> defendant filed a defence and denied the Plaintiff's claim. The Plaintiff's title for a property known **LR NO. RUIRU/RUIRU EAST BLOCK 3/1624** (hereinafter referred to as the suit premises) situate at Mwalimu settlement scheme was used by the 2<sup>nd</sup> defendant to secure a loan from the 1<sup>st</sup> Defendant. The Plaintiff contends that the title was used fraudulently without his knowledge. The Plaintiff also contends that he

ever executed a charge dated 19<sup>th</sup> December 1998. And he did not seek for the consent of the land control Board to charge his property thus the 1<sup>st</sup> Defendant used a fake power of attorney to obtain the borrowing.

2. During the hearing the Plaintiff testified that sometimes in 1994, he together with Job Nyariru and James Okerosi (the 6<sup>th</sup> Defendant) decided to get a loan to start a business after he had retired from a teaching career. The Plaintiff testified that he gave his title **No. RUIRU/RUIRU EAST BLOCK 3/1624** to the 6<sup>th</sup> Defendant. He also gave the 6<sup>th</sup> Defendant the power of attorney so that he could proceed and get a loan from National Bank of Kenya. However after sometime, the Plaintiff started demanding the return of his title as well as the power of attorney but the 6<sup>th</sup> defendant kept on dodging him for along time. The 6<sup>th</sup> Defendant also disappeared from Kisii town for sometime. That is when the Plaintiff suspected there was something wrong and he decided to apply for a search from the lands office.

3. The plaintiff was shocked to discover the 6<sup>th</sup> defendant acquired a loan with his title. The Plaintiff thereafter instructed an advocate who wrote a letter to the 1<sup>st</sup> defendant demanding to be furnished with information of how his property was charged. After paying for the photocopying charges, the plaintiff received some documents, namely the charge over the suit premises, a power of

attorney issued to the 2<sup>nd</sup> Defendant consent by the land control Board and a guarantee. The Plaintiff claimed that he never executed a power of attorney in the favour of the 2<sup>nd</sup> Defendant. He also did not execute a guarantee. He claimed that he never signed a charge and never appeared before an advocate who purportedly witnessed his signature. He also never requested for a valuation report to be conducted over the suit premises.

4. The plaintiff maintained that he had never met a person called Agnes Obare who wrote the letter to the 1<sup>st</sup> defendant admitting liability and claiming that she gave the Plaintiff Kshs. 100,000/= out of the loan proceeds. He denied that he received any consideration from the loan proceeds. The plaintiff sought for orders principally declaring the charge invalid and an order of injunction to stop the sale or any dealings with the suit property.

5. The 1<sup>st</sup> Defendant denied liability by their statement of defence filed on 29<sup>th</sup> August, 2001. It was particularly denied there was no fraud as far as the charge over **RUIRU/RUIRU EAST BLOCK 3/1624** was concerned. The charge was executed by a person who held the power of attorney. The 1<sup>st</sup> Defendant advanced to the 2<sup>nd</sup> Defendant a loan of Kshs. 200,000/=. There was default and the 1<sup>st</sup> Defendant was entitled to realize the security as per the charge. Rosemary Mutinda Kariuki a project officer with the 1<sup>st</sup> defendant gave evidence of how the directors of the 2<sup>nd</sup> Defendant applied for a loan. The application was

made by the 4<sup>th</sup> Defendant in the name of the 2<sup>nd</sup> Defendant; the loan applicants duly furnished the 1<sup>st</sup> defendant with the memorandum and articles of association and a certificate of incorporation of the 2<sup>nd</sup> Defendant. The original title together with the power of attorney was also furnished to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant was satisfied that the power of attorney was in order, so they advanced the loan which was secured by the suit premises. However the loan was never repaid and as far as the charge is concerned it was duly signed by the registered owner. When the borrowers failed to pay the loan, the 1<sup>st</sup> defendant sought to realize the security but this suit was filed seeking for an injunction and an order was issued.

6. Both counsel for the Plaintiff and Defendant filed written submissions in respect of their respective position. I have gone through the submissions as well as authorities cited. The issue for determination is whether the Plaintiff has proved his claim to the required standard that is whether the charge over the suit premises was fraudulently created without his knowledge or authority, and if so whether it is therefore null and void. The Plaintiff admits that he gave his title to the 6<sup>th</sup> Defendant whom he also gave a power of attorney. He confirmed that the signature on the power of attorney was his but contended that although the signature on the charge resembled his signature it appeared as if it was superimposed in an attempt to defraud him of his property.

7. The Plaintiff claims that he gave his title to the 6<sup>th</sup> Defendant sometimes in 1994, with a view of obtaining a loan at the National Bank in Kisii. However the 6<sup>th</sup> Defendant disappeared and it was not until the year 2000 that the Plaintiff conducted a search and realized his title had been used to secure a loan from the 1<sup>st</sup> Defendant. The Plaintiff did not report this matter to the police or even if he did, there is no evidence on record that a matter which carries penal consequences whereby the plaintiff claims his title was unlawfully used and his signature forged was ever reported to the police. The Plaintiff claims that he did not know the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants who are the Directors of the 2<sup>nd</sup> Defendant. These are the people who used his title to secure the borrowing.

8. The 6<sup>th</sup> Defendant is the one with an explanation on how he gave the Plaintiff's title to the 2<sup>nd</sup> to the 5<sup>th</sup> Defendants who used it to secure a loan. There is already judgment against the 2<sup>nd</sup> to the 6<sup>th</sup> Defendants and this leads me to the issue of whether the Plaintiff has proved his case against the 1<sup>st</sup> Defendant. According to the 1<sup>st</sup> Defendant, the power of attorney was duly executed by the registered owner of the suit premises appointing the 2<sup>nd</sup> Defendant as the Attorney to execute all the instruments. The Plaintiff claims that he never signed the charge before a Mr. Josiah Agolo Advocate. This Advocate was not called to give evidence by the Plaintiff. The Plaintiff also did not adduce evidence from a handwriting expert who would

have shed light as to whether his signature on the charge is a forgery.

9. As regards the application for consent of the Land Control Board, which was signed by an officer from the 1<sup>st</sup> Defendant, the printed form indicated that it can either be signed by the owner, lessor, mortgagor, chargor, or authorized agent or agents. The fact that this form was signed by an official of the 1<sup>st</sup> Defendant does not reveal any fraud on their part. The power of attorney was registered under the provisions of Section 117 of the Registered Land Act which provides that:

***“(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 subsisting as regards any person acquiring 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 under such a person.***

***(2) Any person making any payment or doing any act in good faith in pursuance of a power of attorney registered under Section 116 shall not be liable in respect of the payment or act by reason only that before the payment to act the donor of the power had died or become subject to a disability or become bankrupt, or had revoked the power, if the fact of death, disability, bankruptcy or revocation was not at the time of the payment or act known to the person making or doing the payment or act.”***

As at the time the power of attorney was used to secure the borrowing, there is no indication that it had been revoked until the hearing of this suit.

10. As such no evidence was tendered to show the power of attorney was ever revoked. The Plaintiff claims that he gave his title and the power of attorney to the 6<sup>th</sup> Defendant. The 6<sup>th</sup> Defendant was therefore his agent who should offer an explanation what he did with

the title. As far as the giving the power of attorney and the giving of the title to the 6<sup>th</sup> Defendant is concerned, in my humble opinion the 6<sup>th</sup> Defendant was the Plaintiff's agent and the 1<sup>st</sup> Defendant who acted in good faith to advance the loan according to the documents presented to them should not be made to suffer. The Plaintiff's remedy lies with the 6<sup>th</sup> Defendant. I find the suit against the 1<sup>st</sup> Defendant is not proved and it is hereby dismissed with costs.

**JUDGMENT READ AND SIGNED ON 17<sup>TH</sup> SEPTEMBER 2010 AT NAIROBI.**

**M. K. KOOME  
JUDGE**