



**REPUBLIC OF KENYA**

**High Court at Machakos**

**Civil Case 164 of 2009**

**1. PATRICK MUTUKU SILA**

**2. MACKENZIE MUTISO SILA .....**

**PLAINTIFFS/APPLICANTS**

**VERSUS**

**SAMINICO LIMITED ..... DEFENDANT/RESPONDENT**

**R U L I N G**

The **Notice of Motion** dated 32/9/2011 is brought under **Order 40 Rule (1) (a), (b), 4(2), 8 and Order 51 Rule 1 of the Civil Procedure Rules** and all the enabling provisions of the Law.

The application seeks an order of injunction restraining the Defendant Company through its Directors, employees and/or agents from interfering with **LR No. Matungulu/Sengani/3470** by way of selling, alienating, constructing, disposing or interfering in any way by changing the ownership of the suit land pending hearing and determination of this suit.

The application is supported by the affidavit of **Mackenzie Mutiso Sila** the 2<sup>nd</sup> Plaintiff/Applicant sworn on 23/9/2011.

The background facts according to the said affidavit is that the 1<sup>st</sup> Plaintiff, **Patrick Mutuku Sila** was the registered proprietor of land parcel No. **Matungulu/Sengani/1311** and was so registered in trust for the family of the late **Sila Mutiso**, the 2<sup>nd</sup> Plaintiff's father. That in the year 2007 family members resolved to dispose of the suitland. The land was subdivided and one of the resultant parcels, that is parcel No. **Matungulu/Sengani/3470** measuring twenty (20) acres was sold to the Defendant Company at the price of Kshs.8,000,000/= on 30/8/2007.

The Applicants' complaint is that the Defendant has breached the terms and conditions of the sale agreement by failing to pay the purchase price although the title to the land has already been transferred to the Defendant Company. The Applicants accuse the Defendant Company of going ahead to subdivide and sell the land to third parties contrary to the terms of the agreement.

In opposition to the application, the Defendant Company through one of its directors, **Franklin Musila Makola** swore a replying affidavit on 24/10/11. It is averred in the said affidavit that through a sale agreement dated 30/8/07, the Defendant Company purchased a parcel of land measuring 20 acres from one **Michael Mutiso Sila** (now deceased) and the 1<sup>st</sup> Plaintiff, **Peter Mutuku Sila** which land was excised from land parcel No. **Matungulu/Sengani/1311** at the purchase price of Kshs.8,000,000/=.

The land parcel No. **Matungulu/Sengani/3470** and **Matungulu/Sengani/3473** totalling approximately 20 acres excised from land parcel No. **Matungulu/Sengani/1311** were transferred to the Defendant Company upon payment of Kshs.1,200,000/= deposit.

The Defendant denies the averments by the Applicant that no part of the purchase price has been paid and has asserted that a total of Kshs.3,000,000/= has been paid so far. According to the Defendant Company it is the 2<sup>nd</sup> Applicant who has frustrated their bid to pay the balance of the purchase price by chasing away and damaging properties of prospective buyers of the plots that were subdivided from land parcel No. **Matungulu/Sengani/1370** which the Defendant Company subdivided the 160 plots measuring 40ft x 100ft. The Defendant Company states that he has already sold thirty of the said plots.

It is contended by the Defendant Company that part of the purchase price payment was made to the beneficiaries of the estate of the late **Michael Mutiso Sila** and to the 1<sup>st</sup> Plaintiff/Applicant. That the 2<sup>nd</sup> Plaintiff/Applicant is not the legal representative of the late **Michael Mutiso Sila** nor was the 2<sup>nd</sup> Applicant a party to the sale agreement.

A further affidavit was sworn by **Frankline Musila Makola** on 20/3/2012. In the said affidavit, it is averred that the 1<sup>st</sup> Applicant has continued to receive the balance of the purchase price leaving the remaining balance at Kshs.4,100,000/=. It is also contended that the initial purpose of buying the suitland was for selling to third parties, a fact which was in the knowledge of the Applicants. It is further deponed that the 1<sup>st</sup> Applicant withdrew his claim against the Defendant Company on 19/3/2012 and that the 2<sup>nd</sup> Plaintiff has no *locus standi* to claim anything from the Defendant.

The firm of **K.N. Nyamweya & Company Advocates** appeared for the Plaintiff while the firm of **F. Katunga & Company Advocates** appeared for the Defendant Company. The application was canvassed by way of written submissions which I have duly considered.

On 15/3/2013, the Plaintiffs withdrew an earlier application dated 25/5/2011.

It is not in dispute that vide a sale agreement dated 30/8/2007 20 acres of land which were to be excised from land parcel No. **Matungulu/Sengani/1311** was sold to the Defendant Company. The sellers are reflected in the sale agreement as “**Michael Mutiso Sila and other family members of the late Sila Nthamba.**”

The buyers are reflected as ‘**Samico Ltd and Samuel Dominic Muathe**’. The registered party was reflected as **Peter Mutuku Sila**.

The suit herein was instituted by **Peter Mutuku Sila** as the 1<sup>st</sup> Plaintiff and **Mackenzie Mutiso Sila** as the 2<sup>nd</sup> Plaintiff. **Mackenzie Mutiso Sila** the 2<sup>nd</sup> Plaintiff is reflected in the sale agreement as the ‘**Mandated Negotiator**’. **Michael Mutiso Sila** who was the seller has since passed away. The 2<sup>nd</sup> Plaintiff who has deponed that he is a son to the late **Michael Mutiso Sila** has not produced any letters of grant of representation.

The 1<sup>st</sup> Plaintiff who is said to have held the title to the property in question in trust for the other family members filed a notice of discontinuance and/or withdrawal of his claim against the Defendant Company on 15/11/12. The 1<sup>st</sup> Plaintiff and his advocate **Mr Nyamweya** appeared before **Hon. Judge G. Dulu** and informed the court that he did not wish to continue with the case. That leaves the 2<sup>nd</sup> Plaintiff alone.

The 2<sup>nd</sup> Plaintiff is not a personal representative of his father’s estate. The Title Deed was registered in the 1<sup>st</sup> Plaintiff’s name. I would agree with the argument by the Defendant Company’s counsel that the 2<sup>nd</sup> Plaintiff has no *locus standi* to institute this suit.

From the sale agreement, it is clear that the down payment was to be made once the land was ready for subdivision and the balance to be paid in total once the consent of the Land Control Board to transfer the land was obtained. The buyer upon signing the agreement took possession of the land and was free to start developing the same but was not to transfer the land until the full and final payment was made. The Defendant Company has conceded that they have so far made payments of a total sum of Kshs.4,100,000/=. The full payment has therefore not been made. The issue of further subdivision of the land into small plots for sale was not addressed in the sale agreement. The issue of selling the plots to raise money for the purchase price is also not addressed in the agreement. It is however clear from the exhibited documents that the “**sellers**” continued receiving the money from the Defendant Company in installments. I say “**sellers**” in quotes because from the agreement states the seller as “**Michael Mutiso Sila and other Machakos family members of the late Sila Nthamba**” while the Title Deed was in the name of **Peter Mutuku Sila** the 1<sup>st</sup> Plaintiff. The agreement between the parties states that “**...any unlikely dispute, we be referred to a mutually agreed umpire**”. This clause of the agreement seems to have been ignored by the parties.

How the agreement was going to be implemented when the sellers are reflected in an amorphous form and mentions “**Machakos family members**” and “**Kangundo family members**” remains anathema. It’s little wonder that payments made so far have been made to different parties with some disputing the payments.

All in all, with the 1<sup>st</sup> Plaintiff having withdrawn from the case and the 2<sup>nd</sup> Plaintiff having no capacity to sue herein, the case against the Defendants remains in limbo. There is no *prima facie* case established. The evidence on record does not meet the threshold for a grant of injunctive orders. Consequently, the application fails with costs.

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**B. THURANIRA JADEN**

**JUDGE**

Dated and delivered at Machakos this 7<sup>th</sup> day of **May** 2013.

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**JUDGE**