



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 979 OF 2012

Formerly HCC 18 of 2005

SARAH CHELEL BOIT.....PLAINTIFF

VS

DAVID SOIN & 14 OTHERS.....DEFENDANTS

(Suit for eviction; counterclaim that suit land is held in trust; land sold with employees on a portion of it; the employees alleging a promise to settle them; no document to demonstrate such promise; no independent witness; no proof of trust; prayer for eviction allowed).

JUDGMENT

A. INTRODUCTION AND PLEADINGS

This suit was commenced by way of plaint filed on 15 December 2004 at the High Court in Kisumu and registered as Kisumu High Court Civil Case No. 9 of 2004. It was transferred to the High Court at Eldoret and registered as Eldoret High Court Civil Case No. 15 of 2005 and later to the Environment and Land Court where it was registered as Eldoret E&L Case No. 979 of 2012. In the plaint, the plaintiff pleaded that she is the registered proprietor of the land parcel L.R No. 9401 which land measures about 153.38 Hectares. It is pleaded that the defendants without any colour of right have unlawfully trespassed and entered into a portion of the said land measuring about 15 acres. The claim of the plaintiff is for a declaration that that the defendant's occupation is unlawful and she has also sought orders of eviction.

The law firm of M/s Ledishah J.K Kittony & Company Advocates filed Defence and Counterclaim for all defendants save for the 8th and 15th defendants. The same was later amended. The case of the said defendants is that they are not trespassers and that they have been occupation of the land for a period of over 70 years. They made a claim for the portion that they occupy by way of adverse possession. In the alternative, they pleaded that when the plaintiff's late husband, Samuel Boit, took possession of the land, he found the defendants on the land and recognized them and therefore held the land in trust for them. It is pleaded that when Sameul Boit died, the farm was managed by his brother, Peter Boit, who also recognized the defendant's interests. They have sought a declaratory order that the land is held in trust for them and claim 5 acres each. They have asked that the land be sub-divided among the defendants, their children, servants and or agents.

The plaintiff filed a Reply to Defence and Defence to Counterclaim. She refuted the allegations of the defendants and averred that they are mere squatters. She denied that the defendants were on the suit land when her husband acquired it or that her deceased husband recognized them as being entitled to any portion of the land. She denied that her husband held the land or any portion in trust for them. She pleaded that if there was any trust, the same should have been noted in the register.

The plaintiffs later filed an application seeking to strike out the defence and counterclaim. Through a ruling delivered on 13 May 2009, Mwilu J (as she then was), struck off the claim of the defendants related to Adverse Possession, but directed that the question of whether or not the defendants were entitled to the suit land by way of trust be tried.

The parties finalized pre-trials and the matter proceeded for hearing.

B. EVIDENCE OF THE PARTIES

(i) Evidence of the Plaintiff

The plaintiff testified as PW-1. She testified that in the year 1984, her late husband, Samwel Kipler Boit, purchased the suit land from one Duncan Campbell Scroggie and the title was transferred into his name. Mr. Boit died on 19 May 1989. Upon his death, the plaintiff took out letters of administration. The land was eventually transferred into her name on 26 November 2001 as personal representative and on the same day the title was transferred to her as beneficiary. The land is now in her name and she produced the certificate of title. She stated that there is no entry in the register of any trust. She testified that the defendants were former workers of the previous owner and were residing on the farm as workers. After her husband bought the land, he retained the defendants as his employees. She stated that the farm had tea and dairy cattle and there was an area where most of the workers resided though others lived on different areas of the land. They developed some workers quarters and moved their workers to the said quarters. However, the defendants refused to move to the quarters. She came to know that the defendants were claiming a portion of the land in the year 2000 when she took over the land. They were occupying about 10-15 acres and were no longer working in the farm. She denied any knowledge of any trust in favour of the defendants.

In cross-examination, PW-1 stated that her entry in the register was as "beneficiary" pursuant to the grant of letters of administration issued to her. She admitted that the children of Mr. Boit are also beneficiaries in the land although they have not been registered in the title. She testified that she got the 15 names of the defendants from her farm manager, and that it was not within her knowledge that defendants 8, 10 and 15 had died when the suit was instituted. She also said that she is not aware that defendants 3 and 4 died after the institution of the suit. She was not aware that there are 40 other families on the land whom she did not name as defendants. She was however not able to tell the number of households in the disputed land. She has found it hard to access the area because of hostility. She could not tell whether the defendants were in occupation of the land when her husband bought it. She was aware of a meeting held between her husband, Mr. Scroggie the seller, and the workers, before they purchased the land. She however did not attend the meeting. She denied any suggestion that it was agreed that her husband would hold the land in trust for the workers, and denied that they had agreed to allocate some land to them. They could however be allowed to plough some land at the quarters for their subsistence. After the death of her husband, her father in law appointed Peter Boit, a brother of the deceased, to manage the farm. She denied that Peter recognized the interests of the defendants. At some point the farm was given out to be managed by Eastern Produce Company Limited.

PW-2 was Silas Shihinji, an executive officer at Eldoret High Court. He produced the file in respect of the succession cause of the late Samwel Boit which is Eldoret High Court P & A No. 18 of 1990. It emerged that there were two orders confirming the Grant of Letters of Administration; the first on 4 June 1991 and the second on 30 July 2009. The confirmation of 4 June 1991 did not however distribute anything. The confirmed grant of 30 July 2009 distributed the property to the plaintiff to hold in trust for herself and 4 others, presumably her children.

With the above evidence, the plaintiff closed her case.

(ii) Evidence of the Defendants

DW-1 was Jane Wambui Ngotho who is one of the defendants. She testified that she moved into the farm together with her parents when she was still young. She got married while living on the land. At that time,

the land was a forest and they cleared it, and planted tea for the European settler who then owned the farm. She testified that when they learnt that the farm was being sold to Samwel Boit, they went to the District Officer who called a meeting. In the meeting Samwel was asked what he intended to do with the workers on the farm, and he responded that he would continue staying with the workers, in the same way the previous owner was staying with them. After taking over the farm, Samwel Boit relocated them to another area of the farm, which is where they reside to date. This area where they were relocated was approved by the Chief who measured for each, 30-40 steps. Samwel provided timber for building of houses which was done. About 15 persons were moved to this area and the witness stated that Samwel promised them 5 acres each. He however did not deliver on his promise until he died. When the plaintiff took over, she paid each of them gratuity for the years they had worked because she was laying them off. They however continued occupying the land because of the promise they had been given by Samwel.

In cross-examination, DW-1 agreed that she entered the farm as an employee of Mr. Scroggie and when the land was sold, they were still his employees. She had nothing in writing to support her position that Samwel promised them land. She stated that she never worked for Samwel and neither did the other 14 persons, as they had all retired during Scroggie's tenure.

DW-2 was David Sitienei Soin. He is also one of the defendants. He testified that 4 of the named defendants, Anna Chepchumba Kogo (10th defendant), Joseph Kipruto Kosgei (8th defendant), Arap Kenei (15th defendant) and Kipsum Kurtany (5th defendant), had died before the institution of the case. He testified that he was born on the land and the European settler found his parents on the land. His parents worked for the initial European settler and helped in clearing the forest to create farm land where tea was planted. The settler had 15 core workers who resided on the farm. He testified that when Scroggie sold the land to Samwel, a meeting was called by the D.O and later a baraza was held by the Chief. Samwel agreed to relocate them and promised to later provide them with 5 acres each. When the land was under Peter Boit, there was exchange of correspondence between Peter Boit and Eastern Produce Ltd who managed the farm. A letter dated 28 August 2001 was produced as an exhibit. However when the plaintiff took over the land, she asked the defendants to move out of the land. He stated that she ought to have followed the initial arrangement that they had with Samwel who had promised to process titles for them for 5 acres each.

I posed a few questions to the witness who testified that all the defendants worked for Samwel for a few years.

With the above evidence the defendants closed their case.

C. SUBMISSIONS OF COUNSEL

Ms. Kipseei for the defendants submitted that the claim against the deceased defendants cannot be sustained. She also took issue with the drafting of the prayers in the plaint which are inter alia for eviction against the defendants and "any person whomsoever claiming through or under them." It was her view that the plaintiff had a duty to bring on board every person capable of being sued. She submitted that the persons have grown into various families and several households created and it will be difficult to know who was claiming under the defendants and who was claiming on their own right. She also raised issue on the registration of the plaintiff as proprietor which does not indicate that she is holding the same on behalf of the others named in the confirmed grant. She further submitted that when the land was transferred to Samwel Boit, the interests of the defendant were taken up and transferred to the new owner who held part of the land in trust for them. She submitted that Samwel had acknowledged this. She stated that the plaintiff has a duty as administrator to inter alia perform all duties on behalf of the deceased and she has a duty to deliver the portions of the suit land just as the deceased would have. She relied on several authorities in her submissions.

On the other hand, Mr. Manani for the plaintiff submitted that title to the land was issued under the Registration of Titles Act (CAP 281) (repealed) which ought to apply. He relied on Section 23 of the Act which provides that the certificate of title shall be taken as conclusive evidence that the person named therein is absolute proprietor subject to any restrictions in the title. He also relied on Section 80 of the

statute to argue that the interests of an owner cannot be defeated on the basis of an alleged trust unless it is demonstrated that the proprietor acquired the property through fraud. He also relied on the Constitution as protecting proprietary interests and also to the Trusts for Sale Act. He was not of the view that there was any trust in this case. He was also of the opinion that the plaintiff's title is a good title obtained through transmission. He further submitted that the plaintiff has no duty to settle the landless defendants. He also relied on various authorities which I have taken note of.

D. DECISION

I have considered the pleadings, evidence and submissions of the counsels.

Let me first deal with the issue about whether or not some parties to this suit are alive or dead. I cannot for certainty tell if at all some parties are dead or alive for no documentary proof was tendered before me. Even Ms. Kipsei herself did not at any time apply to have the suit against some of her clients, who are now said to be deceased, to be marked as abated. Neither did any person come forward to state that they are personal representatives of any of the defendants. I would not wish to declare any person dead unless I am given sufficient proof of their demise for which no person has tendered. I will therefore take it that the 8th and 15th defendants have not filed any defence to this suit and that the other defendants have filed defence and counterclaim.

The case of the plaintiffs is simple; that she is the owner of the suit land and she wants the defendants evicted as they have no right over it. A lot was said by the defendants about her title. I have looked at her registration which was done 26 November 2011. Actually, two entries were made on that day. The first entry is No.16 in the title which states as follows :-

"Grant of Letters of Administration in the Estate of Samwel Kipler Boit (Deceased) To Sarah Chelel Boit "As a personal Representative."

The other entry which is entry No. 17 is "Transfer (Assent) to Sarah Chelel Boit " The Beneficiary."

I have looked at the file in respect of the succession cause of the Estate of the late Samwel Boit. It would appear that the grant was confirmed on 4 June 1991 but no distribution was made. That was probably an oversight on the part of the court. Later another confirmation of grant was made in 2009, this time with the distribution being made. I think the title needs to be rectified to accommodate the details in the confirmed grant, which is, that the plaintiff holds the suit land not as sole beneficiary but on behalf of herself and the children of the deceased.

But the above is neither here nor there, and I do not think that it is an issue in this case. What is in issue in this case is whether or not the defendants are entitled to a portion of the suit land by dint of a trust. If the defendant's claim fails, then there is no way they can resist the claim of the plaintiff for eviction. Much was said about the length of time that the defendants have been on the land, but this does not count, as the claim for the land by way of adverse possession was dismissed. I will therefore straight away delve into whether or not there was a trust in this case.

The defendants allege that the plaintiff holds the land or at least a portion of it in trust for them. They state that Samwel Boit promised to give them land. It is on the basis of that promise that they found their claim. No documentary evidence was tendered to demonstrate any promise made by either Mr. Scroggie or Mr. Samwel Boit, where they expressly promised to allocate the defendants any land upon the take over by Samwel Boit. The only document tendered by the defendants to support their cause was a letter dated 28 August 2001 written on the letterhead of Eastern Produce Kenya Ltd and addressed to Peter Boit, Director Kaptindo Estate. I think it is best that I set down the contents of the letter in full.

Re : Squatters in Kaptindo

Thank you for coming to Kaptindo Estate as you had promised.

The problem with your Squatters was partly resolved due to your encouragement and assurance of resettling them.

The following is an updated list in which we have deleted deceased persons and replaced with their respective spouses.

Name.	ID No.
1. David Sitienei Soin	558xxxx
2. Jane Chelagat	200xxxxx
3. Ochieng Mbura Mwande	556xxxxx
4. Kiplimo Chepkwony	124xxxxx
5. Kipsum Arap Kurutany	559xxxxx
6. Monicah Chepkoech Butia	559xxxxx
7. Alice Cheptanui Malakwen	400xxxxx
8. Koskei Kipruto Joseph	558xxxxx
9. Rael Jemutai Chepkwony	401xxxxx
10. Annah Chepchumba Kogo	400xxxxx
11. Wamboi Ngotho Thumbi	401xxxxx
12. Kiptenai Tarus	559xxxxx
13. Wahome Gishimu	716xxxxx
14. Salome Cheptum Sitienei	559xxxxx
15. Kiprotich Kenei	559xxxxx

Four people made a request to you during the meeting that you assist them together with the rest. These were:-

Name ID No.

1. Kibirech Arap Kirui 687xxxx – said to have been in Kaptindo before
2. Sulul Chepkemboi Rono 077xxxx “ “ “ “
3. William Tirop Bett (Chief) 077xxxx – Area Chief
4. Emmanuel Letting
5. Sululu Jepkemboi Rono (old farm cook)

Yours faithfully,

SIGNED

For EASTERN PRODUCE KENYA LIMITED

J.K. Katah

General Manager – M/C Operations

Cc Mr. Kipsambu – Senior Estate Manager – M/C (E)

Cc Mr. Bett – Area Chief

JKK/ca

I do not think the above letter in any way is an acknowledgement from the owners of the suit land that they hold the land or a portion of it in trust for the defendants. Indeed it is written by Eastern Produce Co. Ltd who were management agents in the farm. It is also addressed to Peter Boit, and it has not been demonstrated to me, that Peter Boit held any proprietary interest in the suit land. He was neither proprietor, nor at any time, an administrator of the estate of the late Samwel Boit. Peter Boit therefore had

no capacity to deal with the suit land without the permission of the proprietor or the administrators of the proprietor. But even then, nothing in writing has been tabled to show any sort of acknowledgment or affirmation that the defendants would be settled on the said farm and be given 5 acres each. The defendants claim is therefore founded on an alleged oral promise.

No independent witness came to testify as to the existence of this oral promise. Peter Boit was never called as a witness. Neither was Duncan Scroggie, the former owner of the farm. It was said that Samwel Boit made this promise in a meeting called by the District Officer (D.O) and later in a Chief's Baraza. The D.O was never called as a witness. Neither was the Chief. No minutes of the said meeting were ever tabled before this court. I am not therefore satisfied that on a balance of probabilities, the defendants have proved any promise to settle them made by any of the proprietors of the suit land. The defendants have therefore failed to prove to me the presence of any trust.

Having failed to prove any trust, the defendants have not demonstrated any right to be upon the suit land. They lived on the land with the licence of the owners which licence has been withdrawn by the plaintiff. They therefore no longer have any right to be in the suit land. I have no reason to deny the prayer asking for their eviction. Ms. Kipseei raised the issue that there are many households in the area. I do not however have such evidence on record. In fact the evidence of the defendants was to the effect that it was 15 people who were allowed residence on the land. The claim against them "*and any person claiming through or under the defendants*" is to me proper. If any person feels that they are not supposed to fall under this umbrella, they are entitled to apply to court and the court will determine their rights.

I however appreciate that the defendants have been resident on the suit land for a considerable duration of time and this judgment requires them to move out. I am sympathetic to them and I will allow them up to the end of the year to move out. However, if they do not move out on or before the 31st of December 2014, the plaintiff is at liberty to apply for their eviction.

As to costs, the plaintiff has proved her case and I see no reason why I should not grant her costs.

I therefore make the following final orders :-

- 1. That the defendants have failed to prove that they are entitled to the land parcel L.R No. 9401/1 (I.R No. 15951) or to any portion of it by dint of a trust.*
- 2. That the defendants have failed to prove that they are entitled to remain or to be upon the land parcel L.R No. 9401/1 (I.R No. 15951).*
- 3. That the plaintiff is entitled to an order of eviction.*
- 4. That the defendants are given upto 31 December 2014 to vacate the land parcel L.R No. 9401/1 (I.R No. 15951) and if they do not vacate as scheduled, the plaintiff is at liberty to apply for their eviction.*
- 5. Costs of the suit to the plaintiff.*

Judgment accordingly.

DATED AND DELIVERED AT ELDORET THIS 6TH DAY OF NOVEMBER 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in the presence of:

N/A for M/s Manani Lilan & Co Advocates for the plaintiff.

Ms Tigoi present for the defendants.