



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL CASE NO. 268 OF 1999**

**MBATHA MBUVI ::: PLAINTIFF**

**VERSUS**

**BENJAMIN MBOSO MUTWEIA ::: DEFENDANT**

**Coram: J. W. Mwera J.**  
**10 Ithuku Advocate for Plaintiff/Applicant**  
**Olonde for Munyasya Advocate for defendant/Respondent**  
**C.C. Muli**

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**R U L I N G**

The court was poised to hear the plaintiff/applicant's application dated 29.11.2000 for injunction against the Defendant in regard to two land parcels No. WAMUNYU/KAITHA/384 and WAMUNYU/KILEMBWA/350 when Mr. Olonde raised a preliminary point of law earlier notified, that this suit in which the injunction application features, was bad in law because it was time-barred. The court heard that 20 the sale agreement on which the plaintiff sought to base his rights and interests in the 2 parcels aforementioned was entered into in 1971 and that the suit was filed in 1999. That the plaintiff was seeking, as it were, to enforce this agreement as per the prayers long after its time. Mr. Olonde added that even that agreement would not be enforced at all because whether by fraud or mistake the registration over the 2 parcels of land was a first registration and therefore unimpeachable.

Mr. Ithuku told the court that the plaintiff endeavoured to sell these 2 pieces of land to the defendant before they were surveyed (adjudicated?). But that the defendant then by fraud went ahead to have the land parcels registered in his name and he has since occupied them inspite of demands by the plaintiff that he hand the lands back to him. Mr. Ithuku conceded that the registration is a first registration.

The pleadings beginning with the plaint filed here on 1.9.99 say in part:

***10 "3. The plaintiff did enter into a written and witnessed land sale agreement sometimes (sic) in the year 1971 for the sale of his unsurveyed parcel of land to the defendant for an agreed purchase price of Ksh.4250/=."***

The plaint goes on to state that the defendant paid only 350/= of the purchase price and went into occupation when the plaintiff migrated from the area in issue to live elsewhere. Not quite in accord with O. 6 r. 4 Civil Procedure Rules as regards particulars of fraud, it was pleaded that the defendant fraudulently procured registration of the two parcels of land. That on the whole there was a breach of 20 contract and so this court had to declare the two said parcels of land the property of the plaintiff while the defendant would get his refund of Sh.350/- from the plaintiff.

In the defence on behalf of the defendant he denied the whole claim including the contract of sale, part payment, fraud and all. He pleaded protection under the Limitation of Actions Act, as now raised by Mr. Olonde and maintained that his two parcels of land were surveyed or adjudicated as any other land in the area.

After hearing both sides this court is of the view even as at this point that the suit was time-barred on account of the alleged sale agreement of 1971 which the Defendant/respondent denies anyway. One could say that this bit awaits inquiry by evidence but to what end? Besides, the land in issue (the 2 parcels) having gotten the numbers at first registration, both sides are agreed upon thus, it serves no purpose not to

say at this point that whether that registration by was fraud or mistake in favour of the defendant after due adjudication or survey that point should not wait to be reached at the trial. It saves time money etc. to say here that success of the suit is distinctly out of question. A first registration over land is unimpeachable as per the Registered 10 Land Act and case law. Accordingly no injunction application can competently be grounded on an incompetent suit. So the preliminary point is upheld and the suit may as well stand dismissed with costs. Orders accordingly.

**Delivered on 23rd May 2001.**

**J. W. MWERA**

**JUDGE**