THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0867 OF 2014

1. CITY ALLUMINUM AND GLASS SERVICES LIMITED }
2. ONYANGO OKETCH JOHN } …… PLAINTIFFS

VERSUS

1. BARCLAYS BANK OF UGANDA LIMITED } …… DEFENDANTS
2. BABIRYE LEAH }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiff sued the defendant for recovery of a general and special damages for breach of contract stated to be a sum of shs. 2,854,164,879/= interest thereon and costs. The plaintiffs' claim is that the 2nd plaintiff is a director of the 1st plaintiff. On or about 26th July, 2010, the 2nd defendant executed powers of attorney in favour of the 2nd plaintiff. By that powers of attorney, the 2nd defendant authorised the 2nd plaintiff to pledge as security, her land comprised in LRV 2837 Folio 21 Plot 74 being 0.126 hectares of land situated at Main Street in Iganga, for a loan of shs. 180,000,000/= to be obtained from the 1st defendant, at the rate of 21% per annum repayable over a period of five years in monthly instalments of shs. 4,006,000/= On basis of that powers of attorney, the 1st plaintiff on 24th July, 2009 passed a resolution authorising the company to borrow that sum of money from the 1st defendant. A sum of shs. 180,000,000/= was disbursed to the 1st plaintiff on 20th September, 2020.

The 2nd defendant and the 2nd plaintiff had before then executed a memorandum of understanding dated 16th September, 2020 by which it was agreed that the 2nd plaintiff was to assign the amount obtained from the 1st defendant together with interest over the five year term of the loan, being shs. 243,000,000/= to the 2nd defendant. In turn, the 2nd defendant was to repay to the 1st defendant, a sum of shs. 150,000,000/= of the amount borrowed. Furthermore, it was agreed that out of the

loan obtained by the 1st plaintiff and advanced to the 2nd defendant, the 2nd defendant was to advance to the 2nd plaintiff the sum of shs. 20,000,000/= as a loan; shs. 75,000,000/= was to offset an outstanding loan owed to a one Hajji Tenywa in order to release the title deed free from all encumbrances; shs. 16,000,000/= was given to the 2nd defendant to meet miscellaneous expenses; and shs. 93,600,000/= was to be reserved for meeting the five years' interest on the amount borrowed. The 2nd defendant issued a cash cheque in the sum of shs. 54,700,000/= to the 2nd plaintiff as security for the performance of her obligations. In the event of default by the 2nd defendant, the 2nd plaintiff was authorised to borrow money from any financial institution to offset any amount outstanding on the loan as at the date of such default.

The 1st plaintiff defaulted on the terms of the loan prompting the 1st defendant to recall it. As at 7th December, 2010 the amount outstanding on the loan was shs. 148,531,037/= The 1st defendant then advertised the 2nd defendant's collateral for sale in order to recover that sum. The 2nd plaintiff subsequently on 28th December, 2020 executed an agreement with the 1st defendant authorising the 1st defendant instead to recover shs. 150,000,000/= from rental income accruing to the 2nd defendant from the commercial building situate on land comprised in LRV 2837 Folio 21 Plot 74. The 1st defendant further deducted a sum of shs. 53,000,000/= from the 1st plaintiff's operations account. The 1st defendant then released the certificate of title to the 2nd defendant. Consequently the 1st plaintiff did not derive any benefit from the borrowing.

b. <u>The defence to the claim</u>;

In its written statement of defence, the 1st defendant contends that it advanced a loan of shs. 150,000,000/= based on a tripartite mortgage deed dated 9th September, 2010 whereby the 2nd defendant was the mortgagor and the 1st plaintiff the borrower. Having defaulted on the loan, both the 1st plaintiff and the 2nd defendant authorised the 1st defendant to sell off the mortgaged property and use the proceeds to pay off the outstanding debt. Following disagreements between the 2nd defendant and the 2nd plaintiff, the former revoked her powers of attorney and redeemed the title deed. On top of the shs. 148,531,037/= outstanding when the loan was recalled, the plaintiff's and the 2nd defendant had to pay shs. 45,000,000/= as the cost of collection.

On her part, the 2nd defendant contended that within only two months of the amount borrowed having been disbursed to it, the 1st plaintiff had defaulted on the repayment terms. The 1st plaintiff instead instructed the 1st defendant to liquidate the security. This prompted the 2nd defendant to revoke the powers of attorney she had issued to facilitate that borrowing. The 2nd defendant further assigned the 1st defendant rental collections from the mortgaged property which was applied towards payment of the outstanding loan where after the title deed was released to the 2nd plaintiff. The 1st plaintiff was neither the donee of the powers of attorney was it privy to the memorandum of understanding. The loan having been repaid by the 2nd defendant, she is not liable to any of the plaintiffs.

c. <u>The issues to be decided</u>;

In their joint memorandum of scheduling, the parties agreed upon the following issues to be decided by court, namely;

1. Whether the plaintiffs have any claim against the defendants.
2. Whether the 1st defendant is bound by the memorandum of understanding between the plaintiffs and the 2nd defendant.

d. <u>The submissions of the plaintiffs;</u>

The 2nd plaintiff was self-represented and as well acting on behalf of the 1st plaintiff submitted that the 2nd defendant desired to borrow money from the 1st defendant yet her collateral was at the time held by a money lender. Consequently the 2nd defendant gave the 2nd plaintiff powers of attorney authorising him to borrow money on her behalf, part of which would be applied toward release of the collateral from the money lender, hence the memorandum of understanding. Whereas the 2nd plaintiff obtained shs. 150,000,000/= thought the 1st plaintiff under that arrangement all of which he advanced to the 2nd defendant, the 2nd defendant defaulted on her obligations under the memorandum of understanding. By virtue of the memorandum of understanding, the 2nd defendant was obliged to pay the plaintiffs shs. 4,058,004/= per month for a period of 60 months, hence shs. 243,480,420/= in total. The 1st defendant acted wrongly when from the amount borrowed by the 1st plaintiff, it deducted shs. 59,300,000/= paid to the money lender in order to obtain release of

the 2nd defendant's title deed. It further acted wrongly when before due date, it deducted a first instalment of shs. 4,376,779/= and consequently, the 1st defendant wrongfully recognised the 2nd defendant as the mortgagor. The 2nd defendant then wrongfully revoked the power of attorney before the debt was discharged in full. Although the 2nd defendant was not privy to the loan agreement between the 1st plaintiff and the 1st defendant, the 1st defendant permitted the 2nd defendant to pay off the debt by payment of a sum of shs. 40,026,633/= by 7th January, 2011 and handed back the certificate of title to the detriment of the plaintiffs. The 1st plaintiff's credit rating was so affected that it could not access credit anymore, resulting in its closure of business. The mortgage deed between the defendants that was executed on 9th September, 2009 is void since the 1st plaintiff and the 1st defendant had on 12th August, 2020 already executed a loan agreement. The plaintiffs signed a deed of assignment of rent under undue influence from the 1st defendant. The plaintiffs therefore claim amounts of money they would have earned had they invested the money they have been deprived of by reason of the defendants' breach of contract.

e. <u>The submissions of counsel for the defendants;</u>

Counsel for the 1st defendant, KSMO Advocates argued that the 1st plaintiff has no claim against the 1st defendant. Although the powers of attorney authorised the 2nd plaintiff to borrow from the 1st defendant, he did not borrow any funds. Instead it is the 1st defendant who borrowed. Moreover, the property that formed the subject matter of the powers of attorney was jointly owned by another who is not signatory to the powers of attorney. It was thus an invalid unilateral powers of attorney in respect of co-owned property. The 2nd defendant did not adduce evidence but her counsel, M/s OSH Advocates filed final submissions in which they argued that none of the plaintiffs has a cause of action against the 2nd defendant. The 1st plaintiff is neither privy to the power of attorney nor the memorandum of understanding which constitute the basis of the plaintiffs' claim. On the other hand, the 2nd plaintiff exceeded his authority under the power of attorney when he assigned his powers and duties to the 1st plaintiff. The 1st plaintiff compounded the situation when it failed to service the loan. The 2nd defendant was therefore justified in revoking the power of attorney and redeem her property. She is not indebted to any of the plaintiffs hence the suit should be dismissed with costs.

f. The decision;

The factual context.

The facts of the case as deduced from the pleadings and the available evidence are that the 2nd defendant is the proprietor of land comprised in LRV 287 Folio 21 plot 74 Main Street, Iganga. The premises were let out to Finance Trust Bank (Uganda) Limited as a periodical tenant. Sometime before the year 2010, the 2nd defendant had used the title deed to the land as collateral for a loan she obtained from a money lender, a one Hajji Tenywa. By July, 2010 the 2nd plaintiff owed the said money lender a sum of shs. 59,000,000/= At or around the same time, the 2nd defendant entered into an arrangement with the 2nd plaintiff for the latter to help her obtain further credit. For that purpose the 2nd defendant on 26th July, 2010 executed powers of attorney in favour of the 2nd plaintiff authorising him to borrow up to shs. 180,000,000/= from Barclays Bank, Jinja Road Branch.

On basis of the said power of attorney, the 1st plaintiff on or about 23rd July, 2010 (it appears to have been back-dated) passed a board resolution authorising the 2nd defendant to "borrow money from M/s Barclays Bank (Uganda) Limited using [the] company account in the Jinja Road Branch for transactions which shall be deemed to be done for and on behalf of the company."

Still on basis of the said power of attorney, the 2nd defendant and the 2nd plaintiff on 27th July, 2010 entered into a memorandum of understanding by which it was agreed that; the 2nd defendant was to make her title deed available as collateral to enable the 2nd defendant borrow shs. 150,000,000/= at 21% rate of interest over a period of five years; to pay the cumulative interest thereon of shs. 30,000,000/= On his part, the 2nd plaintiff undertook that upon obtaining the shs. 150,000,000/= from Barclays Bank, Jinja Road Branch, to pass it on all to the 2nd defendant; to receive shs. 30,000,000/= from the 2nd defendant repayable over a period of five years without interest; to provide the 2nd defendant with collateral for that borrowing.

On account of the 1st plaintiff's board resolution of 23rd July, 2010 the 1st defendant on 12th August, 2020 approved the 1st plaintiff's loan application. It offered the 1st plaintiff a loan of shs.

150,000,000/= at 21% per annum rate of interest, repayable in instalments of shs. 4,058,004/= per month over a period of 60 months. Upon the 1st defendant's acceptance of the terms, from the shs. 150,000,000/= borrowed the 1st defendant deducted shs. 59,300,000/= which it paid to the money lender in order to obtain release of the 2nd defendant's title deed, to secure the loan. The parties then signed a tripartite mortgage agreement on 9th December, 2010 naming the 1st plaintiff as the borrower and the 2nd defendant as the mortgagor. The 1st defendant further deducted a first instalment of shs. 4,376,779/= and hence disbursed 86,323,221/= onto the 1st plaintiff's account, which the 1st plaintiff then advanced to the 2nd defendant.

The memorandum of understanding signed between the 2nd defendant and the 2nd plaintiff was amended on 16th September, 2010. By that amendment the 2nd defendant undertook to advance a loan of shs. 20,000,000/= to the 2nd plaintiff. The 2nd plaintiff agreed to advance shs. 75,000,000/=to the 2nd defendant out of the money borrowed by the 1st plaintiff, out of which the money owed to the money lender would be paid. The 2nd defendant undertook to repay the entire sum borrowed from the bank upon which the 2nd plaintiff would retrieve the title deed and hand it back to the 2nd defendant.

The first instalment fell due on 20th October, 2010 and it was paid by the 1st plaintiff. When the second instalment fell due on 20th November, 2010 it was not paid. This prompted the 1st defendant on 7th December, 2010 to recall the loan. By 17th December, 2010 both the 2nd defendant and the 1st plaintiff had defaulted on their loan obligations toward the 1st defendant. The 1st plaintiff consequently instructed the tenant, Finance Trust Bank (Uganda) Limited, to pay the rent accruing on the premises, directly to the 1st defendant.

On 28th December, 2010 acknowledging that shs. 148,531,037/= was outstanding due on the loan, the 1st defendant executed a deed of assignment with the 2nd defendant and her co-owner of LRV 287 Folio 21 plot 74 Main Street, Iganga by which they assigned all their rental income from those premises to the 1st defendant, until the entire sum would be off-set. A sum of shs. 119,960,086/= then still being outstanding, the 1st plaintiff then on 23rd and 31st July, 2012 wrote to the 1st defendant authorising it to realise the security offered by the 2nd defendant for the loan. The 1st defendant nevertheless issued a default notice on 20th August, 2012. On 22nd January, 2013 the 2nd

defendant revoked the power of attorney she had given to the 2nd plaintiff whereupon she proceeded to redeem the title deed after discharging the loan.

1st issue; whether the plaintiffs have any claim against the defendants.

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. The plaintiffs rely on a memorandum of understanding executed between the 2nd defendant and the 2nd plaintiff on 27th July, 2010 and amended on 16th September, 2010. Perusal thereof shows that it was agreed that; the 2nd defendant was to make her title deed available as collateral to enable the 2nd defendant borrow shs. 150,000,000/= at 21% rate of interest over a period of five years; to pay the cumulative interest thereon of shs. 30,000,000/= On his part, the 2nd plaintiff undertook that upon obtaining the shs. 150,000,000/= from Barclays Bank, Jinja Road Branch, to pass it on all to the 2nd defendant; to receive shs. 20,000,000/= from the 2nd defendant repayable over a period of five years without interest. The 2nd defendant undertook to repay the entire sum borrowed from the bank upon which the 2nd plaintiff would retrieve the title deed and hand it back to the 2nd defendant.

It is an undisputed fact that by 9th September, 2010 LRV 2837 Folio 21 Plot 74 at Main Street in Iganga was registered to Babirye Leah (the 2nd defendant) and Nairuba Joy as administratrix of the estates of the late Nakito Racheal and Kirangi Betty respectively. Prior to that, the land had on 20th October, 2000 been registered to Kirangi Betty (now deceased), Babirye Leah (the 2nd defendant) and Nakato Racheal (now deceased) "as tenants in common in equal shares."

According to section 193 of *The Registration of Titles Act*, every proprietor and every transferee when registered of any land, while continuing so registered has the same estates, rights, powers and remedies and is subject to the same engagements, obligations and liabilities, in like manner as if he or she had been the original proprietor of the land by or with whom the engagement, obligation or liability sued upon was entered into or incurred, or the original proprietor. The implication then is that both Babirye Leah (the 2nd defendant) and Nairuba Joy were tenants in common in equal shares.

Where property is held as tenants in common, each co-owner has a distinct proportionate share. Unlike with joint tenancies, in tenancies in common the co-ownership arrangements are such that each of the co-owners holds a distinct share, or proportions of entitlement, which will normally be equal shares, but any percentage split is possible. Tenants in common each have the right to exercise acts attributable to owners of land, so long they do not interfere with the equivalent rights of the other co-owners. Except where a tenant in common acts to physically oust another tenant in common, or acts to unlawfully interfere with mutual rights of enjoyment, the notion of trespass between tenants in common, each tenant in common has the right to exercise acts attributable to owners of land. This applies, regardless of the size of the share of each tenant in common, meaning that a tenant in common with a much greater share of the property cannot act in ways that exclude the right of possession of any other tenant in common with a smaller share.

Each co-owner under a tenancy in common holds a separate and distinct interest in the land, which they can dispose of in any way they please in most circumstances. Because there is no right of survivorship, each tenant in common is free to sell his or her share or transfer it at will. The transferee or beneficiary receives the ownership interest and becomes a new tenant in common with the other owners. Section 146 (1) of *The Registration of Titles Act* provides that the proprietor of any land under the operation of the Act may appoint any person to act for him or her in transferring that land, or otherwise dealing with it by signing a power of attorney. Most of the time it is possible for a joint owner of land to act unilaterally to sell their interest in the land without the other co-owner(s), and thus it is possible for a donee of powers of attorney to sell the interest in land co-owned by the donor without the consent of the other co-owners. Therefore each tenant in common is free to unilaterally execute powers of attorney affecting their interest in the land,

provided its scope and effect does not interfere with mutual rights of enjoyment of the rest of the co-tenants.

To bring the co-ownership of land to an end, the tenancy in common must be terminated. Severance of the tenancy in common is typically effected in one of three ways: by one person's acting unilaterally upon his or her own share so as to destroy the unity of possession (for example, by selling or encumbering it). An act of any one of the persons interested operating upon his or her own share may create a severance as to that share; by mutual agreement (for example, by written contract by dividing the shared property into portions and allocating them amongst themselves); or by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting distinct and independent interests (for example, by conduct which demonstrates all tenants mutually dealt with their interests as several).

Courts consider the totality of evidence so as to discern whether the parties shared a common intention to treat their interest in the property as constituting distinct and independent interests (see *Williams v. Hensman (1861), 70 E.R. 862* and *Williams and Burgess v. Rawnsley [1975] Ch. 429*). The mutuality for this purpose is to be inferred from the course of dealing between the parties and does not require evidence of an agreement. What is determinative is the expression of intention by the co-owners as evidenced by their conduct. A course of dealing sufficient to sever requires only that the co-owners knew of the other's position and mutually treated their interests as several. It will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the persons interested. In this type of severance, the court must find a course of dealing by which the shares of all the parties to the contest have been effected (see *Wilson v. Bell [(1843), 5 IR. Eq. 501* and *Jackson v. Jackson [(1804), 9 Ves. 591*).

When a tenancy in common is severed, tenants in common can apply to a court to partition the land. This means that the court is being asked to divide the property into different lots or sections. More often than not the application is done mutually by both parties, however this is not necessary and can be done by one party alone as long as the co-owner is notified. The court has discretion as to whether to grant such an order.

There are two general types of partitions. The first is a partition in kind which is by way of the physical division of the land. The court determines how to divide the land based on the ownership interest of each tenant in common. This may be easier when the property consists of fairly large tract or acres of land. The second type of partition is a partition by sale. Through this process, the court orders the sale of the property, even if the co-tenants did not want to sell their share. The court distributes the share of the profits to each co-tenant in relation to their ownership interests.

Unlike transfers, mortgages do not usually take effect by way of conveyance; they operate by way of security as a charge against title. In consequence, the unity of possession is not broken when a mortgage is granted and a tenancy in common is not severed. Neither can a unilateral statement of intention to sever by itself effect a severance. Some form of action or mutual agreement is required to sever a tenancy in common.

In the instant case, there is no evidence to show that the unilateral power of attorney by the 2nd defendant to the 2nd plaintiff interfered with mutual rights of enjoyment of the other co-tenant. Although the 2nd defendant unilaterally encumbered her share in the land, there is no evidence to show that by that act or any other discernible course of conduct, Babirye Leah (the 2nd defendant) and Nairuba Joy shared a common intention to treat their respective interests in the land as constituting distinct and independent interests. Neither of the two; Babirye Leah (the 2nd defendant) and Nairuba Joy, has applied to court for partitioning of the land.

Powers of attorney enable the donee to do on the donor's behalf anything in respect of property that the donor could do if capable, except make a will, subject to the conditions and restrictions set out in the power of attorney. While a general power of attorney gives the donee the power to act on behalf of the donor by doing anything which he or she can lawfully do by an attorney, a specific power of attorney on the other hand authorises the donee to act on the donor's behalf in respect of a single transaction or to sign a single document.

A donee of powers of attorney must focus on the best interests of the grantor. The donee is not entitled to make decisions based on what is good for himself or herself; all of the donee's actions should be in the best interests of the donor of the Power of attorney (see *Fredrick J. K. Zaabwe v.*

Orient Bank Ltd and five others, S. C. Civil Appeal No. 4 of 2006). Where an agent, who has been given a power of attorney to do certain things, uses the power to do something for a proper purpose, but the act done is for the agent's own purposes to the exclusion and detriment of the principal, the actions of the agent will be outside the scope of the power of attorney and are not even capable of ratification by the principal (see *Imperial Bank of Canada v. Begley [1936] 2 All ER 367*).

On the other hand, a prudent bank is expected to ask itself why a person would give away his or her property to secure the borrowing of another for a transaction in which he or she has no interest at all. Consequently a fiduciary relationship exists between a bank and owner of property that is being used to secure a loan facility, which requires the bank to make a full disclosure to the owner of property in so far as the loan is concerned (see *Fredrick J. K. Zaabwe v. Orient Bank Ltd and five others, S. C. Civil Appeal No. 4 of 2006*). The bank has a duty to ensure that the powers are being used for and on behalf of the donor and not to his/her detriment or for the benefit of the donee of the powers. The mortgage deed ought to clearly state that the borrower is acting under a power of attorney issued in accordance with the Act, the failure of which is a serious irregularity that renders the mortgage invalid.

The power of attorney executed by the 2nd defendant on 26th July, 2010, the memorandum of understanding executed between the 2nd defendant and the 2nd plaintiff on 27th July, 2010 and amended on 16th September, 2010 all show that the intention was that the 2nd defendant was to make her title deed available as collateral to enable the 2nd defendant borrow shs. 150,000,000/= from Barclays Bank, Jinja Road Branch. Instead it is the 1st plaintiff, with whom the 2nd defendant had no prior arrangement, which borrowed the money. The powers of attorney were issued to the 2nd plaintiff, for the benefit of the 2nd defendant and not the 1st plaintiff. It follows that the execution of the mortgage on 9th September, 2010 to secure the borrowing of the 1st plaintiff, exceeded the authority given by the power of attorney. However, the 2nd defendant ratified the 2nd defendant's excess of authority when she executed the tripartite mortgage deed on 9th December, 2010.

Although the plaintiffs submitted that there had been a loan agreement between the 1st plaintiff and the 1st defendant prior to the execution of the tripartite mortgage deed, no evidence of this was adduced. The only evidence before court is that a tripartite mortgage agreement was created

between the 1st plaintiff as borrower, the 1st defendant as lender and the 2nd defendant as mortgagor and it is on that basis that funds were disbursed by the 1st defendant. The purpose was to make it clear that the mortgagor provided the property to serve as security for the lender advancing a loan to the 1st plaintiff as borrower. A tripartite mortgage agreement is important from the lender`s point of view, since when the borrower defaults in repaying the loan to the lender, the lender will have recourse against the property. The main objective of the tripartite agreement is to provide financial support to the borrower, against security of a property that belongs to a third party, who is in the position of a confirming party. It means that the third party has no problem with that transaction and is aware of all related issues.

According to section 2 of *The Mortgage Act, 8 of 2009*, a "third party mortgage" is one which is created or subsists to secure the payment of an existing or future or a contingent debt or other money or money's worth or the fulfilment of a condition by a person who is not the mortgagor, whether or not in common with the mortgagor. According to section 18 (1) (a) of the Act, in third party mortgages it is the obligation of the borrower, and not the third party (the mortgagor), to pay the principal money on the day appointed in the mortgage agreement, and, so long as the principal money or any part of it remains unpaid, to pay interest on it or on so much of it as for the time being remains unpaid at the rate and on the days and in the manner specified in the mortgage agreement.

It has not been shown that the 1st defendant made any deductions from the 1st defendant's account that are inconsistent with its obligations under the third party mortgage. In a third party mortgage, the mortgagor makes a contractual promise to ensure that a borrower fulfils his or her obligations and / or pay an amount owed by a the borrower if he or she fails to do so himself or herself (see *Guma Paulino v. Bank of Africa (U) Ltd and two others, H. C. Civil Suit No. 13 of 2008*). Therefore the 1st defendant's acceptance of mortgage payments from the third party (the 2nd defendant), whether wittingly or not, was not wrongful as contended by the plaintiffs. This is because that right is a statutory one arising from the 1st defendant's default.

On the other hand, under the "first breach doctrine" or the doctrine of "prior material breach," if a party to a contract committed the first material breach, it cannot sue afterwards to enforce the

provisions of the contract which were favourable to that party even if there is a subsequent breach by the other party by reason of the anticipatory breach (see *SK Shipping (S) Pte Ltd v. Petroexport Ltd [2010] 2 Lloyd's Rep 158*). The innocent party is able to terminate the contract if it can show that the other party acted in such a way so as to provide a clear and absolute intention that it would not perform its obligations. The words or conduct of the party in breach should be clear and absolute to a reasonable person taking into consideration all of the circumstances at the time of termination. In addition to this, the innocent party must have a subjective belief that the other party will breach the contract. Once these conditions are satisfied, the innocent party take steps to terminate the contract and mitigate its losses.

By its letters of 23rd and 31st July, 2012 authorising the 1st defendant to realise the security offered by the 2nd defendant for the loan, the 1st plaintiff evinced a clear intention not to discharge the loan. This constituted a material prior breach by the 1st defendant. It cannot thereafter sue for breach of that contract. The 1st defendant was entitled to terminate the contract and mitigate its losses. Concerning the agreement between the 2nd plaintiff and the 2nd defendant, this was superseded by the mortgage deed and became impossible of performance. The memorandum of understanding was conditioned on the 2nd defendant securing the loan yet this was done by the 1st defendant. The 2nd defendant not having fulfilled the condition precedent, i.e. securing the loan, he cannot seek to enforce the contract.

As regards the plaintiff's contention that it was wrongful of the 2nd defendant to have revoked the powers of attorney, a donor can rescind a special power of attorney at any time so long as the donor is competent. The donor does not need to explain why he or she chooses to revoke it, for as long as the attorney is notified of the revocation. If the Power of Attorney was registered, the revocation must also be registered. In the instant case not only was the 2nd defendant notified of the revocation but also it was duly registered. This issue therefore is answered in the negative, the plaintiffs have no claim against the defendants.

2nd issue; whether the 1st defendant is bound by the memorandum of understanding between the plaintiffs and the 2nd defendant.

Although a contract or its performance can affect a third party, as a general rule, a contract cannot confer rights or impose obligations arising under it on any person except the parties to it (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847*). This is the doctrine of privity whose implication is that,: (i) a person cannot enforce rights under a contract to which he is not a party; (ii) a person who is not party to a contract cannot have contractual liabilities imposed on him or her; and that (iii) contractual remedies are designed to compensate parties to the contract, not third parties. The doctrine of privity prevents a third party from suing on a contract to which he or she is not a party.

A contract is not merely a promise but a promise supported by consideration, i.e. a bargain. If someone is not a party to the bargain, he or she is not a party to the contract. A third party may not enforce a contract except where it was made expressly for his or her benefit in such circumstances that it was intended to be enforceable by him or her (see *Drive Yourself Hire Co (London) Ltd v. Strutt [1954] 1 QB 250* and *Beswick v. Beswick [1968] AC 58, [1967] 3 WLR 932, [1967] 2 All ER 1197*).

In this case the 1st defendant was not party to the memorandum of understanding between the 2nd plaintiff and the 2nd defendant. Since a person who is not party to a contract cannot have contractual liabilities imposed on him or her, this issue too is answered in the negative; the 1st defendant is not bound by the memorandum of understanding between the 2nd plaintiff and the 2nd defendant. In conclusion, the suit is misconceived and is accordingly dismissed with costs to the defendants.

Delivered electronically this 28th day of June, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
28th June, 2021.