



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAJIADO**

**CIVIL CASE NO. 31 OF 2018**

**SAMBAYON OLE SEMERA.....PLAINTIFF**

**VERSUS**

**KALKA FLOWERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**BANK OF BARODA KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. Sometime between 2008 and 2009, the plaintiff entered into a verbal agreement to lease his property L.R. No. Kajiado/ Kisaju/3029 to the 1<sup>st</sup> defendant at a monthly rent of Kshs. 70,000. He was later made to sign a document brought to him by Captain Srithar, a director of the 1<sup>st</sup> defendant who told him it was a lease that had been given to him by Davendra Halai (now deceased), (**herein Halai**). He was also requested to release the Title Deed for his land for the purpose of the said lease which he did.

2. In February, 2016, the plaintiff learnt that his property had been advertised for sale by public auction on 18<sup>th</sup> February, 2016. A notice had been placed on the property by Spotlight Intercepts Auctioneers. When he confronted the 1<sup>st</sup> defendant's officials on the issue, they informed him that it was a mix up on documentation but the matter would be resolved.

3. He was later to learnt through his advocates, that his property had again been scheduled for sale on 23<sup>rd</sup> February, 2018 by public auction, this time by Messrs. Garam Investments Auctioneers on the basis of a loan advanced to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant and his property had been charged as security.

4. The plaintiff averred that he was not aware of the charge created over his property; that his property was fraudulently charged and the intended sale by auction was illegal and unlawful. He asserted that the intended auction was malicious since the charge registered over his property had been done without his knowledge. He further asserted that he never signed any document to charge his property in favour of the 2<sup>nd</sup> defendant; that the title to his property was procured by the 1<sup>st</sup> defendant through fraud and misrepresentation that it was for purposes of a lease.

5. The plaintiff stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants took advantage of his illiteracy and the relationship to the directors of the 1<sup>st</sup> defendant to defraud him. He also stated that he did not seek consent from the Land Control Board to charge his property to the 2<sup>nd</sup> defendant; did not appear before any advocate to sign the charge in favor of the 2<sup>nd</sup> defendant and that his family's consent to charge was not sought. He averred that he was also not served statutory notices by the 2<sup>nd</sup> defendant of the intention to sell his property by public auction. The plaintiff wondered how the 2<sup>nd</sup> defendant granted the 1<sup>st</sup> defendant accelerated and fraudulent loans despite knowing of its inability to repay.

6. The plaintiff again averred that the power of attorney allegedly used to execute the charges was illegal since there was no consent from the Land Control Board as required under the Land Control Act. He also denied giving a power of attorney to Halai authorizing him to charge his property to any bank or financial institution, including the 2<sup>nd</sup> defendant for the 1<sup>st</sup> defendant's financial gain. He maintained that the purported power of attorney was fraudulent and a forgery and any actions by the defendants to secure loans from financial institutions demonstrated the highest level of conspiracy and fraud.

7. He filed a plaint dated 18<sup>th</sup> January, 2018 and sought the following reliefs:

***a) A permanent injunction restraining the defendants, their agents, servants and or employees from trespassing and interfering with his ownership and user and or dealing with parcel Number Kajiado/ Kisaju/ 3029.***

**b) Spent**

**c) A declaratory judgment that the purported charge registered over Parcel Number Kajiado/ Kisaju/3029 is fraudulent and null and void.**

**d) An order to discharge his property from the purported charge/charges at the defendants' costs.**

**e) Costs of the suit.**

**1<sup>st</sup> Defendant's defence**

8. The 1<sup>st</sup> defendant filed a defence dated 16<sup>th</sup> February, 2018. It admitted the averments in the plaintiff's plaint at paragraphs 4, 5 and 6 of the plaint. These paragraphs pleaded that he was the owner of the property; that he leased the property to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant was to pay rent of Kshs. 70,000 monthly. In answer to paragraphs 7 and 8, the 1<sup>st</sup> defendant, however, averred that the plaintiff voluntarily executed a power of attorney and gave his Title Deed for the suit property to Halai. On that basis, Halai, executed a legal charge to secure the loans advanced to the 1<sup>st</sup> defendant. It denied of any conspiracy with the 2<sup>nd</sup> defendant or impropriety on its part.

9. The 1<sup>st</sup> defendant stated that it was not served with statutory notices of intention to sell the security. It agreed with the plaintiff that the intended sale was illegal and supported the plaintiff's prayer for judgment against the 2<sup>nd</sup> defendant, but sought dismissal of the suit against it.

**2<sup>nd</sup> Defendant's defence**

10. The 2<sup>nd</sup> defendant filed a defence dated 11<sup>th</sup> April, 2018. It contended that the suit should be stayed and or dismissed for being *sub judice*.

11. The 2<sup>nd</sup> defendant admitted that the 1<sup>st</sup> defendant applied for a loan of Kshs. 75,000,000 and accepted an offer dated 6<sup>th</sup> June 2007. The 1<sup>st</sup> defendant presented a Power of Attorney dated 12<sup>th</sup> July, 2005 and registered on 1<sup>st</sup> August, 2005 from the plaintiff appointing Halai as his Attorney in relation to the suit property. The original title Deed for the property was also handed over to by the 1<sup>st</sup> defendant's officials.

12. The 2<sup>nd</sup> defendant maintained that the application for the Land Control Board consent was executed by the plaintiff and consent to charge subsequently obtained; that the legal charge was executed by Halai by virtue of the Power of Attorney and was registered and the loan disbursed to the 1<sup>st</sup> defendant. The 2<sup>nd</sup> defendant asserted that the loan was also secured by another legal charge over L.R No. Kajiado/ Kisaju /1679 and 1743. There was a further charge dated 8<sup>th</sup> August, 2007 bringing the aggregate loan amount to Kshs. 150, 610,000.

13. The 2<sup>nd</sup> defendant averred that in November, 2010, the 1<sup>st</sup> defendant requested for released the title documents that had been used to secure the loan from NIC Bank Ltd after Kshs. 250,000,000 was paid leaving a balance of Kshs. 60,000,000/- which was to be repaid by the 1<sup>st</sup> defendant in 60 monthly installments of Kshs. 1,396,096 commencing 31<sup>st</sup> January, 2011 but the 1<sup>st</sup> defendant failed to service the loan.

14. It notified the 1<sup>st</sup> defendant of the default through letter dated 11<sup>th</sup> May, 2011; sent the 90 days' statutory notice on 2<sup>nd</sup> July, 2013 calling for the payment of the arrears totaling to Kshs. 77,746,081.47 and subsequently instructed auctioneers to issue a 45 days' notification of sale which was also sent to the plaintiff by registered mail. The auction scheduled for 7<sup>th</sup> November 2014 was however called off after the 1<sup>st</sup> defendant promised to pay the outstanding amount but again defaulted. It subsequently commenced the process of realizing the security through letter dated 3<sup>rd</sup> July, 2015, but again the 1<sup>st</sup> defendant requested for time to pay.

15. The 2<sup>nd</sup> defendant stated that on 2<sup>nd</sup> November, 2015, a 45 days' notice was issued to the 1<sup>st</sup> defendant calling for the payment of Kshs. 77, 746,08 failing which the property would be sold. The 1<sup>st</sup> defendant paid Kshs. 11, 880,000 and promised to liquidate the balance within 30 days and requested for a postponement of the auction scheduled for 18<sup>th</sup> February, 2016. the 1<sup>st</sup> defendant failed again to pay thus a notification of sale was issued and served on the plaintiff on 22<sup>nd</sup> March, 2017 and the property advertised for sale by public auction. All the notices were sent to the plaintiff by registered mail.

16. The 2<sup>nd</sup> defendant maintained that even though the plaintiff was aware of the impending auction, he did not take any steps. It denied that it was involved in the fraud particularized in the plaint. It maintained that it properly exercised its statutory power of sale, under took presale valuation as required by law and advertised the property for sale by public auction. It urged the court to dismiss the suit and allow it to exercise its statutory power of sale.

**Plaintiff's evidence**

17. The plaintiff testified, adopting his witness statement, that he knew Halai and Captain Srithar, both directors of the 1<sup>st</sup> defendant. He had previously dealt with them when he sold a property to their other company known as Agro Irrigation and Pump Services Ltd and they were to sink a bore hole for him. Later the Halai verbally leased from him 70 acres at an agreed rental amount of Kshs. 70,000. The deceased introduced cattle on the land and started growing flowers. They later requested for the title deed for his land Kajiado/ Kisaju/3029 so that he could not give it to another person since they had leased the land from him. He gave out the title deed as requested.

18. He denied giving a power of attorney to Halai dated 12<sup>th</sup> July 2005 or applying for consent from the Land Control Board to lease the

land. He also denied entering into any transaction with the 2<sup>nd</sup> defendant; giving the 2<sup>nd</sup> defendant his title deed or any other document. He maintained that Halai and the 1<sup>st</sup> defendant took advantage of his illiteracy to act as they did. He stated that he only signed a document he was told him was with regard to the lease as an acknowledgement that he been paid Kshs. 10,000 on top of the Kshs. 60,000 he had earlier been paid as rent.

19. The plaintiff testified that that he did not know that the 1<sup>st</sup> defendant had used his title deed to borrow money from the 2<sup>nd</sup> defendant, and that he only came to suspect that there was a problem when spotlight auctioneers attempted to sell his land. When he confronted Captain Strithar, he was made to believe that it was a mistake. He later learnt through his advocates that his land was to be sold by Garam Auctioneers after it was advertised for sale in a newspaper. After conducting a search, it became clear to him that his land had been charged in favour of the 2<sup>nd</sup> defendant without his knowledge.

20. He denied that applying for the Land Control Board's consent to charge the land. He maintained that he was not aware of the application for consent dated on 3<sup>rd</sup> July, 2007 or the consent given on 4<sup>th</sup> July, 2007. He also denied attending the Land Control Board meeting for any consents. He maintained that the 1<sup>st</sup> defendant committed fraud and irregularities when it charged his land in favour of the 2<sup>nd</sup> defendant. He confirmed that the 2<sup>nd</sup> defendant never served him with statutory notices.

21. In cross examination, he admitted that he never demanded his title back since the agreed amount for lease was being paid. He denied being aware that his property had been charged in favour of Diamond Trust Bank Ltd or that a power of attorney and his title deed had been given to Diamond Trust Bank Ltd and later to the 2<sup>nd</sup> defendant to secure a loan advanced to the 1<sup>st</sup> defendant. He denied ever signing documents for securing a loan from any bank including the 2<sup>nd</sup> defendant. He prayed that his suit be allowed with costs.

22. The 1<sup>st</sup> Defendant did not call any evidence.

### **2<sup>nd</sup> Defendant's evidence**

23. DW2 *Martin Karanu*, a legal manager with the 2<sup>nd</sup> defendant relied on his witness statement dated 19<sup>th</sup> October 2020 and produced documents in the 2<sup>nd</sup> defendant's bundle as exhibits. He stated that the 2<sup>nd</sup> defendant advanced a loan to the 1<sup>st</sup> defendant on the basis of the plaintiff's property as security. The 1<sup>st</sup> defendant fell into arrears after failing to repay the loan. He asserted that 2<sup>nd</sup> respondent met all the legal requirements before advertising the property for sale. That the 1<sup>st</sup> defendant admitted default and the 2<sup>nd</sup> defendant was entitled to sell the security.

24. In cross examination, he admitted that he was not an employee of the 2<sup>nd</sup> defendant at the time the loan was taken; the security was registered on the basis of the power of attorney and the loan was disbursed to the 1<sup>st</sup> defendant and not the plaintiff. He also admitted that the power of attorney did not authorize anyone to borrow money from any bank. He stated that he did not know the advocate who attested the power of attorney or whether the plaintiff was illiterate. He also admitted that he did not know whether Land Control Board consent was obtained for the power of attorney.

25. The witness further stated that he did not know why the application for consent was undated, who prepared it and who applied for the consent to charge. He again stated that he did not know why the applications for consent were made on 3<sup>rd</sup> July, 2007 and consents issued the following day, 4<sup>th</sup> July, 2007. He could not also tell why the signatures were different. He admitted that he did not know whether there was a relationship between the plaintiff and the 1<sup>st</sup> defendant; the purpose of the first loan of 75 Million given on 6<sup>th</sup> June, 2007 and whether the property was valued before the loan was disbursed as required by law.

26. The witness admitted that there was a discrepancy on the dates in the charge and that although the loan of 75 million was disbursed in 2007, he did not know the actual date and whether it was disbursed at once or not.

27. Regarding the further charge, he again admitted that he did not know whether the bank evaluated the 1<sup>st</sup> defendant's ability to service the loan before approving the further advance applied for on 8<sup>th</sup> August, 2008. He again admitted that he did not know whether the 2<sup>nd</sup> defendant informed the plaintiff about the further charge; He did not know why the application for consent was made on 3<sup>rd</sup> December, 2008 and consent obtained the same day; whether the application for consent to further charge was signed by the plaintiff or nor and whether the plaintiff appeared before the Land Control Board.

28. The witness again stated that he did not know why the 1<sup>st</sup> defendant's title deed given as further security was released leaving that of the plaintiff' as the only security for the outstanding loan amount. He told the court that he did not know whether or not the plaintiff was served with statutory notices. He admitted that the legal charges were executed by Halai on the basis of the power of attorney and not the plaintiff. The application for Land Control Board consent was signed by the 2<sup>nd</sup> defendant's advocate on its authority.

29. He also admitted that one of the charges had different dates. The front page was dated 11<sup>th</sup> July, 2007 while the recital was dated 1<sup>st</sup> July 2006. It was executed on 2<sup>nd</sup> July, 2007 and registered on 8<sup>th</sup> August, 2007 while the consent to charge was issued on 4<sup>th</sup> July, 2007.

### **Plaintiff's submissions**

30. The plaintiff filed written submissions dated 9<sup>th</sup> September, 2021. He submitted that the charge and further charge registered against his property, were illegal and fraudulent as the defendants conspired to defraud him of his property. He argued that the power of attorney dated 12<sup>th</sup> July, 2005, was also illegal, unlawful and fraudulent. It was obtained through conspiracy between the defendants. Relying on the

definition of power of attorney in **Black's Law Dictionary, 10<sup>th</sup> Edition**, he argued that a power of attorney is a contractual document governing the relationship between a principal and an agent which must meet all the legal requirements of a contract. He maintained that since the power of attorney did not comply with the provisions of the Registered Land Act Cap. 300 (now repealed) since he did not execute that power of attorney.

31. The plaintiff argued that he only signed a document he was told was for leasing his property to the 1<sup>st</sup> defendant for farming purposes at a monthly rent of Kshs. 70,000, a position that was uncontroverted. He relied on Section 112, 117 and 119 of the Evidence Act. He maintained that the power of attorney was illegal, fraudulent and was obtained through conspiracy between the defendants who took advantage of his literacy level. He submitted that he did not appear before advocate who attested the alleged power of attorney on 12<sup>th</sup> July, 2005 and no reason was given why the advocate was not called as a witness. He argued, therefore, that the requirements of section 110 of the Land Registration Act were not met. He pointed out that the certificate was clear the advocate did not know the person executing the power of attorney and that the person was identified by Mr. Halai. He maintained that he did not execute that document.

32. In the view of the plaintiff, the burden of proof shifted to the 1<sup>st</sup> defendant the moment he disowned the power of attorney. He relied on sections 112, 97(1) and 98 of the Evidence Act. He urged the court to find that he did not sign the power of attorney and that it was, therefore, fraudulent, illegal and of no legal effect.

33. Regarding the legal charge for Kshs. 75,000,000, the plaintiff argued it was null and void and could not bind him since the power of attorney the basis of which it was executed was illegal. He argued that he was not the chargor and his property was charged without his knowledge. According to the plaintiff, even if the power of attorney had been lawful, the donee could not have acted in his interest when the 1<sup>st</sup> defendant had its title document(s) released leaving his property as the only security. He relied on **Kibiro Wagoro Makumi v Francis Nduati Macharia & another** [2018] eKLR that evidence having been adduced that the title used was acquired fraudulently, the onus shifted to the 2<sup>nd</sup> defendant to challenge the plaintiff's claim that the title upon which it advanced the loan was tainted.

34. He further submitted that there was no valid Land Control Board consent. The application for consent by the 1<sup>st</sup> defendant was made on 3<sup>rd</sup> July, 2007 and consent obtained the following day, 4<sup>th</sup> July, 2007, without him appearing before the Land Control Board. He argued that the 1<sup>st</sup> defendant could not apply for consent to charge his property without his authority, a clear demonstration of fraud and conspiracy. He maintained that since he did not apply for consent and failure by the 1<sup>st</sup> defendant to call evidence regarding the issue, this was proof that everything was forgery and fraud committed by the defendants to use his property for their financial gain. He relied on **Peter Nguqi Kigira v Fredrick Nganga Kigira** [2021] eKLR for the proposition that if evidence is not tendered to support an averment in the pleadings, such averment remains mere statement, and if there is no rebuttal of evidence by a party, that evidence remains uncontroverted.

35. The plaintiff argued that there was no way the consent could show that he was the one charging his property when he had nothing to do with the preparation, execution and registration of the charge in favor of the 2<sup>nd</sup> defendant. He maintained that he was being burdened by a fraudulent transaction he was not party to. He maintained that there was no valid consent. He relied on **Kiplagat Kotut v Rose Kipngok** [2014] eKLR that no valid consent from the land control board had been obtained.

36. Submitting on the further charge for Kshs. 150, 610,000, he asserted that despite the 1<sup>st</sup> defendant defaulting on the loan first loan, the 2<sup>nd</sup> defendant went ahead to advance it more money under the further charge over his property without his knowledge and consent. This, he argued, was clear evidence of collusion to defraud him of his property.

37. According to the plaintiff, although the further charge was executed by Halai under the alleged Power of Attorney, the letter of consent was addressed to him to create a false impression that he had applied for consent which was not the case given that the consent did not also mention the 1<sup>st</sup> defendant. He again wondered how an application for consent could be made on 3<sup>rd</sup> December 2007 and consent obtained the same day. He contended that the 1<sup>st</sup> defendant's failure to repay the loan despite being given time, and failure to call evidence while aware that his property was likely to be sold, demonstrated a fraudulent intention on its part.

38. He relied on **CCB V MIB & another** [2014] eKLR on revocable and irrevocable power of attorney. He also cited **Re estate of Nicole Polcino(Deceased)** [2008] eKLR and **Elijah Makeri Nyangwera v Stephen Mungai Njuguna & another** [2013] eKLR. He also relied on **Stephen Ikiao v M'taru M'thanari M'kiamba** [2010] eKLR, that the doctrine of *non est factum* applies to those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purport of a particular document. He again relied on the Court of Appeal decision in **Josephine Mwikali Kikenye v Omar Abdallah Kombo & another** [2018] eKLR.

39. Regarding non service of notices, the plaintiff submitted that the notices were not served on him. He relied on the Court of Appeal decision in **Stephen Boro Gitiha v Nicholas Ruthiru Gatoto** [2017] eKLR for the argument that non service of a notice is a fundamental breach of the provisions of section 74 of the RLA which derogates from the chargor's equity of redemption. He also relied on **Trust Bank Limited v George Ongaya Okoth** [2000] eKLR that time runs from the date of service of the notice.

40. He urged the court to allow his suit.

41. The 1<sup>st</sup> defendants did not file submissions.

## **2<sup>nd</sup> defendant's submissions**

42. The 2<sup>nd</sup> defendant filed its written submissions dated 21<sup>st</sup> September, 2021. It maintained that the plaintiff executed the power of attorney dated 12<sup>th</sup> July, 2005 appointing Halai as his attorney and gave the Title Deed for the property to the donee which was charged in its favour.

43. Regarding the validity of the power of attorney, the 2<sup>nd</sup> defendant submitted that the burden was on the plaintiff to prove that it was not valid, and that the plaintiff had the duty to call the advocate who attested its execution. It relied on argued that the plaintiff could not, therefore, rely on the plea of *non est factum* with regard to the power of attorney. The 2<sup>nd</sup> defendant cited the decisions in *Geoffrey Mutie Mutunga v Wilson Mutunga Mbai* [2020] eKLR and *Koileken Ole Kiponka Orumoi v Mellech Engineering & Construction Limited & 2 others* [2015] eKLR to support its argument.

44. According to the 2<sup>nd</sup> defendant, although the plaintiff indicated testified in chief that he thought the document he signed was a lease, he did not produce the alleged lease he signed. He did not also explain why he gave his title deed for the property to a tenant. The 2<sup>nd</sup> defendant maintained that it was entitled to exercise its statutory power of sale.

45. On the applications for the Land control board consent and consent to charge, the 2<sup>nd</sup> defendant argued that the plaintiff was party to the process and signed the applications for consent to charge. The plaintiff, it argued, was, therefore, estopped from claiming that the consents were irregularly obtained and were illegal. In the 2<sup>nd</sup> defendant's view, the charge and further charge were executed pursuant to the power of attorney; were duly registered and the loan disbursed to the 1<sup>st</sup> defendant.

46. Regarding default by the 1<sup>st</sup> defendant to pay the loan, the 2<sup>nd</sup> defendant maintained that the 1<sup>st</sup> defendant failed to service the loan as agreed; it issued and served statutory notices on the plaintiff and 1<sup>st</sup> defendant by registered post. The 2<sup>nd</sup> defendant maintained that the charge and further charge were neither illegal; fraudulent nor unlawful. It argued that the plaintiff did not prove conspiracy between it and the 1<sup>st</sup> the defendant regarding the preparation, execution and registration of the power of attorney and charges. It blamed the plaintiff for not taking any steps to safeguard his interests, either by visiting its offices or contacting the auctioneer, despite being aware of the intended auction.

47. It also argued that since the plaintiff had been joined as an interested party in **ELC 375 of 2017**, the present suit ought to be stayed. In any case, it argued, it is *res judicata* as the 1<sup>st</sup> defendant's application for injunction was dismissed and it was, therefore, at liberty to proceed to realize the security.

48. It urged the court to dismiss plaintiff's suit with costs.

#### **Determination**

49. I have considered the pleading, evidence and submissions by parties. I have also perused the exhibits and considered the decisions cited. The plaintiff's case is that he entered into an oral leased agreement with the 1<sup>st</sup> defendant's directors whom he had known and had previously sold land to one of their companies. Later Captain Srihar, a director of the 1<sup>st</sup> defendant took to him a document he was made to believe was a lease to sign which he did. He was also asked to give original title deed for the property since the 1<sup>st</sup> respondent was investing on the land and it did not want him to give it to another person.

50. He was later surprised to learn that his property had been used as a security by the 1<sup>st</sup> respondent to secure a loan advanced to it by the 2<sup>nd</sup> defendant and the property was to be sold by public auction due to the 1<sup>st</sup> defendant's failure to repay the loan. He denied giving a power of attorney to Halai. He also denied applying for consent for the power of attorney or to charge. He maintained that he was not aware of the power of attorney; consents to charge; the legal charges registered against his property or the loan advanced to the 1<sup>st</sup> defendant. He also maintained that he was not served with statutory notices.

51. The 1<sup>st</sup> defendant admitted that the plaintiff leased the land to the 1<sup>st</sup> defendant. It however stated that the plaintiff gave the power of attorney to Halai which Halai used to execute the legal charges to secure the loan advanced to the 1<sup>st</sup> defendant. It however denied that it was served with statutory notices.

52. The 2<sup>nd</sup> defendant on its part maintained that the legal charges were properly executed on the basis of the power of attorney; that the 1<sup>st</sup> defendant applied for loans which were disbursed and that legal charges were executed over the suit property and registered in its favour. According to the 2<sup>nd</sup> plaintiff, the 1<sup>st</sup> defendant defaulted in loan repayment and after serving requisite statutory notices to both the plaintiff and the 1<sup>st</sup> defendant, it moved to realize the security. It denied committing any fraudulent acts against the plaintiff.

53. From the above contestations, the issues that arise for determination are; whether the plaintiff donated the power of attorney; whether the charge and further charge were lawfully executed; whether the 2<sup>nd</sup> defendant could sell the plaintiff's property and whether the plaintiff was served with statutory notices.

#### **Whether the plaintiff donated the power of attorney**

54. The plaintiff argued that he did not execute the power of attorney dated 12<sup>th</sup> July 2005 to Halai. He stated that he only signed a document he was made to believe was for leasing his land. He asserted that he did not appear before the advocate who purportedly attested that power of attorney. He argued that the 1<sup>st</sup> defendant's officials took advantage of his literacy level and used his property to the 1<sup>st</sup> defendant's financial advantage. The defendants argued that the plaintiff voluntarily donated the power to Halai and that it was properly done and registered.

55. I have considered this issue and the evidence on record. The plaintiff denied donating the power to Halai, a director of the 1<sup>st</sup> defendant, who used it to execute a legal charge and further charge to secure a loan advanced to the 1<sup>st</sup> defendant by the 2<sup>nd</sup> defendant. In other words, the plaintiff did not execute the power of attorney.

56. The law places the burden of proof on the plaintiff to prove his case on a balance of probability. Section 107 of the Evidence Act (Cap 80) provides that whoever desires the court to give judgment on the basis of existence of certain facts, must prove that such facts exist. Further, section 108 provides that the burden of proof in a suit or civil proceedings lies on the person who would fail if no evidence was led at all by either party. In this regard, the plaintiff bore the burden to prove his case against the 1<sup>st</sup> defendant on this issue.

57. That position of the law notwithstanding, the plaintiff denied donating the power of attorney to Halai. That power of attorney triggered the events that followed and are the subject of this dispute. The plaintiff also argued that he did not appear before the advocate who allegedly attested his signature and he did not know him. With this denial, the burden of proof shifted to the 1<sup>st</sup> defendant and its officials to prove that the plaintiff actually donated the power to Halai, executed that power and appeared before the advocate who attested his signature.

58. Section 109 of the Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. In that case, the 1<sup>st</sup> defendant wanted the court to believe that the plaintiff donated the power to Halai which the plaintiff denied. The burden of proof, therefore, shifted to the 1<sup>st</sup> defendant on this issue.

59. The fact that evidential burden of proof can shift depending on the circumstance of the case, was stated by the Supreme Court in **Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 2 Others** [2017] eKLR, thus:

***[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.***

60. The burden having shifted to the 1<sup>st</sup> defendant, it was its duty to call evidence to prove that indeed the plaintiff donated the power to Halai, thus disprove the plaintiff's claim that he did not donate that power. The 1<sup>st</sup> defendant did not call evidence to support its claim that the plaintiff voluntarily executed the disputed power of attorney as it pleaded in its defence.

61. Section 112 of the Evidence Act provides that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. In that case therefore, where the party fails or refuses to adduce evidence to prove or disprove the fact in question, the court is entitled to make an adverse inference that if such evidence was called it would have been adverse to that party.

62. The fact of who executed the power of attorney shifted to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not call evidence to disprove the plaintiff's contention that he did not donate the power to Halai; that he did not know the advocate and did not appear before the advocate. The evidence of who executed the power of attorney was on the 1<sup>st</sup> defendant's officials who did not testify on that fact.

In **CMC Aviation Ltd v Crusair Ltd (No1)** [1987] KLR 103, **Madan JA**, (as he then was) stated:

***The pleadings contain the averments of the three parties concerned. Until they are proved or disproved, or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded on them. Proof is the foundation of evidence.***

***As stated in the definition of "evidence" in section 3 of the Evidence Act, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.***

63. The 1<sup>st</sup> defendant, apart from filing a statement of defence, did not call evidence. Its statement of defence, therefore, remained mere assertions, while the plaintiff's averments and evidence remained uncontroverted. This is because the 1<sup>st</sup> defendant did not deny the plaintiff's averments in his plea. In fact, the 1<sup>st</sup> defendant admitted that the plaintiff leased the land to it and that it was paying him KShs. 70,000 per month. According to the plaintiff, the document he signed as a lease, was taken to him by Captain Srithar. The plaintiff maintained that the 1<sup>st</sup> defendant's officials took advantage of his literacy level and their closeness to him to use his property to the 1<sup>st</sup> defendant's benefit without his knowledge.

64. This fact was also not denied. Captain Srithar did not testify and enlighten the court what document he took to the plaintiff to sign. He was the only person who could tell the court what the plaintiff signed. The plaintiff further maintained that he did not appear before the advocate who attested the signatures on the power of attorney. That advocate did not also testify. The power of attorney clearly shows at the certification that the Donor of that power was not known to the advocate but was introduced to him by Halai. That the 1<sup>st</sup> defendant's officials took advantage of the plaintiff's literacy level was not controverted either.

65. The 2<sup>nd</sup> respondent argued that the plea of *non est factum* was not available to the plaintiff with regard to the power of attorney. The 2<sup>nd</sup> defendant's argument was that by that doctrine, the plaintiff was bound by his signature on the power of attorney and was estopped from denying his consent to be bound by terms contained in that document. It relied on **Geoffrey Mutie Mutunga v Wilson Mutunga Mbai** (supra) and **Koileken Ole Kiponka Orumoi v Mellech Engineering & Construction Limited & 2 others** (supra).

66. The doctrine of *non est factum* arises where a party has been misled into executing or signing a document that is materially different from that which he intended to execute or sign. The party therefore raises that defence to argue that the document in question is not his or

what he intended to execute or sign.

67. In Josephine Mwikali Kikenye v Omar Abdalla Kombo & another (supra), the court of Appeal cited the decision in Gallie v Lee and Another [1969] 1 All ER 1062, where Lord Denning (MR) stated:

*If the deed was not his deed at all, (non est factum) he is not bound by his signature any more than he is bound by a forgery. The document is a nullity just as if a rogue had forged his signature. No one can claim title under it, not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it. No matter that this innocent person acted in the utmost good faith, without notice of anything wrong, yet he takes nothing by the document.*

68. In Josephine Mwikali Kikenye v Omar Abdallah Kombo & another (supra), after considering several decisions on this defence, the Court of Appeal stated:

*[30]. Applying those principles to the facts at hand, we...find that the appellant had established the defence. It was her uncontroverted evidence that she could neither read nor write at the time the sale agreement was executed. It was the 1st respondent who read out and explained to her the contents thereof. We note that the 1st respondent did not deny the same. From the 1st respondent's explanation she believed that she was executing an agreement relating to the mode of the loan repayment. In real sense, she had executed a sale agreement which was substantially different in nature. The learned Judge overlooked this vital piece of evidence, we believe, because she was preoccupied with the fact that the appellant had engaged in a somewhat similar transaction when she purchased the suit premises from One Shamji. With respect, that transaction was not before the learned Judge and she was not in a position to tell how the transaction was concluded. Moreover, the appellant had not challenged that transaction but the sale agreement in question.*

69. The 2<sup>nd</sup> respondent could not drive the plaintiff from relying on this doctrine. First, the 2<sup>nd</sup> defendant had not dealt with the plaintiff in so far as the execution of the power of attorney was concerned. The plaintiff pleaded and testified that he was made to believe that he was signing a lease. The document was taken to him by Captain Srithar and the 1<sup>st</sup> defendant admitted in its defence that indeed the plaintiff leased land to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not deny that the document the plaintiff signed was a lease or that he gave the title deed to his land for purposes of that lease.

70. The 2<sup>nd</sup> defendant's contention that the plaintiff had earlier entered into an agreement to sell land to another company associated with the 1<sup>st</sup> defendant was not an issue before this court and whether or not the plaintiff executed a sale agreement was neither here nor there. The fact that the plaintiff was not made aware that he was signing a power of attorney was not controverted. Only those who were present could testify on what the plaintiff signed. This which was not done.

71. From the above analysis, and in the absence of evidence to the contrary, I find and hold that the plaintiff did not donate the power of attorney dated 12<sup>TH</sup> July 2005 to Halai. Even if it had been proved that the plaintiff signed that document, which was not done, the alleged power of attorney would have been fraudulent and a forgery and, therefore, null and void.

#### **whether the charge and further charge over the property were lawfully executed**

72. The next issue is whether the charge and further registered against the plaintiff's property were lawful. The charge dated 11<sup>th</sup> July 2006 and further charge dated 8<sup>th</sup> September 2008 respectively were executed by Halai pursuant to the impugned power of attorney dated 12<sup>th</sup> July 2005. That fact was admitted by the defendants. The charge and further charge show that the plaintiff was the chargor. The undisputed fact is that the plaintiff did not execute the legal charges and was not aware of them.

73. Having determined that there was no valid power of attorney donated to Halai capable of giving him power or authority to execute documents on behalf of the plaintiff, both the charge and further charge purportedly executed on the basis of that non-existent power of attorney, did not amount to valid legal charges capable binding the plaintiff to the 2<sup>nd</sup> defendant.

74. The consents to charge and for the further charge dated 4<sup>th</sup> July 2007 were also obtained on the basis of that power of attorney. This is so because the plaintiff denied applying or signing the applications for consents. There being no evidence that the plaintiff executed the legal charges and obtained consents to charge and further charge, the execution of those legal charges and applications for consents had no foundation in law. There was no valid power of attorney that could confer power or authority on Halai to execute documents on behalf of the plaintiff. That power of attorney could not also be basis of valid applications for consent. I once again find and hold that the legal charges and consents were outright illegalities. They could not found a lawful and binding contract between the plaintiff and the 2<sup>nd</sup> defendant, capable of being performed by him.

#### **Whether the 2<sup>nd</sup> defendant could sell the plaintiff's property**

75. It is by now clear that the issue of whether the 2<sup>nd</sup> defendant could sell the plaintiff's property must be in the negative. The plaintiff did not charge his property in favour of the 2<sup>nd</sup> defendant. The legal charges were not lawfully executed on his behalf to secure the loans advanced to the 1<sup>st</sup> defendant. The plaintiff was not even aware that his property had been offered as security and charged in favour of the 2<sup>nd</sup> defendant to secure loans the 2<sup>nd</sup> defendant advanced to the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant did not adduce evidence to prove that the plaintiff knew that his property had been offered as security for the loans advanced to it. To that extent, therefore, the plaintiff was an innocent party whose property was fraudulently used to secure loans he was not aware about and had nothing to with.

76. To demonstrate that there was something untoward in this regard, is the fact that although the 1<sup>st</sup> defendant had also offered its properties Kajiado/Kisaju/1679 and 1743 as additional securities to secure the loans, those securities were discharged and released to the 1<sup>st</sup> defendant leaving the plaintiff's property as the only security without his knowledge. This is a clear demonstration that the 1<sup>st</sup> defendant and its officials were up to no good and were not mindful of the plaintiff's interest. They were out to get maximum benefit from the plaintiff's property but failed to pay the loans leaving the property at the mercy of the 2<sup>nd</sup> defendant's statutory right of sale.

77. The 1<sup>st</sup> defendant's fraudulent actions could not bind the plaintiff, an innocent party, who had nothing to do with those actions. A contract founded on illegalities and or misrepresentations, could not bind the plaintiff. The 2<sup>nd</sup> defendant could not, therefore, exercise its statutory power of sale against the plaintiff's property as there was no binding contract between it and the plaintiff; "**Not even an innocent purchaser who bought on the faith of it, nor an innocent lender who lent his money on the faith of it.**" (*Gallie v Lee and another* (supra))

#### **Whether statutory notices were served**

78. Having determined the first three issues as I have, this issue should not arise for determination. However, for the completeness of the matter, I will say something about it.

79. The plaintiff argued that he was not served with statutory notices that his property was to be sold by public auction. He learnt through his advocate that his property had been advertised for sale prompting him to file this suit. The 1<sup>st</sup> defendant agreed with the plaintiff that it was also not served with statutory notices. It supported the plaintiff's claim that the purported sale was illegal for lack of service of requisite notices. The 2<sup>nd</sup> defendant however argued that notices were issued and served and that it properly invoked its statutory right of sale.

80. I have considered this issue, the evidence and perused the 2<sup>nd</sup> defendant's bundle of documents produced as exhibits. The 2<sup>nd</sup> defendant's witness was at pains to show that the plaintiff was served with statutory notices. He did not point out to the court any single statutory notice that was served on the plaintiff. For instance, no demand letter was shown to have been sent to the plaintiff. There was no doubt that Halai the purported donee of the power was deceased. Even if he was alive, the power of attorney was fraudulent and, therefore, he could not lawfully act on behalf of the plaintiff.

81. The 2<sup>nd</sup> defendant argued that some statutory notices were sent and used a copy of its advocates' instructions to the auctioneer at page 150 of its bundle of documents to justify its claim. However, the document has a list of names of people whose properties had been earmarked for sale. Even though the plaintiff's name is on that list, his postal address was given as **P.O.BOX 8611 NAIROBI**. This was despite the fact that all documents show that the plaintiff's postal address is P.O BOX 24 KAJIADO. This address is on his title deed; applications for consent that he did not sign; the letters of consents and the legal charge and further charge. One need not stress that the 2<sup>nd</sup> defendant did not show that it served statutory notices to the plaintiff as required by law.

82. In *Nyangilo Ochieng & Another v Fanuel B. Ochieng & 2 others* [1996] eKLR, the Court of Appeal again stated:

*It is trite that before a chargee can exercise his/her/its statutory power of sale there must be compliance with Section 74(1) of the Registered Land Act (Cap.300, Laws of Kenya). This section obliges the chargee to serve, by registered post, the relevant statutory notice. Three months after the chargors receiving such notices the bank's power of sale arises. This is the basis upon which the bank can put up the properties for sale...It is for the chargee to make sure that there is compliance with the requirements of s.74(1) of the Registered Land Act. That burden is not in any manner on the chargor. Once the chargor alleges non receipt of the statutory notice it is for the chargee to prove that such notice was in fact sent. (emphasis).*

83. In *Stephen Boro Gitiha v Nicholas Ruthiru Gatoto* (supra), the Court of Appeal again held that:

*Section 74(1) of the RLA was designed to offer protection to chargors by protecting them from situations where their property would be disposed of without the requisite notice. It was a right conferred by statute and the courts could not lightly treat or minimize any breach of the said right. Auction sales not preceded by the requisite statutory notice were not mere irregularities. They were unlawful, null and void, incapable of passing effective and proper title to the purchasers, as illegality cannot engender legal title.*

84. Applying the above decisions to this case, it is clear from the evidence on record, that the 2<sup>nd</sup> defendant did not prove that it served statutory notices on the plaintiff with the result that its statutory power of sale of the plaintiff property, even if it had existed, had not crystallized. Any attempt to sale the plaintiff's property was in exercise of a non-existent statutory of sale that had not in any event crystallized. It was an outright illegality that cannot be countenanced by a court of law.

85. In the circumstances, I am satisfied that the plaintiff has proved his case on a balance of probabilities, first; that he did not donate the power of attorney to Halal and therefore any actions arising from that purported power of attorney were **void abinitio**. Second; that he was not served with statutory notices as required by law.

86. Consequently, the plaintiff's suit is hereby allowed and the following orders hereby issue:

*a. A declaration is hereby issued that the purported legal charge and further charge registered over Parcel Number Kajiado/Kisaju/3029 were fraudulent, null and void.*

*b. An order is hereby issued directing the 2<sup>nd</sup> defendant to forthwith discharge the plaintiff's property Kajiado/Kisaju/3029 from the purported legal and further charges registered against the property at the 1<sup>st</sup> defendant's cost.*

*c. A permanent injunction is hereby issued restraining the 2<sup>nd</sup> defendant, its agents, servants and or employees from selling, trespassing and or in any manner whatsoever, interfering with the plaintiff's ownership and user of parcel Number Kajiado/ Kisaju/ 3029.*

*d. Costs of the suit to the plaintiff to be borne by the 1<sup>st</sup> defendant.*

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 9TH DECEMBER 2021.**

**E.C MWITA**

**JUDGE**