

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 459 of 1993

SALEH NG'ANG'A ALIAS NG'ANG'A GITURO.....PLAINTIFF
VERSUS
MANOAH SHIYAI AGAMBERA.....1ST DEFENDANT
MANGU ENTERPRISES LIMITED.....2ND DEFENDANT

JUDGMENT

By an amended plaint filed on 11th September 1993, the plaintiff averred that between the years 1973 and 1976 his mother one Grace Waruguru Ng'ang'a purchased for him shares in the second defendant in the name of Ng'ang'a Gituro after which the plaintiff was allotted a plot. Thereafter the second defendant fraudulently and without the plaintiff's consent illegally transferred the plot now known as **KAMBI YA MOTO/MENENGAI BLOCK 1/360** (hereinafter referred to as "***the suit premises***") to the first defendant and later caused the same to be registered in the name of the first defendant. The plaintiff set out the particulars of fraud and said that he had suffered loss and damages as a result of the said fraud and sought judgment against the defendants jointly and severally for an order requiring the Land Registrar to cancel Title No. **KAMPI YA MOTO/MENENGAI BLOCK 1/360** in the name of the first defendant and to issue a new title in the plaintiff's name and mesne profits.

In his written statement of defence, the first defendant admitted that Grace Waruguru Ng'ang'a was the plaintiff's mother but denied that she purchased for the plaintiff shares in the second defendant in the name of Ng'ang'a Gituro. He stated that he lawfully acquired the suit premises and lawfully secured first registration of the same in his name. He denied having committed any acts of fraud as alleged by the plaintiff. The first defendant further stated that he was a polygamous man and the suit premises were being cultivated by his two wives and their children.

The second defendant did not enter any appearance nor file any defence.

Grace Waruguru Ng'ang'a, the plaintiff's mother testified and confirmed that the plaintiff was indeed her son and was born during the state of emergency before independence. She said that the first defendant was her lover and in 1973 the first defendant was living with her in her house at Mangu. She further stated that she bought two shares from the second defendant, one share in her name and the other in the name of the plaintiff (Ng'ang'a Gituro). She produced two receipts which were issued to her by the second defendant. She said that one share was equal to three acres and the second defendant allotted her only three acres and when she enquired about the title deeds for the two parcels of land she was given the one in respect of her son's share. She stated that the first defendant was not a shareholder but he fraudulently obtained a title deed to the suit premises.

Before the titles were issued a surveyor had shown the plaintiff's mother her three acres of land and after the titles were issued it turned out that she was staying on the suit premises. She had developed shops and residential houses on the suit premises, she claimed. She further stated that the first defendant had voluntarily given the title deeds for the suit premises to her. After the first defendant gave her the title deed she went and reported the matter to the

area chief who in turn reported the matter to the area District Officer and the District Officer gave her a letter to take to the lands office.

She further claimed that she lived with the first defendant for about 8 to 10 years and he unlawfully obtained another title deed for the suit premises while he knew that she was holding a similar one.

In cross examination, she stated that she had named the plaintiff after her father, Ng'ang'a Gituro. She met the first defendant in 1969 when she already had five children. She denied having ever been married to the first defendant. She said that she started having problems in her relationship with the first defendant in 1973 as he wanted to leave her and go back to his wife. She further stated that when she paid the money for the two shares, the second defendant did not issue her with any share certificates.

The plaintiff called **Peter Mwangi Ng'ang'a (PW2)** as a witness and he testified that he was the one who built the plaintiff's house on the suit premises having been contracted to do so by the plaintiff's mother. He built a residential house, a shop, a butchery and a hotel. He said that he completed the work in 1988.

The plaintiff told the court that he was a tax driver and was born in 1963. He said that the first defendant was a friend to his mother (PW1). He said that he became a shareholder of the second defendant through payments which were effected by his mother. However, the title deed for the parcel of land which was supposed to be his was issued in the name of the first defendant. He urged the court to enter judgment in his favour as prayed in the plaint.

In cross examination, the plaintiff said that he had lost his identity card and when Mr. Orege, counsel for the first defendant showed him a copy of the same it had the name Saleh Ng'ang'a Manoah. He said that he had changed his name from **Saleh Ng'ang'a Gituro** to **Saleh Ng'ang'a Manoah** in 1981. He further stated that he adopted the name **Manoah** (the first defendant's name) on instructions of his mother and the first defendant.

The first defendant was a retired Kenya Railways worker and at the time of the hearing he was staying at the suit premises. He testified that the plaintiff's mother had been his friend and they lived together from 1969 to 1990. He said that he acquired a title deed for the suit premises in 1985 but it got lost and he reported the loss to Menengai Police Station and was issued with a police abstract. On 21st June 1991, the loss of the original title was gazetted and he was issued with another title deed. He said that the title deed that was produced by the plaintiff was the one which got lost and became null and void after gazettment of its loss. He denied having given the title to the plaintiff's mother. He further stated that he was a share holder of the second defendant and produced a share certificate as defence exhibit C. He said that he paid Kshs.3,100/- for 150 shares and Kshs.200/- as registration fees but the receipts which were issued to him by the second defendant were stolen by the plaintiff. The first defendant further stated that he was the one who developed the suit property and not the plaintiff's mother. He had also bought for the plaintiff's mother a parcel of land known as Plot 1/359 which was next to the suit premises. He denied having obtained the title deed to the suit premises fraudulently. He said that **Peter Mwangi Ng'ang'a (PW2)** was his contractor but since he was a relative of the plaintiff's mother he had agreed to testify in favour of the plaintiff.

In cross examination by Mr. Mungai Mbugua for the plaintiff, the first defendant said that he did not have any differences with the plaintiff until 1991 when his mother told her children to kill him (the first defendant) so that they could inherit the property that he had. She said that in his presence and the children started assaulting him. He reported the matter to the police and the plaintiff's mother and one of her sons known as Macharia were arrested and charged in a court of law. However, he was prevailed upon by the plaintiff's mother to withdraw the case which he did.

In his submissions, the plaintiff's counsel stated that the first defendant had not rebutted the particulars of fraud that were alleged against him by the plaintiff. He further submitted that although the first defendant had shown to the court a title deed for the suit premises that was registered in his name, receipts had been tendered by PW1 to prove that she had indeed purchased shares in the second defendant company for herself and the plaintiff who was then a minor. He urged the court to presume the existence of a trust in favour of the plaintiff. He relied on LIMULI VS MARKO SABAYI [1979] KLR 251 where it was held:-

“There is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land even if it is a first registration, and there is nothing to prevent giving effect to such a trust by requiring the trustee to execute transfer documents”. He further cited MUTHUITA VS WAROE [1982] KLR 186 where it was held that:-

“The absence of a reference to a trust in an instrument of acquisition of land does not affect the enforceability of a trust existing in the land. The provisions requiring reference to a trust in Section 126 of RLA are not mandatory but merely permissive”.

The first defendant's advocate submitted that the plaintiff had failed to prove the allegations of fraud that were made against his client and urged the court to find that the first defendant was the registered lawful proprietor of the suit premises. He further submitted that without existence of any marriage between PW1 and the first defendant any claim of any beneficial interest by PW1 over the suit premises was capricious, oppressive and far fetched. He also pointed out that there was no nexus between the plaintiff's exhibits 1(a), (b), (c) and (e) and the suit premises. He further submitted that there was no nexus between the names **Saleh Ng'ang'a** and **Ng'ang'a Gituro**. It was also not clear what the actual name of the plaintiff was because his identity card bore his name as **Saleh Ng'ang'a Manoah**.

Mr. Orege urged the court to hold that the first defendant was the one who developed the suit premises and had been in occupation of the same and proceed to dismiss the plaintiff's case.

It is not in dispute that the first defendant is the registered proprietor of the suit premises since 15th April 1985. It is also not in dispute that he reported the loss of his land certificate for the suit premises and the same was gazetted on 21st June 1991 and thereafter he was issued with another title deed on 26th August 1991. The effect of such gazettment of loss of the original title deed was to nullify the title deed that had been issued previously. The title deed that was produced by PW1, though in the first defendant's name, was not valid as the same had already been nullified and a new one issued.

The receipts which were produced by the plaintiff were issued by the second defendant in the name **Ng'ang'a Gitunu** and *not* **Ng'ang'a Gituro**. All the five receipts bear the same name. It is therefore doubtful whether the said receipts were intended to be issued to a Mr. Ng'ang'a Gituro when they bear the name **Ng'ang'a Gitunu** and the plaintiff's mother never raised any issue with the person who issued the same if indeed her evidence can be believed. Infact the first receipt that was issued on 9th April 1973 was in the name of **Ng'ang'a Gilunu**. The plaintiff was not issued with any share certificate by the second defendant but on the other hand the first defendant produced a share certificate (D. Exhibit C) issued by the second defendant for 150 shares. Thereafter the first defendant was issued with a title deed in respect of the suit premises. The plaintiff did not prove that there was any fraud on the part of the defendants in the issuance of the said title deed. If there was no evidence that the first defendant was a share holder in the second defendant, then there would have been some suspicion of fraud as to how he had acquired the said title deed but not so when there is clear evidence that he was indeed a share holder in the said company.

If the plaintiff's mother truly believed that the first defendant had acquired the title deed to the suit premises unprocedurally way back in 1985, she should have taken appropriate legal

action immediately thereafter rather than wait until October 1991 when she registered a caution against the title claiming beneficial interest over the said property, and more so, considering the fact that she was not married to the first defendant.

The first defendant testified that he had lived well with the plaintiff's mother until 1991 when she told her children to kill him so that they could acquire his property and it is therefore not surprising that it was in the same year that the plaintiff's mother proceeded to register the aforesaid caution. On the other hand, the plaintiff's mother claimed that she started having problems in her relationship with the first defendant in 1973 when he wanted to leave her and go back to his wife. If what she alleged in court was true, she would have taken action immediately she realised that the first defendant had acquired a title deed to the suit premises. The contention by PW1 was not easily believable.

In my view the plaintiff's claim was not proved and I dismiss his suit with costs to the first defendant. I hold that the first defendant is the registered proprietor of the suit premises. The plaintiff and his mother have nothing to do with that property.

DATED, SIGNED and DELIVERED at Nakuru this 18th day of May, 2006.

D. MUSINGA

JUDGE

18/5/2006

Judgment delivered in open court in the presence of Miss Tangwa for the plaintiff and Mr. Onganyi holding brief for Mr. Orege for the defendant.

D.

MUSINGA

JUDGE

18/5/2006