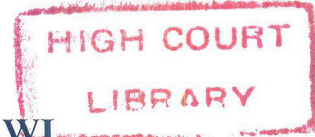




**JUDICIARY  
IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
LAND CAUSE NO. 34 OF 2014**



**BETWEEN**

**ALEXANDER SOLANKE (JNR) ..... 1<sup>ST</sup> PLAINTIFF**

**RHODA SOLANKE ..... 2<sup>ND</sup> PLAINTIFF**

**-AND-**

**NBS BANK ..... 1<sup>ST</sup> DEFENDANT**

**PELANI K.S. MALANGE ..... 2<sup>ND</sup> DEFENDANT**

**ALEXANDER SOLANKE (SNR) ..... 3<sup>RD</sup> DEFENDANT**

**CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA**

Mr. Gulumba, of counsel, for the Plaintiffs

Mr. Mpaka, of counsel, for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

3<sup>rd</sup> Defendant, present in person

Ms. Annie Mpasu, Court Clerk

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**JUDGEMENT**

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*Kenyatta Nyirenda, J.*

Introduction

The Plaintiffs commenced the action herein at Zomba District Registry, by a generally endorsed writ of summons issued on 3<sup>rd</sup> December 2010, claiming for an injunction restraining the Defendant from selling or continuing with the sale of House Title No. Michiru 9/1 [hereinafter referred to as the “property”]. In 2013, the action got transferred from Zomba District Registry to the Principal Registry.



The 1<sup>st</sup> Plaintiff is the registered owner of the property. The 2<sup>nd</sup> Plaintiff is the 1<sup>st</sup> Plaintiff's mother. The 1<sup>st</sup> Defendant is a registered bank. The 1<sup>st</sup> Defendant sold the property to the 2<sup>nd</sup> Defendant. The 3<sup>rd</sup> Defendant is a father to the 1<sup>st</sup> Plaintiff.

### Pleadings

It is the Plaintiffs' case, as per the Amended Statement of Claim, that the 3<sup>rd</sup> Defendant fraudulently misrepresented himself to the 1<sup>st</sup> Defendant in entering into a charge and a further charge over the property. The fraudulent misrepresentation has been particularized as follows:

- (a) Applying for the charge as Alexander Solanke (jnr) when in actual fact he was not;
- (b) Signing the charge as Alexander Solanke (jnr) when in actual fact he was not;
- (c) Entering into and signing the charge when in actual fact he did not have title to the property; and
- (d) Knowingly entering into the charge agreement when he was not Alexander Solanke (jnr).

On the basis of the foregoing, the Plaintiffs plead as follows:

- “6. *The Plaintiff repeats paragraph 4 and 5 herein and aver that the said charge and further charge were obtained, made by fraud and/ or mistake within the meaning of section 139 of the Registered Land Act.*
7. *The Plaintiff avers that the 1<sup>st</sup> Defendant had knowledge of the said fraud and mistake or ought to have known the said fraud and mistake.*
8. *The Plaintiff avers that the 1<sup>st</sup> Defendant caused the said fraud and/or mistake or in the alternative substantially contributed to the said fraud and mistake by its act, neglect or default.*

### Particulars under paragraphs 7 and 8

- 8.1. *Omission on the part of the 1<sup>st</sup> Defendant to verify the signatures that on the lease document and that of the 3<sup>rd</sup> defendant.*
- 8.2. *Entering into the said charge without ascertaining whether the 3<sup>rd</sup> Defendant had title to the property.*



- 8.3. *Entering into the said charge without ascertaining as to whether the person signing is in actual fact Alexander Solanke (jnr).*
- 8.4. *Entering into the further charge agreement without ascertaining as to whether the 3<sup>rd</sup> Defendant had title to the property.*
- 8.5. *On the other part of the 1<sup>st</sup> Defendant knowingly entering into the said charge and further charge that the 3<sup>rd</sup> Defendant has no title to the property.*
- 8.6. *Failure on the part of the 1<sup>st</sup> Defendant to exercise due care and diligence in the circumstances.”*

Further, or in the alternative, the Plaintiffs aver that the 1<sup>st</sup> Defendant negligently entered into the charge and further charge with the 3<sup>rd</sup> Defendant. The particulars in respect of the alleged negligence are said to be set out in paragraphs 7 and 8 of the Amended Statement of Claim as outlined above.

It is also alleged that, due to matters aforesaid, the Plaintiffs have suffered loss and damage, namely, rendering the property seriously encumbered, deregistration of the Plaintiff as the proprietor of the property, anxiety and emotional shock at the possibility of the Plaintiff to lose the property, financial loss, loss of the property due to the sale of the same by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and loss of title property.

Based on the foregoing, the Plaintiffs claim (a) permanent injunction restraining the Defendant's their agents, servants or whomsoever from the selling or continuing with the sale of the property herein to the Defendant or whosoever, (b) an order setting aside the charge and further charge herein, (c) an order directing the cancellation of the registration of the charge and further charge, (d) an order setting aside the sale agreement of the property between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant, (e) as to the 1<sup>st</sup> Defendant damages for neglect and/or default, (f) as to the 3<sup>rd</sup> Defendant damages for misrepresentation and (g) costs of this action

By its Amended Defence, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants admit that the 3<sup>rd</sup> Defendant used the property as security for the loans that he obtained from the 1<sup>st</sup> Defendant as alleged in the Amended Statement of Claim. Save for the said admission, the Defendant denies each and every allegation of fact contained in the Amended Statement of Claim. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants further make no comment regarding the alleged misrepresentation in so far as the said allegation concerns only the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant also expressly denies any negligence in the manner in which the property was used as security for the 3<sup>rd</sup> Defendant's

borrowings from the 1<sup>st</sup> Defendant. In this regard, the Amended Defence further avers that the 3<sup>rd</sup> Defendant in fact exercised due diligence and care in entering the security arrangement for the 3<sup>rd</sup> defendant's borrowings. The care and diligence has been particularized as follows:

- (i) At all material times, the 3<sup>rd</sup> defendant was well known by his identity as Alexander Solanke and it was not known to the 1<sup>st</sup> defendant whether the 3<sup>rd</sup> defendant had a son with the same or similar identity as the 3<sup>rd</sup> defendant in terms of first name and family name.*
- (ii) At all material times, the 1<sup>st</sup> plaintiff was unknown to the defendant by reason of which the only Alexander Solanke known to the 1<sup>st</sup> defendant was the 3<sup>rd</sup> defendant who duly identified himself as such.*
- (iii) At all material times, the 3<sup>rd</sup> defendant identified himself as the Alexander Solanke referred to in the registration title documents over property title number MC 9/1.*
- (iv) At all material times, the 3<sup>rd</sup> had in actual possession of the evidence of the title to the said property title number MC 9/1.*
- (v) At all material times, the 3<sup>rd</sup> defendant had previously dealt with the said property title number MC 9/1 as and in a way suggesting that it was his own.*
- (vi) Subsequent to the transaction with the 1<sup>st</sup> defendant the 3<sup>rd</sup> defendant dealt with property title number MC 9/1 as his own and to the knowledge of the 1<sup>st</sup> plaintiff without any query as to the 3<sup>rd</sup> defendant's title.*
- (vii) On or around 8<sup>th</sup> February and 16<sup>th</sup> February 2009 the said charges over property title number MC 9/1 were duly registered"*

The Defendants also expressly deny that the 1<sup>st</sup> Defendant's negligence occasioned loss and damage to the Plaintiffs and proceed to conclude the Amended Defence thus:

- "8. The 1<sup>st</sup> defendant refers to the content of paragraphs 7 and 8 hereof and avers that in the circumstances, if the plaintiffs suffered any loss and if the 1<sup>st</sup> defendant was negligent, which is denied, the proximate cause of any such loss was not the said alleged negligence at all.*
- 9. The 1<sup>st</sup> defendant refers to clause 7 (iv) and (vi) hereof and avers that in any event the plaintiffs were at all material times estopped from alleging any misrepresentation against the 3<sup>rd</sup> defendant having expressly and/or impliedly authorized the 3<sup>rd</sup> defendant to deal with property title number MC 9/1 in the manner that he did.*



10. *Further the 1<sup>st</sup> defendant refers to clause 3, 4 and 7(vii) hereof and avers that by virtue of the said registration of the charges over property title number MC 9/1, the said lands became duly charged and the 1<sup>st</sup> defendant acquired an indefeasible interest as mortgagee over the title number MC 9/1 with a power of sale that lawfully arose and was exercised on or around 31<sup>st</sup> August 2010 in favour of the 2<sup>nd</sup> defendant notwithstanding the alleged misrepresentation as to title or negligence if any.*
11. *The 2<sup>nd</sup> defendant avers that all material times he was a bonafide purchaser for value without notice of any defect in title on the part of the 1<sup>st</sup> defendant or the 3<sup>rd</sup> defendant or at all.”*

There is a Reply to the Amended Defence wherein the Plaintiffs (a) deny that the 1<sup>st</sup> Defendant exercised due diligence and care in entering the security arrangement for the 3<sup>rd</sup> Defendant's borrowings, (b) aver that had the 1<sup>st</sup> Defendant diligently verified the name and signatures on the registration title document and that of security documents, it could have known that 3<sup>rd</sup> Defendant falsely identified himself as the 1<sup>st</sup> Plaintiff, (c) aver that at all material times they were not aware of the alleged possession of evidence of title to the property and any previous dealings between the 3<sup>rd</sup> Defendant and 1<sup>st</sup> Defendant, (d) aver that having possession of evidence of title is not proof of being the holder of the title to the property and at all material times the 1<sup>st</sup> Defendant were under a duty to verify the true ownership of the property, (e) aver that the 1<sup>st</sup> Plaintiff, being the title holder of the property, and the 2<sup>nd</sup> Plaintiff, being the occupier of the property, had an overriding interest over the property which took priority to that of the 1<sup>st</sup> Defendant and (f) aver that the power of sale of the property was exercised under a defective charge/mortgage and the 2<sup>nd</sup> defendants purchase was not bonafide or at all.

### Burden and Standard of Proof

It is trite that a plaintiff has the burden of proving the elements of his or her lawsuit. In a civil case, like the present one, a plaintiff has to prove his or her case on a balance of probabilities: see **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**.

### Evidence

The Plaintiff's first witness was the 2<sup>nd</sup> Plaintiff. She adopted her witness statement and this constituted her evidence in chief. The substantive part of her evidence is as follows:

- “1. **THAT** I am the mother of the Plaintiff herein and am making this statement on behalf of the Plaintiff who is currently in the United Kingdom where he has been staying for over 20 years his address being 121 Uxbridge Road, Hampton Hill in Hampton Middlesex TW12 1SL. I now attach his passport exhibited hereto and marked “RS1”.
2. **THAT** I make this statement on behalf of the Plaintiff because the Plaintiff could not do it due to due to logistical problems, and further due to the fact that I have a much better grip of the facts because I was around the country.
3. **THAT** the 3<sup>rd</sup> Defendant is the father of the Plaintiff and is a Malawian citizen. I now produce a copy of his passport exhibit hereto and marked “RS 2”.
4. **THAT** the Plaintiff herein is the registered owner of the property registered as Title number Michiru 9/1 in the Land Registry (the property). I hereby produce a copy of lease and exhibited hereto and marked “RS 3”.
5. **THAT** in December 2007 the 3<sup>rd</sup> Defendant applied for a loan to the 1<sup>st</sup> defendant and pledged the property as security. I hereby produce the copies of the application forms duly filed by the 3<sup>rd</sup> defendant exhibited hereto and marked “RS4”.
6. **THAT** following the said application, the 1<sup>st</sup> defendant on the 31<sup>st</sup> day of January, 2008 advanced a loan to the 3<sup>rd</sup> defendant in the sum of MK7, 500,000.00 and charged the property herein as security. I now produce a copy of the said charge exhibited hereto and marked “RS5”.
7. **THAT** I repeat paragraph 4 herein and states that the said charge prepared by the 1<sup>st</sup> defendant purports that the Plaintiff is charging the property to the 1<sup>st</sup> defendant.
8. **THAT** there was clear fraudulent misrepresentation by the 3<sup>rd</sup> defendant in that he proceeded to sign the charge which was not in his name and further to that the 3<sup>rd</sup> defendant did not have title to the property.
9. **THAT** sometime in July 2008, the 3<sup>rd</sup> defendant applied for a further loan from the 1<sup>st</sup> defendant and the 3<sup>rd</sup> defendant yet used the property as security. I now produce copies of the said application forms duly filed by the 3<sup>rd</sup> defendant and exhibited hereto and marked “RS 7”
10. **THAT** following the said application by the 3<sup>rd</sup> defendant, the 1<sup>st</sup> defendant advanced a further loan for the sum of MK1, 500,000.00 to the 3<sup>rd</sup> defendant through a further charge dated 27<sup>th</sup> day of January 2009. I hereby produce a copy of the further charge and exhibited hereto marked “RS 7”.
11. **THAT** it should be mentioned that when the 3<sup>rd</sup> defendant was engaging in all these dealings with the 1<sup>st</sup> defendant he was staying alone in the property as the plaintiff was away in the United Kingdom just the same with all other children.



12. *THAT I repeat paragraph 10 herein and states that as for myself I was staying in Mangochi where I was running a Kindergarten school known as St Luke nursery school at Makawa, and around March 2008 I also left for United Kingdom and came back around July 2009. I now produce copies of my stamped passports and the United Kingdom Visa collectively marked "RS8". The original passport will be made available for inspection at trial.*
13. *THAT I came to realize about the issue around September 2009 when people from the Bank and Trust Auctioneers started coming to the house to make inspections and upon confronting the 3<sup>rd</sup> defendant he admitted to have charged the property to the 1<sup>st</sup> defendant but he informed me that he was handling the matter.*
14. *THAT around July 2010 purely in the spirit of saving the property and not condoning the 3<sup>rd</sup> defendants' conduct I approached the 1<sup>st</sup> defendant on 2 occasions but to no avail. I now produce copies of the communications between myself and the 1<sup>st</sup> defendant collectively marked "RS9". 2<sup>nd</sup> Plaintiff's Letter to the 1<sup>st</sup> Defendant dated 19<sup>th</sup> July 2010)*
15. *THAT it was after that and in consultation with the plaintiff that we decided to take action and commenced these proceedings.*
16. *THAT I hold the 1<sup>st</sup> defendant liable in that they knew the fact that 3<sup>rd</sup> defendant was not a registered owner of the property, or if they had exercised due diligence and care they could have noted the discrepancies in the documents especially as regards to signatures.*
17. *THAT the Plaintiff and other children have gone through a lot of distress, anguish, agony and shock due to conduct of the defendants. The property has been heavily encumbered and sold to the 2<sup>nd</sup> defendant.*
18. *THAT I accordingly pray to his Honourable Court for the reliefs as prayed in the Amended Statement of Claim."*

PW1 tendered the documents referred to in her witness statement, that is, on RS1 (two pages from the Plaintiff's Passport), RS1 (two pages from the 3<sup>rd</sup> Defendant's Passport), RS3 (the Lease), RS4 (Application Form for a Mortgage Loan), RS5 (The Charge), RS6 (Application Form for a Mortgage Loan), RS7 (Further Charge), RS8 (four pages from the 2<sup>nd</sup> Plaintiff's Passport), RS9 (Letter written by the 2<sup>nd</sup> Plaintiff to the 1<sup>st</sup> Defendant), RS9 (2<sup>nd</sup> Plaintiff's Letter to the 1<sup>st</sup> Defendant dated 19<sup>th</sup> July 2010), RS9 (2<sup>nd</sup> Plaintiff's Letter to the 1<sup>st</sup> Defendant dated 30<sup>th</sup> August 2010) and RS9 (1<sup>st</sup> Defendant's Letter to the 2<sup>nd</sup> Plaintiff dated

3<sup>rd</sup> September 2016 and these documents were marked as Exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10 and P11 respectively.

In cross-examination, PW1 was asked questions regarding signatures appearing on Exhibits P1, P3, P2, P5 and P7. She responded by stating that the signatures on Exhibits P1 and P3 were very much similar and these signatures were different from signatures appended to Exhibits P2, P5 and P7.

Probed about her knowledge of her husband's dealings with the 1<sup>st</sup> Defendant, PW1 stated that she did not know at the material time that her husband (the 3<sup>rd</sup> Defendant) was borrowing money from the 1<sup>st</sup> Defendant because she was then living in Mangochi. She only became aware of the mortgage in July 2009 when officials from Trust Auctioneers and Estate Agents went to view the property for valuation purposes. She went on to say that, thereafter, she personally approached the 1<sup>st</sup> Defendant's officers and wrote letters to the 1<sup>st</sup> Defendant (Exhibits P9 and P10) in an attempt to secure the property.

The next set of questions by Counsel Mpaka focused on the Amended Statement of Claim and the following Q and A ensued:

*Q: Your case is that your husband misrepresented himself to the bank?*

*A: Yes*

*Q: He represented himself as if he was your son?*

*A: Yes*

*Q: Read paragraph 4 of the statement of claim. Did your husband succeed in misrepresenting himself to the bank?*

*A: Yes! By the fact that I am now here*

*Q: If you were the bank, you would not have known that you were dealing with a fraudster?*

*A: No!*

Having been shown Exhibit P3, P4, P5 and P6, which, among other matters, contain statements to the effect that Alexander Solanke Junior was personally known to the Lands Registrar (Mr. Kwame Ngwira), Mr. Khuze Kapeta (as personal referee) and the 1<sup>st</sup> Defendant's officers, PW1 agreed that the Alexander



Solanke known in Malawi was the 3<sup>rd</sup> Defendant. She also admitted that from 2008 to 2012, everybody thought that the property belonged to the 3<sup>rd</sup> Defendant and that this was reasonable because both the father (3<sup>rd</sup> Defendant) and the son (1<sup>st</sup> Plaintiff) had the same names.

The last set of questions by Counsel Mpaka to PW1 had to do with the 1<sup>st</sup> Plaintiff's passport:

*Q: Look at Affidavit in Opposition dated 18<sup>th</sup> September 2012. This was the first time that you introduced your son's passport?*

*A: Yes*

*Q: Confirm that at the time the bank gave the loan, it did not have your son's passport?*

*A: No, it did not have his passport*

*Q: Neither at the time of seeking to sell the property?*

*A: No!*

During re-examination by Counsel Gulumba, PW1 stated that she knew Mr. Khuze Kapeta and Mr. Kwame Ngwira but not in a personal capacity. She doubted if at all Mr. Kapeta and Mr. Ngwira knew her son. When questioned regarding the identity that the 3<sup>rd</sup> Defendant used in obtaining the loans, she stated that he used his passport and the name thereon is Alexander Solanke, without further designation as "Senior" or "Junior". In this regard, she stated that the 1<sup>st</sup> Defendant did not exercise due care in that it failed to notice that the name on the Lease Agreement is Alexander Solanke Junior.

With respect to the action that was commenced by the 3<sup>rd</sup> Defendant in the High Court of Malawi sitting at Zomba (Civil Cause No. 2628A), PW1 insisted that the 3<sup>rd</sup> Defendant was not being truthful in describing himself as the leaseholder of the property as it is 1<sup>st</sup> Plaintiff that has title to the property.

Finally, DW2 was asked why she did not explain in her letter to the 1<sup>st</sup> Defendant dated 19<sup>th</sup> July 2010 (Exhibit P9) that the property belonged to the 1<sup>st</sup> Plaintiff and not the 3<sup>rd</sup> Defendant. Her response was as follows:

*"I did not make the explanation because I thought that the Bank had guidelines on giving out loans. I believed that what the Bank had done was correct because by then I had not*

*seen the application dossier and I had not yet sought legal help. If I had known about this, I would not have written the Bank”*

The Plaintiff's second witness was the 1<sup>st</sup> Plaintiff, Alexander Solanke (Jnr) (PW2). He adopted his witness statement as his evidence in chief. His evidence in chief is very much similar to that of DW1. He was born on the 15<sup>th</sup> of June 1974 in the United Kingdom and has been living there ever since. He confirmed that he is the registered proprietor of the property.

Around 2009, his mother informed him that the 1<sup>st</sup> Defendant intended to sell the property due to non-payment of the loan the 3<sup>rd</sup> Defendant obtained from the 1<sup>st</sup> Defendant. In this regard, paragraphs 10 to 14 of the 2<sup>nd</sup> Plaintiff are relevant:

- “10. *THAT the information came as a shock and surprise to me because I was not made aware that the property was used as collateral and more so considering that I have been constantly rendering financial assistance to my parents.*
11. *THAT I was further surprised as to how my farther and indeed the bank could let the property to be used for the charge and further charge when the property belonged to me.*
12. *THAT upon inquires I got hold of the charge and further charges and noticed that the said documents are being purportedly executed in my name. Copies of the Charge and further charge are exhibited hereto and marked “AS 3” and “AS 4” respectively.*
13. *THAT I repeat paragraph 12 herein and state that noticeably the signatures on both the charge and further charge compared to the signature on the lease are totally different and any reasonable bank should have easily captured the same.*
14. *THAT it is clear that the bank failed its duty to exercise the discrepancy.”*

PW2 was cross-examined by Counsel Mpaka. As PW2 was not in Malawi at the material time, most of his answers bordered on hearsay.

The Defendants elected to offer no evidence.

Hearing of the case was concluded on 26<sup>th</sup> August 2016 and, following consultations and agreement by Counsel, the parties were given 14 days within which they were to prepare and file with the Court their respective final written submissions. M/s Destone & Co. filed 1<sup>st</sup> and 2<sup>nd</sup> Defendants Final Written Submissions on 27<sup>th</sup> September 2016. At the time of writing this judgement, the Plaintiffs have yet to file their final written submissions. Be that as it may be, the Court is not oblivious to the fact that the Plaintiffs filed with the Court Skeleton



Arguments at the beginning of the trial. Where appropriate, the Court will make references to these skeleton arguments.

### Issues for Determination

There are essentially three issues for the Court's determination, namely:

1. Whether the 3<sup>rd</sup> Defendant, in signing for the charge and further charge, committed fraud within the meaning of s. 139 of the Registered Land Act (RLA)?
2. Whether the 1<sup>st</sup> Defendant, by its act, neglect or default, substantially contributed to the alleged fraud?
3. Whether the 1<sup>st</sup> Defendant negligently entered into the charge and further charge agreements with the 3<sup>rd</sup> Defendant?

### Alleged Fraud by the 3<sup>rd</sup> Defendant

In his submission, Counsel Gulumba argued that, in principle, a forged legal document – whether it is a transfer or mortgage – is void. He cited the cases of **Slingby v. District Bank Limited [1931] 2 KB 588**, **Right Price Wholesalers Limited v. National Bank of Malawi, Commercial Cause No. 242 of 2009 (un reported)**, **Dylan Mafunga (for and on behalf of Fanny Kandoje Chirinda v. Robby W. Kaombe and NBS Bank Commercial Case No. 20 of 2012)**, **Trevor Guy v. Barclays Bank Plc [2008] EWCA 452** and **Odogwu v. Vast Guide Ltd [2008] All ER 267**.

Counsel Gulumba further submitted that by the 3<sup>rd</sup> Defendant signing for the charge and further charge in the name of Alexander Solanke Junior, the 3<sup>rd</sup> Defendant committed fraud which amounts to mistake within the meaning of s. 139 of the RLA. In the premises, Counsel Gulumba contended that the charges were a nullity and of no dispositive effect.

The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that the Plaintiffs have failed to prove fraud on the part of 3<sup>rd</sup> Defendant. Counsel Mpaka submitted that, in terms of paragraphs 3-6 in the Amended Statement of Claim and as confirmed by PW 1 in cross-examination, the allegation of fraud is exclusively against 3<sup>rd</sup> Defendant but there is absolutely nothing that Plaintiffs have done to prove or nail down 3<sup>rd</sup> Defendant to such a serious allegation as fraud.

Counsel Mpaka also invited the Court to note that the Plaintiffs have pursued

neither the default process under Ord. 13 rr. 6 RSC nor the trial process under Ord. 38 RSC against 1<sup>st</sup> Defendant. On the basis of the foregoing, Counsel Mpaka contends thus:

*“The Plaintiffs’ failure to employ this abundant legal process against 3<sup>rd</sup> Defendant coupled with (i) the failure by Mrs Solanke in exhibits P.8 and P.9 to at least allege in her negotiations with the bank that 3<sup>rd</sup> Defendant was fraudulent, (iii) the insistence by 3<sup>rd</sup> Defendant in exhibits P.4, P.6 and the public records of Civil Cause No. 2628 of 2009 that he is the proprietor of the charged property, (iv) the fact established in cross-examination of PW 2 that the original title deeds were at his parents’ house, and (v) the fact stated in paragraph 11 of Mrs Solankes statement that in fact “when the 3<sup>rd</sup> Defendant was engaging in all these dealings...he was staying alone in the property” we submit, should point this Court to the conclusion that Plaintiffs freely allowed 3<sup>rd</sup> Defendant to take hold of the original title deeds which bore his exact name and deal with them as he pleased. The Plaintiffs know that 3<sup>rd</sup> Defendant was not truly fraudulent. It’s just that the prospected business have gone bad and perhaps the family has no alternative. However, the later is not legal consideration.”*

To my mind, the pleadings and evidence before the Court tell their own story. The Plaintiffs’ case is that the 3<sup>rd</sup> Defendant fraudulently misrepresented himself to the 1<sup>st</sup> Defendant in entering into the two charges. To prove this allegation, the Plaintiffs led evidence to the effect that the 3<sup>rd</sup> Defendant knowingly entered into the charge and further charge as Alexander Solanke (Jnr) when in actual fact he was not and he did not have title to the property. This evidence was not contradicted in cross-examination. As such, these statements must be accepted as true: See **Govati v. Manica Freight Services (Malawi) Limited 1993 16 (2) MLR 521**. I am, therefore, satisfied that the 3<sup>rd</sup> Defendant committed fraud.

That then brings me to the contention by the Defendants that the Plaintiffs ought to be estopped from alleging any misrepresentation against the 3<sup>rd</sup> Defendant on the ground that they had expressly and/or impliedly authorized the 3<sup>rd</sup> Defendant to deal with the property. Despite the strenuous cross-examination of the Plaintiffs by Counsel Mpaka, the Plaintiffs stood firm in their position that they did not know that the 3<sup>rd</sup> Defendant had dealings with the 1<sup>st</sup> Defendant let alone that the 3<sup>rd</sup> Defendant was representing himself as the owner of the property and also using it as security for the loans. In the premises, the alleged estoppel lacks evidential support.



### 1<sup>st</sup> Defendant's Knowledge of Fraud or its Substantial Contribution Thereto

I now turn to consider the effect of the fraud on the transactions herein and, in this regard, ss. 25 and 139 of the RLA come into play. Section 25 of the RLA provides that the rights of a proprietor, whether acquired on first registration or whether acquired subsequently for valuable consideration or by an order of Court, shall be rights not liable to be defeated except as provided in RLA and the Land Act.

Section 139 of the RLA reads:

*“(1) Subject to subsection (2), the Court may Order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first one has been obtained, made or omitted by fraud or mistake.*

*“(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud, or mistake or substantially contributed to it by his act, neglect or default.” – Emphasis by underlining supplied*

For the register to be rectified under s. 139 of the RLA, the Plaintiffs have to prove that the 1<sup>st</sup> Defendant (a) had knowledge of the fraud, (b) caused the fraud, or (c) substantially contributed to the fraud by its act, neglect or default.

The Plaintiffs urged the Court to find that the 1<sup>st</sup> Defendant substantially contributed to the fraud in that it let the glaring disparities between the signatures on the lease, the charges and the passport slip through their net of scrutiny. For reasons which appear presently, it is necessary to reproduce the relevant part of the Plaintiffs' Skeletal Arguments:

*“The bank is also under a duty to know its customers signature and be able to detect an imitation; National Westminster Bank Limited -vs- Barclays Bank International Limited [1974] 3 All ER 850. Further, the Bank is under the obligation to make inquiries in appropriate circumstances. In Lloyd Bank Limited -vs- E.B. Savory & Company [1993] A.C. 201, it was stated that the standard by which the absence or otherwise of negligence is to be determined must be ascertained by reference to the practices of reasonable men carrying on business of bankers and endeavouring to do so in such manner as may be calculated to protect themselves and others against fraud. In the Trevor Guy's case (supra), Lord Justice Lloyd had this to say when interpreting schedule 4, paragraph 2 of Land Registered Act, 2002;*

*“I cannot see that it is arguable that the registration of the charge can be said to have been a mistake, unless at the least Mr. Guy can go so far as to show that the bank, the mortgagee, had*



*either actual notice, or what amounts to the same, what is referred to as Nelsonian or blind eye notice, of the defect in the title of the mortgagor ... so the question is whether Mr. Guy can show an arguable case, on the evidence, for saying that Barclays Bank had actual notice or was turning a blind eye to matters that it knew, which would if it addressed them properly, have shown it that Ten Acre Ltd not good title to the property.” At P. 6.*

*It was established in the Court below that the signatures on the lease which bears the signature of the 1<sup>st</sup> Respondent were glaringly different from that on the charge and further Charge signed by the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Appellant, as rightly observed by the Court below was supposed to make proper inquiries and more importantly they could have discovered the mischief if they properly scrutinized the documents before them.”*

On its part, the 1<sup>st</sup> Defendant vehemently denies contributing, substantially or otherwise, to the fraud. Counsel Mpaka invited the Court to consider this issue by, first of all, bearing in mind that the Plaintiffs have not been able to prove that the 1<sup>st</sup> Defendant had knowledge of the fraud prior to the commencement of this case:

*“the Court will notice that the Plaintiffs called no evidence whatsoever to suggest that NBS Bank Limited had knowledge of the alleged 3<sup>rd</sup> Defendant’s fraud. Starting at pleading level, paragraphs 1-6 allege fraud by 3<sup>rd</sup> Defendant. Only paragraph 7 alleges that NBS Bank had knowledge of the fraud. There is nothing more than that. No particulars, nothing to suggest that the bank had knowledge of the fraud or how the bank may have acquired such knowledge.*

*In cross-examination, PW 1 actually agreed that if 3<sup>rd</sup> Defendant was fraudulent and carried it out NBS Bank would be deceived. So, the logic of the Plaintiffs case and evidence in cross-examination is that NBS Bank had no knowledge of the fraud. It cannot be deceived if the bank knew the 3<sup>rd</sup> Defendant was fraudulent.*

*Besides, it is evident that nobody concerned with the dealings over the property here in Malawi, apart from the Solankes themselves as it turns out now, knew that there is an Alexander Solanke staying in England. The Plaintiffs have led no evidence whatsoever to suggest that NBS Bank Limited had knowledge of the alleged fraud by 3<sup>rd</sup> Defendant.”*

Turning to the specific issue of whether or not the 1<sup>st</sup> Defendant substantially contributed to the fraud, Counsel Mpaka pressed upon the Court to consider the same within the context of security registration process. The identification of parties to a charge is, so he argued, central to the security registration process under the RLA and the steps to the identification of the charger are as follows:

- (a) Drawing up of an instrument in the prescribed form constituting the parties security agreement (s. 60 of the RLA);
- (b) Payment of stamp duty for the instrument (ss. 5, 57, 58 and 59 of the Stamp Duties Act);



- (c) Appearance of the person signing (the chargor) before the Registrar or any prescribed officer with the instrument (s. 105(1) of the RLA);
- (d) Signature of the instrument by the person signing (the chargor) before the Registrar or any prescribed officer (s. 4(1)(a) Authentication of Documents Act and s. 105 of the RLA); and
- (e) Verification of the signature of the instrument by the Registrar or the prescribed officer (s.105(1) of the RLA and r.6(1) or r. 6(2)(b) of the Registered Land Rules.

Counsel Mpaka submitted that the charge and further charge perfectly comply with each and every one of the prescriptions as to the identification of the chargor. It might not be out of order to quote in full the relevant part of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Final Written Submissions:

- “30. *We draw attention of Court to the key fact that the duties in step (c), (d) and (e) are not for the chargee. It is not the chargee who appears before the Registrar or administrative officer. It is not the chargee who attests to the signature of the person signing. It is not the chargee who identifies the chargor and/or verifies the chargor’s signature on the instrument.*
- 31. *The prescription of the law is that if the person signing is an individual he must be “personally known to or be identified by two respectable and responsible persons both whom are known” to the attesting officer. Section 4(2) ADA directs the attesting officer to refuse to attest the instrument if he is not satisfied as to the identity of the individual signing.*
- 32. *The chargee can only rely on that attestation and perform his or her obligation to the chargee under the instrument. In relation to the charges, it is not for the chargee, and it was not for NBS Bank Limited, to identify or verify the signature of the chargor.*
- 33. *Exhibit P.5 and P.7 plainly show that the chargor signed both charges before the Lands Registrar, and that the Registrar indicated that the signing person is personally known him. The bank cannot be accused of any “neglect” or “default” let alone substantial neglect or default for relying on these documents which fully complied with the dictates of the legal process.*
- 34. *It should be notable that the Plaintiffs have raised no query whatsoever with the attesting officer who duly attested the chargor’s signatures on both instruments,*

*and whose duty it was to satisfy himself about the identity and signature of the signing person, and who in fact indicated his satisfaction with the charges identity. Just like they have raised no query, apart from allegations, against the person they say was fraudulent, the Plaintiffs do not complain that the attesting officer failed to identify the person signing. The complaints in paragraph 8 of the Statement of Claim are simply misplaced against the chargee. The bank should not be adjudge in neglect or default let alone substantial neglect or default in the identification of the chargor herein, we pray.”*

I cannot agree more with the weighty submissions by Counsel Mpaka. Firstly, I am very much persuaded that any reasonable banker upon seeing the respective charges, duly verified by the Lands Registrar, could not have doubted that the proprietor as identified by the Registrar is the chargor. Secondly, the holder of original evidence of title to the property is named exactly as the one said to be on the register, that is, Alexander Solanke.

Thirdly, no evidence was adduced to suggest that at the time of obtaining the loans and/or at the execution of the two charges, the 1<sup>st</sup> Defendant was presented with the two passports. To the contrary, the passport of the 1<sup>st</sup> Plaintiff only came into the picture in 2012, making it simply impossible for the 1<sup>st</sup> Defendant to compare the two passports in order for it to determine which of the two Alexander Solankes was before it. It is also noteworthy here that nothing is said in evidence to suggest that the 1<sup>st</sup> Defendant knew about the existence of another Alexander Solanke. At any rate, there is abundant evidence that the other Alexander Solanke (the 1<sup>st</sup> Plaintiff) has no Malawian residence history whatsoever.

Fourthly, statutory offices authorized to identify and verify a chargor duly identified the 3<sup>rd</sup> Defendant as the proprietor named in the title documents. Further, and perhaps much more importantly, the office which issued the titled deeds to Alexander Solanke attested that Alexander Solanke (3<sup>rd</sup> Defendant) is (a) personally known to the office in question and (b) proprietor of the property.

In light of the foregoing, it is my finding that at the time the 1<sup>st</sup> Defendant was dealing with the 3<sup>rd</sup> Defendant with respect to the loans and the two charges, it had no knowledge whatsoever of the 3<sup>rd</sup> Defendant's fraud. It is also my finding that the 1<sup>st</sup> Defendant neither caused the fraud nor contributed (substantially or otherwise) to the fraud. As such, I see no legal basis for fixing the 1<sup>st</sup> Defendant with notice, constructive or otherwise, of the fraud by the 3<sup>rd</sup> Defendant.

This means, for the sake of completeness, that there is no legal basis for (a) setting



aside the charge and further charge, (b) cancelling the registration of the charge and further charge and (c) setting aside the sale agreement of the property between the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant.

### Negligence on the part of the 1<sup>st</sup> Defendant

The Plaintiffs put forward an alternative case. It was averred that the 1<sup>st</sup> Defendant negligently entered into the charge and further charge agreements with the 3<sup>rd</sup> Defendant. The alleged negligence is said to be grounded on the same matters that the Plaintiffs have advanced in support of their claim that the 1<sup>st</sup> Defendant substantially contributed to the fraud.

Counsel Mpaka submitted that in so far as rectification of land register or cancellation or setting aside of charges is completely provided for in s. 139 of the RLA, the common law concept of negligence cannot be employed to go round the statute.

I agree with Counsel Mpaka that the Plaintiffs cannot base their case on this concept in this matter. It is commonplace that land registration and transactions are, as discussed herein, governed by a host of statutes. The whole reason for having these statutes would be defeated if the common law or equity or other tenets of law, other than statute, were to overturn statutory dictates. Section 160 of RLA directs that principles of equity, justice and good conscience can come in to regulate matters concerning registered land only *“if the matter is not provided for in this Act or in any other written law relating to land, leases and charges registered under this Act”*.

In any event, on the basis of my analysis herein regarding the issue of whether or not the 1<sup>st</sup> Defendant substantially contributed to the fraud, I am satisfied that the 1<sup>st</sup> Defendant was not guilty of negligence in entering into the charge and further charge with the 3<sup>rd</sup> Defendant.

### Conclusion

All in all, after a very deliberate and dispassionate consideration of the submissions by counsel and the relevant caselaw discussed herein, I have come to the conclusion that:

- (a) The Plaintiffs have not been able to prove, to the requisite standard, their claims against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and, consequently, the

action by the Plaintiffs against the two Defendants fails and it is dismissed with costs; and

- (b) The Plaintiffs have succeeded in proving that the 3<sup>rd</sup> Defendant committed the fraud which occasioned the Plaintiffs to suffer damage and loss (anxiety and emotional shock at the possibility of losing the property, financial loss and loss of the property).

Having found in favour of the Plaintiffs in their action against the 3<sup>rd</sup> Defendant for damages for the fraud (misrepresentation), I enter judgement in that regard for the Plaintiffs with costs. In the premises, I order that damages and loss suffered by the Applicant be assessed by the Registrar.

Pronounced in Court this 22<sup>nd</sup> day of June 2016 at Blantyre in the Republic of Malawi.



**Kenyatta Nyirenda**  
**JUDGE**