

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL DIVISION

SAMAN PEMULA NO. S6-24-780-2006

BETWEEN

LIM MOOK DUNG

.....PLAINTIFF

AND

- 1. NIRVANA MEMORIAL PARK SDN BHD**
- 2. NV ALLIANCE SDN BHD**
- 3. WONG SEE MUN.....DEFENDAN**

GROUND OF JUDGMENT

This is the Plaintiff's application for a declaration that :

- a) pursuant to the sale and purchase agreement dated 16.1.1997 the Plaintiff is the legal and beneficial owner of the burial plot known as lot DJ03A Zon C; and
- b) the burial of the Third Defendant's late mother on the said burial plot constitutes an act of trespass by the Defendants and said trespass continues until today;

Brief facts:

The Plaintiff entered into 5 Sales and Purchase Agreement (SPAs) with the 2nd defendant of certain burial lots in Nirvana cemetery in consideration of RM 14, 378.50 for each burial plot.

On 3.3.2005, the 2nd defendant mistakenly sold one of the plots to the 3rd defendant. The 3rd defendant buried his mother on the said burial plot.

Plaintiff alleges that the 2nd defendant and the 3rd defendant committed trespass on P's burial plot by performing religious prayers, buried the 3rd defendant's mother and erected tombstone thereon.

The 1st defendant had admitted the mistake and was willing to compensate the Plaintiff but the offer was rejected by the Plaintiff by way of letter dated 17.5.2006.

Hence this application by the Plaintiff before me now.

Issues to be determined:

Whether this Court can allow the Plaintiff prayer for an order that the 1st and 2nd Defendants restore the burial plot DJ03A Zon UC to its original state prior to the burial of the 3rd Defendant's mother in the said burial plot

For the Court to make such an order would amount to exhuming the remains of the 3rd defendant's mother. This would be contravening section 97 (1) of the Local Government Act 1976.

The said plot had been sold to a bona fide purchaser i.e. The 3rd defendant. Therefore specific performance is impossible. Refer to ***Tan Chin Swee & Anor v Seri Ampangan Realty Sdn Bhd*** [2005] 1 CLJ 865.

Therefore such an order is impossible.

Whether 1st and 2nd Defendants trespassed burial plot DJ03A Zon UC

The said plot was admitted by the 2nd defendant as been mistakenly sold to the 3rd Defendant. This amounts to a breach by the 1st defendant but not trespass.

However the 1st defendant have stated that they are ever ready and willing to replace the said plot with another plot of equivalent value, which had been rejected by the Plaintiff for reasons that the original burial plot has geomancy value which cannot be replace by any plot of burial land.

Whether Plaintiff entitled to claim damages for trespass and exemplary damages.

Even if the court is to presume for a moment that there is trespass (which the court has decided that it is not so) the Plaintiff have failed to show how is it that the Plaintiff have suffered damages. Plaintiff must prove actual losses.

As for exemplary damages Plaintiff must show that the 2nd defendant have received profits from the sale, which in this case is not shown.

The Plaintiff has stated that the burial plots were meant solely for his family members but there was evidence to show that on 5.1.2002 the Plaintiff have executed a transfer form to one Ng Chee Leong for the lot UCDJ110 and this fact is not denied by the Plaintiff.

On the issue of Geomancy, this issue is not an issue which the court takes judicial cognizance.

Therefore the application by the Plaintiff is dismissed with costs.

Datin Zabariah Mohd Yusof

Tarikh : 11.6.2009

Bagi Pihak Plaintiff : Encik James Culaz
Tetuan Culaz & Associates

Bagi Pihak Defendant 1 & 2 : Encik John Fam
Tetuan S.N. Fam & Co

Bagi Pihak Defendant 3: Encik Lee Swee Seng
Tetuan Lee Swee Seng