



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**CIVIL SUIT NO. 59 OF 2003**

**MACKINON SOITA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JAMES SIMIYU SITATI.....DEFENDANT/APPLICANT**

**JUDGEMENT**

[1]. The plaintiff in this case has brought this case against the defendant and he prays for orders that an eviction order do issue against the defendant plus costs of the suit. He states that he is the registered owner of all that piece of land known as South Malakisi/Central Namwela/50. He states that the defendant has continued to trespass on the said land without the consent of the plaintiff. He wants the defendant to vacate his land and hand over vacant possession thereof to the plaintiff. The plaintiff states that there was a pending suit Kakamega High Court Civil Suit No.3 of 1981 in which the defendant and others had sought for orders that the suit land belongs to them but the suit was not concluded and abandoned.

[2]. In his evidence the plaintiff states that he lives in East Bukusu. He said that he wrote his statement and an additional statement on 16/1/2013. He relied on those statements. He produced a certified copy of the register showing him as the owner of the land. He produced an agreement between himself and Jason Soita dated 30/7/78. He said the land was being sold for Kshs.18,400 he paid Kshs.11,000 and the balance of Kshs.7,400 was paid in the bank. The agreement was produced as P. Exhibit 2. The plaintiff said that when he bought the land it was in the name of Wellington Sitati Waliaula who was dead. He said that the person who sold the land to him had bought the land from Mr. Waliaula deceased. The plaintiff said that under custom Wellington Sitati Waliaula was his step father since he follows his father.

The plaintiff said that the person he was refunding money to and who had bought the land from Waliaula was told in Nairobi that he could not buy land from a dead person who he agreed to refund the purchase price. The plaintiff said that family of Waliaula had immigrated to Kitale after selling the suit land. The plaintiff said that he therefore filed a Succession Cause for the letters of administration of the estate of Wellington Sitati Waliaula who is his uncle. That this was done under the consent of the family of Wellington. That his son Joseph Mutolo attended the hearing of the Succession Cause. The confirmed grant was produced in Court as Exhibit 4. The plaintiff said that there was no objection to the Succession Cause and after that he got the title to the suit land. The plaintiff produced receipts for the registration of title dated 13/11/78 and 23/10/78 as P. Exhibit 5.

He said that James Simiyu Sitati clanwise is his grandfather and that he was related to the father of Wellington Sitati. That they are cousins. The plaintiff said that when all these things were being done Wellington Sitati was present and in the agreement, he was witness No.13 as Sitati Simiyu. He said that he is not aware that defendant purchased the land in 1978. He denied being his agent and further denied that he defrauded the Land Control Board and that he held land in trust for the defendant. He denied that

the defendant has lived on the land for 12 years or that there are any development by the defendants.

[3]. The plaintiff called Joseph Mutoro Sitati who told the Court that he is a son of Wellington Sitati. That his father owned S. Malakisi N&C Namwela /50. He said the land was sold to a teacher Soita Walusetete. That in the land there was a family house built by his father. He said that the teacher paid the purchase price, then later wanted his money refunded. The money was finally refunded by the plaintiff in his presence in Sirisia Court and he signed the agreement as No.15.

He said that they agreed as a family that the plaintiff should get the land. He said that he was surprised to hear the defendant come and enter the land after money was refunded. He said that the land belongs to the plaintiff.

[4]. The advocates for the parties agreed by consent, that affidavit of Jason Maruti Soita be admitted as evidence by consent.

In that affidavit, Mr. Soita says that in 1968 he purchased land parcel S. Malakisi/N&C Namwela 150 measuring 2.6ha from Wellington Sitati Waliaula for a consideration of Kshs.11000 which he paid in full and took the full possession of the land. That in 1971 Wellington Sitati Waliaula passed on before transferring the land to him. That on 30/7/78 he sold the entire land parcel No. S. Malakisi/N&C Namwela/50 to Macknon Soita for a consideration of Kshs.18400. The copy of the agreement was annexed to the affidavit. He finally says that Macknon Soita instituted Succession proceedings in the estate of late Wellington Sitati Waliaula. He ended his affidavit by saying that he knows of his knowledge that Macknon Soita is the legitimate owner absolute registered proprietor of land parcel No. S. Malakisi/N&C Namwela/50.

The defendant filed a defence and Counterclaim. He said that he purchased the suit land in 1978 from Jason Soita Maruti who had bought it from Wellington Sitati deceased. He stated that the plaintiff being a close friend of the defendant approached the defendant while he was working in Mombasa that on request of the Bamusomi Clan he requested that the defendant buys or redeems the suit land as the said Jason Soita Maruti from of Batemulani Clan who was harassing the widows and family of William Sitati demanding transfer of the same. That the defendant who was away in Mombasa asked the plaintiff to be his agent. That the defendant purchased the land for Kshs.18600. The defendant also alleges that he asked the defendant to act as his agent in processing Succession and Land Control consents for transfer thereof to the defendant and that the plaintiff agreed unconditionally and received money from the defendant to do so. The defendant states that contrary to the said agreement the plaintiff fraudulently changed his mind and transferred the suit land into his own names. The defendant also filed a counterclaim and claimed the land under the doctrine of adverse possession. He also claimed as an alternative that the plaintiff held the land in trust for him.

[5]. The defendant gave evidence through madam Joyce Aswani the wife of the late James Simiyu Sitati. She adopted her statement and produced a grant of representation of her husband's estate. She said that the land was bought by her husband. She said that the agreement produced by the plaintiff was not genuine. She said that her husband was based in Mombasa and he left all the documents with the plaintiff who changed them. She said she has been on that land for 37 years that she has 2000 coffee trees and that they have a permanent house, piped water and installed electricity. She said that they have buried seven people and that her husband is buried there and that the plaintiff never lived in the land and that he lives in Bungoma.

On cross examination, she said that when the agreement dated 30/7/78 was made, she was not there and that her husband was not there. But that Sitati Simiyu are his names. She admitted that she was aware of the succession proceedings of the Estate of Wellington Sitati and that the letters of Administration were granted to Jason Soita. The defendant also admitted that her husband had filed a case in Kakamega High Court.

[6]. Bowers Soita the witness for the defendant relied on her statement made on 8/4/2014. Benson Wandabwa Mukoketi AKA Buxton Wandabwa in support of the defendant relied on his evidence in the

written statement of defence.

The issue for determination in this case is;

*(b) Whether the plaintiff is entitled to his orders*

*For eviction as prayed in the plaint.*

*(b) Whether the defendant is entitled to the suit land under*

*(i) The doctrine of adverse possession*

*(ii) Trust.*

The plaintiff in this Case produced a title deed to show that he is the registered owner. He produced an agreement between himself and Jason Soita dated 30/7/78. He proved he paid Kshs.18,400. He filed a Succession Cause for the letters of administration of Wellington Soita the registered owner of the land. This was open to all. The defendant admits he knew this. Indeed he alleges that he is the one who commissioned the plaintiff to do so as his agent. The son of Wellington Soita one Joseph Matolo attended those proceedings. This Succession was not objected to nor was the Court told that there has been any attempt to annul the same. In the agreement to refund the purchase price for the suit land to Jason Maruti Soita. The said Joseph Matolo was there and he signed the same. The defendant herein was also present and signed as Sitati Simiyu.

The affidavit of Jason Maruti Soita who was refunded the money is crystal clear who refunded the purchase price to him. It was put in as evidence by consent of the parties.

There is absolutely no doubt in my mind that the land was purchased by the plaintiff alone. He was not an agent of any one.

The defendant has not established any element of adverse possession. He claims the land is his as of right. That it was fraudulently registered in the name of the plaintiff by the plaintiff. He was aware of the Succession Cause, why then did he not challenge the confirmation of grant?

The Court file is still there and open to an application for annulment of grant.

He also claims on the same breath to be entitled to the suit land through Trust, why has he not filed a suit for determination of that trust or even pursue the case filed by him at the Kakamega High Court? This is clearly a fishing expedition which cannot be allowed.

There is no prove that he had any money to buy the land in 1978 or that he sent any to the plaintiff. If he could attend Sirisia Court, he could surely have his interests protected by having the land registered in his name.

He could not do so as he did not pay any money to anyone.

There is no adverse possession proved before me and there is no trust proved either. The plaintiff has proved his case on balance of probabilities, the defendant together with his agents, servants and all those claiming under shall move on and vacate the suit land within 60 days. If they do not do so they shall be evicted by the plaintiff with the help of the Court broker and nearest police station. The costs of such eviction to be born by the defendants. The costs of this suit shall be paid by the defendants.

Judgment read in open court.

**DATED and DELIVERED at BUNGOMA this 10<sup>th</sup> day of March, 2017.**

**S.N. MUKUNYA**

**JUDGE**

**In the presence of:**

Court Assistants - Gladys/Joy

Mr. Musumba - For the Plaintiff

Miss Gicheru - Holding brief for M/s Chunge for the defendant.