JOHN NENETE -V- ATTORNEY-GENERAL, COMMISSIONER OF FORESTS AND MIGA INTERGRATED DEVELOPMENT COMPANY

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).

Civil Case No. 294 of 2001

Date of Hearing: 18th February 2003
Date of Judgment: 26th February 2003

Mr D. Tigulu for the Plaintiff
Mrs. A. Kingmele for the 2nd Defendant
No appearance for the 3rd Defendant

JUDGMENT

Kabui, J. By an Amended Notice of Motion filed on 4th November 2002, the Plaintiff seeks the following orders-

1. **That the Consent Order filed herein by the parties on the 18th January 2002 and signed, seated and perfected by this Honourable Court on the 22nd January 2002 be discharged on the grounds that:-**

   (a) **the Consent Order was executed and obtained by fraud and.**

   (c) **the Consent Order is an abuse of the court process.**

2. **That the Plaintiff's Originating Summons filed on the 15th November 2001 be re-listed for hearing on a date to be fixed by the Registrar High Court.**

3. **The Third Defendant pay the Plaintiff's costs of and connected with this application.**

4. **Such other orders or directions the Court deems necessary to make.**

Service of the Notice of Hearing

When I sat to hear the Plaintiff's application at 9:30am on the date of hearing, I noticed that Counsel for the 3rd Defendant, Mr. Tegavota, was not in Court. Counsel for the Plaintiff Mr. Tigulu, told me that he believed that Mr. Tegavota had been made aware of the time and date of hearing because he must have cleared his pigeon-hole at the High Court Registry. I then raised the issue of whether leaving Court documents in the pigeon-hole was proper service of Court documents. I doubted that Mr. Tegavota had not cleared his pigeon-hole and so was not aware of the time and date of hearing he, being a senior practitioner in this jurisdiction, who was aware of his obligation to attend Court. I then adjourned the hearing to 2 pm so that Mr. Tegavota be informed of the hearing or his non-attendance could be explained. When the Court resumed hearing at 2:00 pm, Mr. Tigulu, by way of affidavit, informed me that he recalled speaking to Mr. Tegavota on Thursday or Friday the previous week about the present hearing date and therefore assumed that Mr. Tegavota had known about the present hearing time and date. He said that he had checked Mr. Tegavota's pigeon-hole and found it empty. Mr. Waleferatelia of the High

Court Registry filed another affidavit confirming Mr. Tigulu's version of facts. I also recalled Mr. Tegavota appearing before me on 28th January 2003 in the case of **Shakespeare Qaloboe and Others v. Jackson Qalo**, Civil Case No.283 of 2002. I delivered my ruling 31st January 2003. I further recalled the case of **Ringi v. J.P. Enterprises Ltd.**, Civil Case No. 245 of 2002 being listed before at 10.30 on 11th February 2003 in which Mr. Tegavota was the Solicitor and Counsel for the Defendant. I most probably signed an order in respect of that case on 14th February 2003 or thereabout. I was therefore convinced on that account that Mr. Tegavota had simply forgotten about he time and date of the present hearing or was out of Honiara and was unable to attend Court. I therefore allowed the Plaintiff to proceed in the absence of the 3rd Defendant for that reason. I had adjourned this application on 23rd January 2003 at the request of Mr. Tegavota to allow him to file an affidavit in reply to two affidavits filed earlier by the Plaintiff. He told me then that a Mr. Min had gone to Malaysia for eye treatment and would not return to Solomon Islands until early February this year. He also told me that Mr. Min wanted to cross-examine the Plaintiff and so it was necessary for Mr. Nenete to be present in Court for that purpose. Mr. Tegavota has not filed any affidavits to date to prove his words in Court.

The Background

The 3rd Defendant is the holder of the felling Licence No.A10030 dated 8th March 2001 covering Miqa customary land situated on Vella La Vella in the Western Province. The felling licence is based on the terms of Timber Rights Agreement signed by the 3rd Defendant and the customary owners on 15th February 2001. Miqa customary land comprises Kaneporo, Nagei Sorezari (i), Nagei Sorezari (ii) and Belo Belo land areas. The steps taken to reach the issuing of the felling licence were done under the provisions of the Forests Act 1999, which was at the relevant time alleged not to be in force. The Plaintiff by Originating Summons filed on 5th November 2001 sought declarations questioning the validity of the felling licence on the ground that the Western Provincial Government, which issued Form 3 certification, lacked the jurisdiction to do so. Motis Pacific Lawyers who were then acting for the Plaintiff filed the Originating Summons. The 3rd Defendant filed its Memorandum of Appearance on 17th December 18th January 2002, A & H Lawyers became the new Solicitors for the Plaintiff. Earlier on 10th January 2002, the Plaintiff had signed a Deed of Settlement in which he released the Defendants from all actions, claims etc. and discharged them from all such actions and claims etc. in return for the payment of $10,000.00 payable in two installments plus the payment of $1000.00 salary per month until the operation was completed on Miqa land. The terms of this Deed of Settlement became part of a consent order signed by the parties on 18th January 2002. The consent order was later counter signed by the Registrar on 22nd January 2002. The Plaintiff now challenges the validity of the consent order on the ground of fraud committed upon him by a Mr. Chan.

The Plaintiff's Case

The officials of the 3rd Defendant had, prior to the filing of the Originating Summons, approached the Plaintiff at Gizo and persuaded him to settle his claim out of Court. One of these officials was Mr. Panasasa, the Chairman of the Board of Directors of the 3rd Defendant. The other was the Company Secretary, Mr. Vilaka who promised to pay the Plaintiff $10,000.00 after the Plaintiff had already filed his Originating Summons in the High Court. The 3rd Defendant without the knowledge of the Plaintiff entered into a contract with Orion Limited as the contractor and commenced logging operation on Kaneporo land. Mr. Chan Chee Min is an employee of Orion Ltd. Whilst in Honiara, the Plaintiff saw Mr. Min and requested from him the sum of $500.00 to meet the cost of his return home Mr Min then told the Plaintiff to meet him at the Honiara Hotel on 10th January 2002. The Plaintiff did so and Mr. Min gave him $500.00. There he saw Mr. Tegavota, the Solicitor for the 3rd Defendant. Also, he saw Mr. Min

handed a document to a person who had come to where they were who perused the document and then handed it back to Mr. Min. Mr. Min then told the Plaintiff to sign the document and he did so. The other person also signed the same document. Mr. Tegavota was there at a distance away. The Plaintiff did not understand the purpose of the document he had signed believing it to be something about the $500.00 Mr. Min had given him at the Honiara Hotel. He was never given a copy of the document he had signed. He became rather suspicious later when he asked about the $10,000.00 they promised him and Mr. Min became evasive about it. He then sought legal advice and subsequently filed the Originating Summons.

The 3rd Defendant's Case

Mr.Min had been instructed to negotiate with the Plaintiff with the view of convincing him to settle out of Court. Mr. Min, for that purpose, had instructed an independent Solicitor to draft a Deed of Settlement. He showed the first draft to the 3rd Defendant's Solicitor who read it and made some changes and thereafter the final draft was completed. Mr. Upwe, a Magistrate, had explained the content of the Deed of Settlement to the Plaintiff at the Honiara Hotel on 10th January 2002 before the Plaintiff signed it. Mr. Min also explained to the Plaintiff the purpose of the Deed of Settlement before the Plaintiff signed it. The Plaintiff had received more than $10,000.00 from the 3rd Defendant. After the signing of the Deed of Settlement, Mr. Min instructed Mr. Apaniai of A & H Lawyers to act for the Plaintiff in withdrawing the action commenced by the Plaintiff.

The Issue raised

The issue is whether or not the Plaintiff in signing the Deed of Settlement had done so willingly and freely out his free will fully understanding what he was doing and the consequences that flowed from his action. The Plaintiff has alleged fraud as being the ground for seeking relief in this application.

The Law

The plea of non est factum had been discussed quite extensively by the House of Lords in the case of **Saunders (Executrix of the estate of Rose Maud Gallie (deceased) v. Anglia Building Society (formerly Northamton Town and County Building Society** [1970] 3 A.E.L.R. 961. I need not quote from the speeches of the Law Lords nor do I need to paraphrase them for the purpose of this case. What I can say however is that a signature to a contract or document that is obtained by mistake or fraud can be made ineffective by the Courts. But the road leading towards that destination is largely dependent upon the circumstances of each case. The markers however that would guide the construction of that road are well settled in the speeches of the Law Lords in Saunders' case cited above. I will quote some of the markers only as and when I find them relevant.

The case of fraud against the 3rd Defendant

Mr. Min is an employee of Orion Limited, which is not a party in this application. However, he filed the affidavit on 6th November 2002 on behalf of the 3rd Defendant. According to the affidavit of the Plaintiff filed on 16th October 2002, Mr. Min had been retained by the 3rd Defendant to deal with the Plaintiff perhaps because he was being difficult. This fact was confirmed in Mr. Min's affidavit filed on 6th November 2002. Orion Limited is the contractor of the 3rd Defendant and so both have a common interest in harvesting logs on Kaneporo land. It is not surprising that Mr Min had been assigned to deal with the Plaintiff. Mr. Min instructed an

independent Solicitor to draft the Deed of Settlement. Upon the completion of the first draft, Mr. Min showed it to the Solicitor for the 3rd Defendant who made some changes and then the final draft was done. The Solicitor for the 3rd Defendant instructed Mr. Min what to do next which culminated in the Plaintiff signing the Deed of Settlement on 10th January 2002. After the signing of the Deed of Settlement, Mr. Min instructed Mr. Apaniai, a Solicitor, to withdraw the Plaintiff's Originating Summons. Mr. Min had paid the Plaintiff $5,000.00 on 11th January 2002 and $5,000.00 on 23rd January 2002 respectively in accordance with clause 2 of the Deed of Settlement. Mr. Min had also paid the Plaintiff $1,000.00 per month since February, 2002 after the signing of the Deed of Settlement. The Plaintiff in his second affidavit referred to above, whilst accepting that he had received payments from Mr. Min, said those payments were not from the 3rd Defendant but Mr. Min's personal account. This, he said, was what Mr. Min had been telling him all along each time he received payments from Mr. Min. He denied having received any payments under the Deed of Settlement. There is conflict of evidence on the payments made to Plaintiff.

The Plaintiff's Solicitor filed the Originating Summons on 5th November 2001. There is no evidence to show that the Plaintiff had changed Solicitors since that date. Why did Mr. Min instruct an independent Solicitor to draft a Deed of Settlement, which concerned the client of Motis Pacific Lawyers without their knowledge? Mr. Tegavota of P. T. Legal Services had entered a Memorandum of Appearance for the 3rd Defendant on 17th December 2001. The Solicitor for the 3rd Defendant was therefore aware of the existence of the Plaintiff's action against the Defendants. Mr. Min did not reveal the name of the Solicitor who prepared the first draft of the Deed of Settlement on his instructions. According to the affidavit filed by Mr. Hapa of Pacific Lawyers on 23rd January 2003, that Solicitor was from A. & H. Lawyers of Honiara. A letter dated 19th February 2002 by Pacific Lawyers, addressed to A & H Lawyers seeking clarification on that issue has not been replied to since. The Notice of Change of Advocate filed by A. & H. Lawyers on 18th January 2002 was done on the instruction of Mr. Min, not the wish of the Plaintiff. Mr Min confirmed this fact in his affidavit referred to above. There is no evidence to show that the Plaintiff had changed Solicitors. Also, that Notice had come well after the Plaintiff had signed the Deed of Settlement which seemed to have been drafted by a Solicitor from A. & H. Lawyers as indicated by Mr. Hapa's affidavit referred to above. The Solicitor for the 3rd Defendant was well aware of the Deed of Settlement. In fact, he vetted it before the Plaintiff signed it. That same Solicitor persuaded Magistrate Upwe to accompany him to the Honiara Hotel contrary to the Magistrate's suggestion that the parties come to his office to sign the Deed of Settlement. That same Solicitor was at the Honiara Hotel when the Plaintiff signed but kept away at a distance. Why this Solicitor did not inform Pacific Lawyers who were on record acting for the Plaintiff of his client's intention cannot be explained. The only conclusion I draw from this is that Mr. Min and the Solicitor for the 3rd Defendant were deliberately hiding what they were doing from the Plaintiff and his Solicitors and thus depriving him of consulting his Solicitors to protect his interest. The same may not be said about A & H. Lawyers because there is no evidence to suggest that A & H Lawyers were aware of Pacific Lawyers acting for the Plaintiff. Fraud is an independent ground for setting aside a judgment and giving relief to the applicant. The question of non-est factum need not be pleaded. This, is the position, according to Lord Wilberforce. At page 971, His Lordship said,

"...**But there remains a residue of difficult cases. There are still illiterate or senile persons who cannot read, or apprehend, a legal document; there are still persons who may be tricked into putting their signature on a piece of paper which has legal consequences totally different from anything they intended. Certainly, the first class may in some cases, even without the plea, be able to obtain relief, either because no third party has become involved, or, if he has, with the assistance of equitable doctrines, the third party's interest is equitable only and his conduct such that his rights should be postpone. Certainly, too,**

the second class may in some cases fall under the heading of plain forgery, in which event the plea of non est factum is not needed, or indeed available...and in others be reduced if the signer is denied the benefit of the plea because of his negligence..." The conduct of Mr. Min seems to fall short of the elements of fraud as described by Lord Herschell in **Derry v. Peek** (1889) 14 App. Cas.337 at 374 where His Lordship said,
"...I think the authorities establish the following propositions: First, in order to sustain an action for deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made..."

If there was indeed false representation in this case, it was that Mr. Min was in the habit of telling the Plaintiff that the payments the Plaintiff had been receiving were from his private account rather being from the 3rd Defendant's account. Also, those payments or most of them had been made after the signing of the Deed of Settlement. I do not think that false representation had had anything to do with inducing the Plaintiff to sign the Deed of Settlement as he did on 10th January 2002. There is no evidence of false misrepresentation having been made to the Plaintiff by Mr. Min about anything. I do not think there was a case of trickery either because the Deed of Settlement could not be said to be a false document. It was a true document in character and content except that it was doubtful that the Plaintiff did understand its character and content so that his signature to that document was a demonstration of his mind and intent. The fact that Mr. Min with the aiding of the Solicitor for the 3rd Defendant deprived the Plaintiff of the opportunity to see his Solicitors by hiding what they were doing from Pacific Lawyers was simply one of the steps taken by Mr. Min in terms of paving the way to suddenly confronting the Plaintiff with the Deed of Settlement which he had never seen before and quickly having it read and explained to him and then signing it immediately without the presence of his Solicitors. That cannot be regarded as false representation so as to constitute fraud. I find that fraud has not been made out in this case.

The non est factum plea

Black's Law Dictionary, Sixth Edition, 1990 explains non est factum as "**A plea denying execution of instrument sued on.**" This plea of non-est factum would have been available to the Plaintiff in terms of denying the execution of the Deed of Settlement. In this case, the plea of non est factum does not arise as a defence but as a sword against the 3rd Defendant. I therefore need to discuss it and see whether the Plaintiff can validly claim it in this case.

The first sentence in paragraph 5 of the Plaintiff's affidavit filed on 16th October 2002 states-
"...In signing the document I had thought it was something to do with the $500.00 I had received from Mr. Chan..."

This sentence clearly suggests that the Plaintiff did not know the nature of the document he had signed. The rest of his affidavit told the whole story. He said what he said because he had earlier asked Mr. Min for $500.00 and Mr. Min had told him to see him at the Honiara Hotel on 10th January 2002 and indeed Mr. Min had given that $500.00 as promised. Signing a document soon after the Plaintiff had received the $500.00 from Mr. Min must have caused him to conclude that the document he had signed must have been something to do with the $500.00 for that was the reason why he went to see Mr. Min at the Honiara Hotel. As to the content of the Deed of Settlement, the Plaintiff does not seem to have recalled that the Deed of Settlement had been

read and explained to him by the that person whose name he did not know at that time. That person whose name he did not know was Mr. Upwe, a Magistrate, who had been persuaded by Mr. Tegavota to go and explain the Deed of Settlement to the Plaintiff at the Honiara Hotel. He filed an affidavit on 7th November 2002 to explain his role that day at the Honiara Hotel. Paragraph 5 of his affidavit is pertinent to note. It states-

"...On arrival at Honiara Hotel I was led to where an Asian whose name I don't know was sitting with an old man who I now [sic] as the Plaintiff in this matter. I was given the copy of the Deed of Settlement, which I perused [sic] few minutes. I explained the contents of the Deed to the Plaintiff but I had doubts in my mind if he really fully understood the document. I also had questions on the purpose of executing the Deed, as the Plaintiff does not seem to be well protected..." Mr. Upwe's doubts as expressed in paragraph 5 above was later confirmed in paragraph (vi) of the Plaintiff's second affidavit filed on 18th November 2002 in reply to Mr. Min's affidavit filed on 6th November 2002 in reply to the Plaintiff's first affidavit filed on 16th October 2002. Paragraph (vi) states-

"...As to paragraph 2(d)(vi) the use of a magistrate though legally qualified was merely to witness my signature and not as a lawyer representing my interest. He had not explained the terms of the Deed in a way that I was fully advised of my rights. As a judicial officer he cannot render legal advice to me as suggested by Mr. Chan..." The Plaintiff denies that Mr. Chan did explain to him the purpose of the Deed of Settlement. Paragraph (vii) of the same affidavit he swore and filed on 18th November 2002 is consistent with his denial. That paragraph states-

"...As to paragraph 2(d)(vii) of Mr. Chan's affidavit he never gave the explanation he claimed to have given in paragraph 2(d)(iv). If he in fact said so I would see my previous lawyer about it first. I was the only one signing the Deed on the 10th January 2002 and not the First and Second Defendant. They may have signed some other time before someone else..." Again, the Plaintiff states in paragraph (viii) of the same affidavit-

"...As to paragraph 2(d)(viii) before the signing of the Deed I was not told [that] will be done. I drank about eight (8) cans of VB beer provided by Mr. Chan and Mr. Tegavota before he produced the Deed and then the magistrate arrived. I now realise that being under the influence of liquor and being induced to sign the Deed was preplanned by Mr. Chan and the Solicitor for the Third Defendant..."

Lord Reid in Saunders' case cited above, said that the plea of non est factum would not be available to someone who never cared to read the document before signing nor to someone whose mistake was to the legal effect of the document whether or not the mistake was his or hers or his or her legal adviser. As to the difference between the document signed and that which was believed to have been signed, Lord Reid said,-

"...**I think that in the older authorities difference in practical result was more important than difference in legal character. If a man thinks that he is signing a document which will cost him 10 and the actual document would cost him 1,000 it could not be right to deny him this remedy simply because the legal character of the two was the same. It is true that we must then deal with questions of degree but that is a familiar task for the courts and I would not expect it to give rise to a flood of litigation.**

There must I think be a radical difference between what he signed and what he thought he was signing-or could use the words 'fundamental' or 'serious' or 'very substantial.' But what amounts to a radical difference will depend on all the circumstances. If he thinks he is giving property to A whereas the document gives it to B the difference may often be of vital importance, but in the circumstances of the present case I do not think that it is. I think that it must be left to the courts to determine in each case in light of all the facts whether there was or there was not a sufficiently great difference. The plea of non est factum is in a sense illogical when applied to a case where the man in fact signed

the deed. But it is none the worse for that if applied in a reasonable way..." (page 964). Lord Hodson agreed that want of care on the part of the person who pleaded non est factum was a relevant consideration. His Lordship pointed out that the party who raised the plea of non est factum must prove it with clear and positive evidence. As to the difference between the document signed and the one believed to have been signed, Lord Hodson said,-

"...The difference to support a plea of non est factum must be in a particular which goes to the substance of the whole consideration or to the root of the matter..." (page 965). Likewise, Viscount Dilhorne said,-

"...The difference whether it be in kind or in substance, must be such that the document signed is entirely-the word used by Byles J.or fundamentally different from that which it was thought to be so that it can be said it was never the signer's intention to execute the document..." (page 969). Lord Wilberforce also said, -

"...How, then, ought the principle, on which a plea of non est factum is admissible to be stated? In my opinion, a document should be held to be void (as opposed to voidable) only when the element of consent to it is totally lacking, ie more concretely, when the transaction which the document purports to effect is essentially different in substance or in kind from the transaction intended. Many other expressions, or adjectives, could be used-'basically' or 'radically' or 'fundamentally'..." (page 972). On this same issue, Lord Pearson said-

"...The judgments in the older cases used a variety of expressions to signify the degree or kind of difference that, for the purposes of the plea of non est factum, must be shown to exist between the document as it was and the document it was believed to be. More recently, there has been a tendency to draw a firm distinction between: (a) a difference in character or class, which is sufficient for the purposes of the plea; and (b) a difference only in contents, which is no sufficient. This distinction has been helpful in some cases, but, as the judgments of the Court of Appeal have shown, it would produce wrong results if it were applied as a rigid rule for all cases. In my opinion, one has to use a more general phrase, such as 'fundamentally different' or 'radically different' or totally different..." (pages 982-983).

The Plaintiff is an old man from Vella La Vella who is barely able to write his name. I saw him in Court. Judging from the manner in which he wrote the letters making up his name on his affidavits and the shape of those letters, it is obvious that he is not a person who is able to read and understand English well. He had never seen the Deed of Settlement before nor had been told about it by Mr. Min. In fact, his Solicitor never saw the Deed of Settlement before and after he signed it. His purpose of being at the Honiara Hotel on 10th January 2002 was his expectation to receive $500.00 from Mr. Min. He had earlier asked Mr. Min for $500.00 and Mr. Min told him to meet him at the Honiara Hotel on that day for that purpose. He never went there to discuss business or his Court action against the Defendants. He was taken by surprise when Mr. Min confronted him with a Deed of Settlement and had it read to him within a short time by a stranger before he signed it. As he said in his evidence, he thought the document he had signed was a document pertaining to the sum of $500.00 given to him by Mr. Min. I believe him because what was of interest to him was his need to be able to return home from Honiara and he needed $500.00 from Mr. Min. That was what took him to the Honiara Hotel upon Mr. Min 's promise to him to meet Mr. Min there. He denied Mr. Min's evidence that Mr. Min had explained the purpose of the Deed of Settlement to him at the Honiara Hotel. Even if the Plaintiff was mistaken on this point, any attempt by Mr. Min to do that would have been a waste of time because the Plaintiff would not have understood anything anyway. Mr. Upwe who had read the Deed of Settlement to the Plaintiff himself doubted that the Plaintiff did understand the content of the Deed of Settlement when the document was being read to him. The Plaintiff had also been drinking beer given to him by Mr. Min before he signed the Deed of Settlement.

Clearly, the Plaintiff was never able to work out the character of the Deed of Settlement nor its content. He never knew what he had signed than to vaguely connect it with his receipt of $500.00 from Mr. Min. The Plaintiff never intended anything at all that day except hoping to receive $500.00 from Mr. Min. He was simply told to sign a document, which had the effect of bringing his action in the High Court to an abrupt end without his true intention borne out by advice from his Solicitors. I do not think the Plaintiff was careless in not reading the Deed of Settlement before signing it. In fact, Mr. Min knew that the Plaintiff would not have read the document and understood it and so Mr. Upwe had been brought in to read the document to him and explain its content. No third party had suffered relying on the signature of the Plaintiff but the Plaintiff himself. Whilst it is true that the Plaintiff had signed the Deed of Settlement, he was not aware of its character and legal effect. He had been placed in a situation where he became highly vulnerable to manipulation and into signing it. The Deed of Settlement was fundamentally different both in character and content from what the Plaintiff thought he had signed. Whilst I am prepared to rule on the issue of non est factum, it is the case that this issue was not pleaded by the Plaintiff.

Does the Court have the power to amend the Motion to introduce the issue of mistake and then rule on it?

As said by Lord Wilberforce as cited above, fraud stands alone and independent of the plea of non est factum. That to me means, the plea of non est factum ought to be pleaded to be an issue for determination by the Court. Whilst the Court does have the power to effect amendment on its own motion under Order 30, rule 1 of the High Court (Civil Procedure) Rules, "the High Court Rules," that power is rarely invoked. (See **Nottage v. Jackson** (1883) 11 Q.B.D.627). It is not the duty of the Court to force upon the parties amendments that they do not request. (See **Cropper v. Smith** 26 Ch. D.700). This case does present an odd situation. The 3rd Defendant nor its Solicitor was present in Court. The Plaintiff therefore proceeded with his case under Order 38 of the High Court Rules in the absence of the 3rd Defendant and its Counsel. It did not occur to me that I should call for an amendment for obvious reason. It is not my business to run the case for the parties. The Plaintiff had pleaded fraud and must prove it by evidence or if he was not sure of fraud he should have pleaded non est factum as an alternative ground for relief. Even if I did introduce non est factum, the 3rd Defendant would not have had an opportunity to say anything about it because its representative nor its Solicitor was in Court. I think it would not have been correct for me to do such a thing where the proceeding was being conducted in the absence of the 3rd Defendant and its Counsel. In the result, I would refuse the Plaintiff's application on the ground that the Plaintiff has failed to prove fraud as a basis for relief. The other ground alleging an abuse of Court process will also go as it is premised upon the allegation of fraud being successful. This is however not the end of the Plaintiff's case. He may come back to Court with a fresh Motion pleading mistake and the Court will hear him. As for now, the application is dismissed. I make no order as to costs.

F.O.Kabui
Judge