



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

CIVIL CASE NO. 34 OF 2012

CCB.....PLAINTIFF

VERSUS

MIB).....1ST DEFENDANT

AGRISEEDCO. LTD).....2ND DEFENDANT

JUDGEMENT

INTRODUCTION

1. The Plaintiff CCB (C) and the first defendant MIB (B) were married on 3/3/1981. In 1984, C bought a 60-acre parcel of land comprised in LR NO [particulars withheld] from John Matheka Wasyala and Margaret Wasyala. The property was named [particulars withheld] (Suit land).
2. On 30/12/1996 C donated a Special Power of attorney to B who had the power to deal with the suit land on behalf of C. The marriage between C and B had problems which led to separation and finally the two divorced on 10/3/2010. In 2011 C visited Kenya from the United States of America and was informed that B was in the process of selling the suit land to the second defendant Agriseedco Limited (Agriseedco). Christine thereafter started the process of revoking the power of attorney donated to B. The revocation of the power of attorney was registered on 11/1/2012. A caveat had also been registered by the Registrar of Government Lands Prohibiting any dealings with the suit land.
3. C then moved to court on 13/3/2012 and filed a suit against B and Agriseedco claiming the following reliefs;-
 - (a) *A declaration that the agreement for sale of land dated 15/5/2011 is irregular, fraudulent, null and void and that the same should be cancelled.*
 - (b) *A declaration that the power of attorney donated to the first defendant has been revoked.*
 - c. *A declaration that the agreement for sale dated 15/5/2011 having not been stamped appropriately under the Stamp Duty Act, the same is null and void.*
 - (d) *An order reversing any step taken or registration made by any person or office in furtherance of the transaction herein.*
 - (e) *An order of permanent injunction restraining the defendant from trespassing*

upon, taking possession, intermeddling and/or interfering with the plaintiff's possession, ownership and occupation of the suit land.

(f) Costs of the suit and interest.

(g) Any other order or relief that this court deems fit to grant in the circumstances.

4. Agriseedco filed its defence and raised a counter-claim against C and B in which it claims the following reliefs:-

(a) That the plaintiff's suit be dismissed with costs to the second defendant.

(b) Payment of the sum of the Kshs.105,898/= by the plaintiff and the first defendant jointly and severally together with costs and interest at court rates until payment in full.

(c) An order for removal of the caveat registered on the suit property and immediate registration of the transfer.

(d) Damages for losses incurred from May, 2011 and November, 2011 respectively until the date of transfer with interest thereon.

(e) Costs of the counter-claim together with such further relief and orders as the court deems just and expedient against the plaintiff and first defendant.

PLAINTIFF'S EVIDENCE

5. C testified that when she bought the suit land, she started planting maize, she later changed to cattle rearing and wheat farming. When all these did not do well, she changed to coffee farming. The suit land now has mature coffee plants. She has a factory on the suit land. She has employed 6 permanent employees with his brother PW2 Alfred Kipngetch M'clean as manager. There are also other buildings on the suit land including a farm house and go downs. She uses casual workers whenever she is picking coffee berries.
6. C testified that she bought the suit land through the law firm of F.E. Jamal Advocate. She donated power of attorney to B in 1996 so that Mr B could administer the suit land for the benefit of their three children in case she died. Mr B never used the power of attorney until after they divorced in 2010. In 2011 when she came from the state of California in the USA where she resides, she heard that B wanted to sell the suit land. She contacted him but he could not pick her calls. She then decided to write to the Land Registrar on 3/2/2011 with a view to causing the Registrar to register a caveat on the title to the suit land. On the same date she wrote to the Land Registrar, she went to the firm of Messers Simba & Simba Advocates whom she instructed to prepare revocation of power of attorney which she had donated to Mr B. After making these arrangements, she went back to the U.S.A.
7. At the beginning of 2012 C came back to Kenya. She still heard rumours that B was intent on selling the suit land. She called on Mr Jamal of F. E. Jamal Advocate. Mr Jamal showed her a copy of sale agreement dated 15/5/2011. She was said to be the vendor in the agreement and the purchaser was Agriseedco. The purchase price was Kshs.27,000,000/=.
8. C went to Messers Simba & Simba Advocates to ascertain whether the revocation of the power of attorney had been registered. She was informed that it had not been registered due to an oversight on their part. The revocation of power of attorney was then forwarded to the lands office for registration. The same was registered on 11/1/2012. As at the time of registration of the power of attorney, the suit land had not been transferred to Agriseedco. She testified that she is the one in possession of the suit land and denied Agriseedco's contention that it is the one in possession of the suit land. She also denied Agriseedco's contention that she changed her mind regarding the

sale of the suit land because she wanted a higher price. She denied all claims by Agriseedco.

SECOND DEFENDANT'S CASE

9. DW1 Kassim Omollo Owino is the general manager of Agriseedco. He testified that Agriseedco is a company which deals in research and production of seeds. In the year 2009 Agriseedco decided to look for a farm for purposes of carrying out research. The company commissioned its research officers based at Kitale to look for a farm. A number of farms were visited but the company settled on one farm called Tausi farm. On 7/2/2010 Mr Owino visited the farm for the first time. He met two managers of the farm namely Simon Wabwoba (PW3) and Michael Baraza. He visited the farm because he had information that the same was up for sale. On 12/4/2010 the Group chief executive based in Zimbabwe Mr Morgan and the regional manager James Len came to Kenya and they were taken to among other farms, Tausi farm. A technical committee was formed which evaluated the identified farms which had been narrowed to six. The six farms were evaluated and the committee zeroed in on Tausi farm. Mr Owino then contacted Mr B who gave him his lawyer's contact. Mr Owino got in touch with Mr Jamal Advocate. The purchase price was agreed at 450,000/= per acre which came to KShs.27,000,000/=. Agriseedco then appointed the firm of T. O.K'opere & Co. Advocates to act for it.
10. Mr Owino was shown an indenture which showed that the owner of the suit land was C. He questioned how it was possible to sell the suit land yet the owner is not the one who was involved. He was told that it was possible because Mr B who was selling the suit land had a power of attorney from C. The necessary documents were drawn and Agriseedco was required to pay 10% of the purchase price. The 10% (Shs.2,700,000/=) deposit was paid to F. E. Jamal Advocate on 29/4/2011 through R. T. G.S. The balance of the purchase price (Shs.24,300,000/=) was made on 7/11/2011.
11. Completion documents were forwarded to the lawyer of Agriseedco on 15/11/2011. In late November, Agriseedco started paying five of C's workers in anticipation of take over of the farm at the conclusion of the registration process. On 6/2/2012 the vendor's advocate wrote a letter intimating that he wanted to refund the purchase price. The lawyer for Agriseedco attempted to lodge transfer documents but this was not possible as there was already a caveat registered on the title to the suit property. The purchase price was wired back to Agriseedco who returned it back to the vendor's advocate. Agriseedco denies the claims by C and prays that its prayers in the counter-claim be allowed.

ISSUES FOR DETERMINATION:

12. I have gone through the pleadings herein, the evidence adduced as well as submissions by counsel for the parties to this suit. The counsel did not agree on the issues. A look at the issues which have been raised separately by counsel show that the following are the ones for determination;
- 1. Was the power of Attorney dated 30/12/1996 and registered on 24/3/1997 irrevocable?***
 - 2. Is the revocation of the Power of attorney lodged and registered at the Lands office on 11/1/2012 by the plaintiff valid, and if so what was its effect on the sale transaction?***
 - 3. What was the duty of both the donor and donee with respect to the power of attorney?***
 - 4. Was the agreement dated 15/5/2011 a fraud perpetrated by both defendants upon the plaintiff?***
 - 5. Was the second defendant an innocent purchaser for value without notice?***
 - 6. Can the court nullify the sale agreement dated 15/5/2011, stop the transfer process and order refund of the purchase price?***
 - 7. Is the second defendant entitled to the orders sought in the counter-claim?***
 - 8. What would be the appropriate orders on costs in respect of both the main suit and the counter-claim?***

ANALYSIS OF EVIDENCE AND THE LAW

13. The main issue for determination in this suit is whether the power of attorney dated 30/12/1996 and registered on 24/3/1997 was irrevocable. This is the issue on which all the others are predicated. The counsel for C and Agriseedco have extensively submitted on the point. Both counsel relied on same authorities save for counsel for Agriseedco who relied on an additional authority from the Supreme Court of India. The power of Attorney in contention is a short one and I would like to quote it in its salient parts.

“SPECIAL POWER OF ATTORNEY

Know all men whom it may concern That I, the undersigned CHRISTINE CHEPCHIRCHIR BAIG of Post Office Box Number 39563, Nairobi in the Republic of Kenya, do hereby out of Natural love and affection irrevocably ordain, nominate and appoint my husband MR MIZRA IQBAL BAIG of the same address to be my true and lawful Attorney and Agent, with full power and authority, for me and in my name, to sale, to execute such deeds or instruments as may be necessary and to use all lawful ways and means thereto for the purpose of the property more particularly known as LR NO. 3707/4 (Original Number 3707/1/2). In witness thereof I have hereunto set my hand at Nairobi this 30th day of December, one thousand nine hundred and ninety six.”

14. Though the heading of the power of Attorney is indicated to be “**Special Power of Attorney**”, the body of the same shows that it is an irrevocable power of Attorney which was being donated. Mr Kiarie argued in his submissions that the word irrevocable was only introduced in the body of the power of Attorney. I understood him to mean that since the heading was not stated as irrevocable power of Attorney, then the same is not an irrevocable power of Attorney. The reason why the power of Attorney was headed special power of Attorney is because the donor was limiting the donee to only one property that is LR NO 3704/4. The body of the Power of Attorney was clear that the power being donated was irrevocable.

15. An extract from the free Law Library describes an irrevocable power of Attorney as a power of Attorney that cannot be revoked by the principal. A power of Attorney lapses for legal reasons (by operation of law) such as for incapacity or death. An irrevocable power of Attorney will not lapse because it is continuing (enduring) and irrevocable, cannot be cancelled. An irrevocable power of Attorney must say that it is irrevocable and it must be given for valuable consideration.

16. From the definition given herein above, there are certain elements which must exist before a power of Attorney can be said to be irrevocable. One of those elements is that it must be given for valuable consideration. It is a power which only lapses by operation of law such as for incapacity or death. In Black's Law Dictionary 8th edition by Bryan A. Garner valuable consideration is defined as follows:-

“Consideration that is valid under the law; consideration that either confers a pecuniarily measurable benefit on one party or imposes a pecuniarily measurable detriment on the other” “By a valuable

consideration is meant something of value given or promised by one party in exchange for the promise of the other..... The thing thus given by way of consideration must be of some value. That is to say, it must be material to the interest of one or the other or both of the parties. It must either involve some loss or disadvantage to the promisee for which the benefit of the promise is a recompense” John Salmond, jurisprudence 360 (Glanville L. Williams ed, 10th ed 1947).

17. In the instant case, the power of attorney was neither given for valuable consideration nor was it coupled with any interest. C gave the power to B out of natural love and affection. Love and affection cannot be measured in pecuniary terms. Irrevocable power of Attorney is defined in

Black's Law Dictionary 8th edition as a power of attorney that the principal cannot revoke. It is also termed "Power coupled with an interest". The same dictionary defines power coupled with interest" as follows;-

"A power to do some act, conveyed along with an interest in the subject matter of the power. A power coupled with an interest is not held for the benefit of the principal and it is irrevocable due to the agent's interest in the subject property".

18.C testified that she donated the power to B to deal with the property for the benefit of their children in case she died. This therefore shows that B had no interest in the suit property. B was to deal with it in lawful ways and means as directed in the power of Attorney. As there was no power coupled with interest given to Mr B, the power of Attorney cannot therefore be said to be irrevocable even if it was so described in the instrument donating that power. Mr K'opere cited ***a case from the supreme court of India between Seth Loon Karan Sethiya -Vs- Ivan E. Jon and others*** delivered on 25th April, 1968 AIR 1969 SC73. The appellant was indebted to the Bank of Jaipur Limited, Agra branch. On March,27, 1959 he executed a power of attorney in favour of the bank. That power of attorney, inter-alia, recited;

"AND WHEREAS I am heavily indebted to the Bank of Jaipur Limited, Agra branch and my liability is partly secured by the pledge of my goods and partly by the equitable mortgage of my mother's immovable properties with the said bank;

AND WHEREAS a major part of my said liability is unsecured;

AND WHEREAS I have agreed to appoint the Bank of Jaipur Ltd to be my true and lawful attorney to execute the said decree in suit No.76 of 1949 (with which we are concerned in this appeal) which may ultimately be passed in my appeal and to do the following acts, deeds, matters and things for me, on my behalf and in my name and to credit to my account the sums which may be realised in execution of or under the said decrees;

NOW KNOW YE ALL men and these presents witness that I do hereby irrevocably nominate and appoint the said Bank of Jaipur Limited and/or any principal officers and/or any other person or persons that may be appointed by the said Bank of Jaipur Ltd, or its assigns from time to time in this behalf to be my true and lawful attorney for me and on my behalf and in my name to represent me therein and do all acts, deeds, matters and things in connection with the execution of the said decree in the said Agra suit No. 76 of 1949 and the decree that may be passed in the said appeal that is to say;-

1. ***To proceed with execution of the said decree passed in the said Agra suit No 76 of 1949 and to proceed in execution of the decree which may be passed in the said appeal and to realise and recover the decretal amounts***

8. ***To withdraw any amount that may be deposited in the courts at Agra and/or allahabad or any court of Justice in the said decree and/or in the decree in the said appeal and/or other proceedings in connection with the execution of the said decree or any other order passed or made therein and/or in any insolvency court or from the official receiver concerning insolvency of any of the defendants....."***

19.The above power of attorney was executed by the appellant pending the outcome of an appeal he had preferred against execution of a decree given in favour of the bank by the executing court. The appellant was not successful as the court to which he had appealed affirmed the decision of the executing court. The appellant had argued that the execution application was filed in the name of the appellant but that it was signed by the manager of the bank as his power of attorney

holder. He contended that the power in question had been obtained by false representation among other reasons. The appellant's objection was overruled and the execution was directed to proceed. The appellant then moved to the High Court against that order. The only issue considered by the High Court was whether the power executed in favour of the bank was a power coupled with interest and hence the same could not be revoked in view of **section 202 of the Indian Contract Act 1872 (9 of 1872)**. The High Court held that it was a power coupled with interest and therefore the same could not be revoked by the appellant. When the appellant moved to the Supreme Court with leave, the Supreme Court had no difficulty in holding that the power of attorney in question was a power coupled with interest and hence the same was not revocable. His appeal was thus dismissed.

20. The above decision is in favour of C's argument that the power she donated to Mr B was not an irrevocable power of attorney for it did not meet the legal requirements of an irrevocable power of attorney. I therefore find that the power C donated to Mr B was not an irrevocable power of attorney.

21. I now move to the next issue whether the revocation of power of attorney lodged and registered in the lands office on 11/1/2012 by the plaintiff was valid and if so what was its effect on the sale transaction. There is evidence from C that she instructed the firm of Messers Simba & Simba Advocates to register the revocation of power of attorney. She did this on 3/2/2011 and went back to the U.S.A. When she came back in January 2012, she found that the same had not been registered. She was explained the reason for non registration but nevertheless, the revocation of power of attorney was registered on 11/1/2012. Having found that the power of attorney was not irrevocable, the revocation of the same which was registered on the 11/1/2012 was valid. The registration was done pursuant to provisions of the Registration of Titles Act Cap 281 (now repealed/section 51 of the aforesaid Act states;-

“A power of attorney may be revoked by an instrument of revocation in form N in the first schedule, and after the registration of revocation of the power the registrar shall not give effect to any transfer or other instrument signed pursuant to that power”. In the present case the documents which had been executed pursuant to the power of attorney had not been registered. The registration of the revocation therefore effectively stopped the registrar from effecting any document signed pursuant to the revoked power. There is an argument by Mr K'opere that even if the registration of the revocation of the power of attorney is valid, it could not act retrospectively. This argument is without basis. The section is very clear that no instrument signed pursuant to the revoked power can be given effect. This includes the transfer which had not been registered. The revocation brought all documents which had been signed pursuant to the power of attorney to a halt. It cannot therefore be argued that the revocation having been registered on 11/1/2012 it could not affect what had already been done before that date.

22. The power of attorney as framed did not specify in which manner the power was to be exercised. It did not set out the obligations of the donee with regard to his powers. In a situation where the instrument is ambiguous the donee who is an agent of the doner who is the principal is supposed to act in good faith. In Halsbury's Laws of England Vol 1 4th edition states as follows with regard to authority of agents;-

“In the absence of express directions the agent may exercise his discretion so as to act in the best manner possible for the principal. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places reasonable construction on his authority; but where the limits imposed are definite he has no right to exercise his discretion”

The power donated to Mr B was ambiguous. It was therefore the duty of Mr B to act in the best interest of C. There was a fiduciary relationship between Mr B and C. In the **case of Mjasiri -Vs-**

Joshi [1990 – 1994] 1 EA 372, one Jayantilal Bhanji Joshi (deceased) owned a house along Sokomhogo street in Zanzibar where he lived with his family until 1972 when he left for Canada to live with his son. Before he left he entrusted his house to the late Ahmed Iddi Mjasir the appellant's father, who was to collect rent from tenants, effect repairs to the house when need arose, pay any monies on his behalf such as land rent etc and to keep the balance of money for him. In 1987 Jayantilal Bhanji Joshi died. His wife Jayalamzi Joshi, the respondent in the appeal came to know in 1990 that their house had been sold. She decided to file a suit in the High Court seeking a declaration that her deceased husband is the lawful owner of the house and that the house be registered in her name as the legal representative of her deceased husband's property.

Ahmed Iddi Mjasir who had a power of attorney prepared a deed of conveyance dated 1/10/1987 purported to be between him and the owner of the house which showed that in consideration of the sum of Tshs.150,000/= he paid the owner of the house as purchase price, the owner of the house had sold and transferred the house to him. On the same day Ahmed Iddi Mjasir prepared a deed of gift between himself and his son, Mohammed Mjasir, the appellant and in consideration of natural love and affection for his son, conveyed the house to him. The deed of conveyance was registered in the name of the appellant, Mohammed Iddi Mjasir on the same day. The High Court nullified a deed of conveyance that transferred the ownership of the house to Ahmed Iddi Mjasir as well as the subsequent re-transfer of the house from Ahmed Iddi Mjasir to the appellant. The court found that power of attorney created a fiduciary relationship and that the failure to obtain the consent of the owner of the property before transfer of the same rendered the transaction null and void.

On appeal to the court of Appeal it was held that the original owner had given Ahmed Iddi Mjasir the power of attorney over his property which included the power to sell the house if he thought that the price was reasonable. However the failure by the (donee) to keep accounts of monies received as rent and the money used in repairs for over 20 years, was a serious anomaly that led to the inference that Ahmed was not entirely honest. Consequently it was difficult to say that under the power of attorney, a fiduciary relationship existed between the deceased and the property owner. The deceased was therefore estopped from obtaining advantage from the fiduciary relationship without first obtaining the consent of the owner. The effect of the revocation of the power of attorney by C was that it rendered the sale agreement inactionable.

23. I now move to the issue on whether the agreement dated 15/5/2011 was a fraud perpetrated by both defendants upon the plaintiff. There are a number of actions relating to the agreement which show that both defendants were perpetrating fraud upon the plaintiff.

1. ***Though the defendants contend that the agreement was signed based on a power of attorney given to Mr B, there is no mention in the agreement that Mr B was signing the agreement as holder of power of attorney.***
2. ***Though the agreement indicates that the purchase price was inclusive of farm implements and machinery, the purchase price was a gross undervaluation of the farm which was 60 acres. There is evidence that the price per acre was 450, 000/=. It cannot be possible that this amount included machinery. The Kshs.450,000/= was for land only. The two coffee factories on the suit land were not taken into account. The farm house as well as the warehouses were not taken into account. There was no valuation done by the purchaser. Though DW2 Joseph Mito claimed that there was a valuation done, there was no such evidence adduced by Agriseedco. C later caused a valuation to be carried out. The valuation showed that the suit property was worth shs.56,960,000/=.***
3. ***The deal sounded too good for Agriseedco. A down payment of Shs.2,700,000/= being 10% of purchase price was paid on 29/4/2011. This was even before the sale agreement of 15/5/2011 was prepared and signed.***
4. ***Though the agreement stated that Agriseedco was to take possession of the suit land upon completion of the purchase price, the company wrote a letter on 23/5/2011 seeking to take early possession. Its employees visited the suit land on 24/5/2011 in preparation to move into the suit land.***
5. ***The agreement stated that Agriseedco was to pay the balance of the purchase price upon***

- registration of transfer. The company did not wait for this. The balance of the purchase price Shs.24,300,000/= was cleared on 7/11/2011.*
6. *Mr B had not used the power of attorney since 1996. He used it for the first time in 2011. This was barely a year after he divorced with C. Everything was being done very fast and in secrecy. When Mr B discovered that C had known about the sale he gave his lawyer instructions to cancel the deal. This is a clear indication that Mr B wanted to dispose off the suit land without the knowledge of C.*
24. On the issue as to whether Agriseedco was a purchaser for value without notice, there is ample evidence that Agriseedco was aware that there was something wrong with the transaction. DW1 Kassim Owino Omollo testified that he noticed that the land was in the name of C but that the documents were being signed by Mr B. When he enquired how this could be possible, he was told that Mr B had a power of attorney. Though it was a fact that Mr B had a power of attorney, DW1 while under cross-examination conceded that he spoke to C. C had told him that she was not selling the suit land. Though Agriseedco was aware about C's interest, it went a head to clear the balance of the purchase price of Kshs.24,300,000/= on 7/11/2011. They cannot therefore claim that they were innocent purchasers for value without notice.
25. When Mr B instructed his lawyer to cancel the deal and refund the purchase price, Mr B's lawyer wired the entire purchase price back to Agriseedco. Agriseedco then wired back the money to Mr B's Advocate on instructions of their lawyers. Agriseedco had seen a kill in the whole process and that is why they acted the way they did. Even after the revocation of power of attorney was brought to their attention, they still went ahead to pay stamp duty and other monies as if the revocation of the power of attorney was of no effect. This is not conduct of an innocent purchaser for value without notice.
26. On the issue as to whether the court should nullify the same agreement, stop the transfer and order refund of the purchase price, I have already found that the agreement was intended to defraud C of the suit land. The basis upon which it was signed is the power of attorney which has been found not to have been an irrevocable power of attorney. A revocation of the power of attorney had already been registered and the same is valid and effective. It therefore follows that the agreement and the transfer cannot take further effect. The logical conclusion therefore is that the purchase price which had been paid and which Agriseedco wired back to the advocate for Mr B should be returned to Agriseedco.
27. Agriseedco is claiming Kshs. 105,898/= being outstanding land rent, outstanding rates, rates clearance certificate and travel expenses to Kitale to pay rates and process the rates clearance certificate. It is also claiming losses incurred from May, 2011 and November, 2011. Such losses include staff salaries and wages for security officers from May, 2011 and manager and researchers from November, 2011 until the removal of caveat and registration of transfer of the suit land. Agriseedco's claim is the nature of special damages which should have been pleaded and strictly proved by evidence. In civil appeal No. 192 of 1992 between Coast Bus Services Limited and Sisco E. Murunga and 2 others (unreported) the court of Appeal judges referred to a number of decision on special damages. They then went on to restate the position as regards special damages as follows;-

“We would restate the position. Special damages must be pleaded with as much particularity as the circumstances permit; and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damages were;-

“To be supplied at the time of trial”.

If at the time of filing the suit the particulars of special damages are not known with certainty, then those particulars can only be supplied at the time of trial by amending the plaint to include the particulars which were previously missing. It is only when the particulars of special

damage are pleaded in the plaint that a claimant will be allowed to proceed to the strict proof of those particulars. What amounts to strict proof must of course depend on the circumstances as was stated in Ratliffe's case, namely the character of the acts producing the damage and the circumstances under which those acts were done and we would include the circumstances under which the claimant finds himself operating after say a road traffic accident. If for instance, there be evidence that following a road traffic accident the claimant was admitted in hospital that he paid hospital charges but that he has lost the receipts issued to him following the treatment, then it would be -

“the vainest pedantry” to insist that only the production of the receipts would constitute strict proof”

28. The wages for staff which Agriseedco is claiming was ascertainable if indeed any were incurred. These were special damages which ought to have been pleaded and proved by evidence. DW3 Michael Baraza Wanyonyi who claimed that he was employed by Agriseedco claimed that their pay used to be channeled through Simon Wabwoba one of the managers of C. In cross-examination by M/S Munialo for Mr B DW3 claimed that he is being paid weekly by Agriseedco through M-pesa. No such M-pesa records were produced.
29. There was a claim that C hired people who came and stole 60 bags of coffee which had been harvested by Agriseedco when they took possession of the farm. Mr K'opere in his submissions submitted that the court should award general damages of Kshs.4,000,000/= for the 60 bags of coffee which C conceded that she had taken. I do not understand the basis upon which he arrived at Kshs.4,000,000/= Agriseedco knew that it lost 60 bags of coffee. The value of the coffee if any was lost should have been ascertained and claimed as a special damage claim. A figure cannot be thrown at the court and then Agriseedco says that that is what it lost.
30. The claim for 18,000/= being transport expenses to Kitale for clearance certificate and rates was ascertainable. Buses from Nairobi and even shuttles or aircrafts issue receipts. Hotels in Kitale also issue receipts for accommodation. Hotels also issue receipts for meals. There was no single receipt produced in support of this claim. This claim cannot therefore be allowed.
31. The only claims which were properly pleaded and proved are in respect of payment of land rent, Kshs.45,898/= outstanding rates, Kshs.40,000/= and rates clearance certificate, Kshs.2,000/= totaling to Kshs.87,898/=. The question which arises in the circumstances is whether C or B is liable to pay that claim. C cannot be made to pay a claim when her liability has not been proved. Her land was being sold without her knowledge. Mr B who was trying to sell it was doing so in breach of the fiduciary relationship between him as agent and C as principal. C cannot therefore be made to pay for what she did not do. C had revoked the power of attorney given to Mr B on 11/1/2012 well before the payments were made. This fact was brought to the attention of Agriseedco through Mr B's lawyer. In free law library it is stated that unless the power of attorney has been made irrevocable, the grantor may revoke the power of attorney by telling the attorney – in fact it is revoked. However, if the principal does not inform third parties and it is reasonable for the third parties to rely upon the power of attorney being in force, the principal may still be bound by the acts of the agents, though the agent may also be liable for such unauthorised acts.
32. In the instant case, Agriseedco was aware that the power of attorney had been revoked but still they went ahead to make payments. Mr B himself had informed Agriseedco through his lawyer that the donor of the power had revoked it. Agriseedco still went ahead to make payments. It is difficult in the circumstances to find Mr B liable for any payments which were made by Agriseedco who had been notified that the power had been revoked.
33. The caveat by the registrar was registered on the basis that fraud was being committed. C has gone ahead to prove that indeed there was fraud being perpetrated upon her. The registrar's caveat cannot therefore be removed as requested by Agriseedco.

DETERMINATION

34. For reasons given hereinabove, I find that none of Agriseedco's claims can be granted. The upshot of this is that its claims against C and B are hereby dismissed. C shall have costs of the counter-claim but Mr B shall not have costs of the counter-claim as he was the cause of the whole problem in this case.

On the other hand, I find that C has proved her case against Mr B and Agriseedco. Her claim is allowed in terms of prayer (a), (b), (d), (e) and (f) of the plaint.

Dated, signed and delivered at Kitale on this 16th day of October, 2014.

E. OBAGA

JUDGE

16/10/2014

In the presence of Mr Kiarie for plaintiff, M/S Munialo for first defendant and Mr K'opere for second defendant. Court assistant – Mr Kassachoon.

E. OBAGA

JUDGE

16/10/2014