



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Civil Case No. 199 of 2011

Between

ALEX NZIOKA MULEI.....

PLAINTIFF

V E R S U S

1. FACE MUTUA MUSYOKI

**2. DIVISIONAL INTEGRATED DEVELOPMENT PROGRAMMES COMPANY LTD
(DIPS).....DEFENDANTS**

R U L I N G

1. The Plaintiff's suit is based upon a sale agreement dated 2nd May 2002 between the Plaintiff and the 2nd Defendant. By that agreement the Plaintiff sold to the 2nd Defendant some 20 acres of land in **parcel reference L.R. MAVOKO TOWN/BLOCK 2/73** for KShs 2,800,000/00.

2. It is the Plaintiff's case as pleaded in the plaint that the 2nd Defendant was in breach of the said sale agreement for non-payment of part of the purchase price.

3. Subsequent to the sale agreement the Plaintiff had transferred the land sold to the 1st Defendant, the managing director and majority share-holder of the 2nd Defendant.

4. The Plaintiff has further pleaded that the 1st Defendant then caused the subdivision of the suit land into several plots which were then "illegally" offered for sale to the public.

5. It is the Plaintiff's case that there is an implied or express trust under the sale agreement in his favour, and that the 1st Defendant is thus registered as proprietor of the suit land in favour of the Plaintiff.

6. The Plaintiff seeks the following main reliefs in the Plaint -

(i) Permanent injunction to restrain the Defendant from selling or in any other manner howsoever alienating any resultant plot created by the subdivision of land parcel L.R. MAVOKO TOWN/BLOCK 2/73.

(ii) A declaration that the 1st Defendant holds the resulting plots in trust for the Plaintiff and an order terminating the said trust.

(iii) An order directing the District Land Registrar, Machakos, to rectify the register of the land by

cancelling the registration in favour of the 1st Defendant and “re-register” the land in the Plaintiff’s name.

7. The Defendants have filed defence denying the Plaintiffs claim.

8. Together with the plaint the Plaintiff filed **notice of motion dated 1st October 2010**. That application is the subject of this ruling. It seeks the main order of inhibition “inhibiting the registration of any dealing with” the suit land pending disposal of the suit.

9. The application is brought under **section 128(1)** of the **Registered Land Act, Cap 300. Sections 1A, 1B and 3A** of the **Civil Procedure Act, Cap 21** are also cited.

10. The grounds for the application are -

(i) That the 1st Defendants has “proceeded to wrongfully sub-divide” the suit land.

(ii) That the Defendants are the trustees of the Plaintiff in the suit land but are in breach of the said trust in that they have offered for sale the sub-divided plots without the Plaintiff’s consent.

(iii) That the order sought is necessary for protection of the Plaintiff’s beneficial interest, and generally for preservation of the *status quo* pending disposal of the suit.

(iv) That unless the order sought is granted the Defendants’ activities in respect of the suit land may likely “remove the substratum of the suit” thereby rendering it nugatory.

11. There is a supporting affidavit sworn by the Plaintiff to which the sale agreement is annexed. Also annexed are an agreement dated 30th October 2003 and a copy of the register of the suit land.

12. The Defendants opposed the application by **replying affidavit sworn by the 1st Defendant and filed on 29th October 2010**. In that affidavit failure to pay the balance of the purchase price is admitted. It is also pointed out that the Plaintiff agreed to transfer the suit land into the 1st Defendant’s name so that the same could be sub-divided and sold in order to pay the outstanding purchase price as permitted in the sale agreement.

13. The Defendants have further argued in the replying affidavit that under the sale agreement the Plaintiff’s remedy for the 2nd Defendant’s failure to pay the balance of the purchase price is to sue for it and to get the 3% p.a. interest upon the same.

14. The Defendants also filed a **notice of preliminary objection to the suit dated 28th October 2010**. The legal point taken is that the suit as filed is statute-barred by statutory limitation of time.

15. I have considered the submissions of the learned counsels appearing. No authorities were cited. I have also carefully read the sale agreement dated 2nd May 2002.

16. **Clauses 4, 5 and 6** of the said agreement provide as follows -

“4. That the purchaser would be at liberty to enter into the land with his surveyor and do sub-divisions at their (sic) own cost and in the event of not completing payment of the purchase price the purchaser will pay interest at (the) rate of 3% per annum until the amount is paid in full.

“5. I have authorized (the purchaser) to sell the said sub-divisions as part of the means to clear the outstanding purchase price.

“6. For the avoidance of doubt the aforesaid title shall be held by (the purchaser) in trust for the (vendor) which trust will cease on payment to the vendor of KShs 2,800,000/00”.

17. The Plaintiff's main remedy for breach by the 2nd Defendant of the clauses regarding payment of the purchase price is contained in Clause 4 of the sale agreement. That remedy is payment of 3% p.a. interest upon any unpaid balance of the purchase price. The trust provided for in Clause 6 is to secure payment of the purchase price. Upon payment of the full purchase price the trust would cease. Clause 6 says so.

18. The suit land was registered in the 1st Defendant's name by consent of the Plaintiff. Sub-division of the same and sale of the resulting plots to third parties was expressly permitted by the sale agreement. It is thus doubtful, *prima facie*, that the Plaintiff would be entitled to recover the suit land upon the trust stated in the sale agreement.

19. It is to be noted further that the cause of action in this suit is founded on the contract of sale of land entered into between the Plaintiff and the 2nd Defendant on 2nd May 2002. The suit having been filed on 1st October 2010, the action, it appears, *prima facie*, is statute-barred by limitation. See **section 4(1) (a) & (e) of the Limitation of Actions Act, Cap 22.**

20. The further agreement dated 30th October 2003 was between the Plaintiff and the 1st Defendant. It provided for transfer of the land to the 1st Defendant. The agreement also talks of the 1st Defendant owing an outstanding balance of KShs 1,939,000/00. The 1st Defendant undertook to pay this by 31st December 2003.

21. It may be argued that the 1st Defendant entered into this further agreement on behalf of the 2nd Defendant as its managing director and majority shareholder. But even then, the outstanding balance was not paid on 31st December 2003, which means that the cause of action accrued on 1st January 2004. The Plaintiff thus had 6 years from that date to file suit, that is, until 31st December 2009. This suit having been filed on 1st October 2010, it was, *prima facie*, filed out of time.

22. But I do not consider that the issue of limitation of time was fully canvassed as the present application was dealing only with the order of inhibition sought in the application. That legal point of limitation may be fully canvassed at a later stage.

23. Regarding the order of inhabitation sought, I have already held that the Plaintiff's remedy lies in an action for the balance of the purchase price and interest as provided for in the sale agreement. I have also held that the trust provided for it in the sale agreement was to secure payment of that balance and interest. No proprietary interest as would entitle the Plaintiff to recover the land he sold was intended.

24. In the circumstances I must refuse the notice of motion dated 1st October 2010. It is dismissed with costs to the Defendant. It is so ordered.

25. The delay in preparation of this ruling was caused by ill-health on my part for the last few years. It is deeply regretted. But I thank God that I have now regained my full health.

DATED AT NAIROBI THIS 30TH DAY OF JULY 2012

H.P.G. WAWERU

JUDGE

COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28TH DAY

OF SEPTEMBER 2012

ASIKE-MAKHANDIA

.....

JUDGE