



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 186 OF 2012

TOROITICH MISOI MERENG::::::::::::::::::::: PLAINTIFF

VERSUS

MOHAMED ALI:::::::::::::::::::::1ST DEFENDANT

SETTLEMNT FUND TRUSTEES:::::::::::::2ND DEFENDANT

JUDGMENT

By a plaint dated 10th November 2004 the plaintiff sued the defendants for orders for:

1. The recovery of the suit land namely KUINET SETTLEMENT SCHEME PLOT NO.256 approximate area five (5) acres from the defendants jointly and severally to the plaintiff.
2. An injunction to permanently and temporarily restrain the defendants jointly and severally by themselves, their 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 NO. 256 approximate area five (5) acres.
3. Costs and interest thereon
4. Any other or further relief deemed fit in favour of the plaintiff.

The 1st defendant filed a memorandum of appearance dated and filed on 14/12/04 and a statement of defence dated and filed on 1/3/04. The 2nd defendant neither entered appearance nor filed a defence hence interlocutory judgement was entered on 16/3/15.

This matter came up for formal proof on 17/5/17 when the plaintiff herein testified. He stated that he was allocated 5 acres by the department of Settlement vide a letter dated 14th October 1981. The plaintiff produced the allocation letter as exhibit No. 1 and an offer letter dated 6th June 1983 as exhibit No. 2. It was the plaintiff's evidence that he paid Kshs. 625/ whereby he was given an official receipt and a charge dated 7th June 1983 which he produced in court as exhibits Nos 3 & 4 respectively. He also stated that he was taken to the Settlement offices in Eldoret and has been in occupation and possession. He further stated that the 1st defendant has never been in occupation of the suit land. The plaintiff stated that this dispute arose in 1997 and 2004 when a lady from the Settlement office Eldoret came and tried to use force to plough the suit land but the plaintiff resisted.

Counsel's Submissions

Counsel reiterated the plaintiff's evidence and submitted that the issues for determination are as to whether the plaintiff was allocated 5 acres in KUINET SETTLEMENT SCHEME NO. 256, whether the defendants committed acts of fraud as pleaded in paragraph 6,7,8, & 9 of the plaint and whether the plaintiff is entitled to the reliefs sought.

Mr. Cheptarus relied on the on the case of **Adrian Gilbert Muteshi v William Samoei Ruto & 4 others [2013] eKLR** to persuade the court that the plaintiff is entitled to the reliefs sought. He submitted that the plaintiff had proved that he was allocated the suit parcel of land by the Settlement Fund Trustee whereby he paid the requisite fees and took possession thereof. He further stated that there was an instance where the 2nd defendant cancelled the plaintiff's name and replaced it with the 1st defendant without prior notice.

Counsel submitted that it was the plaintiff's case that there were unlawful, fraudulent and illegal transactions by the defendants in an attempt to deprive the plaintiff of his suit land. He stated that this was manifested by various attempts by some unknown people from the Eldoret Settlement office who visited the plaintiff's land in 2004 claiming ownership which the plaintiff resisted. Counsel further submitted that the plaintiff had proved his case on a balance of probabilities and therefore was entitled to the reliefs sought

Analysis and determination

I will add more issues for determination of the court as follows:

1. Whether the plaintiff was allocated, accepted, took possession and occupation of the suit land.
2. Whether the 2nd defendant cancelled the allotment of the suit property to the plaintiff and if so whether it was justified to do so.
3. Whether the subsequent allotment of suit land to the 1st defendant was irregular, fraudulent and/or unlawful.
4. Whether the plaintiff is entitled to the reliefs sought in the plaint.

On the first issue as to whether the plaintiff was allocated 5 acres in KUINET SETTLEMENT SCHEME NO. 256, I find that there is undisputed evidence adduced by the plaintiff that he was allocated the land by the Settlement Fund Trustee vide a letter dated 14th October 1981 which he produced as exhibit No.1. The plaintiff was later given a letter of offer dated 6th June 1983 by the 2nd defendant which letter he produced as exhibit No. 2. It was the plaintiff's evidence that he paid some money to SFT and was issued with an official receipt. The plaintiff was later given a charge document in respect of the suit land dated 7th June 1983 which he produced as exhibit No. 4.

It is also on record from the plaintiff's evidence that he is the one in occupation as he had been shown the suit plot by the Settlement office Eldoret. The plaintiff also stated that a lady from the lands office came to plough the suit land but the plaintiff resisted prompting him to visit the Director of Settlement in Nairobi who informed him that he had been misadvised by the Settlement office Eldoret about the real position in respect of the suit land.

On the second issue, the plaintiff alleged that the 1st and 2nd defendants had fraudulently cancelled his name and allocated the suit land to the 1st defendant without following due procedures of notifying him of the said action. It is not clear how the 1st defendant came to be given a discharge of charge and yet the allocation was to the plaintiff. There was no evidence that due procedures for notification to the plaintiff were followed before such steps were taken.

It is unfortunate that the 2nd defendant failed to enter appearance in this matter to shed light on the

allegations of fraud by the plaintiff. If they had acted within the law, then they should have filed a defence to explain how they repossessed the suit land and allocated to the 1st defendant. This is water under the bridge and the court is left with the plaintiff's evidence, the law and authorities to determine the case. One would ask whether the provisions of Section 33(1) of the Agricultural Finance Corporation were adhered to which required SFT in case of default to serve a notice on the plaintiff demanding payment and thereafter if the charged land had to be sold, then to sell the land by public auction after publishing a 21 days' notice of sale in the gazette among other things.

From the evidence it can be concluded that there was something fishy happening at the Settlement office in respect of this plot. The plaintiff had to visit the settlement office in Eldoret and Nairobi to try and clear the air. The plaintiff also went to pay the SFT loan but was told that the amount had been cleared by the 1st defendant who had been irregularly allocated his land. At one point he sought assistance from the provincial Administration including the local Area Chief but did not get any help necessitating the court action. The above narrative settles the 3rd issue as to whether the subsequent allotment of suit land to the 1st defendant was irregular, fraudulent and/or unlawful. The answer is in the affirmative.

This matter was filed contemporaneously with an application for an injunction restraining the defendants from interfering with the suit land but the same was dismissed prompting the plaintiff to move to the Court of Appeal against the ruling. The Appeal was heard and the court allowed it granting an order of injunction.

In the case of **Kihara Muttu –vs- the Director of Land Adjudication & settlement (Misc. application NO.555 of 1996** Hon. Justice Githinji (as he then was) observed as follows:-

“in our case, applicant had been allocated land, paid initial deposit, signed necessary documents and had used the land for many years according to him. The land was forfeited and re-allocated to the interested party. The court in the present case is considering the exercise of statutory power, whether it was exercised in accordance with the law. If the cancellation of the allocation to applicant and the re-allocation was contrary to the law, the court has jurisdiction to grant orders sought although it cannot cancel the title. Applicant says that he will seek cancellation in another forum and the interested party will have a chance to be heard”.

It should be noted as was rightly put by Odunga J while citing the case of **Rukaya Ali Mohammed –vs- David Gikonyo Nambacha & another (Kisumu HCCC NO.9 of 2004** that once an 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 outrightly, illegal or it was against public interest. In this current case the plaintiff was allotted the suit land and he met the conditions therein until the defendants without notice illegally allotted the same land to the 1st defendant. The plaintiff has been in occupation ever since he was allocated the land. From the evidence before me, I am satisfied that the purported cancellation of the allotment to the plaintiff was not done according to the law and the said cancellation was null and void.

From the foregoing and having considered the evidence on record, the submissions of counsel for the Plaintiff together with the relevant authorities, I find that the plaintiff is entitled to the reliefs sought in the plaint. I also find that the 2nd defendant irregularly repossessed the suit land and allocated it to the 1st defendant without following the laid down procedures according to the law. I therefore enter judgement in favour of the plaintiff in terms of prayers (a) and (b) of the plaint.

The costs of the suit are awarded to the plaintiff as against the defendants.

Dated and delivered at Eldoret on this 17th day of October, 2017.

M.A ODENY

JUDGE