

UGANDA / JUDGMENT

Manasseh Kamugisha V Uganda Prefabricated Industry Ltd (Civil Suit No. 115 of 1994) [1995] UGHC 7 (5 December 1995) [1995] UGHC 7

COURT
High Court of Uganda

CASE / FILE NUMBER
Civil Suit No. 115 of 1994

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\insrsid1197279\charrsid15337990 interest o}{\insrsid7343026\charrsid15337990 n}
 {\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 the }
 {\insrsid7343026\charrsid15337990 general}{\insrsid1197279\charrsid15337990 damages at }

\insrsid1197279\charrsid15337990 4}{\insrsid7343026\charrsid15337990 %}
 {\insrsid1197279\charrsid15337990 }{\insrsid7343026\charrsid15337990 per annum}
 {\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 and}{

\i\insrsid1197279\charrsid15337990 }{\insrsid7343026\charrsid15337990 cos}
 {\insrsid1197279\charrsid15337990 t of }{\insrsid1197279\charrsid15337990 the }
 {\insrsid7343026\charrsid15337990 suit.

\par }{\insrsid1197279\charrsid15337990 The }{\insrsid1197279\charrsid15337990 Plaintiff }
 {\insrsid7343026\charrsid15337990 (PW1){\insrsid1197279\charrsid15337990) testified, that in }
 {\insrsid1197279\charrsid15337990 1992,}{

\i\insrsid1197279\charrsid15337990 }{\insrsid7343026\charrsid15337990 be }
 {\insrsid1197279\charrsid15337990 had }{\insrsid7343026\charrsid15337990 entered}
 {\insrsid1197279\charrsid15337990 into an }{\insrsid1197279\charrsid15337990 agreement }

\insrsid1197279\charrsid15337990 with the }{\insrsid7343026\charrsid15337990 defendant}
 {\insrsid1197279\charrsid15337990 }{\insrsid7343026\charrsid15337990 c}
 {\insrsid1197279\charrsid15337990 ompa}{\insrsid7343026\charrsid15337990 ny}{

\insrsid1197279\charrsid15337990 whereby the }{\insrsid1197279\charrsid15337990 plaintiff
 agreed }{\insrsid7343026\charrsid15337990 to lend}{\insrsid1197279\charrsid15337990 his Title }
 {\insrsid7343026\charrsid15337990 Deed in respect of plot}{

\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 703}
 {\insrsid7343026\charrsid15337990 Kyehando Gayaza Road for the }
 {\insrsid1197279\charrsid15337990 Defendant to use for 30 days as }
 {\insrsid7343026\charrsid15337990 security to

secure }{\insrsid1197279\charrsid15337990 a loan of }{\insrsid1197279\charrsid15337990 not}
 {\i\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 exceeding 28m/}
 {\insrsid7343026\charrsid15337990 =}{\insrsid1197279\charrsid15337990 fr}{

\insrsid7343026\charrsid15337990 om Bank of Baroda.

\par }{\insrsid1197279\charrsid15337990 According to the Plaintiff, }
 {\insrsid1197279\charrsid15337990 under }{\insrsid1197279\charrsid15337990 the }
 {\insrsid1197279\charrsid15337990 agreement, }{\insrsid15337990 the }
 {\insrsid7343026\charrsid15337990

defendant agre}{\insrsid1197279\charrsid15337990 ed to pay }{\insrsid1197279\charrsid15337990
 the }{\insrsid15337990 Plaintiff a commission of }{\insrsid1197279\charrsid15337990 5% of the }
 {\insrsid1197279\charrsid15337990 amount }

\insrsid7343026\charrsid15337990 borrr}{\insrsid1197279\charrsid15337990 owed }
{\insrsid7343026\charrsid15337990 and}{\insrsid3306972\charrsid15337990 to return}
{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 the }{

\insrsid3306972\charrsid15337990 plaintiff\rqoute s Title Deed}{\insrsid1197279\charrsid15337990
after }{\insrsid1197279\charrsid15337990 30 }{\insrsid1197279\charrsid15337990 days. }
{\insrsid1197279\charrsid15337990 The plaintiff testified }{

\insrsid1197279\charrsid15337990 further that the agreement }{\insrsid3306972\charrsid15337990
was reduced into writing and was }{\insrsid1197279\charrsid15337990 on }
{\insrsid1197279\charrsid15337990 24/12/92 signed by the Plaintiff }{

\insrsid1197279\charrsid15337990 and }{\insrsid1197279\charrsid15337990 by }
{\insrsid3306972\charrsid15337990 F}{\insrsid1197279\charrsid15337990 red }
{\insrsid3306972\charrsid15337990 Ruhakan the Man}{\insrsid1197279\charrsid15337990 aging }{

\insrsid1197279\charrsid15337990 Director of }{\insrsid1197279\charrsid15337990 the }
{\insrsid1197279\charrsid15337990 defendant Company for the }
{\insrsid3306972\charrsid15337990 defendant company. T}{\insrsid1197279\charrsid15337990

he agreement was at the }{\insrsid14836598\charrsid15337990 trial,}
{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 received }
{\insrsid1197279\charrsid15337990 in evidence }{\insrsid1197279\charrsid15337990 and }{

\insrsid1197279\charrsid15337990 was }{\insrsid1197279\charrsid15337990 mark}
{\insrsid14836598\charrsid15337990 e}{\insrsid1197279\charrsid15337990 d }
{\insrsid1197279\charrsid15337990 (Exh. P1). According }{\insrsid1197279\charrsid15337990 to the

Plaintiffs to i}{\insrsid7742908\charrsid15337990 mplement the agreement, he executed a P}
{\insrsid1197279\charrsid15337990 ower of }{\insrsid7742908\charrsid15337990 Attorney}
{\insrsid1197279\charrsid15337990 in favour of the defendant. In the }{

\insrsid7742908\charrsid15337990 P}{\insrsid1197279\charrsid15337990 ower}
{\i\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 of Attorney, be allowed,
the defendant to use the Plaintiff\rqoute s said Title Deed as }{

\insrsid7742908\charrsid15337990 security}{\insrsid1197279\charrsid15337990 for loan from any
lending Institution. At the trial, the pow}{\insrsid7742908\charrsid15337990 er of Attorney was
received in evidence and was marked}{

\insrsid1197279\charrsid15337990 Exh 12. }{\insrsid7742908\charrsid15337990 According to the
testimony of PW}{\insrsid1197279\charrsid15337990 1, the defendant took the power of Attorney }
{\insrsid5570772\charrsid15337990 together with the Title Deed}{

\insrsid1197279\charrsid15337990 to Bank of Baro}{\insrsid5570772\charrsid15337990 da b}
{\insrsid1197279\charrsid15337990 ut, that }{\insrsid5570772\charrsid15337990 after}
{\insrsid1197279\charrsid15337990 the }{\insrsid5570772\charrsid15337990 expiry}{

\insrsid1197279\charrsid15337990 of {\insrsid5570772\charrsid15337990 the}
\insrsid1197279\charrsid15337990 30 days the defendant did not ret}
\insrsid5570772\charrsid15337990 urn the plaintiff\quote s Title Deed.}
\insrsid1197279\charrsid15337990 {{

\insrsid5570772\charrsid15337990 When the Plaintiff later made se}
\insrsid1197279\charrsid15337990 v}{\insrsid5570772\charrsid15337990 e}
\insrsid1197279\charrsid15337990 ral vain demands for the return of his Title Deed, he instituted
this {{

\insrsid5570772\charrsid15337990 suit. }{\insrsid1197279\charrsid15337990 He prayed f}
\insrsid5570772\charrsid15337990 or the return of his Title Deed}
\insrsid1197279\charrsid15337990 {{\insrsid5570772\charrsid15337990 more commission}}

\insrsid1197279\charrsid15337990 of {\insrsid1197279\charrsid15337990 5%}
\i{\insrsid1197279\charrsid15337990 }{\insrsid5570772\charrsid15337990 of the amount borrowed
in}{\insrsid1197279\charrsid15337990 case the defend}}

\insrsid5570772\charrsid15337990 ant again borrowed more money on}
\insrsid1197279\charrsid15337990 the }{\insrsid5570772\charrsid15337990 security}
\insrsid1197279\charrsid15337990 of}{\insrsid5570772\charrsid15337990 the Plaintiff\quote
s Title Deeds. He further prayed for interest.

\par The Plaintiff admitted in cro}{\insrsid1197279\charrsid15337990 ss}
\insrsid5570772\charrsid15337990 examination}{\insrsid1197279\charrsid15337990 that h}
\insrsid5570772\charrsid15337990 e understood that o}{\insrsid1197279\charrsid15337990 nce a
titl}}

\insrsid5570772\charrsid15337990 e deed was mortgaged}{\insrsid1197279\charrsid15337990 , }
\insrsid1197279\charrsid15337990 it }{\insrsid5570772\charrsid15337990 c}
\insrsid5570772\charrsid15337990 ould not be released until the Loan was}}

\insrsid1197279\charrsid15337990 repaid. }{\insrsid5570772\charrsid15337990 According to the
Plaintiff, he understood that at the time he executed the}{\insrsid1197279\charrsid15337990
power of}{\insrsid5570772\charrsid15337990 Attorney

in favour of the defendant. He}{\insrsid1197279\charrsid15337990 furth}
\insrsid5570772\charrsid15337990 er admitted that he went to the}
\insrsid1197279\charrsid15337990 Bank with the De}{\insrsid5570772\charrsid15337990
fendant\quote s Man}}

\insrsid1197279\charrsid15337990 aging Director at the time when the defendant bor}
\insrsid5570772\charrsid15337990 rowed money from the Bank on the}
\insrsid1197279\charrsid15337990 security of the Plaintiff\quote s T}}

\insrsid5570772\charrsid15337990 itle. While in the Bank, he signed some documents.

\par The defendant in their W. S. D}{\insrsid1197279\charrsid15337990 denied, that the Plaintiff lent to the defendant the Plaintiff\quote s Title deed}{\insrsid5570772\charrsid15337990 for use as security for loan f}{\insrsid1197279\charrsid15337990

or only 30 days. They contended that the Plaintiff did lend the defendant the plaintiff\quote s Title to remain mortgaged until the loan }{\insrsid1197279\charrsid15337990 was}{\i\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990

fully repaid. }{\insrsid5570772\charrsid15337990

\par Accord}{\insrsid1197279\charrsid15337990 ing to }{\insrsid5570772\charrsid15337990 Fr}{\insrsid1197279\charrsid15337990 ed }{\insrsid1197279\charrsid15337990 Ruhakana }{\insrsid15099065\charrsid15337990 (DW1)}{\insrsid1197279\charrsid15337990 the }{\insrsid1197279\charrsid15337990 Plaintiff}{\insrsid15099065\charrsid15337990 iff had}{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 in }{\insrsid1197279\charrsid15337990 1992 agreed to }{\insrsid1197279\charrsid15337990 lend to the }{

\insrsid1197279\charrsid15337990 defendant }{\insrsid15099065\charrsid15337990 his title dee}{\insrsid1197279\charrsid15337990 d for the defendant to use as security to }{\insrsid1197279\charrsid15337990 secure }{\insrsid1197279\charrsid15337990 the }{\insrsid1197279\charrsid15337990 loan }{\insrsid1197279\charrsid15337990 from }{\insrsid1197279\charrsid15337990 Bank }{\insrsid1197279\charrsid15337990 of }{\insrsid1197279\charrsid15337990 Ba}{\insrsid15099065\charrsid15337990 r}{\insrsid1197279\charrsid15337990 oda. Under that }{\insrsid1197279\charrsid15337990 agreement (1) }{\insrsid1197279\charrsid15337990 the }{\insrsid15099065\charrsid15337990 defendant }{\insrsid1197279\charrsid15337990 were }{\insrsid1197279\charrsid15337990 to use the }{\insrsid15099065\charrsid15337990 Title de}{\insrsid1197279\charrsid15337990 ed }{\insrsid15099065\charrsid15337990 only for 30 days.}{\insrsid1197279\charrsid15337990 (2) The }{\insrsid1197279\charrsid15337990 defendant }{\insrsid1197279\charrsid15337990 was to }{\insrsid1197279\charrsid15337990 pay }{\insrsid1197279\charrsid15337990 the Plaintiff a commission of }{\insrsid15099065\charrsid15337990 5% }{\insrsid1197279\charrsid15337990 of the }{\insrsid15099065\charrsid15337990 amount}{\insrsid1197279\charrsid15337990 }{\insrsid15099065\charrsid15337990 borrowed.}{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 The amount to be }{\insrsid1197279\charrsid15337990 borrowed was }{\insrsid15099065\charrsid15337990 28m/=}{\insrsid1197279\charrsid15337990 According }{\insrsid15099065\charrsid15337990 to DW1 when he went to the Bank, he}{\insrsid1197279\charrsid15337990 found }{\insrsid1197279\charrsid15337990 defendant }{\insrsid1197279\charrsid15337990 was to }{\insrsid1197279\charrsid15337990 pay }{\insrsid1197279\charrsid15337990 the Plaintiff a commission of }{\insrsid15099065\charrsid15337990 5% }{\insrsid1197279\charrsid15337990 of the }{\insrsid15099065\charrsid15337990 amount}{\insrsid1197279\charrsid15337990 }{\insrsid15099065\charrsid15337990 borrowed.}{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 The amount to be }{\insrsid1197279\charrsid15337990 borrowed was }{\insrsid15099065\charrsid15337990 28m/=}{\insrsid1197279\charrsid15337990 According }{\insrsid15099065\charrsid15337990 to DW1 when he went to the Bank, he}{\insrsid1197279\charrsid15337990 found }

\insrsid1197279\charrsid15337990 that {\insrsid1197279\charrsid15337990 the }
\insrsid1197279\charrsid15337990 Bank could give {\insrsid1197279\charrsid15337990 them
only {\insrsid15099065\charrsid15337990 20m/=}{\insrsid1197279\charrsid15337990 , }{\insrsid15099065\charrsid15337990 the application w}{\insrsid1197279\charrsid15337990 ould take
long to}{\insrsid15099065\charrsid15337990 process the bank could not }
\insrsid15099065\charrsid15337990 accept a limitation}{

\insrsid1197279\charrsid15337990 of {\insrsid1197279\charrsid15337990 30 days of the }
\insrsid15099065\charrsid15337990 Mortgage and required the pers}
\insrsid1197279\charrsid15337990 on giving {\insrsid1197279\charrsid15337990 security }{\insrsid1735360\charrsid15337990 to execute with them a guarantee}
\insrsid1197279\charrsid15337990 for {\insrsid1197279\charrsid15337990 the repayment of the
loan. When {\insrsid1197279\charrsid15337990 he {\insrsid1197279\charrsid15337990 informed }
\insrsid1197279\charrsid15337990 the {\insrsid1197279\charrsid15337990 Pl}
\insrsid1735360\charrsid15337990 aintiff about those conditions,}
\insrsid1197279\charrsid15337990 the {\insrsid1197279\charrsid15337990 latter }{\insrsid1197279\charrsid15337990 accepted {\insrsid1197279\charrsid15337990 to }
\insrsid1197279\charrsid15337990 give {\insrsid1197279\charrsid15337990 his}
\i\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 title for the }{\insrsid1735360\charrsid15337990 defendant\rqoute s use despite that bottle}
\insrsid1197279\charrsid15337990 }{\insrsid1735360\charrsid15337990 nec}
\insrsid1197279\charrsid15337990 k. DWI further testified, {\insrsid1197279\charrsid15337990
that }{\insrsid1197279\charrsid15337990 the Plaintiff later {\insrsid1197279\charrsid15337990 executed }
\insrsid1197279\charrsid15337990 a {\insrsid1197279\charrsid15337990 power of Attorney in
favour {\insrsid16661807\charrsid15337990 of the defendant }{\insrsid16661807\charrsid15337990 a}{\insrsid1197279\charrsid15337990 nd executed }
\insrsid1197279\charrsid15337990 with the {\insrsid1197279\charrsid15337990 Bank &}
\insrsid16661807\charrsid15337990 memorandum}{\insrsid1197279\charrsid15337990 of }{\insrsid16661807\charrsid15337990 Deposit of Title Deed}{\insrsid1197279\charrsid15337990 and
an {\insrsid16661807\charrsid15337990 Individual Guarantee}{\insrsid1197279\charrsid15337990 }
\insrsid16661807\charrsid15337990 for the}{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 repayment }
\insrsid1197279\charrsid15337990 of the {\insrsid1197279\charrsid15337990 loan }
\insrsid1197279\charrsid15337990 by the {\insrsid1197279\charrsid15337990 defendan}{

\insrsid16661807\charrsid15337990 t. Ac}{\insrsid1197279\charrsid15337990 cording }
{\insrsid1197279\charrsid15337990 to DWI, }{\insrsid1197279\charrsid15337990 these documents
were }{\insrsid16661807\charrsid15337990 executed by the Plaintiff In his prese
nce}{\insrsid1197279\charrsid15337990 in the Bank }{\insrsid1197279\charrsid15337990 on }
{\insrsid1197279\charrsid15337990 13/1/93, }{\insrsid16661807\charrsid15337990 from}
{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990
the testimony of DW1, }{\insrsid1197279\charrsid15337990 after }
{\insrsid1197279\charrsid15337990 the Plaintiff had }{\insrsid16661807\charrsid15337990
executed}{\insrsid1197279\charrsid15337990 }{\insrsid16661807\charrsid15337990 those
documents (Exh. D1
and Exh. D2)}{\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 the
defendant }{\insrsid16661807\charrsid15337990 obtained}{\insrsid1197279\charrsid15337990 a }
{\insrsid1197279\charrsid15337990 loan }{\insrsid16661807\charrsid15337990
of 20m/=}{\insrsid1197279\charrsid15337990 on the security of the }
{\insrsid16661807\charrsid15337990 Plaintiff\quote s Title dee}{\insrsid1197279\charrsid15337990
d and }{\insrsid1197279\charrsid15337990 paid the }{\insrsid1197279\charrsid15337990
plaintiff }{\insrsid16661807\charrsid15337990 his agreed commission.}
{\insrsid1197279\charrsid15337990 DW1 }{\insrsid1197279\charrsid15337990 admitted }
{\insrsid1778523\charrsid15337990 in his testimony that}{\insrsid1197279\charrsid15337990 }
\insrsid1197279\charrsid15337990 the plaintiff }{\insrsid1197279\charrsid15337990 demanded for
his Title deed. According to }{\insrsid1197279\charrsid15337990 DW1, they }
{\insrsid1197279\charrsid15337990 could }{\insrsid1197279\charrsid15337990 not }
\insrsid1197279\charrsid15337990 return }{\insrsid1197279\charrsid15337990 the Title deed
because }{\insrsid1197279\charrsid15337990 they }{\insrsid1197279\charrsid15337990 still had
outstanding }{\insrsid1197279\charrsid15337990 amount }
\insrsid1778523\charrsid15337990 of 2m/= on the loan. }{\insrsid1778523\charrsid15337990
\par }{\insrsid15337990 Under cross-}{\insrsid1197279\charrsid15337990 examination, }
{\insrsid1197279\charrsid15337990 DW1 }{\insrsid1778523\charrsid15337990 admitted}
{\insrsid1197279\charrsid15337990 that }{\insrsid1778523\charrsid15337990 the }
\insrsid1778523\charrsid15337990 vari}{\insrsid1197279\charrsid15337990 ed conditions }
{\insrsid1197279\charrsid15337990 of }{\insrsid1778523\charrsid15337990 their agreement (Exh.
P1) were}{\insrsid1197279\charrsid15337990 }
\insrsid1197279\charrsid15337990 not }{\insrsid1197279\charrsid15337990 reduced into writing. }
{\insrsid1778523\charrsid15337990 He confirmed that the power of }
{\insrsid1197279\charrsid15337990 Attorney was executed by the Plaintiff before the Bank }

\insrsid1778523\charrsid15337990 documents}\insrsid1197279\charrsid15337990 (Memorandum of Dep}\insrsid1778523\charrsid15337990 osit of Title Deed Exh. D1 and i}\insrsid1197279\charrsid15337990 ndividual Guarantee Exh. D2) wer}{

\insrsid1778523\charrsid15337990 e executed by the plaintiff.

\par Jimmy Ringtho (DW2) testified}\insrsid1197279\charrsid15337990 that he was a Banking officer with Bank of Baroda He was in charge of credit Department of that Bank. He confirmed, that the Defendant was their custom}\insrsid5400782\charrsid15337990

er and that an overdraft of 20m/=}\insrsid1197279\charrsid15337990 was extended}\insrsid5400782\charrsid15337990 to it by the Bank on the securi}\insrsid1197279\charrsid15337990

ty of property on plot 703 block 210 Kyebando Mengo registered in the name of Manasseh Kamugisha. According to him, in accordan}\insrsid5400782\charrsid15337990 ce with the Bank procedure, Manasseh Kamugish}\insrsid1197279\charrsid15337990

a as the owner of the security had to sign Memorandum of deposit of his Title with the Bank and a letter of Guarantee to guarantee the repayment of the loan. DW2 testified, that the plaintiff signed }\insrsid5400782\charrsid15337990 those documents}{

\insrsid1197279\charrsid15337990 on 13/1/93. These documents were at}\insrsid5400782\charrsid15337990 the trial admitted in evidence}\insrsid1197279\charrsid15337990 }\insrsid5400782\charrsid15337990 but after comparison,}{

\insrsid1197279\charrsid15337990 their originals were returned to the witness. Only their photo copies }\insrsid5400782\charrsid15337990 were retained and marked thus:-}\insrsid1197279\charrsid15337990 Memorandum of Deposit of Title Deed Exh. D1}{

\insrsid5400782\charrsid15337990 ;}\insrsid1197279\charrsid15337990 an}\insrsid5400782\charrsid15337990 d Individual Guarantee form 1 Exh. D2. DW2 further testified}\insrsid1197279\charrsid15337990

that it was not practice in their Bank to return the security before the loan was fully repaid. He con}\insrsid13111439\charrsid15337990 firmed that in the instant case,}\insrsid15337990 }\insrsid1197279\charrsid15337990 there was an outsta

nding balance of }\insrsid13111439\charrsid15337990 596,499/}\insrsid1197279\charrsid15337990 =}\i\insrsid1197279\charrsid15337990 }\insrsid1197279\charrsid15337990 on the loan as shown in the Bank statement of the defendant\rqoute

s A/C as at 28/2/93. The Bank statement was at the trial received in evi}\insrsid13111439\charrsid15337990 dence and was marked Exh. D.3.

\par {\insrsid15337990 Under cross-}{\insrsid1197279\charrsid15337990 examination, DW2 admitted, that he could not remember by heart the d}{\insrsid13111439\charrsid15337990 uration of the defendant\quote s over}{\insrsid1197279\charrsid15337990

draft as he did not have relevant application which {\insrsid13111439\charrsid15337990 contained the necessary information.}{\insrsid1197279\charrsid15337990 According DW2}{\insrsid13111439\charrsid15337990 , the overdraft was being serviced}{

\insrsid1197279\charrsid15337990 . That the last payment {\insrsid13111439\charrsid15337990 was 100,000}{\insrsid1197279\charrsid15337990 /= which was made on 30/9/94. }{\insrsid13111439\charrsid15337990

\par {\insrsid1197279\charrsid15337990 At the commencement of the hearing the following fou}{\insrsid13111439\charrsid15337990 r}{\insrsid15337990 }{\insrsid1197279\charrsid15337990 issues were fram}{\insrsid13111439\charrsid15337990

ed for determination of the court:-

\par (1){\insrsid1197279\charrsid15337990) }{\insrsid13111439\charrsid15337990 Whether}{\insrsid1197279\charrsid15337990 the}{\insrsid15337990 agreement between the parties }{\insrsid13111439\charrsid15337990 was limited to the period of 30 days.

\par {\insrsid1197279\charrsid15337990 (2) }{\insrsid13111439\charrsid15337990 Whether}{\insrsid1197279\charrsid15337990 the term}{\insrsid13111439\charrsid15337990 s of the contract were modified.

\par {\insrsid1197279\charrsid15337990 (3) }{\insrsid13111439\charrsid15337990 Whether}{\insrsid1197279\charrsid15337990 t}{\insrsid13111439\charrsid15337990 here was a breach of contract.

\par {\insrsid1197279\charrsid15337990 (4) }{\insrsid13111439\charrsid15337990 Whether}{\insrsid1197279\charrsid15337990 the plaintiff is entitled to his Title deed be}{\insrsid13111439\charrsid15337990 fore the repayment of the loan by the Defendant.

\par {\insrsid1197279\charrsid15337990 Counsel for the defendant submitted}{\insrsid13111439\charrsid15337990 that the contract (Exh. P1 env}{\insrsid1197279\charrsid15337990 isaged that the Bank {\insrsid13111439\charrsid15337990 would}{

\insrsid1197279\charrsid15337990 grant a loan {\insrsid13111439\charrsid15337990 of 28m/= for a period of 30 days as from 30/12/92. H}{\insrsid1197279\charrsid15337990

e contended that after execution of the agreement, the terms were subsequently varied by agreement of the parties {\insrsid9657520\charrsid15337990 as the Bank could only lend 20m/= and had}{\insrsid1197279\charrsid15337990

rejected the limitation of 30 days of the security. For the plaintiff it was submitted that a written contract could not be varied by a verbal agreement.

The above argument raised the question whether a written agreement can be varied by a subsequent verbal agreement of the parties. It is crystal clear

that the law does not allow a written contract to be varied by a verbal agreement of the parties but

as from the time of *Birmingham and District Land Co. Vs. London and North Western Rail Co.* (1888) 4 O.R. 268, it was established that

if a party by his voluntary concession led, the other party on the faith of that concession to shape his conduct, the court shall estop him from retracting that concession to the

detriment of the other party. The concession will remain in force until he gives a clear notice of his

intention to withdraw it. This is an equitable remedy.

In the instant case, DW1, testified that after

executing the agreement (Exh. P1), the defendant encountered difficulty at the Bank, because then he later could only lend 20m/= instead of 28m/=

in 1972, it could not agree on the 30 days limitation on the security and

it required the owner of the property for security to sign memorandum of deposit of the property with the Bank and an individual guarantee to guarantee the loan

\insrsid1197279\charrsid15337990 repayment.}\i\insrsid1197279\charrsid15337990 }
 {\insrsid1197279\charrsid15337990

In the view of DW1, the refusal of the Bank to accept the 30 days limitation on the security could have frustrated the contract as it contradicted its terms. According to DWI, he communicated those facts to the plaintiff who accepted to allow the defenda}

{\insrsid4920749\charrsid15337990 nt to use the}{\insrsid1197279\charrsid15337990
 plaintiff\quote s Title Deed despite that bottle n}{\insrsid4920749\charrsid15337990 eck. This
 piece of evidence had}{\insrsid1197279\charrsid15337990

not been refuted or challenged in cross examination. The eff}{\insrsid4920749\charrsid15337990
 ect is that the plaintiff is dee}{\insrsid1197279\charrsid15337990 med t}
 {\insrsid4920749\charrsid15337990 o have accepted it. In my view }}

\insrsid1197279\charrsid15337990 the}{\insrsid4920749\charrsid15337990 acceptance of the
 plaintiff to}{\insrsid1197279\charrsid15337990 }{\insrsid4920749\charrsid15337990 go ahead with
 the contrac}{\insrsid1197279\charrsid15337990 t when h}{

\insrsid4920749\charrsid15337990 e was clearly informed of the ne}
 {\insrsid1197279\charrsid15337990 w terms, was an implied acceptance on his part of the new
 conditions of the }{\insrsid4920749\charrsid15337990 contract. His execution of Exh. D1}{

\insrsid1197279\charrsid15337990 and }{\insrsid4920749\charrsid15337990 Exh.}
 {\insrsid1197279\charrsid15337990 D2 further reinforced his acceptance of the new terms. These
 conducts le}{\insrsid4920749\charrsid15337990 d the defendant to be}{

\insrsid1197279\charrsid15337990 lieve, that the plaintiff accepted the new terms. That the
 defendant would return the plaintiff\quote s Title Deed af}{\insrsid4920749\charrsid15337990 ter
 the loan was fully repaid.

\par }{\insrsid1197279\charrsid15337990 It was argued for the Plaintiff,}
 {\insrsid1998091\charrsid15337990 that the plaintiff signed Exh. D1 and Exh. D2, be}
 {\insrsid1197279\charrsid15337990 cause he k}{\insrsid1998091\charrsid15337990 ne}{

\insrsid1197279\charrsid15337990

w that the defendant would repay the loan within 30 days. This is not valid in the face of the fact
 that the Plaintiff admitted in him testimony that he was informed he was executing the power of
 Attorney in favour of the defendant. Despite the knowledge

of the new terms, he executed the power of Attorney giving to the defendant authority to use the
 plaintiff\quote s Title Deed without setting}{\insrsid1998091\charrsid15337990 any time limit. He
 must be take}{\insrsid1197279\charrsid15337990

n to have tacitly \line {{\insrsid1998091\charrsid15337990 accepted the ne}
{\insrsid1197279\charrsid15337990 w {{\insrsid1197279\charrsid15337990 terms. In }
{\insrsid1998091\charrsid15337990 those circumstances}}{\insrsid1197279\charrsid15337990
the Plaintiff is estopped from {{\insrsid1197279\charrsid15337990 insisting }
{\insrsid1197279\charrsid15337990 on the }}{\insrsid1197279\charrsid15337990 terms }
{\insrsid1197279\charrsid15337990 of }}{\insrsid1197279\charrsid15337990 the }}
\insrsid1998091\charrsid15337990 original contrac}}{\insrsid1197279\charrsid15337990 t { }
{\insrsid6098037\charrsid15337990 E}}{\insrsid1197279\charrsid15337990 xh. P1). For }
{\insrsid1197279\charrsid15337990 those reasons my answer to issues }}
\insrsid1197279\charrsid15337990 No. 1 is in the negative }}{\insrsid1197279\charrsid15337990 and }
{\insrsid1197279\charrsid15337990 to }}{\insrsid1197279\charrsid15337990 issue }
{\insrsid859615\charrsid15337990 No. 2 is in the affirmative.
\par }}{\insrsid1197279\charrsid15337990 Following my answers to issues No. 1 }
{\insrsid1197279\charrsid15337990 and }}{\insrsid1197279\charrsid15337990 2 above, }
{\insrsid1197279\charrsid15337990 my}}{\i{\insrsid1197279\charrsid15337990 }}
\insrsid1197279\charrsid15337990 answer }}{\insrsid1197279\charrsid15337990 to issue No. 3 is also
in }}{\insrsid1197279\charrsid15337990 the }}{\insrsid1197279\charrsid15337990 negative. }
{\insrsid859615\charrsid15337990 Under}}
\insrsid1197279\charrsid15337990 }}{\insrsid1197279\charrsid15337990 the varied terms of the
contract, the defendant was to }}{\insrsid859615\charrsid15337990 pay the pl}
{\insrsid1197279\charrsid15337990 aintiff a commission of 5% }}
\insrsid1197279\charrsid15337990 of the }}{\insrsid1197279\charrsid15337990 amount }
{\insrsid1197279\charrsid15337990 of }}{\insrsid1197279\charrsid15337990 money }
{\insrsid1197279\charrsid15337990 borrowed on }}{\insrsid1197279\charrsid15337990
the security }}{\insrsid1197279\charrsid15337990 of the }}{\insrsid859615\charrsid15337990
Plaintiff\quote s title deed, and}}{\insrsid1197279\charrsid15337990 }
{\insrsid1197279\charrsid15337990 to }}{\insrsid859615\charrsid15337990 return}}
\insrsid1197279\charrsid15337990 the }}{\insrsid859615\charrsid15337990 Plaintiff\quote s}
{\insrsid1197279\charrsid15337990 }}{\insrsid859615\charrsid15337990 Title}
{\insrsid1197279\charrsid15337990 Deed }}{\insrsid1197279\charrsid15337990 after }}
\insrsid1197279\charrsid15337990 the loan was }}{\insrsid1197279\charrsid15337990 fully repaid.
The }}{\insrsid1197279\charrsid15337990 Plaintiff himself }}{\insrsid859615\charrsid15337990
admitted}}{\insrsid1197279\charrsid15337990 in his testimony, }}
\insrsid859615\charrsid15337990 that the }}{\insrsid1197279\charrsid15337990 defendant had paid }
{\insrsid1197279\charrsid15337990 him }}{\insrsid1197279\charrsid15337990 the agreed
commission of }}{\insrsid1197279\charrsid15337990 5% }}

\insrsid859615\charrsid15337990 of the 20m/=. Both DWI and DW2 testified}
{\insrsid1197279\charrsid15337990 that {\insrsid859615\charrsid15337990 the}
{\insrsid1197279\charrsid15337990 defendant ha}{\insrsid859615\charrsid15337990
d not yet fully repaid the loan. There was still}{\insrsid1197279\charrsid15337990 an amo}
{\insrsid859615\charrsid15337990 unt outstanding.}{\insrsid1197279\charrsid15337990 According
to DW2, the }{\insrsid859615\charrsid15337990 Banki}{
\insrsid1197279\charrsid15337990 ng }{\insrsid1197279\charrsid15337990 officer in charge of the
credit facilities in }{\insrsid1197279\charrsid15337990 Bank }{\insrsid1197279\charrsid15337990
of }{\insrsid1197279\charrsid15337990 Baroda, }{
\insrsid1197279\charrsid15337990 the defendant still bad an }{\insrsid1197279\charrsid15337990
outstanding balance }{\insrsid1197279\charrsid15337990 of }{\insrsid859615\charrsid15337990
596,499/}{\insrsid1197279\charrsid15337990 =}{
\i\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 on the loan. DW2 }
{\insrsid859615\charrsid15337990 further testifi}{\insrsid1197279\charrsid15337990 ed that it was }
{\insrsid859615\charrsid15337990 not a normal practice for}{
\insrsid1197279\charrsid15337990 }{\insrsid1197279\charrsid15337990 the Bank }
{\insrsid1197279\charrsid15337990 to }{\insrsid1197279\charrsid15337990 release }
{\insrsid1197279\charrsid15337990 security }{\insrsid1197279\charrsid15337990 before }{
\insrsid1197279\charrsid15337990 the loan }{\insrsid1197279\charrsid15337990 was fully repaid. }
{\insrsid1197279\charrsid15337990 The Plaintiff }{\insrsid1197279\charrsid15337990 himself }
{\insrsid1197279\charrsid15337990 is }{
\insrsid1197279\charrsid15337990 aware }{\insrsid1197279\charrsid15337990 of }
{\insrsid1197279\charrsid15337990 that, }{\insrsid859615\charrsid15337990 for he}
{\insrsid1197279\charrsid15337990 }{\insrsid859615\charrsid15337990 testified}{
\insrsid1197279\charrsid15337990 that he }{\insrsid859615\charrsid15337990 understood}
{\insrsid1197279\charrsid15337990 a property }{\insrsid1197279\charrsid15337990 once }
{\insrsid1197279\charrsid15337990 mortgaged }{\insrsid1197279\charrsid15337990
would not be released until the }{\insrsid1197279\charrsid15337990 loan was }
{\insrsid859615\charrsid15337990 fully repaid.}{\insrsid15337990 }
{\insrsid1197279\charrsid15337990 As shown above, the defendant }
{\insrsid1197279\charrsid15337990 has }{
\insrsid1197279\charrsid15337990 not }{\insrsid1197279\charrsid15337990 yet }
{\insrsid859615\charrsid15337990 fully paid}{\insrsid1197279\charrsid15337990 the }
{\insrsid1197279\charrsid15337990 loan. }{\insrsid1197279\charrsid15337990 T}{

\insrsid859615\charrsid15337990 he security therefore can}{\insrsid1197279\charrsid15337990 not be released }{\insrsid1197279\charrsid15337990 before the loan }
{\insrsid1197279\charrsid15337990 was fully repaid. In that case }}

\insrsid1197279\charrsid15337990 in accordance }{\insrsid1197279\charrsid15337990 with the now terms of }{\insrsid1197279\charrsid15337990 the contract, }{\insrsid1197279\charrsid15337990 the }
{\insrsid859615\charrsid15337990 defendant}{

\insrsid1197279\charrsid15337990 }{\insrsid859615\charrsid15337990 cann}
{\insrsid859615\charrsid15337990 ot return the Plaintiff\rsquote s title}
{\insrsid1197279\charrsid15337990 as yet. }{\insrsid1197279\charrsid15337990 There was }}

\insrsid859615\charrsid15337990 therefore no bre}{\insrsid1197279\charrsid15337990 ach of the contract as }{\insrsid859615\charrsid15337990 yet.

\par }{\insrsid1197279\charrsid15337990 On whether the plaintiff is entitled to }
{\insrsid1197279\charrsid15337990 his }{\insrsid1197279\charrsid15337990 title deed before the }
{\insrsid1197279\charrsid15337990 de}{\insrsid859615\charrsid15337990

fendant fully repaid the loan, M}{\insrsid1197279\charrsid15337990 r. Kato submitted in the }
{\insrsid1197279\charrsid15337990 affirmative }{\insrsid1197279\charrsid15337990 \bullet }
{\insrsid1197279\charrsid15337990 He argued }}

\insrsid1197279\charrsid15337990 that }{\insrsid1197279\charrsid15337990 the }
{\insrsid859615\charrsid15337990 agreement (Exh. P1}{\insrsid1197279\charrsid15337990) }
{\insrsid1197279\charrsid15337990 was clear. }{\insrsid1197279\charrsid15337990

\par }{\pard\plain \qj \li0\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin0
\itap0\pararsid1197279 \fs24\lang1033\langfe1033\cgrid\langnp1033\langfenp1033
{\insrsid1197279\charrsid15337990

According to him, as between the Plaintiff and the Defendant, }{\insrsid859615\charrsid15337990 the}{\insrsid15337990 }{\insrsid1197279\charrsid15337990 latter was to del}
{\insrsid859615\charrsid15337990 iver the Plaintiff\rsquote s Title deed}{

\insrsid1197279\charrsid15337990 to the Plaintiff after 30 days as from 30/12/92. In the view of the learned counsel, that contract was binding }{\insrsid859615\charrsid15337990 between}
{\insrsid1197279\charrsid15337990 th}{

\insrsid859615\charrsid15337990 e plaintiff and the defendant.

\par

\par }{\insrsid1197279\charrsid15337990 As I had }{\insrsid859615\charrsid15337990 pointed}
{\insrsid1197279\charrsid15337990 out earlier when I argued issue No.}
{\insrsid859615\charrsid15337990 1 above}{\insrsid1197279\charrsid15337990

the Plaintiff by his conduct led t}{\insrsid16321336\charrsid15337990 he defendant who believed him to}{\insrsid1197279\charrsid15337990 act on the belief that the Plainti}{\insrsid16321336\charrsid15337990 ff had agreed that his Title dee}{

\insrsid1197279\charrsid15337990 d would not be returned until wh}{\insrsid16321336\charrsid15337990 en the loan was fully repaid. He}{\insrsid1197279\charrsid15337990 is estopped from insisting on the old term of 30}{\insrsid16321336\charrsid15337990

days as expressed in Exh}{\insrsid1197279\charrsid15337990 . P1. For that }{\insrsid16321336\charrsid15337990 reason}{\insrsid1197279\charrsid15337990 , the Plaintiff is not entitled to his Title Deed before th}{\insrsid16321336\charrsid15337990 e defendant fully repaid the loan.

\par }{\insrsid1197279\charrsid15337990 The Plain}{\insrsid16321336\charrsid15337990 tiff also claimed a further comm}{\insrsid1197279\charrsid15337990 ission of }{\insrsid1197279\charrsid15337990 5%}{\i\insrsid1197279\charrsid15337990 }{

\insrsid1197279\charrsid15337990 of any other amount which }{\insrsid16321336\charrsid15337990 the defendant might have again }{\insrsid1197279\charrsid15337990 borrowed on the security of the Plaint}{\insrsid16321336\charrsid15337990 iff\quote

s Title Deed. This claim too}{\insrsid1197279\charrsid15337990 must fail because the Plaintiff did not lead any evidence to establish that the defendant again borrowed so}{\insrsid16321336\charrsid15337990 me monies on the strength of the Plaintiff

\quote s Title Deed besides the 20m/=}{\insrsid15337990\charrsid15337990 .}{\insrsid16321336\charrsid15337990 He}{\insrsid1197279\charrsid15337990 alleg

ed it so the burden to prove it was on him. As there was no such proof, the claim must fail. In the whole th}{\insrsid15337990\charrsid15337990 e suit is dismissed with cost.

\par }\pard \qj \fi720\li4320\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin4320\itap0\pararsid15337990 {\insrsid15337990\charrsid15337990

\par G. M}{\insrsid1197279\charrsid15337990 . OKELLO}{\insrsid15337990\charrsid15337990

\par }\pard \qj \li5040\ri0\sl360\slmult1\widctlpar\aspalpha\aspnum\faauto\adjustright\rin0\lin5040\itap0\pararsid15337990 {\ul\insrsid15337990\charrsid15337990 JUDGE}{\ul\insrsid1197279\charrsid15337990 }{\insrsid15337990\charrsid15337990 \line 5/12/95}{

\insrsid1197279\charrsid15337990 \line

\par }

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