IN THE COURT OF APPEAL OF KENYA

AT ELDORET

CIVIL APPEAL 87 OF 2004

BETWEEN

DORCAS INDOMBI WASIKE…………………………………………...…..APPELLANT

AND

1. BENSON WAMALWA KHISA

2. BENSON WAMALWA KHISA (in his capacity as the personal representative of the Estate of Rispah Naliaka Khisa)…RESPONDENT

(Appeal from a judgment of the High Court of Kenya at Kitale (Nambuye, J) dated 9th July 1999

in

H.C.C.C. NO. 27 OF 1996
****

JUDGMENT OF THE COURT

In this first appeal the dispute between the parties concerns the boundary between two parcels of land, both of them agricultural, situated in Naitiri Settlement Scheme in Bungoma District of Western Province. These are **Bungoma/Naitiri/79**, which was allotted to one ***Joanes Khisa*** in or about March 1965, and **Bungoma/Naitiri/83**, which, like the one above, was also allotted in 1965, but to one ***Peter Wasike***. At the hearing of the suit it was common ground that both parcels of land were allotted by the Settlement Fund Trustee (SFT), which is a body corporate created under the Agriculture Act Cap 318 of the Laws of Kenya, with power to:

> **"…………………sue and, be sued, and, for and in connexion with the purposes of this part, may purchase, hold, manage and dispose of moveable and immovable property, and may enter into such contracts as it may deem necessary or expedient" (see section 167 of the Agriculture Act)**

In the letters allotting the foregoing two parcels of land, no acreage was therein stated. The respective parcels of land were described by way of their respective numbers namely 79 and 83; and SFT reserved the right of re-entry which right would terminate upon execution by it of a transfer of title to the respective parcels of land in favour of each of the allottees.

The dispute between the parties started sometime in 1972. Omari Momanyi (PW5), a Registrar of Titles in the department of Land Adjudication, testified that by a letter dated 10th June 1972, the allottee of parcel No 79 complained to his office that 7 acres of land meant to be part of his plot had mistakenly been made part of an adjoining parcel, to wit plot No 83. Following that complaint SFT conducted investigations and discovered that indeed a mistake had been made and part of plot No 79 was made part of plot no 83. A decision was then

made that the aggrieved party would be given a rebate proportional to the value of the land which was mistakenly included in plot No 83, and the owner of the latter plot would meet that reduction. That decision was not acceptable to the allottee of plot NO 79. He however, died in 1982, before the issue was resolved.

By a plaint dated 15th March 1996, and filed in the High Court at Eldoret on the same day his son, Benson Wamalwa Khisa, (1st respondent), and his widow, Rispah Naliaka Khisa (2nd respondent) sought a declaratory judgment that Dorcas Indombi Wasike (the appellant), the widow of Peter Wasike, the original allottee of parcel No 83, held 5.3 acres of parcel No Bungoma/Naitiri/83, in trust for them and for an order that the District Surveyor excise that portion, add it to parcel no Bungoma/Naitiri/79 to make its total acreage 37.5 acres, and thereafter evict the appellant therefrom and then issue a new title deed for the resultant bigger portion.

The appellant was served with the plaint and summons to enter appearance. She appeared and filed defence in which she denied she held the disputed portion of land in trust for the respondents. She averred, inter alia, that the land was allotted to her husband who paid for it to the SFT.

The respondents testified and called three witnesses. The 2nd respondent who testified first stated that her deceased husband got 37 acres of land from SFT but later on the appellant encroached onto an area measuring 5 acres. Her evidence on this score went like this:-

> “ **I know Dorcas Indombi Wasike. She is my neighbour, I have sued her because I want land 35 acres; She took a portion of my land. She has taken away 5 and ½ that is what I want from her**”.

The 1st respondent was the second to testify. On that aspect it was his evidence that his late father was allotted 37 acres. He was, however clear that at no time have they had possession of the disputed portion. In this regard he testified thus:-

> **“It is settlement office who showed us our respective portions. It was a mistake for the settlement office to show Dorcas more than (she) was entitled……….We have not sued settlement office.”**

James Kasala Maina (PW3), a retired District Land Adjudication and Settlement Officer, testified that when the dispute between the parties arose he was mandated to check how the mistake giving rise to the dispute arose. It was his evidence that the allottee of plot No 83, was shown his land first on the morning of a given date. The boundary of the land was pointed out to him. On the same day, in the afternoon, the allottee of parcel No 79 was shown the extent of that piece of land. Both allottees were shown where to set up their respective homesteads. Peter Wasike was shown the disputed area as the place to set up his homestead, which he did. It is common ground that when he eventually died he was buried there. PW3 conceded that in pointing out the respective boundaries of the two parcels of land SFT made a mistake.

Joan Musimbi Evedi (PW4) a District Land Adjudication and Settlement Officer, Bungoma District, produced copies of the letters of allotment for parcel Nos 79 and 83. Under Cross-examination, he conceded that these letters did not show the acreages of the respective parcels of land, but an unidentified person noted acreages on the file covers of each plot, which notations could not be relied upon.

Only the appellant testified on her own behalf. Her evidence, which is also supported by the respondent to some degree, is that her husband was shown his land in 1965. He was shown where to set up his homestead and immediately thereafter he built a house, planted fruit trees, trees, and carried out other developments thereon. The boundary between her husband’s land and that of the respondents, is a waterway. Upon her husband’s death, sometime in 1975, he was buried on the portion in dispute. Subsequently, she paid for the entire piece of land and was thereafter issued with title documents. When a dispute arose between the respondents and herself, the matter was discussed and it was resolved that she would pay SFT additional money to cover the 5 extra acres, which she paid. She produced copies of proceedings before the Land Registrar of the area concerning the dispute. His decision, as material, read as follows:-

> **“……the water way forms a common boundary of parcels 79, 80 and 81 on one side, and 82, 186, and**

83 on the other side. It could not be believed that the exceptional crossing was by parcel No 79. And from the evidence adduced by the three witnesses it is evident that there was a mutual agreement in settlement office to have the seven (7) acres transferred from parcel No. 79 to parcel No 83. It is more evident so as seen on settlement letter Ref No. ASC/(N)/11/28 Vol. 111/13 of 8/11/1975 and another of ASC/3/37/83/76 of 28th August 1984.

I therefore conclude by stating that the parcels of land in dispute do remain as they are on the registry endorsement and the ground. I give a right of appeal to the Chief Land Registrar or the High Court within thirty days from the date of this ruling."

The decision was given on 15th January 1990. We have no evidence that an appeal was preferred against that ruling.

In her judgment Nambuye, J found as fact that the disputed 5 aces were wrongly given to the appellant's husband. In her view SFT had no power to credit it to parcel No. 83. The learned Judge rendered herself thus on the issue:-

" I have not found any trace of a legal provision or rule which states that the S.F.T. had power to alter plots or the land charge. Once a plot is allotted to settler the settler becomes the legal allottee…. They had no power to alter boundaries of the two plots. If they had no power to do what they did then it follows that the disputed portion still legally belongs to the plaintiffs…. the defendant holds the portion in trust for the plaintiffs at their pleasure."

In the end the trial Judge concluded that the respondents had proved their case and in the event held that 5.3 acres of land parcel No Bungoma/Naitiri/83 was held by the appellant in trust for the respondents and directed the District Surveyor, Bungoma, to excise the same and credit it to parcel No. Bungoma/Naitiri/79. The learned Judge also ordered the Land Registrar of the area to cancel the title to the appellant's land and re-issue a new one reflecting the change. There were other consequential orders but we do not find it necessary to set them out in this judgment.

The appellant was aggrieved by that decision and hence this appeal in which 13 grounds have been set out in the Memorandum of Appeal. However a careful reading of those grounds reveals that one main issue is raised in the appeal, namely whether the respondents adduced evidence to establish the existence of a trust express, implied, constructive or resulting in nature, concerning the 5.3 acres allegedly improperly included in parcel no Bungoma/Naitiri/83.

The appellant's counsel, Mr Amolo, cited several authorities and a careful reading of all those authorities reveal one thing. Whether or not a trust exists is a matter of evidence. Those authorities, and in particular **Mbothu & 8 Others vs Waitimu & 11 Others [1986] KLR 171**, are clear that:-

" The law never implies, the Court never presumes a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

We earlier set out the essential facts of this case. The appellant and both respondents are neighbours. They became neighbours following the allotment to their relatives by SFT of neighbouring parcels of land. The two neighbouring parcels of land were sub-divisions of a larger parcel of land owned by SFT and which had been set aside by the government for alienation. That was the only aspect which linked the parties to this appeal. They were beneficiaries of land from a common owner. How the original allotees of the two parcels of land were nominated or selected as beneficiaries was not an issue in this matter. The main issue at the trial was how the respective plots were identified and the acreage of each plot ascertained.

It was common ground that the letters of allotment did not show the acreages of both parcels of land. Each of the allotees was shown the extent of his land on the ground. The boundary between the two plots was initially shown as a waterway. When each allotee took possession of his land there was no dispute as to the extent of the parcel of land allotted respectively to them.

This is a first appeal. **Selle and Another v Associated Motor Boat Company Ltd and Others (196) EA 123,** among other decisions, lays down the principle to guide the Court in dealing with this appeal. The Court is obligated and the parties expect the court to,

not only analyse the evidence, but also to come to its independent conclusions on that evidence without of course overlooking the conclusions reached by the trial Court. The Court is also expected to give allowance to the fact that it neither saw nor heard the witnesses testify as to give an appropriate assessment of their demeanor as witnesses.

The respondents in their evidence, stated that the 5.3 acres was taken from them by the appellant's husband. They however, admitted under cross-examination that neither Joanes Khisa, no r themselves had ever been in possession of the disputed portions of land. It was not a case where the appellant's husband shifted a boundary or trespassed on land which had been allotted to Joanes Khisa. Rather it is a case in which SFT, by its own admission through its officers, had mistakenly thought the water way was the boundary mark between the parties' respective parcels of land. Is this a case which, in the circumstances would lead a Court either to infer or imply a trust? Joanes Khisa did not have any existing right over the 5.3 acres. Nor did Peter Wasike owe him any duty to hold the land for his benefit. There was neither a contractual, filial, or other relationship from which a trust could be implied. Their respective relationship with SFT was contractual and a mistake of the latter could not properly be inferred as transferable to either the appellant's deceased husband or any other allottee of land by SFT. In our view there was no proper basis for the trial Judge to conclude that the 5.3 acres in dispute belonged to the respondents. They did not own it, nor had they paid for it. It was not a case of trespass by either the appellant or her deceased husband. Besides no evidence was adduced nor was it suggested that all allottees were to get equal acreages. What is clear from the evidence is that each allottee's payment was to be commensurate to the respective acreages of the parcels allotted to them.

Besides, when the dispute between the parties arose, the matter was referred to the Land Registrar of the area to determine the boundary between parcels Nos. Bungoma/Naitiri/79 and 83. Under **section 21 (2)** of the Registered Land Act Cap 300 Laws of Kenya, the power to determine boundaries relating to land registered under that Act vests in the Land Registrar. Earlier in this judgment we set out, in part only, the decision of the Land Registrar, Bungoma, over the dispute between the parties. His decision was that the circumstances of the case necessitated that the boundary remain as had been pointed out by SFT. The trial Judge did not agree with that decision, but she seems to have overlooked the provisions of **section 21(4)** of the Registered Land Act, which provides thus:

> **" 21(4) No Court shall entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined as provided in this section."**

The decision of the Land Registrar as earlier on stated, was given on 15th January, 1990. This suit was filed in 1996. By then the Land Registrar had determined the boundary. The suit was not filed by way of an appeal but as a fresh suit. The respondents were told they had a right of challenging that decision either before the Chief Land Registrar or before the High Court. However, they did not exercise that right. Their right to question the boundary in issue was spent and it was improper for them to implead the appellant six or so years later on the same issue.

Finally we would like to comment on the trial Judge's conclusion that SFT did not have the right to vary the allottees acreages. As we stated earlier in this judgment the parties were not allotted specific acreages of land. They were shown pieces of land without any indication what the acreages of the respective plots were. That being so neither side was entitled to demand any specific acreage of land. Consideration for the land allotted varied according to the size of land allotted. What SFT did was to adjust the respective payments for each plot of land when upon resurvey it was realized that the plots were unequal. No land was taken away from the respondents subsequent to the date of allotment.

Besides, before the ownership of the respective parcels of land was transferred by SFT to the respective allottees, the title remained with SFT as the registered owner. And although SFT gave the parties possession of their respective parcels of land it retained the right to enter the land at will as owner. It had also the right to resile from the deal if it had reason to do so. Its action in revising the respondents'

payment; was, if anything, to their benefit. Otherwise they would have been required to pay as much for their share of the land as the appellant even though the latter's parcel of land was larger. The respondents' parcel as pointed out at the date possession was given to them never changed at any time thereafter, and the trial judge was therefore, in error to hold that SFT effected a reduction of the acreage of that parcel of land.

Furthermore even if SFT made a mistake in respect to the acreage of both pieces of land, the Register of the two parcels of land could not by virtue of s.143 (1) of the Registered Land Act be rectified it being a first registration.

We have said enough to show that the trial Judge had neither a legal nor factual basis for ordering the appellant to surrender 5.3 acres of her land. No trust was proved and none could either be inferred or implied. Nor had the appellant encroached on the respondent's land whatsoever. Consequently, we allow the appeal, set aside the judgment of the trial court and order that the respondents' suit in the High court be dismissed with costs here and the Court below awarded to the appellant, to be taxed if not agreed upon.

Dated and delivered at Eldoret this 12th day of November, 2010.

S. E. O. BOSIRE
………………………….
JUDGE OF APPEAL

E. M. GITHINJI
…………...………….
JUDGE OF APPEAL

P. N. WAKI
…………………………
JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR