



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 264 OF 2016

BETWEEN

AGRI SEEDCO LTD.....APPELLANT

AND

CHRISTINE CHEPCHIRCHIR BAIG.....1ST RESPONDENT

MIZRA IQBAL BAIG.....2ND RESPONDENT

(An appeal from the Judgment of the High Court of Kenya, Environment and Land Court

at Kitale (E. Obaga, J), dated 16th October, 2014

in

ELC Case No. 34 of 2012)

JUDGMENT OF THE COURT

[1] This appeal arises from a dispute regarding the sale of property belonging to Christine Chepchir Baig (herein 1st respondent). The property is known as LR No. 3707/4 (Original Number 3707/1/2) (herein the suit property). The 1st respondent is the Lessee of the suit property from the Government of Kenya for the residue term of 999 years from 1st June, 1913. The suit property is situated in Trans Nzoia district. It measures 24.28 Hectares, which converts to approximately 60 acres. At the material time, the suit property had a farm house, an office block, a go-down, coffee milling factory extending about 3 acres, 7 acres with cultivation, and the rest of the expansive 50 acres was covered by coffee plantation.

[2] The 1st respondent had purchased the suit property, in 1984 during the subsistence of her marriage to Mizra Iqbal Baig (2nd respondent). The marriage was entered into on 3rd March, 1981. The controversy over the sale of the suit property arose from the exercise of a special power of attorney that was donated by the 1st respondent to the 2nd respondent during the subsistence of the said marriage. The special power of attorney donated out of natural love and affection was registered on 24th March, 1997 under the Registration of Titles Act as No. IP/A31590/1.

[3] The power of attorney gave the 2nd respondent full power and authority in regard to the suit property, to act on behalf of the 1st respondent in her name, to sale, and to execute such deeds or instruments as may be necessary for the purposes of the suit property. In particular, the power was to be used in the best interest of the 1st respondent, and in the event of her demise, for the administration of the suit property to the benefit of their 3 children. Unfortunately, the marriage between the 1st and 2nd respondent broke down and the two divorced on 10th March, 2010. The 1st respondent who had moved to the United States of America, did not revoke the special power of attorney after the divorce.

[4] On 3rd of February 2011, upon suspicion that the 2nd respondent was attempting to sell the suit property; the 1st respondent wrote to the Chief Land Registrar to put the title deed for the suit property under lock and key to avert an impending fraud. She also contacted the law firm of Simba & Simba Advocates and instructed the firm to lodge a caveat on her behalf.

[5] Meanwhile, Agri Seedco Ltd (appellant), being a company dealing with research and production of agricultural seeds, was interested in opening a research centre in Trans Nzoia. After scouting for a property best suited for their purpose, they settled for the suit property. It was their assertion that the conveyance process was commenced in March 2011 with the full knowledge of the 1st respondent.

[6] Subsequently, the 2nd respondent in exercise of the power of attorney granted to him by the 1st respondent, entered into an agreement with the appellant for sale of the suit property at a consideration of Kshs. 27 million. The agreement was dated 15th May, 2011 and the 2nd respondent executed the same as vendor through the power vested in him by the special power of attorney.

[7] The transaction was finalized and the entire purchase price was paid to the 2nd respondent's lawyer, F.E Jamal Advocate, through the appellant's lawyers T.O Kopere & Company Advocates. As a result, through a letter dated 15th November 2011, the 2nd respondent's advocate forwarded the completion documents to the appellant's advocate, together with a bunch of keys to the suit property. Consent from the Land Control Board was also obtained.

[8] The 1st respondent claimed that she was unaware of the foregoing developments until January, 2012, when she found out about the transaction. She was incensed because the transaction was done without her knowledge or consent. In addition, the consideration was in her view a gross under value of the suit property, whose market value she estimated at Kshs. 56,960,000.00.

[9] The 1st respondent also discovered that her advocates Simba & Simba advocates had not lodged the caveat as she had instructed him to do. Consequently, through a revocation which was duly lodged and registered as LR 57663/1, the 1st respondent revoked the special power of attorney donated to 2nd respondent. She also caused a caveat to be registered against the suit property on 10th February, 2012 under **section 116(1) of Government Lands Act (Cap 280) (GLA)**.

[10] Before the registration of the caveat, the 2nd respondent's advocates, wrote a letter dated 6th January, 2012, to the appellant's advocates informing them of the revocation of the special power of Attorney. The purport of this was that the purchase price paid by the appellant was to be refunded in full as the entire transaction could not proceed in light of the revocation. In response, the appellant's advocates maintained that the power of attorney was of an irrevocable nature, and therefore a Court Order was required to revoke it; and that since the full purchase price was paid and the transfer documents had been stamped and lodged for registration, the transaction was complete and finalised. In addition, the appellant had already taken physical possession of the suit property, put employees on the suit property and paid land rent and rates for the suit property. The appellant's advocates therefore declined the refund of the purchase price, and wrote a letter dated 30th July, 2012, to the 2nd respondent's advocates to this effect.

[11] It is important to note that at this juncture, the completion documents had been lodged and were awaiting registration. The 1st respondent therefore, filed a suit in the High Court in which she claimed that the 2nd respondent and the appellant had fraudulently entered into the agreement for sale of the suit property without her knowledge or consent. In an effort to preserve her proprietary rights over the suit property, the 1st respondent sought the following orders:

- (a) declaration that the agreement for sale was irregular, fraudulent, null and void and for this reason be cancelled;
- (b) declaration that the power of attorney donated to the 2nd respondent had been revoked;
- (c) declaration that the agreement of sale, was not stamped appropriately under the Stamp Duty Act, and is therefore null and void;
- (d) an order reversing any steps taken, or registration of any instrument made by any person or office in furtherance of the transaction herein;
- (e) an order of a permanent injunction restraining the appellant from trespassing upon, taking possession, intermeddling and/or interfering with the 1st respondent's possession, ownership and or occupation of the suit property.

[12] In his defence, the 2nd respondent admitted that the transaction was entered into without the knowledge and consent of the 1st respondent. He acknowledged that he had instructed his lawyers to return the purchase price immediately the 1st respondent revoked the special power of attorney.

[13] The appellant also filed a defence and counterclaim in which it contended that the 1st respondent had no *locus standi* to bring any claim over the suit property, since her proprietary rights over the suit property had been extinguished. The appellant pleaded that having paid the full purchase price, taken physical possession of the suit property, and lodged the conveyance/transfer documents for registration, its rights to the suit property had crystallized.

[14] Contrary to the claims of the 1st and 2nd respondent, the appellant insisted that the 1st respondent's claim that she was not aware of the transaction, were spurious as she was aware when the deposit was made, when physical possession of the suit property was granted to the appellant, and when the completion documents were forwarded to the 1st and 2nd respondents' advocates. The 1st respondent had through her brother, a caretaker, who resides on the farm on the suit property, contacted the director of the appellant company requesting to be allowed to harvest the coffee plantations on the suit property worth about Kshs. 4,000,000.00. Furthermore, the appellant contended that the special power of attorney donated to the 2nd respondent gave the 2nd respondent authority to enter into any sale without reference to the 1st respondent.

[15] For the above reasons the appellant sought dismissal of the 1st respondent's suit and counterclaimed against the 1st and 2nd respondents

jointly and severally for an order for the removal of the caveat registered against the suit property and recovery of;

(a) Kshs. 105,898.00 made up of Kshs. 45,898.00 paid as land rent, Kshs. 40,000.00 paid as rates, Kshs. 2,000.00 rates clearance certificate and Kshs. 18,000.00 to process the clearance certificate, all being payment in respect to the suit property.

(b) Kshs. 1,080,100.00 paid as stamp duty for the transfer transaction.

(c) For loss and damage incurred due to payment of wages between May, 2011 to November, 2011 for work to be done on the suit property which work was not done due to the dispute between the parties.

[16] During the hearing of the suit, the 1st respondent testified and also called two witnesses in support of her case. These were her brother, **Alfred Kipng'etich M'Clean (Alfred)** who was the General Manager of Tausi Farm which comprises of the 60 acres on the suit property, and **Silas Walekhwa Wabwoba (Simon)** an employee at Tausi Farm who was managing the coffee plantation. Both witnesses testified that they learnt of the sale of the suit property sometime in May, 2011 when a **Mr. Kassim** from the appellant's company visited the farm and informed Simon of the sale. **Alfred** was the one who alerted the 1st respondent about the sale.

[17] The appellant testified through its general manager, **Kassim Omollo Owino (Kassim)**. He testified that he first visited Tausi Farm on 7th February, 2010, when he met Simon and another manager at the farm and informed them about their company's interest in buying the farm which was up for sale. They visited the farm again in April and in October of the same year and then contacted the 2nd respondent whose contact they were given by Simon and the other manager. The 2nd respondent gave them the contact of his lawyer, Mr. Jamal, and they instructed their lawyer who negotiated with Mr. Jamal. Mr. Joseph Mwito a plant breeder also confirmed the evidence of Kassim that he had visited Tausi farm, talked to two managers and the sale agreement was entered into pursuant to which the farm was handed over to them in 2011. [18] **Mr. Michael Barasa Wanyonyi (Michael)** who had worked at Tausi farm for 15 years also testified on behalf of the appellant that he was working at the farm when he learnt from the 1st respondent in 2011 that Tausi farm had been sold. Thereafter, Kassim and other employees of the Company visited the farm. Michael and his colleagues were informed that their new employer was the appellant. On the same day, Alfred carried away household goods from the farm. The witness explained that between November and December, 2011, the 1st respondent's sister **Stella M'Clean** went to the farm in the company of hired goons, broke into the store and stole 60 bags of coffee berries. Although the 2nd respondent was represented by counsel, he did not call any witnesses nor did he testify.

[19] Upon considering the evidence before him, the trial Judge concluded that; the special power of attorney donated by the 1st respondent to the 2nd respondent did not meet the legal requirements of an irrevocable power of attorney; that there was a fiduciary relationship between the 1st and 2nd respondents, therefore the 2nd respondent was to act in the best interest of the 1st respondent; that the effect of the revocation of the power of attorney by the 1st respondent rendered the agreement for sale between the 2nd respondent and the appellant void; that the appellant was not an innocent purchaser for value without notice as it was aware that the 1st respondent did not want to sell the suit property but still went ahead with the transaction with the 2nd respondent; and that the revocation of the special power of attorney was registered, valid and effective hence the transfer could not take effect. The trial Judge therefore dismissed the counterclaim and ruled in favour of the 1st respondent granting her prayers as prayed in the plaint.

[20] It is that decision that has triggered the current appeal which is centred on seven grounds that we reproduce herein verbatim:

"1. The Judgment and Decree was grossly against the appellant, lop-sided, unbalanced and totally failed to consider the evidence adduced before the court by the parties and consequently unfair and unjust to the appellant.

*2. The learned Judge erred in Law and fact in finding that the irrevocable Power of Attorney given by the 1st respondent to the 2nd respondent which was the basis of the entry of the Sale Agreement dated 15/05/11 and revoked on 11/01/12 (Eight Months) after the Agreement without due consideration to the fact that an irrevocable Power of Attorney cannot be revoked by the donor without following due procedure **BUT** still proceeded to grant Prayers (a), (b) and (d) of the 1st respondent's plaint in effect making the revocation to act retrospectively contrary to the law.*

*3. The Learned Judge erred in Law and fact in granting an order/declaration revoking an Irrevocable Power of Attorney under **Prayer (b)** of the 1st Respondent's Plaint when the lawful steps for Revoking an Irrevocable Power of Attorney had not been taken by the 1st Respondent before the Sale Agreement dated 15/05/12 was entered.*

*4. The Learned Judge erred in Law and fact in coming to the finding that a Sale and Conveyance Transaction which took over **Eight (8)** months with the full knowledge of all the parties was **Hurried** and **Fraudulent** and coming to the erroneous and absurd conclusion that there was Collusion, Conspiracy or Fraud between the Appellant and the 2nd Respondent without any slightest evidence to that effect thus arriving at a wrong decision.*

*5. The Learned Judge erred in Law and fact in ignoring the 1st Respondent's own evidence by **PW2 – Alfred Mclean** the brother of the 1st Respondent who testified that he informed the 1st Respondent about the Sale of the Property by the 2nd Respondent to the Appellant between May and September, 2011 long before the 1st Respondent came to the Country from USA in December, 2011 and purported to challenge the Sale transaction and Revoke the Irrevocable Power of Attorney.*

*6. The Learned Judge erred in Law and fact in dismissing the Appellant's Counterclaim and failing to order the Respondents to pay back to the appellant the land Rent of **Kshs.45,898/=** paid by the Appellant, the Rates of **Kshs.40,000/=** and also refund the Stamp Duty of **Kshs.1,080,000/=** together with Interest on the Purchase Price of **Kshs.27,000,000/=** when the Judge in granting **Prayer (d)***

of the 1st Respondent's *Plaint* recognized that Registration of the Transfer had been done and proceeded to Reverse the same without ordering Refund of Stamp Duty and Transfer Fee already paid by the Appellant and that is why the Judge disallowed **Prayer (c)** of the *Plaint* since the Sale Agreement and Transfer had been Stamped and Lodged for Registration on 06/02/12 before the Registrar's Caveat was registered on 10/02/12 and the filing of the Suit in the High Court on 13/03/12 as acknowledged in all the Pleadings.

7. *The Learned Judge erred in Law and fact in failing to properly evaluate the evidence adduced before him thus coming to a wrong decision, Judgment and findings.*"

[21] During the hearing of the appeal, **Mr. T.O Kopere** appeared for the appellant while **Mr. P. N. Kiarie** appeared for the 1st respondent and **Ms. B. Munialo** appeared for the 2nd respondent. The appellant and the 1st respondent filed written submissions that were orally highlighted.

[22] For the appellant it was submitted that the learned Judge was biased, unbalanced, unfair and unjust; that he ignored the evidence of PW1 and PW2 which showed that the 1st respondent was aware of the sale; that the sale was not fraudulent; and that the release of the completion documents and payment of the full purchase price by the appellant's advocates marked the conclusion of the transfer process.

[23] For the 1st respondent it was submitted that the mere use of the word irrevocable in the body of the special power of attorney did not make it of an irrevocable nature; that to be irrevocable the power of attorney must satisfy legal requirements which include it being given by deed, and for valuable consideration for purposes of effecting any security or securing any interest of the agent; that in the case of the 2nd respondent the power of attorney was not given as security for the 2nd respondent's proprietary interest in the property as the 2nd respondent had no interest in the property; and that the power of attorney was not given for any valuable consideration.

[24] In addition, the 1st respondent submitted that the finding of the court that there was collusion, conspiracy and fraud between the appellant and the 2nd respondent was based on sound and credible evidence. This evidence was first the fact that neither the agreement of sale for the suit property, nor the application for the Land Control Board consent; nor the letter of Land Control Board Consent, bore the name of the 2nd respondent nor was it indicated that the 2nd respondent was executing the document in the names of the 1st respondent as the holder of a power of attorney. Secondly, the price paid was a gross under value as even the appellant's own witness, Kassim, valued an acre of the land at 450,000/=. Using that valuation, and the land being sixty acres with fifty acres under coffee plantation, and the remaining ten acres having a farm house, two warehouses, two coffee factories and drying lines, the developments on the land were not taken into account.

[25] Further, there was evidence that the appellant had undertaken a professional valuation of the property but withheld this information from the court. The 1st respondent had also undertaken a valuation of the suit property which was produced in evidence, and this showed that the value of the suit property was Kshs. 56,960,000/=. The 1st respondent pointed out that although the agreement between the appellant and the 2nd respondent was executed in May 2011, the 10% down payment was paid on 29th April, 2011 before the agreement was executed. The 1st respondent argued that all these factors showed that the appellant was not an innocent purchaser for value without notice.

[26] On the dismissal of the appellant's counter claim, it was argued that the learned judge properly dismissed the counter claim as the appellant did not plead for the refund of Kshs. 1,080,000/= allegedly paid as stamp duty in the counterclaim and that in any case the said stamp duty had not yet been paid and therefore a refund could not be ordered. As regards the refund of the monies allegedly paid for land rates and rent, the Court was urged that this was not proved. The appellant concluded that the learned judge properly evaluated the evidence and that his findings cannot be faulted. The appellant therefore urged the court to dismiss the appeal.

[27] We have considered this appeal, the submissions made by the parties, and the authorities cited. This being a first appeal, it is our responsibility as a first appellate court to subject the evidence that was adduced at the trial court to a fresh analysis and come to our own conclusion. (See Rule 29 of the Court of Appeal Rules and *Zingo Investment Ltd vs. Maina Enterprises Ltd [2015] eKLR*. [28] There are a number of facts that were not in dispute. These include the fact that the 1st respondent being a lessee from the Government of Kenya was the lawful proprietor of the suit property; that the suit property was acquired by the 1st respondent when she was married to the 2nd respondent; that during the subsistence of the marriage between the 1st respondent and the 2nd respondent, the 1st respondent had donated a power of attorney to the 2nd respondent in regard to the suit property; that the marriage between the 1st and the 2nd respondent fell apart; and that the 1st respondent who had moved to the US after the breakup of the marriage revoked the power of attorney that she had donated to the 2nd respondent when she learnt that 2nd respondent was attempting to sell the suit property. Another important fact that was not in dispute is that the 2nd respondent purporting to exercise the powers donated to him under the power of attorney, entered into an agreement of sale with the appellant for sale of the suit property before the 1st respondent revoked the power of attorney.

[29] The issues that were in dispute were whether the power of attorney donated to the 2nd respondent was an irrevocable power of attorney; whether the revocation of the power of attorney by the 1st respondent, that was registered, was valid and effective; whether the transaction between the 2nd respondent and the appellant in regard to the suit property was tainted by fraud and collusion, or whether the same is valid and enforceable; and whether the learned judge of the High Court was right in dismissing the appellant's defence and counterclaim.

[30] The power of attorney which was issued by the 1st respondent to the 2nd respondent was produced in evidence during the trial. That power of attorney which was duly registered under the Registration of Documents Act Cap 285 is titled "Special Power of Attorney". The pertinent part in the body of the document donating the power given to the 2nd respondent states as follows;

" ... do hereby out of natural love and affection irrevocably ordain, nominate and appoint my husband Mr. MIRZA 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 sell 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).”

[31] A close examination of the above begs the question whether the special power of attorney was irrevocable and whether the step later taken by the 1st respondent of revoking the power of attorney, had any legal effect.

[32] The relevant provisions of the former Registration of Titles Act (now repealed) that provides for donation of the power of attorney in regard to transfer or other dealings with land are sections 50 and 51 which states as follows:

50. The proprietor of any land, if not a minor, a lunatic or a person of unsound mind, may appoint any person to act for him in respect of the transfer or other dealing with the land in accordance with this Act by executing a power in form M in the First Schedule, and a duplicate or an attested copy thereof shall be deposited with the registrar, who shall enter in the register a memorandum of the particulars therein contained and of the date and hour of its deposit with him:

Provided that—

(i) a power of attorney executed in due and customary form and giving sufficient powers in the opinion of the registrar may be registered as though executed in form M;

(ii) a power of attorney registered before the date of this Act in accordance with the provisions of the Registration of Documents Act, or the Government Lands Act, shall be deemed to be duly registered for the purposes of this section, provided it has been so registered prior to any act thereunder being effected in respect to land registered under this Act; but nothing in this section shall make valid a power otherwise invalid, or any transaction under it, by reason of that action.

51. 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:

Provided that—

(i) a revocation executed in due and customary form may, at the discretion of the registrar, be registered as though executed in form N;

(ii) a revocation of any power of attorney referred to in paragraph (ii) of the proviso to section 50 shall be registered in accordance with the provisions of the Act under which the power of attorney is registered.

[33] The Registration of Titles Act does not address irrevocable powers of attorney; however, the use of the word ‘may’ in section 51 leave no doubt that the existence of powers of attorney that are not irrevocable is envisaged. ‘**Bowstead and Reynolds on Agency**’ Seventeenth Edition, at Paragraph 10-006 at page 554 gives the position at common law in regard to irrevocable powers of attorney as follows:

“At common law, where the authority of an agent is given by deed, or for valuable consideration, for purposes of supporting or effectuating any security, or protecting or securing an interest of the agent, it is irrevocable during the subsistence of such security or interest. But authority is not irrevocable merely because the agent would be prejudiced by its revocation, as by laws of commission, or has a special property in, or lien for advances upon, the subject matter of it, unless the authority was given expressly for the purpose of securing such interest or advances.”

[34] This position appears to have been accepted by the New South Wales Supreme Court in *Quest Rose Hill PTY Ltd vs White* [2010] NSWSC, 939 in which Ward J stated:

“81...The fact that a power of attorney is declared to be irrevocable is not conclusive as to whether, at common law, it is so (Collier and Lindsay, at 238; Dal Point, at [25.230], 748; Bowstead and Reynolds at [10-007]. In Cordiant, Palmer J. noted that:

‘A power of attorney, to be irrevocable at common law, must be coupled with an interest so that it is given for the better securing of that interest as against the donor.’

82. Thus, for power of attorney to be irrevocable at common law, it is necessary that the grant of power be supported by consideration and that it be coupled with an interest (Cordiant, at [152]; dal pont, at [25.20],...”

[35] Thus, the position at common law is clear that the use of the word irrevocable in a power of attorney does not necessarily render a power of attorney irrevocable, but the power of attorney is only irrevocable where it is given for valuable consideration and is for protecting or securing the interest of the agent.

[36] The power of attorney that was donated to the 1st respondent states that the power was donated to the 2nd respondent out of natural love and affection. The consideration of natural love and affection cannot be measured in monetary terms, nor is it valuable consideration. In addition, there is no evidence that the power was donated for the benefit of the 2nd respondent. The 1st respondent explained that she donated the power to the 2nd respondent to be used for the benefit of their 3 children in the event that the 1st respondent passed away. This means that the authority was not for the benefit of the 2nd respondent. Therefore notwithstanding the use of the word “irrevocable” the power of attorney donated by the 1st respondent to the 2nd respondent did not meet the requirements of an irrevocable power of attorney and therefore the

authority was revocable.

[37] The revocation of the power of attorney was executed by the 1st respondent on the 3rd February 2011 in accordance with **section 51** of the Registration of Titles Act, but registered on the 11th January 2012. This means that the power of attorney remained valid until the date of registration of the revocation, after which the power was invalid and of no legal effect.

[38] Going back to the facts of this case the appellant and the 2nd respondent entered into an agreement of sale in regard to the suit property on the 15th of May 2011. Thereafter an application for the Land Control Board Consent was lodged on the 11th July 2011. The consent to the transfer of the suit property to the appellant was granted on the 14th of September 2011, and the balance of the purchase price was paid on the 7th November 2011 through the 2nd respondent's advocates. These dates are important because up to 7th November 2011 the 1st respondent had not taken any action to revoke the 2nd respondent's authority.

[39] It was in December 2011 that the 1st respondent apparently communicated her disapproval of the sale. This was followed by an application to register a caveat which was lodged on 5th January 2012, and a registration on 11th January 2012, of the revocation of the power of attorney donated to the 2nd respondent by the 1st respondent, which was just before the appellant's lodged the conveyance/transfer documents for registration on the 6th February 2012, the same day the appellant's advocates claimed to have received a letter from the 2nd respondent's advocates advising him of the revocation of the power of attorney.

[40] What stands out from the above, is that the revocation of the power or attorney was registered on the 11th January 2012 before the appellant lodged the conveyancing documents for registration. The question is, what was the effect of this revocation on the agreement that was entered into by the 2nd respondent in May 2011 while the power of attorney was still subsisting? According to the 1st respondent she had executed the revocation of the power of attorney on 3rd February 2011 and instructed the firm of M/s Simba & Simba advocates to register the revocation of the power of attorney, but she only later realised that this was not done. **Kassim** conceded that the 1st respondent informed them in November 2011 that she was not selling her land. This means that the appellant was aware even as they lodged the transfer documents for registration that the transaction did not have 1st respondent's blessings.

[41] What is of concern is that by the time the 1st respondent came out to disown the transaction and to register the revocation of the power of attorney, the 2nd respondent had already committed her to the transaction by signing both the agreement of sale and transfer documents for the suit property, and the 2nd respondent's advocate had received the balance of the purchase price from the appellant's advocates. Assuming that the appellant was a bona fide purchaser for value without notice of any defect on the 2nd respondent's authority, the 1st respondent would be bound by the transaction. At this stage we must therefore address the issue whether the sale entered into between the appellant and the 2nd respondent was irregular or fraudulent or whether the appellant was a bona fide purchaser for value without notice.

[42] In *Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000]eKLR; Tunoi JA (as he then was) stated:*

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

[43] In her plaint dated 13th March 2012 the 1st respondent pleaded particulars of fraud against the appellant and 2nd respondent as follows:

- “(i) Purporting to enter into a sale agreement over the suit property without the 1st respondent's knowledge or consent.*
- (ii) Preparing, concluding and executing the sale agreement to make it appear as if the 1st respondent had executed the same.*
- (iii) Making, receiving and keeping payments involving the said transaction without the 1st respondent knowledge.*
- (iv) Generally acting in a fraudulent manner by dealing in land without the knowledge and or authority of the registered owner.*
- (v) Purporting to sell and/or buy the land at a gross undervalue.”*

[43] The relationship between the 1st respondent and the 2nd respondent being that of a principal and agent, it gave rise to a fiduciary relationship between the 1st respondent and the 2nd respondent, and therefore the 2nd respondent was under a duty to exercise good faith in the discharge of the agency. (see *Mjasiri v. Joshi [1990 – 1994] 1 EA 373.*)

[44] In regard to proof of good faith, **section of 117** of the **Evidence Act** states as follows:

117. Where there is a question as to the good faith of a transaction between parties, one of whom stands to the other in a position of active confidence, the burden of proving the good faith of the transaction is on the party who is in a position of active confidence.

[45] The 2nd respondent having been in a position of active confidence to the 1st respondent, it was for the 2nd respondent to prove that he exercised good faith in engaging in the sale transaction. The 2nd respondent filed a defence in which he denied the allegations of fraud and

maintained that **“he was selling the land parcel in good faith to pay himself out after the marriage broke”** He did not call any evidence in support of his defence. Be that as it may, it is evident from the defence that the 2nd respondent was more concerned with his own interest and not the interest of the 1st respondent, or the purpose for which he was given the power of attorney. It is also apparent that the 2nd respondent did not consult the 1st respondent, but entered into the transaction without her knowledge or consent, and only purported to resile from the agreement when he realized that 1st respondent had become aware of the agreement of sale and was making all efforts to block it. Clearly there was no evidence of good faith on the part of the 2nd respondent. In entering into the sale agreement over the suit property and executing the agreement and transfers without the 1st respondent’s knowledge and consent and being aware of the 1st respondent’s opposition to the transaction the 2nd respondent exhibited a fraudulent intention.

[46] As for the appellant, while it may have initially relied on the 2nd respondent’s authority, it is apparent that the 1st respondent directly and through her brother and sister, made it known that she had not sanctioned the transaction. This was admitted by the appellant’s witness Kassim, who testified that the 1st respondent called him from the US in November 2011 and informed him that she was not selling the suit property. The appellant testified through Kassim that the final payment to the 2nd respondent’s advocates was made on 7th November 2011, and that the 2nd respondent’s advocate released the completion documents on 15th November 2011. Kassim also maintained that there were no encumbrances on the title to the suit property as at 30th November 2011. This means that the appellant ignored the caution given to it by the 1st respondent and her relatives, and opted to proceed with the transaction. The appellant cannot claim to have been unaware of the controversy surrounding the 2nd respondent’s authority to sell the suit property. In opting to proceed with the transaction and even to lodge the conveyancing documents, the appellant could not claim to be a bona fide purchaser for value without notice

[47] Worthy of note is that although the 2nd respondent purported to be engaged in the transaction in exercise of the authority issued to him by the 2nd respondent, there was no mention of any such authority either in the agreement of sale or the transfer document. In executing the documents the 2nd respondent used the name of the 1st respondent without disclosing the power of attorney. This was not only irregular but also strange as Kassim testified that he had seen the indenture for the suit property and noted that it indicated the 1st respondent as the owner of the suit property.

[48] In addition, the 1st respondent maintained that the agreed price of Kshs. Twenty Seven Million for the sale of the suit property between the appellant and the 2nd respondent was fraudulent, as it was a gross under value. In support of this contention she produced a valuation of the property wherein the property was valued at Kshs. Fifty Six Million Nine Hundred and Sixty Thousand as at 7th February 2013. The 1st respondent maintained that the appellant had also carried out an independent valuation whose report was withheld from the court. Although this was denied by Kassim he could not explain how they arrived at the figure of Kshs. Four Hundred and Fifty Thousand per acre. The speed with which the appellant attempted to have the transaction finalized even paying the balance of the purchase price before the conveyancing documents were registered is also telling. We find that in the circumstances of this case, the appellant was well aware that the 1st respondent who was the registered owner of the suit property did not wish to sell the property but nonetheless tried to pull a fast one by purporting to use the power of attorney which she had issued to the 2nd respondent. We therefore agree with the finding of the learned Judge that the appellant was not a bona fide purchaser for value without notice.

[49] The revocation of the power of attorney by the 1st respondent was registered on 11th January 2012. This was before the appellant lodged the conveyance and transfer documents for registration. Under **section 51** of the Registration of Titles Act (now repealed), the Registrar of Lands could not give effect to the conveyance/transfer or any other instrument signed pursuant to the revoked power of attorney. Thus, the land transaction entered into by the appellant in regard to the suit property became invalid and ineffective. The argument that the revocation could not be applied retrospectively does not hold water, as the registration of the transfer of title had not been effected.

[50] In regard to the appellant’s counterclaim, the claim for payment of Kshs. 105,898 arose in regard to payments for land rates and rates clearance certificates. These payments were all made after the 1st respondent had warned the appellant that she was not selling the suit property. We concur with the learned Judge that the 1st respondent having revoked the power of attorney before the payment were made she cannot be held responsible for those expenses. This also includes the claim for payment of stamp duty. As concerns the appellant’s claim for damages for loses incurred from May 2011 to November 2011, it is evident that the sale transaction had not been finalized and any action taken by the appellant before it was registered as the owner of the suit property was taken at his own risk. The 1st respondent who was not aware of the transaction cannot be held responsible. Moreover any loss arising from the failed transaction gave rise to a special damage claim which ought to have been specifically pleaded and proven, and this was not done. For these reasons we find that the appellant’s counterclaim was properly dismissed.

[51] The upshot of the above is that we find no substance in this appeal. It is accordingly dismissed with costs.

Those shall be the orders of court.

DATED and Delivered at Eldoret this 25th day of July, 2019.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.