



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT NO. 3052 OF 1986 (OS)**

**JOSEPH MATHENGE KANYORO.....PLAINTIFF**

**VERSUS**

**WAKARWA PRINTERS LIMITED.....1ST DEFENDANT**

**KENYA INDUSTRIAL ESTATES.....2ND DEFENDANT**

**JUDGEMENT**

**1. THE PLEADINGS**

The Originating Summons commencing this suit is dated 25th August, 1986 and was filed on 26th August, 1986. It was brought under Section 3A of the Civil Procedure Act (Cap. 21), Order XXXVI rule 3A of the Civil Procedure (Revised) Rules, and Section 128 of the Registered Land Act (Cap. 300). The Plaintiff was seeking orders as follows:

- (i) a declaration that the charged properties, L.R. 209/7388/70 at Nairobi and L.R. KARIA/THEGENGE/791 at Nyeri guaranteeing the first Respondent to the second Respondent, be declared discharged;
- (ii) an order that the Kenya Industrial Estates (2nd Defendant) be restrained, inhibited and stopped from acting in pursuance of a chargee's rights over the said properties;
- (iii) an order that the second Defendant do discharge the secured properties and remove any encumbrances on the said parcels of land, and reconveyance be effected to the Plaintiff;
- (iv) the Court be pleased to make further and better orders as the ends of justice may require;
- (v) the first Defendant be made to pay damages for the period they have unlawfully held the said properties as security without consent;
- (vi) costs be provided for.

Supporting evidence was set out in the affidavit of *Joseph Mathenge Kanyoro*, the Plaintiff. He averred that he is the registered owner of both L.R. No. 209/7388/70 in Nairobi, and L.R. No. KARIA/THEGENGE/791. He had entered into an agreement on 13th September, 1983 with his former employer, Wakarwa Printers (1st Defendant) to provide guarantee by charging the above properties with Kenya Industrial Estates (2nd Defendant). The deponent avers that it was a term of the said agreement of guarantee, that the first Defendant would comply with the loan conditions imposed by the second Defendant, and should give the Plaintiff the first priority to acquire shares in the first Defendant. It was a term of the agreement (para.3) that the first Defendant would not terminate the Plaintiff's services, or allow the intervention of outsiders in the business of the first Defendant unless first the securities had

been released to the Plaintiff. It was also provided that if the Plaintiff's services were terminated, then the first Defendant would immediately return his securities to him free of any encumbrance. Under the agreement, the Applicant charged L.R. No. KARIA/THEGENGE/791 and L.R. No. 209/7388/70 in March 1983 to the second Defendant, to secure a loan to the first Defendant of Kshs.1,153,000/= bearing interest at the rate of 11% per annum. The deponent avers that some time about November 1984 the first Defendant, in breach of Clause 3(c) and (d) of the agreement of 13th September, 1983 entered into an agreement with Muranga Industrial Company Ltd (MICL) whereby MICL would acquire majority shareholding in the first Respondent. And furthermore, in breach of Clause 3(c), (i) and (k) of the agreement of 13th September, 1983 the first Defendant terminated the appointment of the Applicant, on 22nd February, 1985; but the Respondent failed to discharge the charges lodged against the Plaintiff's properties.

The Plaintiff's grievances were multiplied when the first Defendant defaulted in the payment schedules to the second Defendant at the end of 1984; and the second Defendant failed to inform the Plaintiff of the default and the amounts of money falling in arrears. On 7th January, 1985 the first Defendant requested the Plaintiff to revoke the guarantee; and on 8th January, 1985 the Plaintiff did so. In the letter from the Chairman of the first Defendant to the Plaintiff, of January, 1985 which terminated his services, the following communication was made:

**“As stated earlier we shall leave your titles to you, but you have to be reasonable. You must allow the normal process of registration and de-registrations. To enable the process to be initiated, write to KIE revoking your guarantee and asking the chairman to provide alternative security so that the process can commence.”**

The Plaintiff duly responded to the formal request coming from the first Defendant, by writing to the Managing Director of the second Defendant on 8th January, 1985 as follows:

**“Please take notice that with immediate effect I wish to withdraw as a guarantor of Wakarwa Printers Co. Ltd.**

**“By copy of this letter, I am instructing you to write to the Chairman, Wakarwa Printers and the Directors of Wakarwa Printers respectively to provide alternative securities with immediate effect...”**

The second Defendant, however, wrote a letter dated 22nd January, 1985 in the following terms:

**“...your title deeds will be discharged only when KIE has been furnished with alternative security sufficient to cover the loan.”**

In spite of repeated demands by the Plaintiff, the Defendants did not discharge the said securities. *It also turned out that the first Defendant was in financial difficulties, and this was known to the second Defendant* which had initiated certain courses of action against the first Defendant, but without informing the Plaintiff.

The deponent avers that the second Defendant had at all times been aware that the Plaintiff's guarantee was only intended for the first Defendant whose shareholders had been the Plaintiff's sister and his brother-in-law, *Mr. and Mrs. Sam Karuga Wandai*, and not any other shareholders; so that *no invitation to new shareholders could be made without the Plaintiff's consent*, but such consent was not sought by the *second Defendant. It is deponed that the second Defendant had re-scheduled the loan to the first Defendant, and had accepted change in the shareholding of Wakarwa Printers Ltd . without the Plaintiff's prior consent.*

The second Defendant's Notice of Objection, brought under Order L rule 16(1) of the Civil Procedure Rules, and dated 21st October, 1986 was filed on 22nd October, 1986. It was contended that no reasonable cause of action against the second Defendant had been shown; that the procedure adopted was wrong; and that the chargee's rights and powers of sale are unimpeachable, as no fraud had been alleged.

It was asserted that the second Defendant was a stranger to any negotiations between the Plaintiff and the first Defendant, whether before or after the creation of the charges. The second Defendant contended that the Plaintiff had freely and voluntarily created and executed the charges after the full text of the charges had been read and explained to him.

**J.W. Munubbe** the Chief Legal Officer of the second Defendant swore a replying affidavit, dated 21st October and filed on 22nd October, 1986. The essence of his averments went as follows:

(i) that, the Plaintiff had freely and voluntarily created the charges on L.R. No. KARIA/THEGENGE/791 and L.R. No. 209/7388/70 to secure repayment of a loan of Kshs.1,153,000/= to the first Defendant from the second Defendant, together with interest and relevant expenses;

(ii) that, the second Defendant is willing to discharge the charges subject to the loan together with interest thereon and relevant expenses being paid in full, or alternatively on provision by the Plaintiff and/or the first Defendant of suitable substitute securities;

(iii) that, the second Defendant was not party to any agreements or negotiations between the first Defendant and the Plaintiff.

On 6th April, 1987 the Plaintiff swore an affidavit in response to the second Defendant's affidavit, filed on 8th April, 1987. The deponent averred that he had not granted his property as security in favour of the first Respondent, save in accordance with the agreement between him and the first Defendant, dated 13th September, 1983. He further averred that the second Defendant had negotiated with the first Defendant, and in the process varied the loan beyond the original guarantee, accepting new shareholders into the first Defendant and accepting substitute securities without informing the Plaintiff as guarantor.

On 30th April, 1996 **Mr. Justice Khamoni** made three consent orders as follows:

(a) THAT parcel No. KARIA/THEGENGE/791 be and is hereby

substituted with title number MURANGA TOWN/BLOCK 3/42 also known as FORTHALL TOWNSHIP/BLOCK 111/42. (b)

THAT the title documents relating to KARIA/THEGENGE/791 be released to the Plaintiff on registration of the charge against the said title number MURANGA/BLOCK 3/42.

(c) THAT title No. L.R. 209/7388 be retained by the 2nd Defendant until further orders.

## **2. THE PLAINTIFF'S CASE: TESTIMONY**

The hearing of this case began on 11th February, 2004 when **Mr. Munene** appeared for the Plaintiff, **Mr. Onyina** appeared for the second Defendant, but the first Defendant was not represented even though the hearing notice had been duly served.

P.W. 1, the Plaintiff himself, was sworn and led through the examination-in-chief. He said he was the registered owner of both L.R. No. 209/7388/70 and L.R. No. KARIA/THEGENGE/791. He averred that he had charged both plots to the second Defendant, under the terms of a written agreement between him and the first Defendant. The charge was in favour of Kenya Industrial Estates. The Plaintiff had at the time been the General Manager of the first Defendant, a position he had retained for two years before being asked to go on leave and his service was then terminated. The first Defendant then incorporated into its shareholding other persons, an act which, under the agreement of 13th September, 1983 entitled the Plaintiff to the release of his securities charged to the second Respondent. *The second Defendant, by their letter of 22 nd January, 1985 did duly agree to discharge the charges on the Plaintiff's property, except that they wanted alternative security to be provided – by the first Defendants .* The Plaintiff testified that while alternative property was provided, to-date neither of the charged properties has been

discharged. The first Defendant did send the Plaintiff to the second Defendant, to deliver alternative security, but the second Defendant did not take action by discharging the properties of the Plaintiff. The second Defendant subjected the Plaintiff to a confusing situation in which he had to deal with different members of staff, whenever he visited the offices of the second Defendant, and it turned out that he received no statement on the relevant loan account, nor did he have access to any useful information. The Plaintiff averred that he had at no time been asked by the second Defendant to pay the debts of the first Defendant. He testified that after this suit was filed, the second Defendant filed a replying affidavit; but they then arranged with the first Defendant for alternative security, though without keeping the Plaintiff in the picture. The second Defendant also varied the loan amounts, as well as the guarantees, without at all informing the Plaintiff as guarantor. On 30th April, 1996 a consent order was made in Court requiring title to L.R. No. KARIA/THEGENGE/791 to be released to the Plaintiff; but the second Defendant took no action on this order.

On cross-examination, the Plaintiff affirmed that he did have an agreement with the first Defendant, dated 13th November, 1983; the second Defendant was not a party to this agreement. The Plaintiff averred that the first Defendant had defaulted in loan repayment to the second Defendant, but this default was not reported to the Plaintiff and the relevant account simply fell into arrears. In the course of time the two Defendants agreed on a mode of settling the loan which was not communicated to the Plaintiff.

Similarly, when the two Defendants made arrangements to incorporate within the first Defendant's shareholding the *Muranga Industrial Development Company Ltd*, the Plaintiff was kept in the dark. When the land title No. MURANGA TOWN/BLOCK 3/42 was presented to the second Defendant to charge and to release the title for L.R. No. KARIA/THEGENGE/791 consents were to be obtained before making that transaction; but the Plaintiff does not know whether such consent was obtained. The Plaintiff had expressed in writing his intention of withdrawing from the guarantee.

### 3. THE SECOND DEFENDANT'S CASE: TESTIMONY

On the second occasion of hearing, on 15th March, 2004 learned counsel, **Mr. Munene** closed the Plaintiff's case and the defence witness, **Mr. Austin Adong o Midembi**, was conducted through the examination-in-chief. The witness testified that he had worked with the second Defendant over the last 24 years; he held the position of Legal Assistant; and he was conversant with the facts of the case. He averred that there had been a contract between the second and the first Defendants, under which the former had granted a development loan for machinery and capital. The loan amount was Kshs.1,153,000/=, granted sometime about 1983/1984. The second Defendant, under the loan agreement, took debentures in the first Defendant. The second Defendant also held charges on two separate properties – L.R. No. 209/7388/70 and L.R. No. KARIA/THEGENGE/791, in Tetu, in Nyeri District; these being executed by **Joseph Mathenge Kany oro**, the Plaintiff. There were no further agreements made on the matter; and the second Defendant was guided by the simple principle that once the guarantee was given, it was valid and there would be no discharge of securities and of the guarantee until the loan was fully paid. At the moment, the witness testified, the said loan had not been fully paid. The witness also said – and this runs against the clear evidence on record: “I haven't seen any record showing that the Plaintiff asked to be discharged.” The witness, I have to say, failed to tell the truth; for in his very next breath he recalled that the second Defendant's letter of 22nd January 1985 had spelled out “conditions of withdrawal and discharge of guarantee.” Sure, such a clarification could not have been made unless the Plaintiff made a request – and he certainly made that request by his letter to the Managing Director of the second Defendant dated 8th January, 1985.

The witness confirmed what the Plaintiff had stated, *that there had been a variation of the terms of the loan, with the second Defendant's committee making a re-scheduling thereof*. The directors of the first Defendant had been invited to the said re-scheduling of loan. At this same meeting the directors of Muranga Industrial Development Company Ltd. had also been invited to attend, though they failed to turn up. *The witness acknowledged that the Court order of 30th April, 1996 had directed that the Plaintiff's security, KARIA/THEGENGE/791 be substituted with a different security, L.R. No. MURANGA TOWN/BLOCK 3/42; and he acknowledged too that this substitution has not yet taken place*. He said the reason for there being no substitution is that the Land control Board has not yet given the consent to

charge; but he attributes blame to the borrower, who should have been the one making the request. From this evidence I have to draw the conclusion that it is not as though the Land Control Board had for some good cause declined to give consent to discharge of the original charge and the creation of a new charge: it is simply that *nobody has ever moved the Land Control Board to take the necessary decision* . This, clearly, borders on disobedience to Court orders - and it is not the Plaintiff who would be the culprit in that regard. The witness said the loan in question is still outstanding, and must be repaid in full. The witness urged: "I would ask the Court to dismiss the Plaintiff's case. If he gets the substitute security charged to us, then we can release him." Yet the witness had just said that for the Land Control Board's consent to register substitute security, "request should have come from the borrower." *It is obvious that the Plaintiff is not the borrower; and therefore the witness's prayer cannot possibly be in good faith.*

On cross-examination, the witness in certain respects, contradicted his earlier testimony. He said:

**"The [second Defendant's] letter of 22nd January, 1985 to the Plaintiff was responding to his of 8th January, 1985 which sought discharge... By January we knew that the Plaintiff wished to withdraw from the guarantee."**

The witness admitted that it "was not in order" that the correspondence passing between the two Defendants, and relating to the outstanding loan, had kept the Plaintiff in the dark. *He admitted too that the second Defendant's letter of 18 th February, 1985 amounted to a variation of the contract; because it involved a re -scheduling of the loan and an invitation of new directors for the first Defendant; a proposal for new working capital; and the introduction of new guarantors* . This agreement led to a new contract, the Plaintiff not even being given a copy.

#### 4. SUBMISSIONS FOR THE PLAINTIFF

Learned counsel, **Mr. Munene** urged that the Defendants be ordered to discharge the encumbrances on the two properties – L.R. No. 209/7388/70 and L.R. No.

KARIA/THEGENGE/791. He recalled that there already was a consent order for discharging the charge on L.R. No. KARIA/THEGENGE/791 but the Defendants have ignored it. He urged that this consent order be enforced.

Counsel submitted that where there is a contract of guarantee, and the same is varied between the borrower and the lender without the express consent of the guarantor, then there will be a discharge of the guarantor. For this proposition counsel cited the cases: **Patel v. National and Grindlays Bank** [1970] EA 132; **Abraham Kiptanui v. Delphis Bank**, HCCC No. 1864 of 1999. In the Abraham Kiptanui case Commissioner of Assize (as he then was) **P.J. Ransley** quoted the relevant principle as stated in **Holme v. Brunskill** n3Q.B.D 505:

**"The true rule in my opinion is, that if there is any agreement between the principals, with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is insubstantial and it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet if it is not self-evident that the alteration is insubstantial, or one which cannot be prejudicial to the surety, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration."**

Learned counsel submitted that the principals, in the instant case, had dealt directly between themselves; they had agreed to vary the terms; the Plaintiff was never made aware even after he sought information. In these circumstances where the guarantor is not informed and he is not a party to the variations, counsel submitted, he is discharged, as a matter of law. He should in these circumstances be discharged, and he, the Plaintiff, should be awarded costs – counsel submitted.

#### 5. SUBMISSIONS FOR THE SECOND DEFENDANT

Learned counsel, **Mr. Onyina** contended that the Plaintiff had freely and voluntarily created and executed the charges after the full text was explained to him; and in the circumstances the second Defendant's rights and powers of sale could not be challenged.

Counsel submitted that since **J.W. Munubbe** who had sworn an affidavit in support of the second Defendant's case, on 21st October, 1986 had died and could not be examined, he was not available as a witness, and therefore the reply to the affidavit evidence of the deceased could not be tested. On this point I would take the position that, in this lengthy cause the reply objected to carries no special force, and the judgement herein is arrived at on a broad base of evidence and submissions, and consequently its foundation as an objective decision is not at all compromised.

Counsel submitted that the agreement made between the Plaintiff and the first Defendant, under which the Plaintiff had guaranteed the loan from the second Defendant, bound only the Plaintiff and the first Defendant.

Counsel for the second Defendant was in agreement with counsel for the Plaintiff, *that any variation in the contract of lending between a lender and a guarantor would discharge the guarantor from liability* . But he went on to contend that there had been no proof of such variation. Such proof, in my respectful opinion, was quite unnecessary since it had directly been conceded by the second Defendant that such variation had indeed taken place. I have recorded earlier that the witness for the second Defendant "confirmed that there had been a variation of the terms of the loan, with the second Defendant's committee making a re-scheduling thereof..."

Counsel then argued that "it is the law that much as a variation of a contract may discharge a guarantor, a guarantor still remains liable for a default which may have accrued before the date of variation." In this regard he cited Halsbury's Laws of England, 4th ed., Vol. 30, para. 253:

**"Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor (or with a co-surety) in a manner at variance with the contract the performance of which is guaranteed."**

Counsel proceeded to urge that the Plaintiff had confirmed in his testimony that he had knowledge of the first Defendant's default in settling the debt account with the second Defendant, and that it is precisely the settling of that account which he had guaranteed. Consequently, counsel submitted, the Plaintiff remains liable to the second Defendant for the settlement of the account in question.

Counsel also contended that the suit was based on the wrong law, because it has captioned Section 128 of the Registered Land Act (Cap. 300), whereas L.R. No. 209/7388/70 is property registered under the Registration of Titles Act (Cap. 281).

On the last day of hearing, on 12th November, 2004 learned counsel, Mr. Titi (for the second Defendant) contended that the letter aforementioned of 18th February, 1985 had made no variation to the loan agreement between the first Defendant and the second Defendant. I cannot allow this claim, as it runs against the evidence adduced on behalf of the second Defendant. The foundation of this judgement is the evidence given for the parties, not the generalised statements of counsel.

## **6. SUBMISSIONS FOR THE PLAINTIFF - IN RESPONSE**

Learned counsel, **Mr. Munene** urged that the passage in *Halsbury's Laws of England* , 4th ed., p. 137, para. 253 in no way helped the second Defendant's case – because the second Defendant had failed to show any consent on the part of the Plaintiff, at the time the principal parties made a variation to the loan arrangement. The terms negotiated by the principal parties, counsel contended, were prejudicial to the Plaintiff. Counsel urged that the said letter of 18th February, 1985 carried clear variations, which had caused prejudice to the Plaintiff: the defence witness had admitted that there were variations, and as a result no demands were made on the first Defendant to settle accounts.

Counsel also disputed the claim made by counsel for the second Defendant, that the consent order of 30th April, 1996 placed any duties on the Plaintiff. It was the first Defendant who was required to provide new security – and so *it was for the first Defendant to secure the registration, and then release of title to the Plaintiff. Counsel submitted, and quite correctly, with respect, that the new security is not the property of the Plaintiff, and therefore the process of registration of the same did not place any obligations upon the Plaintiff* ; instead, this obligation fell on the two Defendants. Counsel prayed that the two title deeds be both released; and any settlements outstanding be made as between the two Defendants themselves.

## 7. FINAL ANALYSIS AND ORDERS

Here is a case in which a solicitous chief executive officer of a corporate body who offered his own securities in aid of his company, was turned away from that company while the corporate entity behaved as if it had a right to continue to enjoy those securities. So telling in this regard is the tenor of the chairman's letter to the Plaintiff, dated 7th January, 1985 and marked JMK3 as an annexure to the Plaintiff's affidavit of 26th August, 1986. The relevant section reads:

**“It is now clear that you no longer wish to take instructions from the Chairman when he suggests that you go on leave. Whether you recognise it or not the Chairman is still the Chairman and has a responsibility for seeing that the company runs.”**

In compliance with the “Guarantee Agreement” (annexure JMK1) between himself and the corporate body (first Defendant), the Plaintiff had on 8th January, 1985 written to the management of the first Defendant as follows:

**“Please take notice that with immediate effect I wish to withdraw as a guarantor of Wakarwa Printers Co. Ltd.”**

This request was accepted when the Chairman of the first Defendant, who wrote to the Plaintiff on 31st January, 1985 as follows:

**“We would like to process this matter of discharge of your titles as soon as possible...”**

There is no doubt that there was a binding agreement dated 13th September, 1983 under which the Plaintiff was entitled to his prayers against the *first Defendant*. The first Defendant elected not to respond to the Plaintiff's claims or to appear at all in Court; and it is for certain that the Plaintiff's claims are proved against the first Defendant. It is on that basis that I will be making appropriate orders.

But, what is the position of the *second Defendant* ? The burden of the second Defendant's case is that its rights and powers of sale are indefeasible, for the reason that the Plaintiff had freely and voluntarily created and executed the charges over his properties. I do not agree with learned counsel, for reasons stated further on, though the point made for the second Defendant is technically correct, that the said agreement of 13 *th September, 1983 had only bound the Plaintiff and the first Defendant* . This technical point ceases, however, to have any significance given the *variation to the terms of the loan made by the second Defendant to the first Defendant* – a fact in respect of which the Plaintiff's evidence is quite credible; and a fact confirmed by the witness for the second Defendant even though counsel has attempted to subtract therefrom. The governing principle of law is clearly stated in *Halsbury's Laws of England*, 4th ed. Vol. 30, para. 253:

**“Any material variation of the terms of the contract between the creditor and the principal debtor will discharge the surety, who is relieved from liability by the creditor dealing with the principal debtor...”**

The question *whether the variation involved in the instant case was a material one* , is a matter of fact. From the evidence I take notice of the contractual agreement between the Plaintiff and the first Defendant, of 13th September, 1983; I take notice of the clear terms upon which the Plaintiff's securities were to be restored to him, in the event of certain courses of conduct by the first Defendant; I take notice

of the fact that upon the happening of certain events the Plaintiff demanded the restoration of his land titles, free of encumbrance, and the *first Defendant formally acceded to the request* ; I take notice of the fact that the *same first Defendant made variations to the terms of the loan with the second Defendant, and that in these dealings the Plaintiff was kept in the dark* . These events, I believe and do now hold, *created a major variation to the loan arrangements between the two principal parties, namely the first Defendant and the second Defendant, which adversely affected the Plaintiff. Therefore, the guarantee which the Plaintiff had given must be held to have lapsed. And the legal effect is that if the second Defendant has suffered any damage due to breaches of the loan contract by the first Defendant, then relief must be sought only against the first Defendant.*

I have to note also that the Honourable **Mr. Justice Khamoni** had, on 30th April, 1996 made the consent order that the encumbrance over the Plaintiff's property, L.R. No. KARIA/THEGENGE/791 be removed and his title be restored to him. The nonimplementation of that order by the two Defendants, I would say, was wrongful and bordered on contempt of Court. From my finding in this judgement, the *second Defendant has no right to retain charges over either of the properties of the Plaintiff*, L.R. No. 209/7388/70 and L.R. No. KARIA/THEGENGE/791.

I will therefore make my findings in favour of the Plaintiff and against the two Defendants, and specifically order as follows: (a) THAT, the charged property L.R. No. KARIA/THEGENGE/791 which had been declared discharged on 30th April, 1996 be forthwith, and in any case within 21 days of the date hereof, discharged and title thereof delivered by the second Defendant to the Plaintiff.

**(b) THAT, the charged property L.R. No. 209/7388/70 be and is hereby declared discharged; and the second Defendant shall forthwith and in any event within 30 days of the date hereof have the charge discharged and the title thereof restored to the Plaintiff.**

**(c) THAT, the second Defendant be and is hereby restrained, inhibited and stopped from acting in pursuance of a chargee's rights over the said two properties, KARIA/THEGENGE/791 and L.R. No. 209/7388/70.**

**(d) The Plaintiff shall set down this case for formal proof against the first Defendant, for damages in respect of the wrongful holding of the Plaintiff's securities. The Registry shall give a date on the basis of priority.**

**(e) The first and the second Defendants shall jointly and severally bear the costs of this suit.**

**Orders accordingly.**

**DATED and DELIVERED at Nairobi this 4th day of February, 2005.**

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Plaintiff: Mr. Munene, instructed by M/s. Munene & Co. Advocates**

**For the 2nd Defendant: Mr. Onyina; Mr. Titi; instructed by M/s. R.A. Ochando & Co. Advocates**

**First Defendant absent and unrepresented**