

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 89 of 1991

CHARLES MWAI GATERE PLAINTIFF

VERSUS

1. AGNES NJERI KAMBO

2. KANGATHIA NDOGOTO

3. AGUTHI RANCHING CO LTD..... DEFENDANTS

JUDGMENT

The plaintiff by his amended plaint averred that the defendants divested from him plots number Nyeri/Naromoru/879 and 880. The plaintiff averred that they so divested him of those plots by means of fraud. The plaintiff therefore prayed for a declaration that the transfer of parcels No. Nyeri/Naromoru/879 and 880 into the first and second defendant's name was fraudulent and an order directing the land registrar to rectify the registers by substituting the name of the plaintiff in respect of those parcels of land. The defendants by their defence denied the allegation of fraud by the plaintiff. They averred in their defence that they were allocated by the third defendant those plots. They further averred that the plaintiff has never occupied the property. The plaintiff by his evidence stated that he purchased shares in 1972 and 1973 the third defendant company and was allocated plots number Nyeri/Naromoru/100, 879 and 880. He bought four shares at Kshs.4000/- for one share. He was therefore entitled to twelve acres of land which he was allocated. He subsequently settled on that land. He built on that land but never obtained a title from the third defendant. He made a payment for mapping and survey work. On or about July 1990 the third defendant divested him of plots number Nyeri/Naromoru/879 and 880. That the third defendant fraudulently transferred those plots to the 1st and 2nd defendant. In 1991 he saw some people checking the land. These people he says were 1st and 2nd defendants. This alerted him to carry out a search of the plots which he found that plot No. 879 was registered in the name of the 1st defendant and plot No. Nyeri/Naromoru/880 was registered in the name of the 2nd defendant. He put a caution to those two plots. He said that the defendants must have obtained the titles by means of fraud.

PW 2 has been a neighbour to the plaintiff since 1972. He said that he bought his shamba from the third defendant. He confirmed that the 1st and 2nd defendant have never been on the plaintiff's land.

PW 3 is a member and director of the third defendant. He became a member in 1971. The plaintiff became a member after him. He confirmed that the plaintiff purchased shares equivalent to 12 acres from the third defendant. He said that even upto date there were members who did not have title deeds. On being shown some receipts issued by the third defendant to 1st and 2nd defendants during cross examination he responded by saying that such receipts could entitle one to getting a title deed. He further said that the 1st and 2nd defendant's receipts had not been issued in the normal course of things.

The 1st and 2nd defendants did not attend the hearing. Their advocate who attended was unsuccessful to getting an adjournment of the case. The case therefore proceeded without the benefit of the evidence of the 1st and 2nd defendants.

The 3rd defendant's witness said that he know the plaintiff. He however does not know the 1st and 2nd defendants. He stated that plots number Nyeri/Naromoru/789 and 880 belong to the plaintiff according to

the 3rd defendant's record. The register confirmed that the plaintiff had fully paid for his shares. Although the 1st and 2nd defendants were in the 3rd defendant's register he was unable to tell the court the portion of land they were supposed to get.

Since the 1st and 2nd defendant did not offer evidence the plaintiff's case was uncontroverted. I reject the submissions made by the 1st and 2nd defendants' counsel that the plaintiff's case cannot succeed because the 1st and 2nd defendants were first registered owners of those plots. In that regard there was no evidence adduced before court in respect of the defendant's registration of those plots. The plaintiff and his witnesses were unanimous in their evidence that the 1st and 2nd defendants irregularly obtained the titles in respect of the plots Nyeri/Naromoru/789 and 880. The 3rd defendant's witness did confirm that the allocation of those plots to the defendant was not in the normal course. The 1st and 2nd defendants had title deeds issued in respect of those plots in 1998. They did not seek occupation of those plots until 1991. The court would ask itself a rhetorical question why would one pay for a plot and not seek to have possession until three years down the line. Could the answer be that they knew that their titles were not legitimately obtained. It certainly is not normal for one to pay for land and then fail to get immediate possession of the same. I find that the combined circumstances surrounding the 1st and 2nd defendants registration as owners of those plots as stated by various witnesses to prove that the 1st and 2nd defendants obtained the titles by means of fraud. The first issue to consider is, did the first and second defendant fraudulently divest the plaintiff of the plots number Nyeri/Naromoru/789 and 880. My response to that issue is in the affirmative. The surrounding circumstances of obtaining the title coupled with their failure to immediately seek possession supports my finding on that issue. The second issue to consider is whether the plaintiff is entitled to a declaration that he is the rightful owner of those plots. Again the court's response is in the affirmative. The plaintiff's evidence on how he purchased share certificates from the 3rd defendant was uncontroverted. He produced in evidence copy of the share certificates. All the witnesses who gave evidence including the third defendant's witness supported his evidence. I therefore do find that the plaintiff is the rightful owner of plots No. Nyeri/Naromoru/789 and 880. The judgment of this court is a follows;-

1. ***The court does hereby make a declaration that the transfer of land parcels Nyeri/Naromoru/879 and 880 by the third defendant to the 1st and 2nd defendants was fraudulent.***
2. ***The court does here make a declaration that the plaintiff is rightful owner of parcels number Nyeri/Naromoru/879 and 880.***
3. ***The court does hereby direct the land registrar to rectify the registers to the said land parcels number Nyeri/Naromoru/879 and 880 by substituting the names of the 1st and 2nd defendants with the plaintiff's name.***
4. ***The plaintiff is awarded costs of this suit.***

Dated and delivered at Nyeri this 11th day of April 2008.

MARY KASANGO

JUDGE