



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT BUNGOMA**  
**CIVIL SUIT NO.93 OF 2011**  
**IMMACULATE AWINO ABONGO.....PLAINTIFF**  
**VERSUS**  
**WENSLEY BARASA.....DEFENDANT**

**JUDGEMENT**

[1] The plaintiff's claim against the defendant is for eviction from land parcel No. E. Bukusu/S. Kanduyi/5778. The plaintiff claim is that he purchased the suit land from one Aggrey Maurice Adala a portion comprising of 0.09ha for Kshs.550,000 on 29/12/2010. He produced a sale agreement and the Certificate of title of the suit land. He said that when he purchased the suit land there were three mud houses on the land.

[2] He called Aggrey Maurice Nadwa as his first witness who said that he was the one who sold the land to the plaintiff. The witness said that he had bought that land in 1991 from one Wekesa Simiyu who had obtained the letters of administration from the owner Evans Masika. Evans Masika was the brother of Wekesa Simiyu.

Mr. Aggrey Maurice Nadwa said that he had been registered as owner in 1992. The witness said that the original land was 3.3 ha prior to the Succession suit.

[3] The last witness for the plaintiff Simon Wekesa Simiyu said that he knew Evans M. Simiyu – deceased. He confirmed that Aggrey bought the land from him which was approximately ¼ of a hectare.

He said the original land was in the name of Simiyu W andabwa Okwatenge. He said that in the Succession suit he was an administrator and that he signed the mutation forms to transfer the land to Aggrey.

He stated that he was not aware that the land had been sold. He said that the defendant does not live on the land with his family and that the people who live there are hawkers of groundnuts.

[4] The defendant Mr. Wesley Barasa Marani told the Court that in 1987, he bought a piece of land of 96X100 feet from Mr. Evans Masika Simiyu. That they made an agreement on 11/10/1987 and he paid Kshs.5,000. He produced the agreement in Court. That later on he paid 5,000 on 5/12/87.

Mr. Simiyu said that he later added a portion of 15 feet by 100 feet for a price of Kshs.2,500/-. He produced an agreement for the same dated 5/12/87 and that he paid the balance on 8/12/88. That further

he purchased another portion of 26 feet by hundred and paid Kshs.8000. That on 21/12/88 he added a further portion of 5X100 feet and gave Ksh.2500/-. He produced the agreement of that portion as plaintiff exhibit 4. He said that his entire land became 96X100 feet. He said that he lived on the land until there were clashes at Mr. Elgon when he came to live in Bungoma. He said that Evans never gave him the title deed. That this was because he demanded a crate of beer and the defendant could not do so as a Muslim. He said that he went to the Chief and later filed a suit in the Senior Principal Magistrate's Court No. 611 of 1993 which was later dismissed by the Court because he did not prosecute it in time. He said he could not do so since he had no money and that he later became hypertensive.

The defendant says that he has been on the suit land for 33 years. He asks for the plaintiff's case to be dismissed. He raised no counter claim.

[5] The issue for determination is whether the plaintiff has made any case for the eviction of the defendant and whether the defendant has any legal recognizable interest on the suit land.

[6] From the copy of the register produced as P. Exhibit 4, it is clear that the suit land herein was a subdivision of Plot No.4766. The Green Card for the suit land was opened on 24/5/92 in the name of Simon Wekesa Simiyu. The same was transferred to Aggrey Morris Andalo Nadwa on 31/7/92. Then on 30/12/2010 It was transferred to Immaculate Awino Atsango the plaintiff herein.

The defendant herein gave evidence that he purchased his various fragments that finally became a portion of 96'X100' feet between the years 1987 and 21<sup>st</sup> December 1988. When purchased the fragments, the suit land did not exist. He was buying pieces of land that were comprised in Plot No.4766 which belonged to Simiyu Wandambusi Okwatenge. The agreement was between the defendant and Evans Masika Simiyu and it was in the hope that the said Evans Masika Simiyu would get a share from his father Simiyu Wandambusi Okwatenge and pass on to the defendant.

Unfortunately Evans Simiyu died before he could get the share from his late father registered into his name and before his portion could not be identified.

The question therefore is, what piece of land and/or interest in land was the defendant buying between 1987 and December 1988? No interest had accrued or existed in favour of the late Evans Simiyu. None is noted in the Register of the suit land.

Evidence is on record that the interest in plot in plot No.4766 that would have belonged to Evans Masika Simiyu was registered in his brother's name and the administrator of his Estate one Wekesa Simiyu who sold this land to Aggrey Moses Nandwa on 31/7/92. Nadwa then sold the land to the plaintiff on 30/12/2010.

By the time the plaintiff bought the suit land, there was no indication at all that there was any inhibition on the suit land. The defendant has admitted that he was not on the suit land. He had left the same during the land clashes in the area and had come to stay in Bungoma Town. She was then a bona fide purchaser for value without notice of the defendant's presence on the suit land.

Besides, what land did the defendant purchase from the deceased Evans Masika Simiyu? When he purchased the land that he now claims in the years 1987 and December 1988 what title was in place? This was Plot No.4766. The Court was told this piece of land was 3.3ha. The same was subdivided through a Succession Cause when its owner Simiyu Wandabwa Okwatenge died. Various parcels were created including the suit land.

Is there a way of knowing where the fragments the defendant bought are situated? There was no evidence adduced before me of that fact. Was the defendant who claims to have been on the land for 33 years aware of the Succession Cause of Plot No.4766 aforesaid? Why did he not join in that cause to protect his interests? No evidence was lead to that fact. The defendant has not counterclaimed in this case. I am unable to see any interests of his that can be protected in this case. He admits he is not on the suit property. If there are any structures on the suit property the plaintiff shall be at liberty to demolish and

take full control of his land after 60 days. If the defendant has any structures on the suit land he shall equally have 60 days to remove the same.

This suit succeeds to that extend. Each Party shall bear their own costs.

DATED at BUNGOMA this 28<sup>th</sup> day of October, 2015

**S. MUKUNYA**

**JUDGE**