



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 1200 OF 2000

BETTIE ATEMO NANGA.....APPLICANT

-VERSUS -

MIDDLE EAST BANK KENYA LTD.....RESPONDENT

JUDGMENT

1. **BETTIE ATEMO NANGA** (Bettie) was a faithful Christian of the Nairobi Pentecostal Church (NPC). On one occasion in August 1997 when she attended that church the pastor announced that one of the church members, namely Simon Sijenyi Oloo was going to make a presentation regarding investment. The pastor invited church members to attend that presentation. Bettie by her evidence confirmed that she attended that presentation which was entitled: prosperity and investment in business in a godly way. She also received Oloo's brochures which she produced in evidence. The brochure is entitled "INVESTMENT IN SHARES BY GOD'S PEOPLE; that brochure makes very enticing promises to make profit for those who invest in shares with Oloo's company. Let me reproduce part of what the brochure stated:

"Investment in the stock and shares is least understood by many Christians, non Christians in Kenya and elsewhere in the world. They think it's a domain for the rich. So they end up remaining poor and put their money in business that have very high failure rates."

2. The brochure then quotes a parable in the Bible of servants who were given wealth by their master one buried it while others invested it. The brochure then pronounces this in respect to those who invested:

"The other two are like those who invest in stock and shares at Nairobi stock exchange. Here you can make a profit of even 110% per month."

Oloo through that brochure invited people to talk to his company, Simlo Enterprise Ltd (Simlo) about:

"Buying & selling shares and stocks at the Nairobi stock exchange..."

3. Bettie stated that a week after that presentation she went to see Oloo. On that day Oloo asked her to invest with Simlo Ksh 1.5 million. Bettie was promised by Oloo that she would earn interest on that money. Bettie however did not have that money. On informing him that she did have that money Bettie said:

"...he suggested that he could arrange for me to get the money from the defendant using the title deed of my property subject matter of this suit."

4. The defendant is the **MIDDLE EAST BANK KENYA LIMITED** (the Bank).

5. It is in above context that I am invited, by this action, to determine whether two instruments, the guarantee and the charge executed by Bettie are valid and enforceable against Bettie. The Bank alleges Bettie executed and bound herself and guarantee to pay on demand the principal sum of Ksh 3.5 million being all money or liabilities Simlo would be owing the Bank. The Bank also alleges that Bettie charged her property NAIROBI BLOCK 103/201 (the suit property) as security of Simlo's indebtedness to the Bank.

6. Betties has raised the defence, in respect to both those two instrument, of *non est factum* (the latin word for "it is not my deed").

7. The idea of making profit, as promised by Oloo, must have been uppermost in Bettie's mind because on visiting the offices of Simlo, even though she did not have the money to invest, she signed an agreement with Simlo appointing Simlo as her broker. That agreement is exhibited before this court. Of interest is that it is undated and the only entries in it are in its schedule where Bettie's full name and contact address and telephone number and the name of her father as her next of kin appear. Her signature is witnessed by Oloo. There are many blanks in that agreement, notably is the account number Simlo was opening to carry out investment on behalf of Bettie and also the name and signature of the broker (presumably Simlo). There is a date of 22nd September 1997 reflected in the part of that agreement headed: **"PORTFOLIO/FUND MANAGEMENT FORM"**.

8. Bettie by her evidence stated that Oloo contacted her on 26th September 1997 and informed her that the Bank required her to sign documents in relation to the agreement she had with Simlo. Bettie on going to Oloo's office they both went to the lawyer's office. She learned the law firm was Esmail & Esmail Advocates.

9. At that law firm the secretary called Elizabeth gave Oloo a document which he opened the last page for Bettie to sign and when she requested to read it she stated in evidence:

"...but Oloo was adamant that the lawyer was only collecting signatures from myself just like he had done with other members of the church for purpose of preparing the final documents as had been agreed between Mr. Oloo and I."

10. Bettie's evidence is that she had no benefit of reading or seeing any other page. She also testified that the advocate, Mr. Esmail, did not witness her signature.

11. Bettie also recalled that she signed a letter of guarantee which was blank and was undated.

12. **AKBER ESMAIL** (Esmail) is a Senior member of the Kenyan Bar an advocate of the High Court of Kenya. He gave evidence on behalf of the Bank. He is a partner in the law firm Esmail & Esmail Advocates. He has since 1991 a director and chairman of the Middle East Bank Kenya Limited (the defendant Bank). He is also a member of the Bank's Board of Credit Committee. He said that he was acquainted with the banking facilities granted by the Bank. That for many years his law firm acted generally for the Bank and he has himself, in his capacity as an advocate, handled litigation and conveyancing matters on behalf of the Bank. In particular, that his law firm prepared and registered debentures and charges in favour of the Bank to secure banking facilities given by the Bank to its customers.

13. On or about July 1996 Simlo Enterprises Ltd (Simlo) had an account with the Bank. Simlo was granted overdraft facility from time to time and in June 1997 Simlo had a facility of Ksh 1.8 million which was secured by a lien over a deposit, with the Bank, of Ksh 2,011,254.15. In June or early July 1997 Simlo requested the Bank for additional facility of Ksh 3.5 million which would bring his aggregate facility of Ksh 5.3 million. Simlo offered the Bank the following securities:

a. Lien over the cash deposit;

b. Guarantees from the directors of Simlo;

c. Charge by Sammy and Margaret Mugadi over Title No. NAIROBI/BLOCK 82/223;

d. Charge by Wesley Agina over Title No. Ngong/13757 and;

e. Charge by Bettie over Title No. NAIROBI/BLOCK 103/201.

14. Esmail confirmed that Bettie signed the standard printed form guarantee, guaranteeing Simlo's indebtedness of Ksh 3.5 million and on 26th August 1997 Bettie signed the charge over the suit property in his presence.

ANALYSIS AND DETERMINATION

15. Although the parties learned advocates formulated agreed issues, in total 13 I find that all those issues can be condensed into two main issues as follows:

a. Is the guarantee and/or the charge enforceable against Bettie?

b. Who will bear the costs of the suit?

16. Through her plaint Bettie pleads she is the registered owner of the suit property. She confirmed that she entered into an agreement with Simlo. Pursuant to that agreement she went on 26th September 1997 with Oloo to the law firm, Esmail & Esmail advocates to sign further agreements. Later she received a letter dated 14th January 1998 from the Bank demanding from her payment of Ksh 5,704,302.85 being an overdraft facility. And on 13th December 1998 she received a copy of notification of sale of the suit property. She therefore prayed for an injunction to restrain the Bank from disposing/selling the suit property; for a declaration that the charge dated 25th September 1997 is null and void and; a declaration that she discharged the guarantee.

17. By the amended defence the Bank denied the pleadings in the plaint and plead that Bettie executed the charge on 26th August 1997 in the presence of an advocate whereby she charged the suit property. The said charge contained a special acknowledgment that the chargor (Bettie) understood the effect of section 74 of the Registered Land Act (RLA). That the said charge was wrongly dated 26th September 1997

instead of the correct date which was 26th August 1997. That the Bank is registered as the proprietor of that said charge which was entered as an encumbrance in the register maintained under RLA. That accordingly Bettie cannot dispute its validity. Further that Bettie, both in writing and verbally represented to the Bank and its officers that the said charge was valid and confirmed her liability there under. That the Bank relied on those representations to its detriment and Bettie is estopped from denying the validity of the charge.

18. The Bank pleaded in the alternative that in the event the charge cannot under RLA take effect as a charge that the said charge amounts to a valid agreement in writing of Betty to pay the Bank such sum not exceeding Ksh 3.5 million together with commission and other charges; that it amounts to valid agreement for Bettie to execute in favour of the Bank a valid charge over the suit property to secure the repayments of Ksh 3.5 million together with interest. Further that Bettie executed a letter of guarantee dated 29th July 1997 guaranteeing the Bank repayment of amount advanced to Simlo, not exceeding Ksh 3.5 million.

19. The Bank counterclaimed for declaration of Betties liability under her personal covenant to pay the Bank Ksh 4,303,379.85 inclusive of interest up to August 1998 and further interest from 1st September 1998 until payment in full; a declaration that Bettie is liable to execute a valid charge over the suit property for the principal sum of Ksh 3.5 million together with interest; an order that Bettie do pay the Bank Ksh 4,303,379.85 with interest and; an order Bettie do execute a valid charge.

20. Bettie by her reply to that amended defence denies existence of agreement between her and the Bank to pay the Bank any money and denied having agreed to execute a charge.

21. Bettie's evidence is that she signed the last page of the charge, on the directions of Oloo, in the present of the secretary of Esmail & Esmail advocates called Elizabeth and not in the presence of Esmail. She denied having seen Esmail on the date she signed the charge. She further states that she signed an undated and blank letter of guarantee.

22. As stated before Bettie raises the defence of non est factum. In the case **Tras Canada Credit v Judson 2002 PESCTD 57 (CanLII)** a Canadian Court discussed this defence and had this to say:

“[8] The literal translation of *non est factum* is - it's not my deed. It has been described as a form of mistake where the mistake goes to the very nature of the document which is being signed. Where such a mistake is established, it is invariably a fundamental mistake causing the contract to be void. See *Glenville Savings and Mortgage Corp. v. Slevin* (1992), 1992 CanLII 2770 (MB CA), 93 D.L.R. (4th) 268 at p. 289.

[9] Trans Canada Credit relies on the case of *Marvco Color Research Ltd. v. Harris*, 1982 CanLII 63 (SCC), [1982] 2 S.C.R. 774. This is a decision of the Supreme Court of Canada and the judgment of the court was delivered by Estey J. Specifically, Trans Canada Credit relies on the following statements of Cartwright J. found at p. 779 of the case report and cited, with approval, by Estey J.:

. . . generally speaking, a person who executes a document without taking the trouble to read it is liable on it and cannot plead that he mistook its contents, at all events, as against a person who acting in good faith in the ordinary course of business has changed his position in reliance on such document.

Shortly thereafter, on the same page as the decision, Estey J. had this to say:

He concluded, therefore, that any person who fails to exercise reasonable care in signing a document is precluded from relying on the plea of *non est factum* as against a person who relies upon that document in good faith and for value.

In concluding his reasons in *Marvco* at p. 787, Estey J. underlined the importance of looking at the circumstances of each case. The following appears in his judgment:

I wish only to add that the application of the principle that carelessness will disentitle a party to the document of the right to disown the document in law must depend upon the circumstances of each case. This has been said throughout the judgments written on the principle of *non est factum* from the earliest times. The magnitude and extent of the carelessness, the circumstances which may have contributed to such carelessness, and all other circumstances must be taken into account in each case before a court may determine whether estoppel shall arise in the defendant so as to prevent the raising of this defence. The policy considerations inherent in the plea of *non est factum* were well stated by Lord Wilberforce in his judgment in *Saunders, supra*, at pp. 1023-24:

The law . . . has two conflicting objectives: relief to a signer whose consent is genuinely lacking . . .; protection to innocent third parties who have acted upon an apparently regular and properly executed document. Because each of these factors may involve questions of degree or shading any rule of law must represent a compromise and must allow to the court some flexibility in application.”

23. Betties claim is that she signed the last page of the charge and was not given an opportunity, by Oloo, to read the documents. She was told by Oloo that the signature she was giving was an extension of the agreement Bettie had with Simlo. On the other hand, Esmail stated that Bettie executed that charge in his presence. That she was ushered into his office for that purpose by his secretary Elizabeth. On being asked whether he explained to Bettie the ramifications of Section 74 RLA he answered:

“I was not obliged to guide the plaintiff. I must have cautioned the plaintiff as a matter of course. I am not sure I did that, that is what I normally do.”

24. I began by narrating how Bettie was involved with the company Simlo and how Oloo, its managing director, enticed congregants of NPC church to invest in shares. That address by Oloo must have impressed and enticed Bettie, and not just Bettie, but also many others that we don't know but we do know that persons such as Sammy and Margaret Mugadi and Wesley Agina also wanted to benefit from Oloo told them was Lucrative Investment in shares.

25. Sammy Franklin Mugadi swore an affidavit which was relied upon in evidence by Bettie and I will reproduce it as follows:

FURTHER AFFIDAVIT

I, SAMMY FRANKLIN MUGADI of P. O. Box 11346 Nairobi in the Republic of Kenya do make oath and state as follows.

- 1. I am an adult Kenyan of sound mind and born again.*
- 2. I am the co-owner of Nairobi/Block 82/223 registered in the joint names of myself and my wife Margaret Mugadi.*
- 3. The said property is charged to Middle East Bank Ltd to secure repayment to Middle East Bank of a maximum sum of Ksh 3,500,000/= advanced to Simlo Enterprises Ltd.*
- 4. The proprietor of Simlo Enterprises Ltd, Mr Simeon Sijeny Oloo was a family friend and church elder in the Pente Costal Church Valley Road whom we trusted.*
- 5. The said Simeon Sijeny Oloo invited myself, my wife Margaret Mugadi, Mrs Bettie Atemo Nanga and Mr Wesley Agina to an advocates office in corner house written Esmail & Esmail persuading us that the same were agreements between ourselves and Simlo to enable the Middle Eaast Bank to advance Ksh 1,500,000/= to Simlo Ltd.*
- 6. The claim by Mr Akber Abdullahi Kassam Esmail that Bettie Nanga signed a document in front of him is a complete falsity.*
- 7. All five of us remained at the reception area where Mr Oloo spoke to the female secretary to whom he appeared familiar and the latter produced and showed us the end a document to sign, explaining that they will send to us copies.*
- 8. I did not read the document, nor did any of those who were present as we were hurried.*
- 9. None of us present saw or talked to any advocate nor did any advocate talk to us or explain to us anything about the document.*
- 10. I eventually got a copy of the document only in 1998 when the Bank threatened to sell our property and I visited the bank demanding to be shown why they wanted to sell our property.*
- 11. What I have stated above is true and I am ready, and willing at any time if called upon to attend court and reiterate the averments on oath.*
- 12. All that I have stated herein is true to the best of my knowledge information and belief.*

26. Section 65 of RLA provides as follows:

65. (1) A proprietor may, by an instrument in the prescribed form, charge his land, lease or charge to secure the payment of an existing or a future or a contingent debt or other money or money's worth or the fulfilment of a condition, and the instrument shall, except where section 74 has by the instrument been expressly excluded, contain a special acknowledgement that the chargor understands the effect of that section, and the acknowledgement shall be signed by the chargor or, where the chargor is a corporation, by one of the persons attesting the affixation of the common seal.

27. The charge Bettie and Mr. & Mrs. Mugadi executed required to have an acknowledgment that the provisions of Section 74 RLA are understood by the chargor. The charge before court indeed bear the words:

“AND THE ABOVE NAMED CHARGOR HEREBY ACKNOWLEDGES THAT CHARGOR UNDERSTANDS THE EFFECT OF SECTION 74 AND 79 OF THE REGISTERED LAND ACT AND THE ABOVE NAMED CHARGOR HEREBY AGREES THAT THE BANK MAY EXERCISE THE STATUTORY POWERS OF APPOINTMENT OF A RECEIVER AND OF SALE CONFERRED BY THE SAID SECTION 74 OF THE REGISTERED LAND ACT WITH SUCH EXPRESS VARIATIONS AND ADDITIONS THERETO AS ARE STIPULATED HEREIN.”

28. That notation, as required under section 65 (1) RLA would not suffice if indeed Bettie was not explained what section 74 or 79 of RLA mean to her. It will be recalled that Esmail in evidence and on being asked if Bettie was explained the terms of section 74 RLA said:

“I must have cautioned the plaintiff as a matter of course I am not sure I did that – that is what I normally do.”

29. With that in mind that Esmail did not have clarity whether he informed Bettie about the ramifications of section 74 RLA, what other tell tail signs are there that perhaps Bettie did not sign the charge in the presence of Esmail.

30. The first is the affidavit of Mr. Mugadi whose affidavit was confirmed by his wife Margaret Mugadi. Margaret in her affidavit dated 8th February 2000 stated in part:

“I have carefully read the affidavit of my husband Mr Sammy Franklin Mugadi and hereby confirm that all that is stated in the affidavit is true.

I reiterate that myself, Mr Sammy F. Mugadi, Mr. Wesley Agina and Bettie Nanga were given the signing pages of documents we did not understand and made to sign by a female secretary in the presence of Simeon Sijeni Oloo.

I also reiterate that we at no time appeared before Mr Akber Abdulahi Kassam Esmail advocate for any purposes and I am willing to reiterate this contention on oath.”

31. The affidavit evidence of both Mr. and Mrs. Mugadi was accepted in evidence without cross examination.

32. I have asked myself if indeed as Esmail stated is that his secretary ushered in Bettie into his office and he proceeded to witness the signature of Bettie on the charge then how would Bettie have known that Esmail’s Secretary was called Elizabeth. Doesn’t the fact that Bettie knows Esmail’s secretary by name suggested extended interaction with that secretary which led Bettie to register that name in her mind. In my view that is the plausible explanation.

33. Secondly when Bettie signed the agreement with Simlo she indicated in that agreement her address as P.O. Box 46823 Nairobi. When demands for settlement of amount owed to the Bank by Simlo were sent to Bettie in the year 1998 Bettie wrote to the Bank by her letter dated 3rd April 1998 bringing to the attention of the Bank that it had been sending her letters to wrong address and not to her correct address, that is P. O. Box 46823 Nairobi.

34. The charge instrument, that purportedly was executed by Bettie, reflects the address of P. O. Box 57696 Nairobi. My further perusal of documents shows that that address P. O. Box 57696 Nairobi was the address of Wesley Agina. How could Bettie’s address be mixed up with that of Mr. Agina unless the address was filled up after and in the absence of Bettie. After all Bettie’s evidence is that she only signed the last page of the document and in the presence of Esmail’s secretary.

35. Additionally, the Bank’s letter of offer dated 4th August 1997 of Banking facility, interchangeably referred to by the Bank as loan and also as overdraft, which referred to the securities to secure that facility, one of such securities being the charge over the suit property, was not signed by the directors of Simlo. In other words, Simlo’s directors did not sign to accept the loan/overdraft granted to which Bettie, Mr. and Mrs. Mugadi and Wesley Agina charged their respective property as security.

36. But perhaps the most glaring shortcoming of the charge is the dating of it and its witnessing of Bettie’s signature.

37. The charge is dated 26th September 1997. It was assessed for stamp duty on 27th August 1997. Stamp duty was paid for on 28th August 1997. It was presented for registration and was registered on 2nd September 1997. A careful examination of those dates will show that the charge was registered before it was executed by Bettie.

38. Linda Andai is an advocate of the High Court of Kenya and is employed by the Kenya Government in the Ministry of Lands, Housing and Urban Development as the Chief Land Registrar Officer. She was requested by Bettie’s learned advocate to give an opinion on the charge. She swore an affidavit in that regard and stated:

WITNESS AFFIDAVIT

I, LINDA ANDAI a resident of Nairobi of postal address c/o Ministry of Lands, Housing and Urban Development P. O. Box 30450-00100, Nairobi within the Republic of Kenya do hereby take oath and swear as follows:

- 1. THAT I am an advocate of the High Court of Kenya in the Employment of National Government of Kenya, Ministry of Lands, Housing and Urban Development as a Chief Land Registration Officer.*
- 2. THAT I have perused the charge dated 26th September 1997 and forming subject matter of the suit herein and wish to state as follows in respect thereto:*
 - i. THAT the charge document on the court record is similar to its counterpart that is in the custody of the aforesaid Ministry, records department.*
 - ii. THAT I have noted that the date of registration of the charge is earlier than the date stated to be the date when the charge was executed by the chargor.*
 - iii. THAT the date of assessment of stamp duty is earlier than the date when the charge was executed by the chargor.*
 - iv. THAT it is not ascertainable whether the chargor’s signature was attested by an advocate of the High Court of Kenya.*
- 3. THAT based on the above, I am of the opinion that the charge document ought not to have been accepted for registration in the form that it was presented.*

4. *THAT the charge document ought to have been rejected by the concerned registration officer as the same was not a registrable instrument as provided for in law in the form that it was presented. Further that the charge document was consequently void ab-initio.*

5. *THAT a charge cannot be amended after registration and the remedy would have been to have another charge drawn, duly executed and registered in lieu of the void document for purposes of committing money to the borrower.*

6. *THAT the facts deposed to herein are to my knowledge.*

39. Although this witness confirmed that indeed the charge was registered she was emphatic that it ought not to have been registered with such glaring anomaly.

40. She also brought to the attention of the court that the person who witnessed Bettie's signature in that charge simply signed without putting a name under the signature.

41. The Bank by its submissions relied on the case **Kenya Commercial Finance Company Ltd v Kipngeno Arap Ngeny & another (2002) eKLR** to effect that an error in inserting a wrong date in a charge does not nullify a charge document. That reliance in that case in my view misses what Bettie's case is. Her case is that she signed a blank document undated and therefore she argues section 65 (1) RLA was not complied with. To prove that fact, she has shown that the dates inserted later was the date she signed but then the document was registered before she signed it. Her case is hinged on that she signed a blank document and I am inclined to agree with her testimony. I believe her because I had the opportunity to observe her as she testified, her testimony is supported by Mr. and Mrs. Mugadi. The Mugadi's evidence was not subjected to cross examination and therefore it was accepted as being factually true. Further the address of Bettie reflected in the charge was not Bettie's address. Does that not show that there was no input by Bettie in putting in her address in the charge? In my view it does.

42. It does seem that Bettie was truly captured by the enticement of Oloo because even in her agreement with Simlo the date (page 3 of plaintiff's documents) there are details missing. In other words there are blank parts to that agreement.

43. If indeed as I find the charge was signed in the presence of Esmail's secretary who obviously did not explain the provisions of section 74 RLA then the charge is a nullity and the Bank cannot rely on it in exercise of its statutory power of sale. See the case **John Didi Omulo v Small Enterprise Finance Co. Ltd & another (2005) eKLR** thus:

“The property of the plaintiff was being auctioned in realization of the rights under Section 74 of Cap 300, therefore it is mandatory that the chargor understands the effects and import of the said Section. The requirement that he understands the effects must be incorporated into the charge document and unless that mandatory requirement has been properly understood, then the chargee cannot purport to exercise such a right. And in my view the first bridge is under Section 65 and until that bridge is properly and legally crossed, the chargee has no authority to exercise his redemption powers as found under Section 74.”

44. I have also examined the guarantee. Bettie's evidence is that she also signed a blank guarantee which was undated.

45. I have examined page 8 (of the plaintiff's documents) the agreement between Bettie and Simlo. On that page Bettie filed by hand the part entitled **PORTFOLIO/FUND MANAGEMENT FORM**. Bettie entered in that part her name, post office box number, the fund she intended to invest and details of her next of kin. I have compared the numbers, that is numerals, of the date in the letter of guarantee and what Bettie wrote in her agreement with Simlo. My comparison shows the writing of the date on the letter of guarantee does not resemble that on the agreement with Simlo. I have examined the numeral number “9” in the letter of guarantee and the agreement with Simlo and they are written by different hands. This has led me to find, as I do, that Bettie signed a blank letter of guarantee and she cannot be held to be liable for that which was added later.

46. The Bank cannot, as it wishes to do, run away from the fact that Oloo used his position in the church that Bettie attended and the fact that it gave Oloo free rein to usher around them, who were to be guarantors of his venture and in that way used his influence to get Bettie and others to sign blank documents which were used to secure Simlo's indebtedness. I disapprove of Esmail's response to a question when he said:

“if Simlo did something wrong what has that got to do with me.”

47. I would respond by saying that it has everything to do with the Bank. The very reason why the Bank and Esmail should have ensured Bettie obtained independent advice and should have ensured that Bettie was explained the effects of signing the letter of guarantee and the charge.

48. It is also troubling that Esmail is Director and Chairman of the Bank and is a member of the Bank's Board of Credit Committee. The very committee which needed to ensure the Bank was well secured in respect to indebtedness of Simlo. He was not an independent party who could be expected to have the best interests of Bettie to ensure Bettie understood the chargee's rights provided in section 74 RLA.

49. My finding is that in view of my discussion above the prayer of the Bank for declaration that Bettie is liable for the debt of Simlo to the extent of the charge and the letter of guarantee or for an order that Bettie does execute another charge cannot be granted and is disallowed.

50. Bettie has succeeded and has proved her case. She has met the civil burden of proof. See the case **Eastern produce (K) Ltd – Chemomi Tea Estate v Bonfas Shola (2018) eKLR**:

*“The burden of proof in civil cases on the balance of probability was defined in the case of **KANYUNGU NJOGU VS DANIEL KIMANI MAINGI [2000] eKLR** that when the court is faced with two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”*

51. Section 27 of the Civil Procedure Act provides that costs should follow the event. There is no reason why costs in this case should not follow the event. Costs will be awarded to Bettie.

CONCLUSION

52. The judgment of this court is as follows:

a. A declaration is hereby made that the charge over property NAIROBI/BLOCK 103/201 MUGOYA SOUTH C and the guarantee executed by the plaintiff are invalid and are hereby declared illegal.

b. The defendant shall return to the plaintiff title to property NAIROBI/BLOCK 103/201 MUGOYA SOUTH C within 60 days from today after effecting the necessary discharge at its own costs.

c. The plaintiff is awarded costs of the suit and the counterclaim.

DATED, SIGNED and DELIVERED at NAIROBI this 8th day of JULY 2020.

MARY KASANGO

JUDGE

Before Justice Mary Kasango

C/A Sophie

For the ‘Plaintiff: Ms. Wamocho

For the Defendant: Mr. Onyambu

ORDER

This decision is hereby virtually delivered this 8th day of July, 2020.

MARY KASANGO

JUDGE