



Mereng v Ali (Substituted by Ali Kipkering) & another (Environment & Land Case 186 of 2012) [2022] KEELC 13402 (KLR) (22 September 2022) (Judgment)

Neutral citation: [2022] KEELC 13402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 186 OF 2012
EO OBAGA, J
SEPTEMBER 22, 2022**

BETWEEN

TOROITICH MISOI MERENG PLAINTIFF

AND

MOHAMED ALI (SUBSTITUTED BY ALI KIPKERING) 1ST DEFENDANT

SETTLEMENT FUND TRUSTEE 2ND DEFENDANT

JUDGMENT

Introduction

1. The plaintiff brought this suit against the defendants seeking the following reliefs:-
 - a. The recovery of the suit namely Kuinet Settlement Scheme plot number 256 approximate area five (5) acres from the defendants jointly and severally to the plaintiff.
 - b. An injunction to permanently and temporarily restrain the defendants jointly and severally by themselves, their agents or servants or whosoever from entering into, trespassing upon, interfering with, allowing the transfer of or dealing in whatever manner with the plaintiff's suit land namely Kuinet Settlement Scheme plot number 256 approximate area five (5) acres.
 - c. Costs and interest thereon.
 - d. Any other or further relief deemed fit in favour of the plaintiff.

Background

2. The 1st defendant when this suit was filed was Mohamed Ali (deceased) who died on March 29, 2010. Grant of letters of administration *ad litem* were granted to his son Ali Kipkering on September 23, 2019. The deceased's son was substituted in his place on November 7, 2019.



3. At the time of filing the suit, the plaintiff contemporaneously filed an application for injunction seeking to restrain the defendants from interfering with land parcel known as Kuinet Settlement Scheme plot No 256 (suit property). The application for injunction was fully heard and the same was dismissed with costs in a ruling delivered on June 9, 2005.
4. The plaintiff was aggrieved with the order of June 9, 2005 dismissing his application for injunction. He preferred an appeal against the ruling to the Court of Appeal. In a judgement delivered on November 11, 2011, the Court of Appeal set aside the ruling and order of the superior court and in place thereof made an order allowing the plaintiff's application for injunction.

Plaintiff's Case:

5. The plaintiff's case is that he had donated ten (10) acres of his land for the construction of Kapkono Primary School. In or around 1981 locational leaders from Soy location approached Hon KNK Biwott to assist the plaintiff get a Government plot in appreciation of his gesture of donating land for public utility. Hon Biwott agreed to the leaders' request and the plaintiff was allocated plot No 256 at Kuinet Settlement Scheme.
6. The plaintiff was given an allocation letter for a plot measuring 5 acres at Vyas Scheme which was then under demarcation. When the process of demarcation was completed, the plaintiff was allocated plot No 256 vide an offer letter dated June 6, 1983 in what now was called Kuinet Settlement Scheme.
7. The plaintiff accepted the offer on the following day that is June 7, 1983 by paying 10% of the purchase price which was Kshs 625/= The plaintiff then took possession of the suit property. He constructed a house, dug a borehole and put up a pit latrine. He started cultivating the suit property.
8. In January 1997, a lady from the settlement office, Eldoret went to the suit property and ploughed a small portion without his consent. The plaintiff resisted the lady's move successfully. He went to the Settlement office at Eldoret whereby he found that his name had been cancelled by pen and in place thereof, the name of the deceased had been inserted.
9. The plaintiff was referred to Nairobi where he met the Director of Settlement one Tomno now deceased. When he explained to the Director about what had happened and that he has been on the suit property since 1984, the said director told him that he was misled into re-allocating the suit property to the deceased. The Director offered to give him an alternative plot but he declined as there was no alternative plot as he was still in possession of the suit property and had not been notified of the alleged re-possession.
10. The plaintiff came back and went to the area chief who referred him to the District Commissioner, Uasin Gishu. The District Commissioner by then was Mr Barsangul who became hostile to him. He went back to his area chief who referred him to the District Officer. The District officer could not help him. He went back to the Settlement Office at Eldoret where a clerk perused the file and informed him that there was a letter dated December 16, 1999 by the District Commissioner which was addressed to him. The clerk did not however give him a copy.
11. In April, 2004, the plaintiff went to the Settlement Office at Eldoret in a bid to clear his arrears following the Government directive of 2003 that all those who owed money to the Settlement Fund Trustee had to clear the same. He was informed that the deceased had cleared the arrears.
12. On November 6, 2004, a team of five men and one lady went to the suit property and claimed ownership of the same. The six went to the village elder who demanded to see their ownership



documents but they did not have any. They went away promising to come back later with ownership documents. This is what prompted the plaintiff to file a suit against the defendants.

First Defendant's Case:

13. DW1 Ali Kipkering is son of the deceased. He testified that he is the administrator of the estate of the deceased. His father applied for allocation of a plot at Kuinet Settlement Scheme. The application was successful and he was allocated plot No 256. He signed a charge and paid 10% of the purchase price which was 625/= His father was shown the boundaries of the suit property. He proceeded to construct a house on the same, a borehole and a pit latrine. He also put up a live fence and started cultivating the suit property.
14. The deceased thereafter cleared the balance due to the Settlement Fund Trustee (SFT). He collected a discharge of charge and transfer documents from the SFT for purposes of processing title. These documents were however lost and a report of the loss was reported to Kapsabet Police Station who issued a police abstract to that effect.
15. The witness stated that the suit property was allocated to the deceased after the plaintiff failed to meet the conditions in the letter of offer which included non payment of the amount due to SFT. The witness maintained that the deceased did not obtain the suit property fraudulently and that even Kenya Power and Lighting Company sought permission to erect power lines through the deceased's land. He urged the court to dismiss the plaintiff's claim.
16. DW1 Ali Kipkering called DW2 Abraham Kiprono Rotich who testified that he has been a village elder of the area where the suit property falls and that he is aware that the deceased was the owner of the suit property; that at some time DW1 planted wheat on the suit property but the Plaintiff planted oats on the same thus destroying the wheat which had been planted by DW1.
17. Also called as a witness for 1st defendant is DW3 Joseph Kibiego Mutai who testified that the deceased who died on March 29, 2010 was his father and that DW1 is his brother. He stated that he is aware the deceased was allocated the suit property and that though he does not reside on the suit property, they cultivate the suit property as a family. He stated that he stays about three (3) Kilometres away from the suit property.

Second Defendant's Case

18. The second Defendant is the Settlement Fund Trustee. The second Defendant's case was presented to court by DW4 Dan Mbuvi Ndonge Kalamba the Land and Adjudication officer Uasin Gishu. This witness produced the parcel file which is held by the Settlement office at Eldoret. According to the file documents, the suit property was initially allocated to the plaintiff who paid the 10% required. A charge was prepared but that the plaintiff did not meet the conditions in the offer letter. A notice to remedy the breach was issued but that the Plaintiff did not comply.
19. The suit property was thereafter repossessed and allocated to the deceased who proceeded to pay the requisite charges. A charge in his favour was prepared. After the deceased completed paying for the suit property, he collected a discharge of charge and transfer documents. The witness however stated that one cannot lose his property if the period given to remedy the breach has not expired and a cancellation notice duly issued.

Analysis and Determination

20. The plaintiff filed his submissions on July 18, 2022. The 1st defendant filed his submissions on June 15, 2022. The 2nd defendant filed submissions on July 28, 2022. I have carefully gone through the



evidence adduced by the parties herein as well as their submissions. I do not wish to rehash the parties submissions as they mainly repeat the evidence which was adduced during the hearing save for the authorities relied on.

21. There is no contention that the suit property was initially allocated to the plaintiff. The plaintiff in fact produced allocation letter dated October 14, 1981, letter of offer dated June 6, 1983, charge dated June 7, 1983 and receipt No 686183 dated June 7, 1983 for Kshs 625/= being 10% of the purchase price including conveyancing fee as exhibits 1,2,3 and 4 respectively.
22. There is also no contention that the 1st defendant's position is that the suit property was allocated to the deceased Mohamed Ali upon the same being repossessed from the plaintiff on the grounds that he had failed to meet the conditions in the offer letter and charge namely; cultivate the land, erect a dwelling house, erect a fence around the land and pay the outstanding arrears.
23. The issues which emerge for determination are firstly, whether the plaintiff was in breach of the conditions in the offer letter and charge. Secondly, was the allotment to the plaintiff validly and lawfully repossessed and or cancelled. Thirdly, was the allocation to the deceased lawfully done. Fourthly, which order should be made on costs.

Whether The Plaintiff Was In Breach Of The Conditions In The Offer Letter And Charge

24. The conditions in the offer letter were that the land was to be used for agricultural purposes only. The land was not to be subdivided, charged, let, leased or transferred without prior consent in writing by the SFT. The allottee was expected within six months of taking possession cultivate at least one acre of arable land; erect a dwelling house of suitable materials; erect a fence of suitable materials or plant a hedge around the perimeter of the land.
25. In addition to the conditions in the letter of offer, the plaintiff was expected to repay the principal sum of Kshs 6102/= and interest thereon from June 7, 1983 at the rate of 6½% per annum. The principal sum and interest was to be paid by 56 consecutive half -yearly instalments of Kshs 238/= The charge was clear in clause 6 that it was subject to the *Agriculture Act*.
26. It is on the basis of the above conditions and evidence adduced that I will examine whether there was breach of any of the conditions. The plaintiff's evidence is that he took possession of the suit property in 1993. He proceeded to put up a house, dug a well, erected a live fence and started cultivating the land. He remained in possession until January 1997 when a lady from the Settlement Office Eldoret came and started to plough the land. The plaintiff successfully resisted her moves. The lady's actions are the ones which forced the plaintiff to go and ascertain what was happening from the Settlement office at Eldoret. This is when he discovered that the suit property had allegedly been repossessed and re-allocated to the deceased.
27. There is evidence on record that the plaintiff has remained in possession of the suit property up until the date of hearing of this suit. The parcel file which was produced by the Land and Adjudication officer Eldoret as exhibit 9 confirms this fact. On November 7, 1997, the deceased wrote a letter addressed to the Land Adjudication and Settlement Officer stating that he had been informed that the plaintiff who had been evicted from the land was trying to convince the settlement cashier to allow him to pay. If the plaintiff was not in possession as alleged, then the alleged issue of eviction would not have arisen.
28. Again on December 16, 1999, an officer from the District Commissioner's Office Uasin Gishu wrote to the plaintiff stating that he was still cultivating the land yet he knew that the same had been re-possessed and re-allocated to the deceased. As late as October 16, 2000, the SFT were addressing demand notices to the plaintiff asking him to pay outstanding arrears of the loan.



29. On November 19, 2019, the District Land Adjudication and Settlement officer visited the suit property and filed a ground status report which showed that it is son of the plaintiff who was in possession. The land had been fenced, there was a semi-permanent house, a well and a latrine and wheat had been harvested recently. This report was written pursuant to the request by the Director of Land Adjudication and Settlement.
30. The deceased and or his representatives had been enjoined from interfering with the suit property. The deceased's son in defiance of the injunction went and planted wheat on it. The Plaintiff also planted oats on it. When the issue was brought to the attention of court, Lady Justice (DR) Odeny sent the Deputy Registrar of court to go and ascertain the position on the ground. The report which was filed showed that the wheat and oats had been planted together. It was therefore impossible for one to harvest either the wheat or oats. The judge proceeded to dismiss the 1st defendant's application which was seeking orders to allow him to harvest the wheat as he had planted the same contrary to the orders of the court.
31. It is therefore clear that the plaintiff did not breach any of the conditions in the offer letter. The letters which were written purporting to claim that he had not fenced the land, put up a dwelling house or cultivated it were purposely done to mislead the Director of Land Adjudication and Settlement into re-allocating the land to the deceased.
32. In a brief to the Attorney General, the County Land and Adjudication officer who testified in this case as DW4 was categorical that there is no evidence that the 1st defendant has ever been in possession of the suit property.
33. On the issue of non payment of arrears outstanding, the evidence of the plaintiff is that he had been trying to clear the same but he was always told that he could not do so as the deceased had paid for the same. Demands for payment however continued to be addressed to him and he finally cleared the arrears as confirmed through plaintiff exhibits 5, 6 and 7. It is therefore clear that the plaintiff was neither in breach of the conditions in the letter of offer nor the conditions in the charge.

Was The Allotment To The Plaintiff Validly And Lawfully Re-possessed Or Cancelled

34. As I said hereinabove, the charge which the plaintiff signed was subject to the *Agriculture Act*. Section 174 of the *Act* provided for remedies for recovery of advances on land. If the 2nd defendant felt that the plaintiff had defaulted in payment of the outstanding arrears, then the provisions of the *Agricultural Finance Corporation Act* cap 323 had to be followed. Section 174(1) of the *Act* provides as follows:-

“Where an advance has been made and secured upon any land under this Part, the Settlement Fund Trustees, or any person duly authorized by the Trustees in writing in that behalf, may exercise all such remedies for the recovery of the advance as the Agricultural Finance Corporation is empowered to exercise under the *Agricultural Finance Corporation Act*.”
35. The relevant sections of the *Agricultural Finance Corporation Act* as regards this case are sections 31 and 33 of the *Act*. Section 31(a) and (d) provides as follows:-

At any time, any sum of money, whether principal or interest, due in respect of the loan is unpaid; or

There has been a breach of any other condition of the loan; or



36. Section 33(1) of the *Act* provides as follows:-

“In any of the circumstances or events mentioned in section 31 of this Act, the Corporation may, by notice served on the person to whom the loan has been made or his personal representative (in this section referred to as the debtor) personally or by post, demand repayment of the loan and, after due notice of such demand has been served in similar manner on all subsequent mortgagees of the land on the security of which the loan was made, the Corporation may, without recourse to any court, enter upon the land and either take possession of or sell by public auction through a licensed auctioneer the whole or (where subdivision is not prohibited under section 34 of the Government Lands Act (cap. 280)) any part of the land upon such terms and conditions as the Board may in all the circumstances consider proper.”

37. Section 33(4) of the *Act* provides as follows:-

“A sale under subsection (1) shall not be held until-”

- a. a notice of the sale has been published in the Gazette, or in a newspaper circulating in the area in which the land is situated, stating the date, time and place of the sale, and the terms and conditions of the sale; and
- b. twenty-one days have elapsed since the date of publication of the notice; and
- c. all reasonable steps have been taken by the Corporation to notify in writing the persons having a registered interest (or any unregistered interest of which the Corporation knows) in the land of the intended sale.

38. From the above provisions and particularly section 33(1) of the *Agricultural Finance Corporation Act*, there are two options given. Firstly, is entry and retaking of the charged land or secondly auction of part or all the land charged through licensed Auctioneer.

39. In the instant case, a notice to remedy breach of conditions was addressed to the plaintiff on 1st August, 1994. The plaintiff was given 60 days to rectify the breach. The conditions which were allegedly breached were failure to fence the plot, failure reside on the plot, failure to cultivate on the plot and failure to pay the necessary dues. Before the expiry of the 60 days given, the suit property was re-allocated to the deceased.

40. The *Agricultural Finance Corporation Act* was very clear on what was to happen. The Agricultural Finance Corporation was to either take possession of the land or sell part of it or the whole of it through a Public Auction by a licensed auctioneer. The Act did not provide for re-allocation. There was no evidence adduced to show whether the notice to remedy the breach was delivered personally to the plaintiff or whether it was posted as provided for under section 33(1) of the *Agricultural Finance Corporation Act*. The plaintiff denied ever seeing this letter. His attention was drawn for the first time when a lady from the Settlement office attempted to plough part of the suit property in January 1997.

41. In the case of *Republic v City Council of Nairobi & 3 others* [2014] eKLR Justice Odunga quoted the case of *Rukaya Ali Mohamed v David Gikonyo Nambacha & another* Kisumu HCCA No 9 of 2004 where Justice Warsame (as he then was) stated as follows:-

“Once allotment letter is issued and the allottee meets the conditions therein, the land in question is no longer available for allotment since a letter of allotment confers absolute right of ownership or proprietorship unless it is challenged by the allotting authority or is



acquired through fraud mistake or misrepresentation or that the allotment was out rightly illegal or it was against public interest. In other words, where land has been allocated, the same land cannot be reallocated unless the first allocation is validly and lawfully cancelled.”

42. It is clear from the above quoted provision of the *Agricultural Finance Corporation Act* that the allotment to the plaintiff was not validly and lawfully cancelled or re-possessed.

Was The Allocation To The Deceased Lawfully Done;

43. While dealing with the first two issues herein above, I have demonstrated that the law was not followed. The deceased could not therefore benefit from a flawed process. Even if we were to assume that the plaintiff breached the conditions in the letter of offer and charge and that he was properly served with a notice to remedy the breach which is not the case, the notice to remedy the breach was given on August 1, 1994. The plaintiff was given 60 days within which to remedy the breach. The allocation to he deceased was on August 17, 1994. This was barely 16 days into the 60 days given. The 2nd defendant should have waited for the expiry of the 60 days for the re-allocation to be made if there was such an option because as I have demonstrated hereinabove, there are only two lawful options in which a defaulter can lose his/her land. The first is entry by the Corporation and the second is by sale through Public auction by a licenced auctioneer.
44. The 2nd defendant realized that the allocation of the suit property to the deceased was irregular. This is why they admitted in the defence that indeed the allotment to the deceased had no basis. This explains why the plaintiff was belatedly allowed to clear his arrears decades after he had been prevented to do so despite the deceased having also paid for the same suit property.
45. The documents which the deceased was allegedly given i.e the discharge of charge and transfer could not be found in the parcel file. The deceased’s son claimed that the documents were lost and that he had obtained a Police abstract to that effect. If this was the case, the originals or duplicates of the same could have been found in the parcel file which was produced before the court.
46. The allocation to the deceased was done through misrepresentation of the actual facts. The deceased’s son and his witnesses were not truthful in their testimony. They clearly lied that it is the deceased’s family who constructed a semi-permanent house, dug a borehole on the suit property, put up a live fence and a latrine on the suit property. The ground status of the Adjudication and Settlement office totally contradicts this evidence.
47. The evidence of DW 3 Joseph Kibiego Mutai was not truthful. He at first claimed that he was son to deceased and brother to DW1 Ali Kipkering. When he was cross-examined, it turned out that he was not son of deceased. His claim that it is their family who are cultivating the suit property was also discredited by the ground status report which showed that it is the plaintiff who is in possession.
48. Equally, the evidence of DW2 was discredited during cross-examination. It turned out that he stays at Sirende in Trans-Nzoia County when he claims that he has been a village elder at Kuinet Farm since 1995. It was even doubted that a 25-year-old man could be a village elder.
49. It is therefore clear that the allocation of the suit property was not lawfully done. The 2nd defendant in their defence as well as submissions have conceded as much.

Disposition:

50. From the above analysis it is clear that the plaintiff has proved his case on a balance of probabilities. His claim as been admitted by the 2nd defendant in its defence and submissions. I therefore find that the plaintiff’s claim is well founded. The 1st defendant paid money to the Settlement Fund Trustees. As



was stated in the case of *Philemon L Wambia v Gaitano Lusista Mukofru & 2 others* [2019] eKLR, the 1st defendant subject to law of limitation can seek to recover the amount he paid to Settlement Fund Trustees. I therefore enter judgment for the plaintiff against the defendants in the following terms:-

- a. Recovery of land parcel Kuinet Settlement Scheme Plot Number 256 measuring 5 acres from the defendants.
- b. A permanent injunction to restrain the defendants jointly and severally by themselves, their agents or servants or whosoever from entering into, trespassing upon, interfering with allowing the transfer of or dealings in whatever manner with Kuinet Settlement Scheme Plot No 256 measuring 5 acres other than a transfer to the plaintiff's name.
- c. In the interest of justice and to facilitate the smooth transfer of Kuinet Settlement Scheme plot No 256 to the plaintiff, the illegal offer letter and allotment to the 1st defendant should be cancelled by the 2nd defendant.
- d. The costs of this suit shall be borne jointly and severally by the defendants.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 22ND DAY OF SEPTEMBER, 2022.

E OBAGA

JUDGE

In the virtual presence of;

Ms Bosibori for Dr Chebii for 1st defendant.

Ms Korir for Mr Kenei for plaintiff.

Court Assistant -Albert

E OBAGA

JUDGE

SEPTEMBER 22, 2022

