



**Kienge v Nyauntu & another (Environment & Land Case
55 of 2015) [2024] KEELC 1578 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1578 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 55 OF 2015**

M SILA, J

MARCH 14, 2024

BETWEEN

SAMUEL OMARI KIENGE PLAINTIFF

AND

FRANCIS MORANGA NYAUNTU 1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED 2ND DEFENDANT

JUDGMENT

(Plaintiff being registered proprietor of suit land; suit land charged to the 2nd defendant to secure monies advanced to the 1st defendant; plaintiff contending that he never signed the charge and the deed of guarantee and that the same are forgeries; defendants asserting that the plaintiff duly signed the said instruments; of significance, 1st defendant charged with forging the document of deposit of title and being found guilty; charge and deed of guarantee instrument having various defects which put their authenticity to doubt; court persuaded that the plaintiff has made out a case that he never executed the said instruments; court ordering the charge to be deregistered; two titles emerging in the course of trial; the Land Registrar directed to ascertain the genuine title and return it to the plaintiff)

A. Introduction and Pleadings

1. This suit was commenced vide a plaint which was filed on 12 February 2015. The plaintiff pleads that he is the registered proprietor of the land parcel Bassi/Bogetaorio II/2834 measuring 0.66 hectares (the suit land). He avers that on 30 April 2014, he discovered that a charge had been registered in the title of the suit land. He pleads that he made inquiries through the Branch Manager, Kisii, of the 2nd defendant (Kenya Commercial Bank) and he discovered that the 2nd defendant had caused a charge to be registered in its favour for the sum of Kshs. 1,100,000/= . It is the contention of the plaintiff that this charge was registered negligently and/or fraudulently on the following particulars :



- i. Wrongly and unlawfully obtaining the original title of the suit land.
 - ii. Unlawfully presenting the said title to the 2nd defendant with a view to obtaining financial assistance.
 - iii. Failure to conduct due diligence by the 2nd defendant before accepting to use the said title as security.
 - iv. Failure to obtain consent of the plaintiff before using the said title as security.
 - v. Presenting the legal charge for registration purporting the same to be properly executed a fact they knew or ought to have known to be false.
2. The plaintiff pleads that the 2nd defendant intends to dispose of the suit property and is in danger of losing it. In his suit, he seeks the following orders :-
- a. A declaration that the legal charge registered against the title Bassi/Bogetaorio II/2834 in favour of the 2nd defendant is illegal, null and void and the same be cancelled and the original title be released by the 2nd defendant to the plaintiff.
 - b. Permanent injunction do issue against the defendants by themselves servants, agents or any person acting under their authority restraining them from further charging, selling, transferring or in any other manner interfering with the plaintiff's land title Bassi/Bogetaorio II/2834.
 - c. General Damages.
 - d. Costs.
 - e. Interest.
3. The 1st defendant entered appearance in person and filed a defence which is a general denial of the plaintiff's claim. He pleaded that he is a stranger to the allegations of the plaintiff. He pleaded that he would rely on a letter dated 12 June 2018 from the 2nd defendant to the County Registrar, informing them of the discharge of the property and that the issue is rested.
4. The 2nd defendant filed defence which she subsequently amended to include a counterclaim. It is pleaded that the suit land was charged after the plaintiff voluntarily guaranteed a loan advanced to the 1st defendant and agreed to give his title as security. The particulars of fraud and negligence are denied. It is further pleaded that the plaintiff himself did apply and obtained consent to charge from the Land Control Board. It is pleaded that he voluntarily executed the charge and handed over the original title to the 2nd defendant for registration of the charge. The 2nd defendant avers that the 1st defendant defaulted on the loan and she issued the requisite statutory notices to sell and that the plaintiff continues to owe money to her. In the counterclaim, it is reiterated that the plaintiff charged the suit property to secure monies advanced to the 1st defendant and that a charge was registered on 30 June 2009 to secure the sum of Kshs. 1,100,000/=. It is averred that a deed of guarantee and indemnity dated 30 June 2009 was also executed. It is pleaded that the plaintiff failed to pay and is in arrears. It is further pleaded that the plaintiff's claim that his title was stolen by the 1st defendant is dishonest and is a bid to defraud the 2nd defendant and the following particulars are pleaded :
- a. The transaction forming the basis of this claim was originated by the 1st defendant in concert with the plaintiff herein with the sole intention of defrauding the 2nd defendant.
 - b. The plaintiff failed to disclose the 1st defendant's fraud to the 2nd defendant.



- c. The plaintiff has conveniently stated that the title was stolen by the 1st defendant with the intention to wrest the title as a security from the 2nd defendant to avoid paying the sums owed by the 1st defendant.
5. In the counterclaim, the 2nd defendant seeks the following orders :-
- a. The plaintiff's suit be dismissed with costs together with interest thereon for such period and at such rate as the Court may determine.
 - b. Judgment be entered for the 2nd defendant as per the Counterclaim against the plaintiff for :-
 - i. The sum of Kshs. 1,976,171/= as at 31 July 2014 together with interest thereon at bank commercial rates prevailing from time to time until payment in full.
 - ii. In the alternative the 2nd defendant be allowed to exercise its statutory power of sale over the suit property to recover the sum of Kshs. 1,976,171/= as at 31 July 2014 together with interest thereon at bank commercial rates prevailing from time to time until payment in full.
 - iii. General damages.
 - iv. Costs of the counterclaim together with interest thereon for such period and at such rate as this Honourable Court may deem appropriate.
 - v. Costs of the suit with interest thereon.
 - vi. Any other relief the Honourable Court may deem fit to grant.
6. The plaintiff filed a reply to the amended defence and a defence to counterclaim. He reiterated that the charge was obtained illegally through fraud and forged documents. He denied being obligated to pay any of the monies in the counterclaim and further denied the particulars of fraud. He asked that the counterclaim be dismissed with costs.

B. Evidence of the Parties

7. The plaintiff testified that the 1st defendant is his younger brother. He testified that he and the 1st defendant wished to buy a house in Shauri Moyo, Nairobi, and he (plaintiff) handed to him (1st defendant) his original title deed. The house was however not purchased as it got sold to somebody else. He testified that he demanded to have his title back in the year 2008 but the 1st defendant refused saying that they will look for another house. He testified that in 2011 he received a letter dated 15 July 2011 from the 2nd defendant requesting him to go and sign some documents to enable the 1st defendant obtain a loan. He sensed that something was amiss as his brother was evasive. He went to the Lands office and discovered that the title had been charged on 30 June 2009 which prompted him to file this suit.
8. Cross-examined, by counsel for the 2nd defendant, he reiterated that it was on 15 July 2011 that he discovered that his title had been charged. He reported the matter to the police. He stated that there before he had not had any problem with his brother. He denied being careless and stated that he did not expect that he would use the title deed in the manner that he did. He referred to a letter of acknowledgment dated 12 June 2014, which he said was signed by the 1st defendant in a family meeting, wherein the 1st defendant admitted that he wrongly used his title deed as security for a loan. He disputed the signatures in the loan form.
9. With the above evidence, the plaintiff closed his case.



10. The 1st defendant testified that he is a road works contractor. He testified that in the year 2000 he wished to expand his business and approached the 2nd defendant for a loan facility of Kshs. 2,000,000/=. He deposited his title Bassi/Bogetaorio/3647 as security. The matter took long without the 2nd defendant responding to his application. He was subsequently advised that he could get more money if he had a guarantor. He testified that he went to the plaintiff and asked him to be his guarantor and that the plaintiff agreed. He testified that they went to the 2nd defendant and they were advised to get a valuer for the suit land. He stated that the land was valued and sent to the 2nd defendant's head office in Nairobi but the application was rejected. They however approved his first application. He testified that on 26 January 2009, the 2nd defendant put Kshs. 2,000,000/= into his account and that he serviced the loan properly. However, around the year 2012, the County Council, refused to pay for works that he had done and he could not be able to service the loan. He stated that he is still owed Kshs. 11.4 million to date hence his inability to pay the loan. He testified that on 21 October 2014, he received a letter from the 2nd defendant warning him that his property Bassi/Bogetaorio/3647 would be sold. He stated that around the same time, his brother (the plaintiff) also complained to him that he has received a letter from the bank where they threatened to sell his property (the suit land). He testified that after this case had been filed, he went to plead his case to the 2nd defendant and he claimed that they discharged both his property and the plaintiff's property. He presented a copy of discharge for the suit land and a letter dated 12 June 2018. He testified that the directors of the 2nd defendant have already decided the matter though the titles were still with the 2nd defendant. He produced a loan application dated 3 November 2008, a letter dated 26 January 2009 (a letter of offer), and a statutory notice dated 21 October 2014 (issued upon default). There was objection to the production of the letter dated 12 June 2018 which was disputed. I sustained the objection as he did not have the original of this letter.
11. Cross-examined by counsel for the 2nd defendant, he testified that he applied for a loan with the 2nd defendant on 3 November 2011. He borrowed Kshs. 2,000,000/=. He stated that the letter of offer dated 26 January 2009 was not issued to him. He however acknowledged that the signature in this letter of offer against his name was his signature. He agreed that the said letter of offer required provision of two title deeds as security; the first being his title deed Bassi/Bogetaorio II/3647 and the second being the plaintiff's title to the suit land which is Bassi/Bogetaorio II/2834. He asserted that the plaintiff was aware that his title was to be used as security for the loan and that he gave permission to him to use the said title. He could not recall if the plaintiff signed any documents with the 2nd defendant. Shown the Deed of Guarantee, he averred that the same bore the signature of the plaintiff and that the same had Kshs. 2,000,000/= as the limit of the guarantee. He was shown the charge instrument dated 30 June 2009 and he averred that it also bears the signature of the plaintiff. He acknowledged being given the sum of Kshs. 2,000,000/= and claimed to have paid it without default. He admitted obtaining the statutory notice dated 21 October 2014 which demanded payment of Kshs. 1,976,171/= but insisted that he was not in default. He also admitted that he was jailed (for the offence of forging and uttering a false document).
12. Cross-examined by counsel for the plaintiff, he again admitted receiving a loan of Kshs. 2,000,000/= and reiterated that it is fully paid and that he is awaiting return of his title deed. He now testified that he did not know whether the title to the suit land was also to be incorporated as part of the security for his loan. He admitted that he was charged and found guilty. He was jailed for two years by the Ogembo Principal Magistrate. The complainant in that case was the plaintiff.
13. The Charge Sheet and the judgment in the said case were made available and forms part of the record of this case. The Charge Sheet shows that the 1st defendant was charged with three counts respectively. Making a False Document/Forgery contrary to Section 347 (d) (i) as read with Section 349 of the Penal Code; Uttering A False Document contrary to Section 353 of the Penal Code; and, Obtaining Credit



by False Pretenses contrary to Section 316 (a) of the Penal Code. The judgment shows that the 1st defendant was found guilty of all the three counts and was fined Kshs. 50,000/= or be jailed for 6 months for Counts 1 and 2, and for Count No. 3 he was fined Kshs. 100,000/= or be jailed for 12 months in default. When he gave evidence, the accused was in prison serving the sentence and had to be brought to court to testify pursuant to Production Orders issued to the Prisons Department.

14. With the above evidence, the 1st defendant closed his case.
15. The 2nd defendant called Abraham Terit Kapelo as her witness. He is the Credit Administration Manager of the 2nd defendant at its Kisii Branch. He had a witness statement which he relied upon as part of his evidence. That witness statement provides that the loan applied for was of Kshs. 1,100,000/= . He clarified that the loan applied for was not Kshs. 1,100,000/= but Kshs. 2,000,000/= and that the amount of Kshs. 1,100,000/= was the amount indicated in the legal charge of the suit land. He testified that two parcels of land were used to secure the loan, the first being the parcel Bassi/Bogetaorio II/3647 of the 1st defendant, and the other being the land parcel Bassi/Bogetaorio II/2834 of the plaintiff. The amount secured by the 1st defendant's title was Kshs. 960,000/= and that secured by the plaintiff's title was Kshs. 1,100,000/=. He testified that there was also executed a guarantee for Kshs. 2,000,000/= and stated that the loan is still unpaid. In his witness statement, his evidence was that the plaintiff signed the letter of offer dated 26 January 2009 and agreed to be bound by the terms of the said letter. It further avers that the plaintiff and 1st defendant executed the Deed of Guarantee and Indemnity dated 30 June 2009 and that the plaintiff unconditionally agreed to pay the 2nd defendant any outstanding amount. He stated that the 1st defendant defaulted and they issued a demand letter and statutory notice. He stated that as at 31 July 2014 the amount outstanding was Kshs. 1,976,171/=. He was of opinion that there is collusion between the plaintiff and 1st defendant to defraud the 2nd defendant. He insisted that the plaintiff independently executed the Charge and Deed of Guarantee and Indemnity. He produced the Loan Application Form (titled KCB SME Credit Application Form), the letter of offer dated 26 January 2009, the charge to the suit land (undated but showing that it was registered on 30 June 2009), an official search of the suit land, the Deed of Guarantee and Indemnity dated 30 June 2009, the letter of demand and statutory notice, and some letters from the 1st defendant promising to make payment in order to settle the debt. The 2nd defendant also availed the original title deed to the suit land showing the charge duly endorsed in it.
16. I need to mention that Mr. Sagwe, counsel for the plaintiff, did state from the bar that his client, the plaintiff, has the original title deed, which he said was put under his door (by an unknown person). This of course was baffling, since the bank's position was that it held the original title deed as chargee once the charge was created. I directed that the two title deeds, that held by the plaintiff and that held by the bank, to be presented to court and they are before me at the time of writing this judgment.
17. During cross-examination by counsel for the plaintiff, the two title deeds were put to him. According to him, the bank holds the original title deed. He testified that the plaintiff was a guarantor and not the principal debtor. He was not aware if the bank officials took his photograph or jointly with the plaintiff and testified that this is not part of the bank process. He elaborated that the procedure of the bank is to have the documents signed before an advocate. He testified that the signature of the plaintiff in the Charge and Guarantee instrument were witnessed by an advocate. He could not however confirm that they were his signature as he was not there at the time. He came to the Kisii Branch in the year 2018. He could see some alterations in the Guarantee instrument which were not countersigned. He thought that the signatures in the documents appeared similar to the signature in the Verifying Affidavit. These documents, he stated, were prepared by an advocate. He could not tell if the bank has a copy of the Identity Card of the plaintiff.



18. Cross-examined by the 1st defendant, he affirmed that the loan was disbursed in 2009. That there was some initial payments but the payments stopped.
19. With the above evidence, the 2nd defendant closed her case.
20. I felt the need to have clarity on the charges that the 1st defendant faced in the criminal case. Evidence was given by Francis Nyamuka Otieno, the in charge of the Criminal Registry, Kisii High Court. He testified that the 1st defendant had filed a revision to the High Court, Kisii, being Revision Application No. E171 of 2023 arising from the judgment in Ogembo MCCR No. E 1307 of 2022 where he was accused. He testified that the accused was found guilty of three counts and judgment was delivered on 8 June 2023. What he filed in the High Court was an application for revision of sentence.
21. I invited counsel to file submissions, and I have seen the submissions of Mr. Sagwe, learned counsel for the plaintiff, and Ms. Magoma, learned counsel for the 2nd defendant. The 1st defendant did not file any submissions. I have taken these submissions into account before arriving at my disposition.

C. Analysis and Disposition

22. The plaintiff's case is that he never executed any charge instrument so as to have the suit land charged to the 2nd defendant. He of course contended that the 1st defendant mischievously obtained his original title deed and that the 2nd defendant presented a charge for registration when they knew or ought to have known that he never executed the instrument. He further accuses the 2nd defendant of failing to conduct due diligence and for negligence and fraud. In a nutshell, his case is that the security documents, including the charge, are forgeries and his title ought to be discharged and released to him. The 2nd defendant is the entity that stands most affected by the allegations of the plaintiff and it did assert that the charge instrument was properly executed and charged and that the plaintiff did guarantee the loan advanced to the 1st defendant. It goes further to allege collusion between the plaintiff and the 1st defendant so as to defeat payment of the loan. It is of course not disputed that a loan of Kshs. 2,000,000/= was advanced to the 1st defendant after the letter of offer of 26 January 2009 was accepted by him. What is in dispute is whether the plaintiff guaranteed the said loan and whether he executed the charge instrument so as to have the suit land as security. The task of this court is to determine, whether, on a balance of probabilities, the plaintiff has proved that he never executed the charge instrument and the other documents of guarantee.
23. In his evidence, the plaintiff categorically denied signing the said instruments. The 1st defendant on the other hand insisted that the plaintiff did execute them which evidence was supported by the witness of the 2nd defendant. Significantly, there is evidence that the plaintiff did not only file this civil suit, but also made a criminal complaint against the 1st defendant. This led to the 1st defendant being charged with the three counts, which I had alluded to earlier when setting out the evidence, but which I find worth repeating. The first count was of Making a False Document/Forgery contrary to Section 347 (d) (i) as read with Section 349 of the Penal Code. The particulars of the charge were that on an unknown date during the month of September 2009 at Kisii Township within Kisii County the 1st defendant signed title deposit letter dated 10 September 2009 purporting that it had been written and signed by Samuel Omari Kiege (plaintiff herein) without his consent a fact that he knew to be untrue. The second count was of Uttering a False Document contrary to Section 353 of the Penal Code. The particulars of the charge are that on an unknown date during the month of September 2009 at KCB Kisii Branch, Kisii Township within Kisii County, knowingly and fraudulently uttered a forged document namely title deposit letter dated 10 September 2009 purporting to be the will of Samuel Omari Kiege (plaintiff herein). The third count was of Obtaining Credit by False Pretenses contrary to Section 316 (a) of the Penal Code. The particulars are that on an unknown date during the month of September 2009 at



KCB Branch Kisii withing Kisii County, obtained credit to the amount of Kshs. 1.1 million by signing the title letter dated 10 September 2009 purporting to have been written and signed by Samuel Omari Kienge (plaintiff herein) a fact that was not true. He was of course found guilty of all the three counts and was duly sentenced. He has not filed any appeal against the judgment for what he has filed is only a revision of the sentence. I do not have the benefit of the proceedings of the criminal trial but I have gone through the judgment. I see that among the witnesses who testified was a document examiner and his evidence was that the plaintiff did not sign the said letter of 10 September 2009.

24. Now, this letter of 10 September 2009, is actually not the charge nor the Deed of Guarantee instrument. Instead it is a letter confirming deposit of title with the bank which letter was among the exhibits produced by the 2nd defendant. The letter merely provides that the document has been deposited to create a legal charge and is purportedly signed by the plaintiff. That letter provides that the plaintiff confirms deposit of the title Bassi/BogetaorioII/2834 with intention to create a legal charge and pursuant to a guarantee dated 10 September 2009 entered between him and the bank wherein Francis Moranga Nyauntu is the principal debtor. That letter has a signature of the purported depositor of the title and has no provision for attestation. It does in fact appear to me to be a standard letter that the bank uses which does not make any provision for attestation. The 1st defendant was only charged with offences relating to this document and I have no evidence of him being charged with any offence relating to forgery of the charge instrument or the Deed of Guarantee instrument. But be that as it may, this document dated 10 September 2009, raises more questions than answers. If the charge herein was registered on 30 June 2009, why is it that a document of deposit of title is being executed on 10 September 2009, which is a later date? And why is it referring to a Deed of Guarantee dated 10 September 2009, when the Deed of Guarantee that was produced in this case is dated 30 June 2009? Something is not adding up here.
25. Anyway, the issue before court is not really this document dated 10 September 2009 but the charge which is dated 30 September 2009 and the Guarantee instrument dated 30 June 2009. These are the precise documents in this case though of course they cannot be divorced with the instrument of deposit of title which has already been found by a competent court to have been a forgery and not signed by the plaintiff. In essence, a competent court has found that the plaintiff never signed the document which purports that he handed over his title to the bank. Although I have no definitive finding from the criminal court relating to the charge and the Deed of Guarantee, the finding that the document that purported to hand over the title to the suit land to the 2nd defendant, is a forgery, is a significant finding, for it would support the contention of the plaintiff that he never handed over his title to the bank for purposes of having it charged. Other than this letter dated 10 September 2009, which has already been found to be a forgery, the 2nd defendant has not offered any other evidence to say how it came to be in possession of the title of the plaintiff.
26. I have also looked at the Charge instrument and the Deed of Guarantee which the plaintiff asserts that he never signed. Let me start with the Deed of Guarantee. This document purports that the plaintiff has guaranteed such financial accommodation offered to the 1st defendant. There are alterations in that instrument on the name of the person giving the guarantee. There is typed the name Samwel Omari Kiage in the body of the instrument, then the last name has been changed by hand to read 'Kienge' without any countersigning. That issue of alteration of name is also replicated at the execution page of the instrument. Apart from the name, there is also an issue with the identity card. There is first given an ID number ending with '464' which is crossed out then now repeated with the last digits being '633' written by hand. At the attestation section, the ID card number appearing is that ending with the digits '464.' You wonder who then was signing the instrument and what Identity Card number he held. It will be recalled that when he testified, Mr. Kapedo did not have any copy of the plaintiff's ID card with him. You would expect that such would be in his office file and he would readily have it available. The



- attestation of that document is also purported to have been done by one Jeremiah M. Maroro who has affixed his stamp bearing a Nairobi address. It is not clear, and the bank never offered any evidence, whether the plaintiff needed to travel to Nairobi in order to execute this guarantee instrument. The person who purported to attest this instrument was also not called by the 2nd defendant.
27. Turning to the charge instrument, it is of course the contention of the plaintiff that he never signed it whereas the 2nd defendant insists that the plaintiff did indeed execute the document. I have looked at the execution page of the instrument. That page purports to show that the plaintiff signed the said instrument in the presence of one Mbarak Ogaro Nyanhoga, Advocate, who has affixed his stamp bearing again bearing a Nairobi address. Curiously, there is no date indicated when this signature was appended, the part of the date being blank. It is also not clear how the person attesting the signature identified the person signing it. It is not said whether he was identified by his ID Card and the part relating to identification only has in bracket the words (being known to me) printed as part of the standard form. You would expect that if he was known to him, then the brackets would be removed from the standard form. Just as in the Deed of Guarantee, it is not explained whether the plaintiff travelled to Nairobi to have this instrument signed. Given that the plaintiff denied signing this document, and given the lapses in the document, I think it would have been prudent for the bank to call the person who attested the signature to confirm that indeed the person appeared before him at a particular place and that he duly appended the signature and confirm that he was indeed previously known to him.
28. But that is not all that is the problem with this document. Even the execution page of the bank bears no date. The bank's signature is purportedly attested to by one Irene Chebet who does not say when the person executing the instrument on behalf of the bank appeared before her. These are certainly extremely important details in any instrument relating to land and it even becomes more significant when fraud has been alleged.
29. I am at a loss as to how the 2nd defendant, a reputable bank, allowed such an instrument to be registered in the state that it was, purporting it to be a properly executed charge. Without there being a date of attestation, we cannot say, when, if at all, the plaintiff appeared before the advocate who purported to attest the said instrument. The fact that the bank did not call the attester as a witness, coupled with the fact that the instrument of deposit of title has already been proved to be a forgery, lends credence to the contention of the plaintiff that he indeed never signed the charge instrument and that he never gave out his title deed for it to be charged. This evidence is sufficient to bring this court to the conclusion that the plaintiff has proved to the required standard that he never signed the charge instrument. Maybe it would have helped the 2nd defendant's cause to bring a document examiner to affirm that the signatures in the charge and Deed of Guarantee are of the plaintiff but it appears to me that the bank was not brave enough to do so.
30. I have not forgotten that during the trial, two title deeds were presented to this court, both appearing to be genuine title deeds to the suit land. I am unable to tell which of the two title deeds is the genuine one but what I find even more interesting is that both of them have endorsement relating to the charge. There can only be issued one title deed at a time and I cannot contextualize how the Land Registry proceeded to endorse two title deeds purportedly on the same day on the entry relating to the charge. One of the documents is definitely a forgery and I may need to make some orders on this so that no two title deeds circulate at the same time.
31. From the foregoing, it is my finding that the plaintiff has proved to the required standard that he never executed the charge instrument nor the Deed of Guarantee instrument. It is clear to me that the 1st defendant somehow proceeded to offer the plaintiff's title deed purporting that he has deposited it with the bank for purposes of registering a charge given that he was duly charged and convicted of



the offence. The plaintiff must thus must succeed in his case. I issue a declaration that the purported legal charge registered against the title Bassi/Bogetaorio II/2834 is null and void and the same is hereby cancelled. I order the Land Registrar, Kisii, to cancel and nullify the entry of this charge in the register of the suit land without the need of an instrument of a discharge of charge. I also issue a permanent injunction restraining the bank from selling or in any other way dealing with this property since its interest is pegged to the validity of the charge which I have already declared null and void. There is a claim for general damages but it was not disclosed the nature of the general damages. I have also not seen, in the submissions of Mr. Sagwe, any indication of what general damages is being sought and of what amount. Given that position, I make no award in respect of general damages. Costs of the suit will be borne jointly and/or severally by the two defendants.

32. On the counterclaim, the 2nd defendant seeks judgment for the amounts outstanding against the plaintiff. The 2nd defendant cannot succeed in this. If it wishes to pursue any monies, the 2nd defendant can only pursue the 1st defendant and not the plaintiff. I do not wish to make any further orders on this as it is within the knowledge of the bank on what it needs to do to pursue payment. I will therefore only proceed to dismiss the counterclaim with costs to the plaintiff save that I emphasise, for the avoidance of any doubt, that the plaintiff is not liable to pay the debt of the 1st defendant and the 2nd defendant cannot use the suit land as security for the indebtedness of the 1st defendant.
33. On the two title deeds, I direct that both be released to the Land Registrar, Kisii, by the Deputy Registrar of this court. The Land Registrar to thereafter decipher which of the two title deeds is the genuine one and to proceed to destroy that which is not genuine. He will then make entry relating to the nullification of the charge, without the necessity of having an instrument of discharge of charge, in the title deed and hand over the original of it to the plaintiff for the plaintiff to maintain its custody.
34. Judgment accordingly.

DATED AND DELIVERED THIS 14 DAY OF MARCH 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

