



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 87 OF 2009

EWOTON LEONARD EKUTIAN.....1ST PLAINTIFF

PIUS ATOK EWOTON.....2ND PLAINTIFF

VERSUS

1. MICHAEL KORE ROTICH

2. PETER NGETICH

3. ALLAN CHELIMO.....DEFENDANTS

4. JOHN KIPKOSGEI CHELIMO

5. KENNETH KIBET CHELIMO

6. JANE CHESANG

JUDGMENT

Introduction

1. The original plaintiff filed this suit on **26/6/2009** against four defendants. An amended plaint was filed on **7/7/2009**. When the original plaintiff passed on he was substituted with the current plaintiffs as administrators of his estate and a further amended plaint was filed on **5/3/2015** reflecting the change of parties. When the 4th defendant passed on the plaint was later further amended on **18/4/2018** to include the current 3rd -5th defendants as administrators of his estate. In the further amended plaint, the plaintiffs sought orders which I replicate verbatim as follows:-

a. A declaration that the late Francis Ewaton plaintiff is the sole allottee of Plot No. 328 in Milimani Settlement Scheme, to the exclusion of the defendants and who should be ordered to move out of the said land and failing which the said defendants, their agents and servants or anybody claiming under them be forcefully evicted.

b. A permanent injunction.

c. Costs and interest.

The Plaintiffs' Case

2. It is the plaintiff's case that the plaintiffs are prosecuting this suit in their capacity as the administrators of the estate of the late **Francis Ewaton**, their father and who died during the pendency of the suit; the 3rd, 4th and 5th defendants are the administrators of the estate of the late **William Chelimo Katamet** and who was the 4th defendant in the amended plaint dated 4/3/2015; the plaintiffs' late father was vide a letter of 27/11/1996 allocated Plot No. 328 at Milimani Settlement Scheme by the Department of Land Adjudication and Settlement, and upon making the requisite payment, the Plot No. 328 measuring 20 acres or thereabouts was identified to the plaintiffs' father who took possession of the same, but the title for the said plot has not been issued yet; that during or about 2001 the defendants trespassed and entered into Plot No. 328 and they without the consent of the plaintiffs' father remained therein and are still in such occupation today; that the deceased (4th defendant in the amended plaint dated 4/3/2015) is an allottee of Plot No. 333 in Milimani Settlement Scheme, but instead of

settling in his rightful plot, the late 4th defendant deliberately moved into the plaintiffs plot and he has remained therein without any justification and upon his demise, the 3rd, 4th and 5th defendant have wrongfully remained in the said plot; that the 1st and 2nd defendants are also allottees to plots in the said Milimani Settlement Scheme, but instead of settling in their right plots, they for no reason and with no justification moved into the plaintiffs' plot and they have to date remained therein; that the 1st and 2nd defendants were at the plaintiffs' father's instance and vide ***Kitale CMC Criminal case No. 1862 of 2001*** prosecuted for forcible detainer in regard to the plaintiffs' Plot No. 328. Although the two were convicted of the offence, their appeal to the ***High Court vide Kitale HC Criminal Appeal No. 73 of 2004*** was allowed whereupon it was held that the plaintiff's remedy lay in a Civil Court, and hence the present suit; that the 4th defendant vide ***Kitale High Court Civil Suit No. 90 of 2001 (Paulina Kimoi Cheboswony and William Chelimo Katamet -vs- Ali Lekeper Lebun)*** sought a declaration that he is the lawful allottee of Plot No. 333 in Milimani Settlement Scheme. Although the said declaration was granted, yet the 4th defendant continues to occupy the plaintiff's Plot No. 328 instead of his Plot No. 333. It is contended by the plaintiffs that the defendants are trespassers in their father's Plot No. 328 in Milimani Settlement Scheme, and who should be ordered to vacate and failing which they be forcefully evicted.

The Defendants' Defence

3. The 1st 2nd 4th and 5th defendants filed their amended statement of defence on **4/8/2009** to include even the 3rd defendant. However they never called evidence in aid of that defence and there is therefore no need to set out its contents *in extenso* herein save for the fact that they deny the claim.

Reply to Defence

4. The original plaintiff filed a reply to defence dated **20/8/2009** joining issues with the defendants on the contents of their defence.

5. The hearing of this suit proceeded on the **20/9/2018**. However, on **27/9/2018** when suit came up for defence hearing neither the defendants nor their representative appeared though the date was fixed in court by consent.

6. PW1, Francis Obiria Oseko, the County Land Adjudication and Settlement Officer in charge of Trans-Nzoia County. The gist of his evidence is that upon the orders of this court he visited Plots Nos. 328, 329, 330, 332, 333, and 356 to confirm the location and occupancy of the plots. According to his records Plot No. 328 is owned by Francis Ewoton, measures 20 acres and was allocated in 1996 and payments were made in respect thereof.

7. From PW1's evidence it can be seen that Plots Nos. 328, 329, 330, 332, 333, and 356 are separate and distinct plots and they are all on the records. Plot 329 is in the name of Samson Eliman Evokwon and is occupied by Lazaro Rotich; Plot No. 330 is in the name of Luka Kibachwa Kiptabus and is occupied by Gideon Kibutu; Plot No. 332 is in the name of Chelangat Kaino and it is occupied by Kobilo Solomon; Plot No. 333 is in the name of Hellena Boso and is occupied by Joel Cheboi while Plot No. 356 is in the name of James Ebur. Plot No. 328 is occupied by various people as follows: Michael Rotich (1st defendant), James Chesang, Luka Kibacho Kiptabus, Paulina Kemo Chebosom, William Katamet (who at the date of the report, was the original 4th defendant now substituted with the 3rd, 4th and 5th defendants) and Chelangat Kaino.

8. According to the witness there is no evidence on the record that the allocation of **Plot No. 328** to Francis Ewoton has ever been cancelled.

9. PW2, Joshua Kibet Chelanga, a Surveyor in the Department of Land Adjudication and Settlement testified in this case. He stated that has custody of maps for the scheme. He showed that Plot No. 328 exists and is to be found on Sheet No. 2 of the map while all the other plots save No. 356 are not on that sheet. The maps from the Director of Surveys were produced in evidence by consent after **PW2** had testified.

10. PW3, Pius Ewoton, is the 2nd plaintiff. He testified at the hearing and produced the Grant of Letters of Administration to the Estate of the late Francis Ewoton. He is the son to the late Francis Ewoton. He stated that his father had failed to take possession of the land because there were intruders thereon.

11. I have already indicated that the defendants did not call evidence in support of their defence to counter the plaintiffs' evidence.

12. In the final analysis I find that the plaintiffs have established their claim on a balance of probabilities and I enter judgment for the plaintiffs against the defendants jointly and severally as prayed in the further amended plaint dated **18/4/2018** and specifically issue the following orders:

(a) A declaration, declaring that the late Francis Ewoton (now deceased) is the sole allottee of plot 328 in Milimani Settlement Scheme.

(b) That the defendants, their servants and/or agents and/or anyone claiming under them are trespassers on plot no 328, in Milimani Settlement Scheme;

(c) An order that the defendants their servants and/or agents and/or anyone claiming under them shall vacate from plot no 328 in Milimani Settlement Scheme and in default be evicted therefrom.

(d) A permanent injunction restraining the defendants their servants and/or agents and/or anyone claiming under them from interfering with the plaintiff's quiet possession of plot no 328 in Milimani Settlement Scheme;

(e) An order that the defendants shall jointly and severally pay to the plaintiffs the costs of this suit.

Dated, signed and delivered at Kitale on this 29th day of January, 2019.

MWANGI NJOROGE

JUDGE

29/01/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Kiarie for the plaintiff

Mr. Wanyama for the defendant

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

29/01/2019