



Mikuro v Moruri & 2 others (Environment & Land Case 102 of 2016) [2024] KEELC 5464 (KLR) (24 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 102 OF 2016**

**M SILA, J
JULY 24, 2024**

BETWEEN

ZIPPORAH KEMUNTO MIKURO PLAINTIFF

AND

PETER NYAKUNDI MORURI 1ST DEFENDANT

SHADRACK J. MOSE 2ND DEFENDANT

EQUITY BANK LIMITED 3RD DEFENDANT

JUDGMENT

(Suit by plaintiff challenging the charge registered against her title in favour of the 3rd defendant; plaintiff being the registered proprietor of the suit land; suit land purportedly used as security by the 1st defendant to secure monies advanced to him by the 3rd defendant; charge purportedly executed in presence of 2nd defendant; plaintiff asserting that she never executed the charge nor did she guarantee any monies to the 1st defendant; nothing to show that the plaintiff executed an instrument of guarantee; no bank official called to state that they dealt with the plaintiff and that she agreed to charge her title; save for the word of mouth of the 2nd defendant, nothing tangible to show that the plaintiff appeared before the 2nd defendant to execute the charge; documents leading up to the charge also being dubious including the valuation report which showed that it is the 1st defendant who owns the suit land; plaintiff availing a document examiner’s report indicating that she never signed the charge instrument; weight of evidence in favour of the plaintiff; charge declared null and void and ordered to be cancelled; plaintiff also awarded general damages and costs)

A. Introduction and Pleadings

1. The plaintiff is the registered proprietor of the land parcel West Kitutu/Bogeka/3044. The 1st defendant is her estranged husband. The 2nd defendant is an advocate of the High Court of Kenya



whereas the 3rd defendant is a banking institution. At issue is a charge dated 16 January 2014 prepared by the law firm of M/s Mose Mose and Milimo Advocates, which charge was registered on 24 January 2014 against the title of the suit land, with the plaintiff as chargor, the 1st defendant as borrower, the 3rd defendant as chargee, and the 2nd defendant as the advocate who attested the execution of the charge. The plaintiff contends that she never executed that charge and was never aware of it until she was served with a 40 day redemption notice dated 11 March 2016 through which the 3rd defendant was demanding payment of some monies said to have been advanced to the 1st defendant on the strength of the charge and threatening to exercise its statutory power of sale as there had been default.

2. In her plaint filed on 15 April 2016, the plaintiff asserts that she was never aware of the charge and that she never offered her title to be used as security for monies advanced to the 1st defendant. She contends that the 1st defendant stole her title and without her knowledge used the same to secure monies from the 3rd defendant. She claims that she never signed the charge and that the signature therein purporting to be her signature is a forgery. She pleads the following particulars of fraud against the 1st defendant :
 - a. Stealing and/of fraudulently obtaining the title deed in respect of the suit property;
 - b. Failing to seek for and/or obtain her permission and/or consent to charge the title of the suit property;
 - c. Forging the signature of the plaintiff in the charge instrument;
 - d. Uttering and/or presenting false and fraudulent documents;
 - e. Presenting documents for attestation without the signature of the plaintiff;
 - f. Colluding with the 2nd defendant to attest fraudulent documents;
 - g. Misrepresenting to the 3rd defendant that the charge instrument was sanctioned by the plaintiff;
 - h. Obtaining monies by false pretence.
3. She adds that the fraud of the 1st defendant was in connivance and collusion with the 2nd and 3rd defendant and against them she pleads the following particulars “:
 - a. Failing and/or neglecting to verify the true identity of the person presenting the charge instrument;
 - b. Attesting the charge instruments in the absence of the person chargeable with the documents;
 - c. Affixing signatures on a document that had not been signed by the person chargeable with the same;
 - d. Abandoning and/or abdicating professional responsibility;
 - e. Carrying out and/or performing professional responsibility in a careless and/or negligent manner;
 - f. Colluding and/or conspiring with the 1st defendant to defraud the plaintiff;
 - g. Abusing his mandate and/or authority as an advocate of the High Court of Kenya;
 - h. Failing to heed and abide by professional ethics and etiquette;
 - i. Failing to seek for and obtain relevant identification documents.



4. The plaintiff pleads that on discovering the fraud, she reported the matter to the police on 29 March 2016. She believes that by granting the loan, the 3rd defendant acted negligently and the following particulars of negligence are pleaded :
 - a. Forwarding and/or transmitting the charge instruments to the 1st defendant;
 - b. Failing to notify the plaintiff of the intended charge;
 - c. Charging and/or causing the charge to be registered without the knowledge of the plaintiff;
 - d. Disbursing the loan sum to the borrower without the knowledge of the plaintiff;
 - e. Acting on the basis of false and fraudulent documents;
 - f. Conspiring and/or colluding with the 1st and 2nd defendants to register the charge instruments;
 - g. Aiding and abetting the commission of the fraud with the active participation of the Branch Manager, Kisii.
5. It is the case of the plaintiff that the preparation, engrossment, and registration of the charge instrument was fraudulent and hence the same is irregular, illegal, and invalid. In this suit she seeks the following orders :
 1. Declaration that the Charge instrument dated 16 January 2014 registered over LR No. West Kitutu/Bogeka/3044 on the 24th January 2014 was never executed by the plaintiff and hence same were fraudulent irregular illegal and invalid.
 2. An order compelling the 3rd defendant to cancel, discharge, and/or remove the charge registered over LR No. West Kitutu/Bogeka/3044 on the 24th January 2014 and release the title document to the plaintiff unconditionally;
 3. A permanent injunction restraining the 3rd defendant from selling vide public auction or private treaty or dealing with the suit property;
 4. General damages for fraud and/or fraudulent misrepresentation against the defendants jointly and/or severally for the registration of the charge instrument without lawful authority and mandate of the plaintiff;
 5. Costs of the suit.
 6. Any other relief the court may deem fit and expedient to grant.
6. The 1st defendant appointed counsel and filed defence. He pleaded that he and the plaintiff are husband and wife but “entangled in family disharmony and separation.” He denied stealing the title of the plaintiff and pleaded that her allegations are borne out of their sour relationship. He pleaded that the title was properly charged. He admitted owing the 3rd defendant money though ready and willing to have the loan rescheduled so as to have the security redeemed.
7. The 2nd and 3rd defendants filed a joint statement of defence. They pleaded that the title was properly charged and that the plaintiff consented to the terms of the charge. They pleaded that the 1st defendant applied for a loan of Kshs. 1,500,000/= but a sum of Kshs. 1,000,000/= was approved and that it was a condition that the loan be secured by a personal guarantee and legal charge. They pleaded that the plaintiff offered herself as a personal guarantor and her property to be charged. They averred that both the plaintiff and the 1st defendant appeared before the 2nd defendant and freely and willingly executed the charge and other security documentation. It was pleaded that the plaintiff was accompanied by the



1st defendant, carrying their original identity cards, and that the 1st defendant identified the plaintiff as his wife. It was averred that the meaning and effect of charging the property was explained to both. They pleaded that the charging of the property and disbursement of the loan was in tandem with the law and banking practice.

B. Evidence of the Parties

8. The plaintiff testified on 20 January 2020 before Onyango J. She testified that she is a Lab Technician and the owner of the suit land. She stated that she co-habited with the 1st defendant for 8 years but they no longer live together. On 28 March 2016 she received the redemption notice dated 11 March 2016, which surprised her, and she subsequently made a report at Kisii Police Station. She searched her house and found a valuation report of her property and letter of offer for a loan facility in the name of the 1st defendant. She testified that she was never consulted before the valuation report was done and the report indicated that the registered proprietor was the 1st defendant which was erroneous. She pointed out that the redemption notice gave the name Zipporah Kemunto Moruri yet the names in her identity card read Zipporah Kemunto Mikuro. She explained that ‘Moruri’ is the name of the 1st defendant’s father. She elaborated that the redemption notice was addressed to her correct postal address i.e 75 (redacted) but at the bottom was another address i.e 29 (redacted). The charge instrument had this address **29 which she stated is not her address. She asserted that she never signed the charge instrument and the signature therein was not her signature. She testified that at the time the charge was being prepared she was working in Suba, Migori County, yet the document was prepared in Nairobi. She stated that she has never been to the offices of M/s Mose & Milimo Advocates who drew the charge. She added that she never signed any loan application form. She raised issue that the letter of offer was addressed to the 1st defendant only and is not signed on all pages. After she complained to the police her specimen signature was taken. She also had a forensic document examiner’s report prepared by Inspector Moses Makokha which was marked for identification.
9. Cross-examined, she reiterated that she lived with the 1st defendant for 8 years. The charge was registered when they were living together. She did not know about the address No. **29. She acknowledged that the name and Identity Card number in the charge instrument are hers. She testified that the 1st defendant was charged with forgery and that the case was ongoing at that time. She emphasised that she was in Suba when the charge was purportedly signed.
10. PW-2 was Chief Inspector Benard Cheruiyot a document examiner working with the Department of Criminal Investigations (DCI) Headquarters in Nairobi. He testified that Inspector Moses Makokha, who prepared a document examination report, died on 11 February 2021. He testified that they worked together and attended the same University and he was familiar with his signature. He produced the report that Inspector Makokha had prepared. Inspector Makokha had examined the plaintiff’s known signatures and the signature in the charge instrument and formed the opinion that they were not made by the same person.
11. With the above evidence the plaintiff closed her case. Onyango J was subsequently transferred and it is at this juncture that I took over the matter.
12. DW – 1 was the 1st defendant. He is a businessman living in Nairobi and a car dealer. He described the plaintiff as his wife. He stated that they lived together but they are now separated. They separated in 2013. He affirmed knowing the 2nd defendant whom he described as the lawyer who acted for Equity Bank (3rd defendant) when he borrowed money from them. He was the borrower and the plaintiff the guarantor, and the title of the plaintiff was used to secure the money. He testified that they first appeared before the bank and then before the advocate to sign documents related to the loan. He



- obtained a loan of Kshs. 1,000,000/= and the money was disbursed into his account. He stated that they shared the money between himself and the plaintiff as she had a small kiosk. He stated that he has so far paid Kshs. 600,000/= to pay off the loan but since this case was filed he has been unable to make payment because his business went down. He denied stealing the title deed and asserted that the plaintiff signed the charge instrument.
13. Cross-examined by counsel for the plaintiff he testified that he separated with the plaintiff in 2013. He approached the bank in 2014 when they had some reconciliation. The loan was taken from the 3rd defendant's Kisii Branch. He stated that he appeared with the plaintiff at the bank, and challenged to provide evidence, he stated that this should be in the CCTV of the bank. He claimed that they appeared before a bank official called James Onderi. He is not however among his witnesses. He stated that the money was disbursed directly into his account and that he gave Kshs. 400,000/= in cash to the plaintiff. He admitted that he was charged with a criminal offence related to forgery; he was acquitted. He was aware of the opinion of the document examiner but he did not agree with the same. He however acknowledged that he did not have a contrary report. Re-examined he pointed out that the report does not say that it was him who signed the charge. He stated that when the property was charged, they were living together, but had separated when this case was filed. He thought that the case was triggered by their domestic differences.
 14. DW – 2 was Shadrack Mose, the 2nd defendant. He currently serves as the Solicitor General. His evidence was that the plaintiff and 1st defendant appeared before him with their identity cards. He stated that the two signed the charge in his presence and he witnessed their signatures. He signed and stamped on the document. He stated that he verified that the persons carrying the identity cards were the persons appearing before him. He was of the view that the signature in the identity card of the plaintiff is the same signature in the charge instrument. He refuted the particulars of fraud pleaded against him in the plaint. He stated that in his 32 years of practice it was the first time he was appearing in court and has never imagined participating in fraud. He thought the parties wish to run away from their obligations.
 15. Cross-examined by counsel for the plaintiff, he affirmed that he was instructed by the 3rd defendant to prepare the charge. He stated that the plaintiff and 1st defendant appeared before him at his chambers in Kisii. He had offices in Nairobi, Kisii and Eldoret. He affixed his stamp which has his Nairobi address as this is his only stamp. He did not testify in the criminal case.
 16. With the above evidence the defendants closed their case.

C. Submissions of Counsel

17. I invited counsel to file submissions and I have seen the submissions filed by counsel for the plaintiff, the 1st defendant, and the 2nd and 3rd defendants. I observe that in his submissions, Mr. Mulisa, learned counsel for the plaintiff, first raised issue with the valuation report (made prior to the charge) which purported to state that the owner of the suit land is the 1st defendant and not the plaintiff. He thought that the valuation report was hurriedly done by the 3rd defendant for purposes of depriving the plaintiff of the suit property. He further submitted that the loan application form had the phone numbers of two referees, Hezron Mandugu and Fredrick Omare, but not the plaintiff's number. He added that the 1st defendant failed to call these referees as witnesses to corroborate the claim that the plaintiff signed the documents or participated in the transaction. He submitted that if the plaintiff appeared before the 2nd defendant at his Kisii Office, there ought to have been a visitor's book to show that she indeed visited the office and that such book was not produced and therefore the evidence of fraud and negligence are uncontroverted. He relied *inter alia* on the case of [Trust Bank Limited vs Paramount Universal Bank](#)



- Universal Limited & 2 Others*, Nairobi (Milimani HCCS) No. 1243 of 2001. He submitted that the 3rd defendant failed to call any witness despite filing a statement of defence. He submitted that it was necessary for the 3rd defendant to call the officers who allegedly interacted with the plaintiff when the loan form was lodged. He pointed out that the loan form had the names of three bank officers but none were called as witnesses. He submitted that the plaintiff had pleaded and proved her allegations of fraud to the required standard. He submitted that though the 1st defendant claimed readiness to pay the loan he was not paying as he had nothing to lose after separating with the plaintiff.
18. For the 1st defendant, Mr. Nyambega, learned counsel, submitted that the title to the suit land was presented by the plaintiff herself to secure the loan advanced to the 1st defendant and that she signed the charge instrument in the offices of the 2nd defendant. He submitted that the 1st defendant had explained that he was unable to pay the loan due to unforeseen economic vagaries and business losses. He did not think that the plaintiff had proved fraud to the required standard and referred to the case of *Vijay Morjaria vs Nansingh Madhusing Darbar & Another* (2000) eKLR on the standard of proof in cases of fraud. He submitted that the document examiner's report is dubious and that its authenticity is questioned. He urged that the report should be analysed from the grand scheme of evidence presented and referred to the case of *Loise Wanja Rugendo & Another vs Festus Mbaka Murango & 3 Others* (2020) eKLR, Chuka ELCA No. 5 of 2020. He pointed out that the 1st and 2nd defendants had confirmed that the plaintiff signed the charge instrument in their presence and the plaintiff cannot turn around and rely on the expert report. He submitted that the case is emanating from family disagreements which the plaintiff has taken too far.
19. For the 2nd and 3rd defendants, counsel on record referred me to various cases on the standard of proof on fraud. He submitted that it cannot be established that the specimen signature was obtained from the plaintiff and that the handwriting expert should have obtained the specimen signature from an authenticated record such as the plaintiff's Identity Card. He added that the expert report is not binding upon this court and similarly referred me to various authorities on the veracity of expert reports as evidence. He submitted that the 2nd defendant serves as the Solicitor General and is not an ordinary but very credible witness.

D. Analysis and Disposition

20. The core issue in this case is whether the plaintiff has proved to the required standard that the charge instrument is a fraud and that she never signed it. In answering this question, I am alive to the provisions of Section 107 of the *Evidence Act*, Cap 80, which provides that the burden is on him who alleges, to prove. The standard of proof in cases of fraud is now a beaten path. It has been established that proof of fraud is above a balance of probabilities but not as high as beyond reasonable doubt. This was so affirmed by the Court of Appeal in the case of *Virani t/a Kisumu Beach Resort vs Phoenix East Africa Assurance Company Limited* (2004) 2 KLR 269 wherein it was held that :
- “Fraud is a serious quasi-criminal imputation and it requires more than proof on a balance of probability though not beyond reasonable doubt. Sufficient notice and particulars must therefore be supplied to the party charged for rebuttal of such allegation.”
21. The plaintiff of course asserts that she never signed the charge instrument. The 2nd defendant insists that she did so in his presence. Where, pray, does the evidence tilt? We will have to take into the totality the evidence provided in order to reach the answer.
22. Part of the evidence provided by the plaintiff was that she could not have appeared to sign the charge instrument on 16 January 2014 as she was in Suba, Migori. In light of that position I think the



burden shifted on to the 2nd defendant to demonstrate that she was actually in his office. It would have helped the 2nd defendant to furnish some more particulars to support the assertion that the plaintiff appeared in her office and that he signed the charge instrument in his presence. For example, given that he operates between Nairobi, Kisii and Eldoret, it would have helped him if he had provided some evidence to show that he was in Kisii on 16 January 2014. It would also have helped if he had given some evidence on how he ensures that those appearing before him are actually the owners of the land and chargees and they were the ones noted in the Identity Cards. For example, was there a bank official or other person to confirm that indeed the person appearing was the plaintiff? It would also have helped if he had given evidence on the actual time, or estimated time, that the charge instrument was signed before him given the contention of the plaintiff that she was not in Kisii on the date the document was signed. In his submissions, counsel for the plaintiff did submit that if the plaintiff appeared in the offices of the 2nd defendant there ought to have been a visitor's book. To be fair to the 2nd defendant, the issue of whether or not he has a visitor's book was not put to him when he testified and if counsel for the plaintiff wished to pursue that line he ought to have cross-examined the 2nd defendant on whether or not he has a visitor's book and how the same is recorded. But as I have said, save for simply saying that he saw the identity card of the plaintiff, the 2nd defendant never mentioned what steps he takes, or took in respect of this case, to confirm that the person appearing before him is actually the person named in the document and is the person holding the identity card. Apart from simply saying that the plaintiff appeared before the 2nd defendant, nothing was called by the defendants to support that allegation.

23. We also need to be alive to the fact that the 3rd defendant did not call any witness from the bank. The taking of a loan is a process; the procedure of one guaranteeing another is also a process. The bank ordinarily does due diligence. I do not think that the bank can take in a guarantor who it has not seen and affirms for itself that the person is agreeable to guaranteeing the loan. If the plaintiff was indeed a genuine guarantor and chargee, one or two bank officials must have dealt with her. No bank official came to testify to say that they dealt with the plaintiff at any one time. The 1st defendant in his evidence said that they appeared before one James Onderi at the bank. He was never called as a witness. It is common knowledge that banks have CCTV in their premises. No footage was collected and presented as evidence to show that the plaintiff has ever been in the premises of the 3rd defendant. This aside, the documentation leading to the loan advanced to the plaintiff that were produced by the plaintiff appear to me to be very questionable and I wonder why the bank did not raise any red flags.
24. Let me start with the loan application form dated 5 November 2013. It shows the 1st defendant applying for a loan of Kshs. 1,500,000/=. In that form there is space for one to fill whether he is single or married, the name of the spouse, their identity card number, and their mobile phone number. I see that the 1st defendant filled that he was married but the space for filling in the name of the spouse, the identity card and mobile phone number, are left blank. There is a part for a proposed guarantor. The name filled in there is not of the plaintiff but of one Fredrick Omare Makori whose mobile number is provided. The security to be provided was the title to the suit land. Now, if the suit land was registered in the name of the plaintiff, I wonder why it was not the plaintiff's name that was put as guarantor, but the name of Fredrick Omare Makori. There is a part for the applicant to sign and I see a signature against the name of the applicant, and one other signature whose name is not provided but which appears to be the same as the signature in the charge instrument. This part ought to have only been signed by the applicant of the loan and I wonder on what basis a second signature is inserted. Those two signatures were attested by one James Nyanjong but no such person was called as a witness to support any allegation that the second signature is that of the plaintiff. It is not therefore supported by any evidence that the plaintiff was aware of any loan application made by the 1st defendant. I also note that in the list of documents of the 2nd and 3rd defendants was a guarantee document which was signed



- by one Fredrick Omare Makori as guarantor. The defendants were not brave enough to produce that document as an exhibit so that it can be subjected to cross-examination.
25. The follow up to the loan application form dated 5 November 2013 was the letter of offer from the bank dated 6 December 2013. That letter offers to the 1st defendant a loan facility of Kshs. 1,000,000/= . The letter provides that the facility will inter alia be secured by a personal guarantee of ‘Zipporah Kemunto Mikuro’ and the ID number is provided together, with a first legal charge over of Kshs. 1,000,000/= over the suit land. The letter says that there will be a valuation report to be prepared by the bank’s approved valuer and there will also be a perils insurance taken through Equity Insurance Agency Limited. You would therefore expect that the bank would exhibit the personal guarantee executed by the plaintiff if at all she had agreed to stand as guarantor to the plaintiff’s loan. The bank did not provide any. If there was no guarantee executed by the plaintiff then on what basis was her title being charged ? There would be no basis at all.
26. The other point is on the valuation report which was never refuted by the defendants. That valuation report bears the name of the 1st defendant as proprietor of the suit land yet the suit land is registered in the name of the plaintiff. There is no contrary valuation report produced by the defendants. If a proper valuation was done, it should have been in the name of the plaintiff and not 1st defendant. Such valuation could also not be done without the owner of the land (plaintiff in this instance) being advised of it. In my view, the valuation was done stealthily and avoided the name of the plaintiff so that she is not made aware of it. It should have raised an alarm to the bank that the report bears the name of a person who is different from the proprietor of the land being charged.
27. Apart from the foregoing, the plaintiff is categorical that the signature in the charge instrument is not her signature. There is the document examiner’s report which augments the plaintiff’s position. I have gone through the report. The document examiner was Inspector Moses Makokha who stated that he was a qualified forensic document examiner working with the DCI and had three years experience at the time he prepared the report. He trained as a forensic document examiner at the DCI Headquarters Forensic Document Examination Laboratory and also from the Regional Forensic Laboratory, Khartoum, Sudan. His expert qualifications were not put into any doubt by the defendants. The document examiner elaborated how he went about the task of finding out if the charge was signed by the plaintiff and formed the opinion that it was not the plaintiff who signed the charge instrument. I am aware that a court is not bound by the opinion of an expert as was expounded in the case of *Kimatu Mbuvi t/s Kimatu Mbuvi & Bros vs Augustine Munyao Kioko*, Court of Appeal at Nairobi, Civil Appeal No. 203 of 2001 (2006) eKLR where the court stated as follows :
- “We have stated before, and it bears repeating, that such opinions are not binding on the court although they will be given proper respect, particularly where there is no contrary opinion and the expert is properly qualified. But a court is perfectly entitled to reject the opinion if upon consideration alongside all other available evidence there is proper and cogent basis for doing so. In *Ndolo v Ndolo* [1995] LLR 390 (CAK), this Court stated: -
- “The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decisions. A court cannot simply say: “Because this is the evidence of an expert, I believe it.”
28. From the foregoing, it is discernible that the opinion of an expert is not binding on the court. However, it needs to be given proper respect and the court is entitled to accept the opinion, where, when



considered alongside the other evidence presented, there is a high probability that the opinion of the expert is correct, and especially where there is no contrary expert opinion. In our case, there is no contrary opinion presented by the defendants. If the defendants felt strongly that the opinion of the expert was not correct nothing stopped them from procuring their own document examiner to make an assessment of the handwritings on their behalf. Indeed, the opinion of the document examiner tallies with the other evidence that has been presented. Given the totality of all the evidence presented, I have no reason to doubt the expert evidence which concludes that the plaintiff did not execute the charge instrument.

29. I have already analysed the documents leading to the award of the loan to the 1st defendant and found them dubious. I have also found out that save for mere word of mouth there is nothing tangible that supports the contention of the 2nd defendant that the plaintiff appeared before him and executed the charge in his presence. It was of course submitted by counsel for the 2nd and 3rd defendant, that the 2nd defendant is not an ordinary witness as he serves as the Solicitor General. Whether or not the 2nd defendant is the Solicitor General of this country counts for nothing on his credibility as a witness. Just because one holds a high public position does not by itself mean that such person is a credible witness. In fact, the office or position that one holds is completely immaterial. In law, all parties and all witnesses are put on an equal footing regardless of their offices or positions, a bearing so succinctly put by the Constitution at Article 159 (2) (a) which provides that justice shall be done to all irrespective of status. The law is blind to status. It puts out social pedigrees and stratifications aside and treats all equally. In law, the most impecunious and the richest are on equal ground. There is nothing like high and mighty in law. Even a priest or judge appearing in court as a party or witness is stripped of his robe.
30. My total assessment of the evidence leads me to the conclusion to the required standard that the plaintiff never executed the charge instrument as alleged.
31. Now, if she did not execute the charge instrument, which I am prepared to find, then that charge instrument is null and void and cannot vest upon the 3rd defendant a chargee's interest on the suit property. That charge must be deregistered which order I hereby give. I order the Land Registrar, Kisii, to proceed and cancel the entry of the charge in the register of the suit land. I also order the 3rd defendant to surrender the original title document to the plaintiff forthwith and the Land Registrar will also proceed to nullify and cancel the entry of the charge in the original title document. The expenses for this be shouldered by the 3rd defendant. The 3rd defendant is not a chargee over the suit land and cannot exercise any of the chargee's rights over the suit land. If she remains unpaid, she will have to pursue the 1st defendant independently, without the involvement of the plaintiff. In other words, the plaintiff is not answerable for the debt of the 1st defendant owed to the 3rd defendant. The plaintiff further seeks general damages for fraud and/or fraudulent misrepresentation against the defendants jointly and/or severally. The fault herein was collective against all defendants and the plaintiff deserves to be paid general damages as prayed. Given the nature of the suit land and the value thereof, I will assess general damages in the sum Kshs. 250,000/= jointly and/or severally against the defendants. The said sum to attract interest at court rates from the date of this judgment. The plaintiff will also have the costs of this suit jointly and/or severally against the defendants.
32. Judgment accordingly.

DATED AND DELIVERED THIS 24TH DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

Delivered in presence of :



Mr. Mulisa for the Plaintiff

Ms. Kwamboka h/b for Mr. Mose Nyambega for the 1st Defendant

Mr. Ondande for the 2nd & 3rd Defendants

Court Assistant : David Ochieng'

