IN THE COURT OF APPEAL

AT KISUMU

(CORAM: HANCOX CJ, GACHUHI & GICHERU JJ A)

CIVIL APPEAL NO 18 OF 1990

MAYFAIR HOLDINGS LTD…......……APPELLANTS

VERSUS

AHMED…………………………….. RESPONDENT

(Appeal from the Judgement/Ruling of the High Court of Kenya

at Kisumu (Omolo J) dated 30th May, 1989 in High Court

Civil Case No 215 of 1987)

JUDGMENTS

Hancox CJ. The facts giving rise to this appeal concern an agreement for the sale of a parcel of undeveloped land in a prime position in Kisumu town, comprising 0.1862 hectares, which is said to have taken place in the offices of Mr Behan, an advocate of the High Court in early March, 1987. Because of its contiguity to the Imperial Hotel and other properties owned by Mr Gilani, the Chairman of the appellate company, and because of its situation on Jomo Kenyatta Highway where development is currently taking place, it is obvious from his evidence that he was and is extremely desirous of purchasing this particular land, which is described as Kisumu Municipality/Block 8/236. The learned Judge (Omolo J) from whose decision this appeal is brought recognised this for he referred to Mr Gilani's "passionate desire" to have it. Hence, when the advocates for the son and supposed attorney of the respondent, Mr Shakeel Ahmed, unequivocally repudiated the agreement in their letter of June 19, 1987, it is hardly surprising that Mayfair Holdings sued for specific performance of the agreement, an order for transfer of the property and damages both instead of and in addition to specific performance.

It is therefore necessary to examine in some detail the circumstances surrounding the signing of the agreement dated March 3, 1987, in Mr Behan's offices in Kenya Commercial Buildings in Kisumu. Mr Behan was the first witness to be called on behalf of the plaintiff company and from his evidence (which was not challenged on the point) it is clear that he was acting for both the parties at the material time, and it is reasonable to infer that he did not cease so to act for the son of the respondent until June 19, 1987, when his present advocates wrote to say that they were thenceforth acting for Shakeel. I might mention at this stage that it frequently happens that an advocate, or a solicitor in England, receives instructions from and acts for both parties to a lase transaction, and there is nothing unlawful in it so long as the relevant rules are not infringed. But this practice must on occasion, particularly when a dispute subsequently develops and ends up in court, be fraught with some danger, or at least risk, to both the advocate and his

client or clients.

From its inception this action has been brought against the father of Shakeel, Dr Shabbir Ahmed, a medical practitioner who left Kenya in 1982 in order to take up an appointment with the Word Health Organisation in Jeddah. Since then Shakeel, who is a senior executive in Diamond Trust Ltd, has generally looked after and managed his father's affairs in Britain, Kenya and Pakistan, and to this end his father executed a Power of Attorney in England on June 22, 1984 which was made in the form set out in Schedule I to the Power of Attorney Act, 1971 and was therefore valid under the United Kingdom Legislation but not registered in Kenya (where there is as yet no correspondent statute) until June 15, 1987, three and a half months after the date of the agreement. Leaving aside for the moment the requirements of the Registration of Documents Act cap 284, it would seem that the Registrar is obliged to enter a Power of Attorney in the register thereof if the donor or the donee make an application for that purpose, but it does not seem, on the plain wording of Section 116(1) of the Registered Land Act, cap 300, that the donor or the donee (who is Shakeel in this particular case) is obliged to apply for it to be registered, though I respectfully agree with the learned judge that before it can be registered it must have attached to it a certificate in the form set out at R L 17 in the Third Schedule to the Registered Land Act, or such other form as is approved by the Registrar. By registering the Power of Attorney in this case on June 18, 1987, the Registrar must be taken to have approved the United Kingdom form in which it was expressed. Even so, as the learned judge held, without the certificate the Registrar should not have registered the Power of Attorney because of the mandatory provisions of section 116(2) which say that

"Every such power of attorney shall be executed and verified in accordance with sections 109 and 110". As section 110 deals with verification it is perfectly plain that the document, if executed overseas, had to be verified under sub-section (4) of section 110.

I turn, then, to the requirements of the Registration of Documents Act. The basis of the concluding part of the learned judge's judgment, in which he held that because of the defect in the registration of the attorney, which was the foundation of the agreement of March 3, the plaintiff/appellant was disentitled to any relief on that agreement. But the basis, in turn, of the judge's finding on this issue was that registration of the power of attorney was compulsory and, accordingly, since it was not properly registered (because it was not verified) it could not be received as evidence without the consent of the court under section 18 of that Act.

But was registration of the power of attorney executed by Dr Shabbir Ahmed compulsory under the Registration of Documents Act? Assuming but not deciding that this general power of attorney is a document:

"Conferring or purporting to confer, declare, limit or extinguish any right to title, or interests, whether vested or contingent in or over immovable property … shall be registered as hereinafter prescribed" within the meaning of section 4 it is necessary to read on to the proviso, which states, *inter alia*, that registration of the following documents shall not be compulsory …

(vii) any document registrable under the provisions of the …. Registered Land Act. (The proviso to that sub-paragraph is not relevant).

Although I have not been able to find any judicial authority on the meaning of the word "registrable" (having examined the Trade Marks cases such as *Re Crosfield* [1910] 1 Ch 118 *Re Brock* [1910] 1 Ch 130 and *Re Davis Trade Mark* (1927) 137 LT 714) it is stated in the *Oxford English Dictionary* to mean: "That may be registered". In the context of cap 285 I consider "registrable" means "capable of being registered". It may be that it could not in fact be registered without having been verified under section 110(4) but that does not in any sense mean that this particular power of attorney was not "registrable" under the Registered Land Act. It follows that since it came within the proviso to section 4, registration was not compulsory under the substantive part of that section. It follows equally, that registration was not compulsory either for the purposes of section 9, so that the two month period specified by that section is inapplicable. It cannot therefore be gainsaid that the instant power of attorney, whether or not it complied with the verification section, was and is a "registrable" document under the Registered Land Act. In other

words, I do not think it

is correct to say that because a document otherwise qualifying for registration under the Registered Land Act can become compulsorily registered under cap 285 because it does not comply with one of the conditions under cap 300.

Accordingly in my judgment, the power of attorney was not inadmissible as a document evidencing the issue of the authority of the principal, even though for the purposes of registration it did not comply with the Kenya statute.

What value then, if any, does this power of attorney have? In my opinion it has to be considered as part of the wider concept of the law relating to principal and agent. It will be a matter of fact, not of law, to determine what authority the agent in this case, that is Shakeel, had to bind the principal, that is Dr Shabbir Ahmed; who is the party sued and the respondent to this appeal.

Dr Shabbir Ahmed is of course, himself physically, beyond the reach, or jurisdiction, of this court, but he has submitted to it through his advocates whose address is his address for service. Is he therefore liable for the acts of Shakeel in entering into this agreement, which recites that he is the vendor, and the subtended signature of Shakeel is expressed to be "pp Dr Shabir Ahmed"?

There can be no doubt that, whether or not the power of attorney is in strict conformity with the Kenya law, it nevertheless constitutes Shakeel a recognised agent under order 3 rule 2 of the Civil Procedure Rules, for the purpose of service and appearance in the suit. It was therefore advisable, though I do not need to consider if it was essential, at the inception of this suit for the heading to refer, as it did, to Shakeel as Dr Ahmed's attorney. But that kind of recognised agency for procedural purposes is distinct from the type of agency which has to be considered as part of the law of principal and agent, in order to ascertain whether a principal is bound by an agreement purportedly made by his agent. Since the defence was immediately taken over by the advocate the necessity thenceforth for a recognised agent disappeared. So the case has, so far as this issue of liability is concerned, to be determined fairly and squarely within the law of principal and agent, and as to whether the acts of the agent are such as to bind the principal.

Turning to the pleadings, Mr Gautama on behalf of the appellants, has submitted that the question of whether Shakeel was acting as an agent for his father the defendant, so as to bind him by the agreement was never an issue in the case, and he took this court in detail through the pleadings and the record in order to demonstrate his submissions. Moreover, said Mr Gautama, none of the agreed issues, save No 5, challenge Shakeel's authority at all. They are all directed to the issue of whether the deposit of Shs 200,000 being ten percent of the purchase price was ever paid.

Examining the pleadings for myself, this would also appear to be the tenor of the contentions advanced on behalf of the defendant. For in answer to the material paragraph, paragraph 3 of the plaint the same paragraph in the defence makes an emphatic and elaborate denial that the deposit was ever paid to Shakeel or his advocate. It was left until paragraph 8 before an averment was made that the sale was conditional on Shakeel obtaining his father's signature which ends as follows:

"… and approval of the transaction, which consent was not and cannot be obtained."

Pausing there for a moment it seems to be extraordinarily irresponsible for a man of the maturity and business standing of Shakeel, as he described himself under cross-examination by Mr Gautama, to have entered into an agreement, and to have led the other party on, and to have misled him into thinking he was buying this desirable site, when in truth the consent of the principal was not and could not be obtained. At all events the only issue, No 5, which can possibly be said to have invoked the law of principal and agent, was answered by the learned judge in the negative. Apart from this the real issue for him to try was one of fact: it was whether the plaintiff paid the deposit, an issue which he answered in this way:

"No, the plaintiff did not fail to effect payment of the Shs 200,000."

This result, I confess, I find rather surprising in view of this earlier conclusion:

"I reject the evidence of PW2 (Mr Gilani) that DW1 (Shakeel) for his own convenience chose to leave the cheque with PW1. I am satisfied and I find and hold that PW1 infact retained the cheque pending the return of the forms he issued to DW1 to be signed by the defendant."

This is despite the clear evidence of Mr Behan that:

"on March 3, 1987, Mr Gilani gave the cheque for Shs 200,000 in the name of Dr Shabir Ahmed which was handed to Shakeel Ahmed." Later he said: "yes the cheque was handed to the vendor."

At that stage there was no question but that Mr Behan was acting both for Mr Gilani and for Shakeel. So by giving the cheque to their joint advocate Mr Gilani was in fact and in law giving it to Shakeel, even if, as the learned judge found, Mr Behan retained it, perhaps for the purposes of validating the power of attorney. Mr Gilani's evidence is identical on the point, and the cheque itself, payable to the defendant, is in evidence, dated March 1. True Shakeel said:

"The cheque for Shs 200,000 was not handed to me. The cheque was handed to Mr Behan by Mr Gilani" but in the agreement itself it is acknowledged that:

"The purchaser had paid on or before the signing of the agreement Kenya Shillings two hundred thousand (Kshs 200,000) to the vendor."

Finally Mr Behan said that if there had been a condition that the agreement would only be valid if the father signed another power of attorney he would have included it in the agreement.

So even if Mr Behan did afterwards retain the cheque it was not in my view possible to reach a finding contrary to the evidence which is plain for all to see. Moreover, can it be said that the mental reservation Mr Behan allegedly had as regards the power of attorney, which supposedly inhibited him from handing the cheque over to his other client, can be imputed to Shakeel, who himself said in evidence:

"We wanted Mr Behan to check and see if I had the power and then prepare an agreement. When Behan was ready, he called us to sign. I signed and the other signed. Clause 5 – deposit against purchase price. It means that Shs 200,000 was already given to me."

The emphasis, as elsewhere in the quotations in this judgment, is mine. The sequence of events there demonstrated shows that the parties left it to Mr Behan to check, and then signed and that the purchasers paid the deposit, whether to Mr Behan, or directly to Shakeel, or first to Mr Behan and then to Mr Shakeel who gave it back to Mr Behan, matters not. The parties thought they had a deal and then acted accordingly. Their minds were all directed to concluding the agreement. In my judgment the question of authority did not really arise then, for Shakeel earlier had said: "I believed I had authority."

So did Mr Gilani and so did Mr Behan. In those circumstances I do not consider that the judge's finding as to the passage of the cheque made any difference to the legal consequences of handing it over. Conscious, therefore, as I am of the principles enunciated by this court in *Mwanasokoni v Kenya Bus Services Ltd* [1985] 5 KCA 6, as to the reversal of the finding of fact of a judge on first appeal, I would respectfully disagree with him in this case, both as regards the handing over of the cheque and the legal consequences thereof.

These findings were not, however, decisive in the result at which the learned judge arrived, which, as I said, was because of the supposed inadmissibility of the power of attorney. Even so, it is plain that the judge regretted having to make the finding he did, for he took the drastic step of depriving the successful defendant of his costs. I say "drastic" because it is one thing to deprive a successful plaintiff, who has initiated the litigation, of this costs, on the grounds of some reprehensive conduct of which the court desires to mark its disapproval. It is another to deny costs to a successful defendant, who has been brought to court against his will. In *Ritter v Godfrey* [1920] 2 KG 47 Lord Sterndale MR in a passage

approved in *Donald Campbell v Pollak* [1927] AC 732, enunciated the principle of this form of order as follows:

"Speaking generally, I think it may be said that in order to justify an order refusing a defendant his costs, he must be shown to have been guilty of conduct which induced the plaintiff to bring the action, and without which it would probably not have been brought. This is so stated by Vaughan Williams LJ in *Bostock v Ramsey Urban Council* (1) [1900] 2 KB 625, and it generally may be tested by the question stated in the judgment of the two other members of the court, AL Smith LJ and Romer LJ in the same case, ie, was the defendant conduct such as to encourage the plaintiff to believe that he had a good cause of action?

I do not say that this is the only test, but I think it is the one properly applied to this case."

The learned judge, therefore, having found in favour of the appellant on all the agreed issues save No 6, (which is not relevant at this stage of the appeal) then gave judgment for the respondent because of the legal invalidity of the power of attorney, and consequently, of the lack of any evidence of the agency between Dr Shabbir Ahmed and Shakeel, but as I have said, regarded the defendants' conduct, that is to say Shakeel's conduct, sufficiently unmeritorious so as to deprive him of the costs as a successful party.

I turn now to the law of agency. The general proposition is that "whatever a person who is *sui juris* can do personally he can also do through his agent" – per Stirling LJ in *Bevan v Webb* [1901] 2 Ch D 59 at p 77. The reason is set out in *Story on Agency* 9th Edition where the author says at the beginning:

"In the expanded intercourse of modern society it is easy to perceive that the exigencies of trade and commerce, the urgent pressure of professional, official and other pursuits, the temporary existence of personal illness or infirmity, the necessity of transacting business at the same time in various remote places, and the importance of securing accuracy, skill, ability, and speed in the accomplishment of the great concerns of human life, must require the aid and the assistance and labours of many persons, in addition to the immediate superintendence of him whose rights and interests are to be directly affected by the results."

The relationship of principal and agent can be created in many ways, for example by a verbal telephone conversation, by fax, telex or even by circumstances from which agency can be implied. The execution of power of attorney is but one of the ways in which the relationship can be so created, and if the authority of an agent is required to be conferred by deed or an instrument under seal, as where the agent is given power to execute a deed, then the necessary authority has to be conferred by a power of attorney. However, although under section 3(3) of the Contract Act, cap 23, a contract for the disposition of an interest in land must be evidenced by writing (as under its similar counterpart in the United Kingdom, section 40(1) of the Law of Property Act (1925), writing is not necessary for the appointment of an agent to sell or purchase land, so that the agency in this case (if it existed) could have been created independently of a power of attorney.

Since 1971 powers of attorney are controlled in the United Kingdom by the Powers of Attorney Act (supra), but as I said there is no similar Act yet in Kenya. However the wealth of the authorities that exist on this very extensive subject are in many instances concerned with examining the protection that is necessary to be given to innocent third parties contracting or otherwise dealing with an agent, whether the principal is disclosed or undisclosed.

Two further aspects of the general law relating to agency may also be stated. First that the general rule is that an agent is ordinarily neither entitled to sue nor liable to be sued on a contract made by him in a representative capacity, - per Wright J in *Montgomerie v UK Mutual Steamships Association:* [1891] 1 QB 370 at p 371, and secondly that if an agent is acting for a foreign or overseas principal, the agent was formerly presumed to contract personally with the third party, but it is evident from the judgment of Lord Denning MR in *Teheran – Europe Ltd v ST Bilton Ltd* [1968] 2 All ER 886 at p 889 that an undisclosed foreign principal can sue and be sued on a contract, and this would be a *fortiori* the case where, as here, the foreign (and I use the word "overseas" here as synonymous with "foreign") the principal is both

disclosed and named.

In the instant case no question has arisen as to the personal liability of Shakeel, as agent for his father, neither did the appellants choose to sue him, either cumulatively or in the alternative, for damages being such as directly flow from the breach of warranty. Whether the appellant's legal advisers should have included a claim against Shakeel personally for damages is only a matter for incidental comment here.

What is the position, then, if there is an overseas principal, an agent resident in Kenya, and the former executes a power of attorney in the English language, but under English law with no specific reference to Kenya or to a transaction intended to be conducted according to Kenyan law? In the early case of *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 QB 79 the Court of Appeal was called upon to consider a power of attorney executed by the plaintiff in Brazil, in the Portuguese language directed to a London broker to buy and sell shares. The broker sold shares in the defendant company and did not account for the proceeds to the plaintiff , who claimed rectification of the register, so as to restore the shares to him. It was held that, as the authority given was to buy and sell shares in England, then the power of attorney was to be governed in its construction and effect by English law. Accordingly once the translation from Portuguese to English had been made, the meaning given to the power of attorney, as so translated, was to be according to English law. Lindley, LJ said:

"We have to deal with a power of attorney – a onesided instrument, and an instrument which expresses the meaning of the person who makes it, but is not in any sense a contract. The document is in Portuguese … In that sense and to that extent recourse must be had to Portuguese assistance. When we have got that, and when we have got the translation, we see what this document is. It is a power of attorney executed by a person resident in Brazil, and it is a power to buy and sell shares in all countries. That being the nature of the authority, how is it to be dealt with? If he buys and sells shares in England, he must buy and sell shares according to English Law, and he must deal with people to whom he must produce an English translation of this document."

It will be observed that there are several distinctions between that case and the instant one. In the first place the document was in a different language and secondly the power given was specific, whereas the power here is a general one, inasmuch as it invokes section 10 of the United Kingdom Powers of Attorney Act, 1971, which provides:

"(1) Subject to subsection (2) of this section a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect but expressed to be made under this Act, shall operate to confer … authority to do on behalf of the donor anything which he can lawfully do by an attorney."

In *Halsbury's Statutes of England*, Third Edition Vol. 41 there appears this interesting, and material, comment to the sub-section:

"In making the recommendation now implemented by this section and Sch 1, post, the Law Commission entered the caveat that if the attorney is likely to have to operate in foreign countries it would be preferable not to adopt the statutory form, or, if it is used, to attach to it a copy, signed by the donor, of the relevant provisions of the Act."

That is obviously of vital importance because while nationals of a particular country are presumed to know its laws, such a presumption cannot apply to persons resident elsewhere. So in the instant case Mr Gilani could not have been expected to know what was provided by section 10 of the 1971 Act. It may be advanced on his behalf, reasonably as one might think, that he was contracting in good faith with a person who was closely related to the proposed vendor whom he had no reason at that stage to doubt had authority to sell the land which he was eminently desirous of acquiring. That is one potential injustice that can arise from this case. Conversely it may be argued on behalf of Dr Shabbir Ahmed that when he gave the general power of attorney to his son in 1984, he did not have in contemplation the disposition of a valuable piece of land in Achieng Oneko Road, very close to the centre of the Municipality of Kisumu, in 1987, and it would be unjust to hold him to a bargain into which he never intended to enter.

Despite a diligent search (especially in the *English and Empire Digest* Volume I(1) and I(2) I have been unable to find any authority on all fours with the present case, most of them relating to the sale of goods or movable property. After due thought, in my judgment the correct principle to be applied in the case of land is that the power of attorney has to be construed for its effect in this case according to the Law of Kenya. There is of course no conflict of laws such as occurred in the *Brazilian* case (supra), but in my view the learned judge correctly addressed himself to the two Kenya statutes, the Registration of Documents Act and the Registered Land Act, in considering the power of attorney, though, as I said earlier, I respectfully disagree with him as regards its admissibility in evidence in the instant case. In my opinion it was receivable, even if not registered here, and could be taken into account with all the other evidence, including thecircumstances surrounding the transaction in early February, 1987, so as to determine the nature of effect of the agency and as to whether the principal (Dr Shabbir Ahmed) is liable to be sued on the agreement of February 3, 1987.

I confess I have not found this an easy question to determine, but after taking all these factors into account I have reached the conclusion (with some reluctance, I again confess) that the transaction in Mr Behan's office was not final and binding on both parties. Although Mr Behan said that he had not thought that the sale was subject to the approval of Dr Shabbir Ahmed, I nevertheless conclude that the handing back of the deposit cheque to Mr Behan, coupled with the fact that he prepared a set of forms to be completed for another power of attorney to be executed by the father according to the law of Kenya ,which Shakeel took to Britain in March, 1987, (and which the father refused to sign), added to which was the further circumstance, as the learned judge pointed out:

"… PW1 (Mr Behan) remained in possession of the cheque and that it was never in fact deposited in the account of the defendant."

show that all the parties knew at that stage that the 1984 power of attorney did not give Shakeel unconditional power to dispose of the plot. I say this with much regret because I think it must have meant a lot to Mr Gilani that he had an opportunity of acquiring this piece of land so close to his existing properties, the Imperial Hotel and the Mayfair Bakery, and which he intended to develop into a multi-storey shopping arcade, doubtless a great amenity to the residents of Kisumu. But, as he said:

"the property is very prime – situation location."

So, in my view, that is an additional reason for coming to the conclusion that it would be unjust to hold that Mr Shabbir Ahmed should be held to a transaction to which his mind was clearly not directed, either when he executed the power of attorney in 1984, or when the transaction took place in 1987.

Having come to this conclusion I do not need to decide on the sixth issue nor on the fifteenth ground of appeal, as to whether specific performance should be ordered, both counsel who appeared before us having reserved their submissions on this issue, dependent as it is on a validity of the authority of Shakeel to bind the defendant to the transaction. Having dealt with the substantive part of the appeal I turn again to the question of the costs. I have already referred in outline to the principles to be observed in not awarding costs against the unsuccessful party. But I desire to take this a step further. In the same case (*Ritter v Godfrey*) Lord Sterndale MR also said (at pages 52 & 53):

"… There is such a settled practice in the courts that in the absence of special circumstances a successful litigant should receive his costs, that it is necessary to show some ground for exercising a discretion by refusing an order which would give them to him. The discretion must be judicially exercised, and therefore there must be some grounds for its exercise, for a discretion exercised on no grounds cannot be judicial." In the later case of *Donald Campbell v Pollak* (supra) both Lord Cave LC and Lord Atkinson (at pages 811 & 814) approved of this statement. Lord Atkinson said:

"… I think this judgment of Lord Sterndale contains a clear condensed and accurate statement of the law and of the prevailing practice on the points with which it deals."

It also, in my opinion, accords with section 27(1) of the Civil Procedure Act and its proviso: which it is

evident from the concluding part of his judgment the learned judge in this case had very much in mind. The proviso reads:

" … Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order."

So the principles regarding to the award of costs and the discretion to be exercised in doing so are in essence incorporated into the laws of Kenya. Applying that to the instance case, did the learned judge give valid grounds for exercising his discretion to deprive the successful defendant of his costs, remembering that the actual party who was being deprived of hiscosts was Dr Shabbir Ahmed and not his son Shakeel, whose conduct substantially in my view, encouraged, and certainly precipitated, the litigation? The judge said:

"… On costs, the plaintiff has basically lost and the defendant has in fact won. Under the proviso to section 27(1) of the Civil Procedure Act, the court should, therefore award costs to the defendant. But I do not think I am prepared to do this. The defendant donated the power of attorney to his son DW1. The son accepted that power of attorney and on the basis of the same he led PW2 into entering into the agreement, obviously holding out to PW2 that the power of attorney was valid. It was the duty of DW1 to register the power of attorney so as to make it comply with the Law of Kenya and it is principally on the basis that as the power of attorney was not registered, no valid agreement was made on March 3, 1987, that the defendant has succeeded. To put it another way, the defendant has succeeded simply because DW1 failed to register the power of attorney, and not on any intrinsic merit in his case. In these circumstances, and exercising my discretion as regards costs under section 27(1) of the Civil Procedure Act, I shall not award to the defendant the costs of the suit."

In my judgment the conduct of the two Dr Shabbir Ahmed and Shakeel, are to be considered together as regards this issue. If the respondent had not given his son an unlimited power of attorney, knowing that he had a property in Kenya, even though he may not at that time have envisaged its sale then this situation would not have occurred. I consider therefore that the judge was right in taking the conduct of both of them into account in exercising his discretion. I entirely agree with the learned judge when he said that there was no intrinsic merit in the defendant's case. For myself, had I been trying this case, I should have invited the plaintiffs to consider amending and joining Shakeel so as to charge him with breach of warranty of authority, for he caused a lot of trouble and expense, not to mention distress, to the other party by his action. This was however, not done, and it is not open to us to consider that aspect on this appeal.

For the reasons I have endeavoured to state, therefore, I would dismiss the appeal, though not precisely for the same reasons that Omolo J dismissed the action.

Applying the principles stated in *Ritter v Godfrey* and *Donald Campbell v Pollack* (supra), and after careful consideration of all the matters stated above, I find myself in further agreement with the judge as regards the costs of the action. He gave reasons for the exercise of his discretion which in my judgment were perfectly correct and for the same reasons I would not give the respondent any costs of this appeal.

I would move, accordingly, that this appeal be dismissed with no order as to costs. As Gachuhi and Gicheru JJ A agree, it is so ordered. It will be apparent, then that the remaining issue of whether the plaintiff is entitled to specific performance does not now fall to be decided.

Gachuhi JA. I have read the draft judgment prepared by Hancox CJ and Gicheru JA and I agree that this appeal should be dismissed with no order as to costs.

However, I would like to add that any dealing with the land registered under the Registered Land Act cap 300 has to comply with the provisions of the Act. Section 4 of the Act provides:

"Except as otherwise provided in this Act, no other written law and no practice or procedure relating to land shall apply to land registered under this Act so far as it is inconsistent with this Act".

The plaintiff in its suit prayed for specific performance of the agreement of sale signed by donee of a General Power of Attorney Act 1971. The said agreement of sale was not executed as provided by the Laws of Kenya (cap 300) and as such it was defective and could not be relied upon. PW1 realised this and prepared a fresh power of attorney to be executed according to Kenya Law by the respondent which he refused. Having refused to sign it, there was no way he could have been bound by a defective agreement of sale.

Gicheru JA. Section 10(1)(a) of the United Kingdom Powers of Attorney Act 1971 provides:

"10(1)(a) Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect but expressed to be made under this Act, shall operate to confer on the donee of the power, authority to do on behalf of the donor anything which he can lawfully do by an attorney."

Subsection (2) referred to in paragraph (a) of subsection (1) of the foregoing section relates to the inapplicability of that section to functions which the donor of a general power of attorney has as a trustee or personal representative or as a tenant for life or statutory owner within the meaning of the United Kingdom Settled Land Act 1925.

On June 22, 1984 Dr Shabbir Ahmed, the respondent, appointed his son, Shakeil Shabbir Ahmed (DW1), a resident of Kisumu in Kenya, to be his attorney in accordance with section 10 of the United Kingdom Powers of Attorney Act 1971. This appointment was in the form set out in Schedule 1 to that Act. The general power of attorney donated by the respondent to DW1 and which is hereinafter referred to as the power of attorney, was intended to take effect in accordance with the relevant provisions of section 10(1)(a) of the act aforementioned as are set out above. It therefore gave DW1 authority to do on behalf of his father, the respondent, anything which he (the respondent) could lawfully do by an attorney.

Sometime in the month of February, 1987, Mr Sadrudin Manji Gilani (PW2) met DW1 at a dinner and the two discussed the sale of plot No Kisumu Municipality/Block 8/236, the plot, measuring about 01862 hectares and registered in the name of the respondent under the Registered Land Act, cap 300 of the Laws of Kenya, the Act. PW2 is the Chairman of Mayfair Holdings Limited, the appellant. He negotiated the sale of the plot for the appellant while DW1 was acting for the respondent in this regard. It was agreed that the appellant would purchase the plot from the respondent at a price of KShs 2,000,000. In connection therewith, on March 3, 1987 the parties appeared before Mr Joginder Singh Behan (PW1), an advocate of the High Court of Kenya, to whom the power of attorney together with a certificate of lease in respect of the plot were produced by DW1. On the same day, PW1 who was then acting for both parties drew up a sale agreement, the agreement, for them which they executed in his presence on that day.

Upon execution of the agreement, the appellant handed in cheque No 302875 for KShs 200,000 dated March 1, 1987. This cheque was drawn by the appellant in favour of the respondent and was payment of the ten per cent deposit against the purchase price. The cheque was retained by PW1 who being uncertain of the effectiveness of the power of attorney as concerns the transaction involving the plot, prepared another power of attorney in the form prescribed under the Act. This latter power of attorney was handed over to DW1 who was soon going to the United Kingdom and was to have it executed by the respondent and then returned to PW1. Meanwhile, the cheque mentioned above was to be collected from PW1 by DW1 when the latter returned from England. On his return in May, 1987, DW1 informed PW1 that the respondent was unwilling to proceed with the deal. The subsequent power of attorney prepared by PW1 was therefore not executed by the respondent. Consequently, DW1 did not collect the cheque referred to above from PW1. The deal fell through.

The appellant filed a suit in the superior court against the respondent seeking specific performance of the agreement, an order for the transfer of the plot, and damages for beach of contract in lieu of or in addition to specific performance together with interest thereon at court rates. The respondent's only substantive defence was that the power of attorney wasnot registered under section 116(1) of the Act. This defence was not pleaded. It only featured at the trial of the suit and upon it turned the decision of the superior

court. The appellant through counsel, however, participated in the consideration of the issue of registration of the power of attorney both at the time of leading evidence and final addresses to the said court. Although therefore this issue was not pleaded, from the proceedings before the superior court, it clearly was left to that court for decision – see the case of *Odd Jobs v Mubia*, [1970] EA 476 at page 476 letters H and I.

In his judgment, the trial judge, Omolo J found that the power of attorney did not qualify for registration under section 116(1) of the Act as it lacked the certificate prescribed under section 110(4) of the same Act. He therefore held that its subsequent registration of June 15, 1987 was wrong. He then observed:

"The plaintiff is seeking an equitable remedy form the court and one of the vital documents upon which he relies does not comply with the requirements of the laws of Kenya. It was not registered under section 9 of the Registration of Documents Act. It was registered under the Registered Land Act, but that registration as I have held would appear to have been in violation of section 110(4) of the Act. One of the maxims of equity is that

"Equity follows the law". It cannot override specific provisions of a written law – see *Halsbury's Laws of England*, 4th Ed page 871 paragraph 1299. The power of attorney which is the foundation of the agreement of March 3, 1987 is so defective under the laws of Kenya that it would be wrong to hold the defendant bound by the agreement of March 3, 1987 and to order specific performance of the same. Nor can there be any question of damages to the plaintiff when it is the agreement itself which is rendered invalid by the operation of the law."

The parties had framed a total of seven issues for determination by the superior court. After indicating his answers to these issues, the learned judge finally concluded:

"It was the duty of DW1 to register the power of attorney so as to make it comply with the laws of Kenya and it is principally on the basis that as the power of attorney was not registered, no valid agreement was made on March 3, 1987, that the defendant has succeeded. To put it another way, the defendant has succeeded simply because DW1 failed to register the power of attorney, and not on any intrinsic merit in his case. In these circumstances, and exercising my discretion as regards costs under section 27(1) CPA. I shall not award to the defendant the costs of the suit. My final order in the matter shall be that I order the plaintiff's suit dismissed but each party shall bear his or its costs of the suit."

Against the entire decision of the superior court, the appellant appeals to this court and has put forward 17 grounds of appeal. Principally, these grounds concern themselves with the legal effect of the power of attorney in view of its non-registration either under the Registration of Documents Act, cap 285 of the Laws of Kenya or in compliance with the requisite provisions of the Act; and the validity of the agreement and its enforceability by an order of specific performance.

The preamble to the Act reads:

"An Act of Parliament to make further and better provision for the registration of title to land, and for the regulation of dealings in land so registered, and for purposes connected therewith."

As is mentioned above, the plot, the subject-matter of the agreement, was registered under the Act. The agreement was a dealing in the plot. It was therefore regulated by the Act.

Section 38(1) of the Act provides that:

"No land, lease or charge shall be capable of being disposed of except in accordance with this Act, and every attempt to dispose of the land, lease or charge otherwise than in accordance with this Act shall be ineffectual to create, extinguish, transfer, vary or effect any estate, right or interest in the land, lease or charge."

Thus, the disposition of the plot was governed by the relevant provisions of the Act if the same was to be

effective.

Subsections (1) and (2) of section 85 of the Act are in the following terms:

“85(1) A proprietor may transfer his land, lease or charge to any person (including himself), with or without consideration, by an instrument in the prescribed form.

(2) The transfer shall be completed by registration of the transferee as proprietor of the land, lease or charge and by filing the instrument.” In the instant appeal therefore, the respondent could have transferred the plot to the appellant by an instrument in the prescribed form and that transfer would have been completed by registration of the appellant as the proprietor of the plot and by filing the instrument.

Under the provisions of section 108(1) of the Act:

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

The forms prescribed for instruments effecting disposition of land, a lease or a charge are set out in the third schedule to the Registered Land Rules made under section 160 of the Act, the Rules. Sections 109 and 110 of the Act respectively provides for the execution of these instruments and verification of their execution.

The provisions of section 114(1) of the Act are as follows:

“114(1) Except as provided in subsection (3) of this section, no instrument executed by any person as agent for any other person shall be accepted by the Registrar unless the person executing it was authorised in that behalf by a power of attorney executed and verified in accordance with sections 109 and 110.”

Subsection(3) referred to in subsection (1) of section 114 as is set out above concerns representation of persons under disability in matters connected with the Act.

As I have pointed out above, the authority given to DW1 by the power of attorney in any matter which the respondent could lawfully do by an attorney was unrestricted. That power was unlimited in its application in respect thereof. The respondent could have lawfully executed an instrument evidencing a disposition of land, a lease or a charge by his attorney – DW1 – if the power of attorney was executed and verified in accordance with sections 109 and 110 of the Act.

Section 109(2)(a) of the Act where relevant stipulates that:

“an instrument shall be deemed to have been executed only – by a natural person, if signed by him”.

There is no doubt that the power of attorney was signed by the respondent on June 22, 1984. It therefore complied with the relevant provisions of section 109(2)(a) of the Act. However, its execution required verification under section 110 of the Act. Subsections (1) and (2) of the latter section which lay down the mode of such verification provides:

“110(1) Subject to subsection (3), a person executing an instrument shall appear before the Registrar or such public officer or other person as is prescribed and, unless he is known to the Registrar or the public officer or other person, shall be accompanied by a credible witness for the purpose of establishing his identify.

(3) The Registrar or public officer or other person shall satisfy himself as to the identity of the person appearing before him and ascertain whether he freely and voluntarily executed the instrument, and shall complete thereon a certificate to that effect.”

Subsection (3) referred to in subsection (1) of the foregoing section relates to the Registrar's power to dispense with verification under that section in certain circumstances. Rule 7 of the rules is in the following terms:

"7(1) In addition to the Registrar and the persons specified in section 110 of the Act, the public officers and other persons specified in the Fourth Schedule may verify any instrument for the purpose of that section. (2) A certificate for the purpose of subsections (2) and

(4) of section 110 of the Act shall be in the following form, which may be printed on, or otherwise incorporated in, any instrument presented for registration:

I certify that the above named … appeared before me on the … day of … 19.. and, being identified by … (or being known to me), acknowledged the above signatures or marks to be his (theirs) and that he (they) had freely and voluntarily executed this instrument and understood its contents.

………………………………………………

Signature and designation of person certifying and the Registrar or the public officer or other person certifying (if he has a seal or stamp of office) shall affix his seal or stamp of office to the certificate."

The prescribed officers and other persons specified in the Fourth Schedule to the Rules are:

(1) For instruments executed in Kenya:

(i) A Judge or Magistrate

(ii) The Registrar and the Deputy Registrar of the High Court

(iii) The Registrar-General, the Deputy Registrar- General and any Assistant Registrar-General

(iv) An administrative officer

(v) A Superintendent of Prisons

(vi) An Advocate

(vii) A bank official

(2) For instruments executed in a foreign country:

(i) A notary public

The power of attorney was executed in a foreign country – England. For the purpose of subsections (1) and (2) of section 110 of the Act as are set out above, it required to be verified by a notary public. It was not. For its legal effect therefore, it did not comply with one of the two essential requirements set out under section 114(1) of the Act. By reason of this impediment, an instrument evidencing disposition of the plot executed by DW1 would not have been accepted by the Registrar. As a result, neither would the respondent have been able to transfer the plot to the appellant nor would the latter had been registered as proprietor of the same – see subsections (1) and (2) of section 85 of the Act supra. Accordingly, the agreement was unenforceable. The non registration of the power of attorney either under section 116 (1) of the Act or under the relevant provisions of the Registration of Documents Act was of no consequence in relation thereto. I would also hasten to add that as the transaction between the parties was regulated by the Act, the Registration of Documents Act had no application to it.

Section 116(1) of the Act provides that:

"Upon the application of the donor or the donee of a power of attorney which contains any power to dispose of any interest in land, such power of attorney shall be entered in the register of powers of attorney and the original, or with the consent of the Registrar a copy thereof certified by the Registrar, shall be filed in the file of powers of attorney."

As Hancox CJ has correctly stated in his judgment which I have had the benefit of reading in draft, from the foregoing subsection, it is not obligatory for the donor or the donee of a power of attorney as is referred to therein to apply for its registration. Indeed, the effect of registration of such a power of attorney is to protect third parties as is set out under section 117 of the Act. That section is as follows:

"117(1) A power of attorney which has been registered under section 116 and of which no notice of revocation has been registered under that section shall be deemed

to be subsisting as regards any persons acquiring any interest in land affected by the exercise of the power, for valuable consideration and without notice of revocation and in good faith, or any person deriving title under such a person.

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

Clearly, under the foregoing section, the purposes of registration of a power of attorney as is set out in section 116 (1) of the Act are well defined. Hence, lack of registration of the power of attorney did not affect the validity of the agreement. It was therefore incorrect for the trial judge to hold that the non-registration of the said power of attorney invalidated the agreement. Indeed, had the parties and their counsel (PW1) been a little more diligent before executing the agreement, they would have ensured that the power of attorney was verified in accordance with subsection (1) and (2) of section 110 of the Act and they may have prevented the agreement from coming to grief. This was not done, and owing to the unenforceability of the agreement as is set out above, the same was incapable of specific performance.

For its full effect, the agreement was made with reference to the Act. The parties thereto knew that it was subject to the relevant provisions of the Act. They were enjoined in ensuring compliance thereof. As concerns the verification of the power of attorney, they both overlooked it or did not appreciate its importance to the agreement. This lapse struck to the root of the agreement. Both parties were to blame for it. For this, they had to bear their own costs of the suit in the superior court and not because DW1 had failed to register the power of attorney under section 116(1) of the Act.

From what I have tried to outline above, I agree with Hancox CJ that this appeal be dismissed with no order as to costs.

Dated and Delivered at Kisumu this 10th Day of December,1990

A.R.W. HANCOX

………….

CJ

J.M. GACHUHI

…………………

JUDGE OF APPEAL

J.E. GICHERU

…………………

JUDGE OF APPEAL