**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**Civil Case 272 of 2011**

**BENJAMIN AYIRO SHIRAKU (As Administrator of the**

**Estate of JAMES SHIRAKU INYUNDO) ……..…… PLAINTIFF**

**- versus –**

**FOZIA MOHAMMED (As Trustee for**

**FARDOSA AHMED ABDILLE ……..……. DEFENDANT**

**RULING**

1. The application before this court is the defendant\'s Notice of Motion dated 8 February 2012. The ground upon which the application is founded is that the suit is time-barred within the meaning of **Section 4 (1)** of the *Limitation of Actions Act* and is therefore defective. The defendant maintains that the suit is null and void *ab initio* and is therefore an abuse of the process of this Court. The application is supported in by the Affidavit by the advocate having the conduct of this matter on behalf of the defendant – Fred K. Athuok, again dated 8 February 2012. The application is opposed by the replying affidavit of the plaintiff\'s advocate Namada Simoni dated 22 February 2012.

2. In his short affidavit in support of the application Mr. Athuok details that the plaintiff instituted a suit against the defendant seeking payment of a sum allegedly arising out of a contract the sale of land dated 27 May 1999. He maintained that the contract was to be performed within 90 days as detailed in paragraphs 3 and 4 of the Plaint. He determined to the fact that **Section 4 (1)** of the Limitation of Actions Act detailed that no action could be founded on contract after the end of 6 years from the date on which the cause of action accrued. He noted that the plaintiff\'s suit had been filed on 28 June 2011 which was over six years since the alleged cause of action accrued and was therefore time-barred. Mr. Namada in his affidavit in reply pointed out that the defendant had continued to perform at his obligations on demand

from the plaintiff and made it further payments on 29 February 2008 in past performance of the contract and thus the plaintiff is estopped from pleading limitation. The deep owned and maintained that part performance reopens any agreement and he attached a bundle of correspondence evidencing the payment made in part performance. Mr. Namada went on to say that the agreement, the subject of this case, became unencumbered by *HCCC No. 2169 of 2000* and that case was concluded only on 10 February 2006. He reiterated that the plaintiff cannot be allowed to plead limitation as it would amount to approbating and reprobating at the same time.

3. Counsel appeared before me for oral submissions on the application on 27 March 2012 – Mr. Namada for the plaintiff and Mr. Kigen for the defendant. It was Mr. Kigen's viewpoint that the suit is statutory time barred, noting that it was filed on the 28 June 2011. He maintained that a casual look at paragraphs 3 & 4 of the Plaint revealed that what was being relied upon was an Agreement dated 27 May 1999. Under **section 4 (1)** of the *Limitation of Actions Act*, a suit based upon a contract or agreement cannot be brought after 6 years from when the action accrued. The Plaint at paragraph 4 concedes that the Agreement was to be concluded within 90 days of the date thereof, which was by the 31 August 2000. The Plaintiff then had up until the year 2006 in which to file suit but failed so to do. Mr. Kigen then referred to the Replying Affidavit sworn by Mr. Namada.

4. He noted that Mr. Namada had stated that the contract between the parties had been encumbered by a civil suit brought by a 3rd party but such was no reason for the plaintiff to plead limitation. The documents attached to the Plaint herein showed that the plaintiff was the defendant in the other suit. Mr. Kigen maintained that there was nothing in the law where the Plaintiff merely being a defendant in that suit to stop them bringing this suit within the limitation period. He also noted that the defendant had tried to raise the issue of estoppel. He maintained that promissory estoppel could not lie for two reasons outlined by **Ryan Murray** in his text book **Contract Law The Fundamentals 2nd Edition** viz (a) there must have been an existing legal relationship between the parties and (b) the doctrine operates as a ***" shield not a sword"***. Mr. Kigen maintained that the failure of the Plaintiff to file suit within the limitation period extinguished any legal right between plaintiff and defendant and the plaintiff had been indolent in preserving its rights. Secondly, he commented that promissory estoppel can only be used as a defence not as a cause of action. Mr. Kigen stated that the other issue as per the replying affidavit was the question of part payment. This he stated was covered by section 23 of the Limitation of Actions Act. He stressed that once the right of a party has been extinguished under the operation of law, it is not open for a party to file an action. The whole purpose of limitation periods was to put an end to litigation.

5. In his turn, Mr. Namada initially submitted that the application was only intended to assist the defendant to run away from known obligations. He noted that the plaintiff and the defendant had entered into an agreement for the sale/purchase of a piece of land. The consideration therefore had been Shs. 3.6 million. The defendant had paid Shs. 3 million but before it had paid the balance of Shs.600,000/-, a 3rd party claiming an interest in the same parcel of land had filed a case in this Court, suing both the plaintiff and defendant herein seeking to nullify the agreement for sale entered into between them. He then stated that arising from the filing of the 3rd party suit, the defendant had entered into ***"goodwill discussions"*** with the plaintiff agreeing with the defendant that she would not pay until the 3rd party suit had been finalized. It was for that reason that Mr. Namada had brought up the subject of estoppel. The 3rdparty suit had been concluded by a Judgement dated 10 February 2006, when the said 3rd party's claim was thrown out. It was arising from that situation that the obligation of the defendant to pay the balance of the purchase price arose. The Defendant had since then delayed and failed to pay the balance of the purchase price.

6. However, Mr. Namada pointed out that the defendant had made part payment of the balance of the purchase price as Shs.300,000/- had been forwarded to the advocates for the defendant under cover of the plaintiff's advocates' letter annexed to the replying affidavit and dated 14 September 2010. Mr. Namada further submitted that the case was filed within a period of 3 years of the acknowledgement of the debt and referred this court to **section 23** of the Limitation of Actions Act. He maintained that the plaintiff's right accrued on the date of the last payment – 14 September 2010. He also referred the court to **section 39 (2)** of the Limitation of Actions Act which detailed that a period of limitation does not run where there

is equitable as well as promissory estoppel. The defendant cannot refuse to pay on the basis of what he had promised to pay. It cannot be determined, he went on to say, whether it is a shield or gives a right for a claim to be made. Mr. Namada maintained that equity demands that the parties engage in good faith. He observed that when both parties were sued by a 3rd party, promises were made (as to the payment of the balance of the purchase price after the 3rd party suit had concluded). This is what Mr. Namada meant by promissory estoppel. It did not need to be in writing, it could be by word or conduct. He referred the court to page 103 of the **Ryan Murray** text book and the finding of **Denning LJ** in **Combe v Combe (1951) 2 KB 215**.

7. Mr. Kigen in reply commented that Mr. Namada had created the impression that promises were made as between the parties – see paragraph 3 (ii) of the replying affidavit. If there had been a promise, the language of that paragraph would have been different. He also noted that paragraph 7 of the Plaint clearly negates any presence of a promise. He stressed that it was open to the plaintiff to bring a claim within the time permitted by the law. He emphasized that there must be a legal relationship to invoke the principle of estoppel. Only if the Defendant today decided to pay would it create a legal obligation.

8. Paragraph 4 of the Plaint reads as follows: "It was a salient term of the said Agreement that the entire agreement would be performable within 90 days or upon registration and transfer of the property and upon the purchaser obtaining vacant possession. The plaintiff shall refer to the agreement for its full tenor and purport." Further, Mr Namada's replying affidavit at paragraph 2 (ii ) recited that the agreement as between the parties became encumbered by the case *HCCC No. 2169 of 2000* and it was the defendant who utilised the pendency of the case as an excuse not to complete the agreement between the parties. Nowhere in either the pleadings or the replying affidavit is there any mention of any promise by the plaintiff to pay the balance of the purchase price once the aforementioned High Court case had been completed. There was no evidence before court that the plaintiff and the defendant had arrived at any variation of the agreement, particularly as regards to the payment by the plaintiff of the balance of the purchase price of Shs.600,000. Having said that, I have no quarrel with the fact that the plaintiff did indeed pay to the defendant Shs.300,000/-as per the letter addressed to the plaintiff's advocates by the advocates for the plaintiff dated 14 September 2010. That left the balance of the purchase price at Shs.300,000/-which was a comparatively small amount in relation to the whole purchase price. I think that it has to be presumed that after the aforementioned suit had been decided, there were discussions between the parties. How else would the advocates for the defendant have come to write the said letter of the 14 September 2010?

9. I would turn now to the matters of law raised by the parties\' Counsel. Mr. Namada referred me initially to **section 23** of the Limitation of Actions. With respect I do not consider that **section 23** helps him. That section refers to a right of action to recover land or a right of a mortgagee of movable property to bring a foreclosure action in respect of the property. To my mind, the plaintiff herein is not seeking to recover land but to obtain it. I was then referred to **section 39 (2)** of the same Act. That reads as follows:

***"39. (1) a period of limitation does not run if –***

***(a) there is a contract not to plead limitation; or***

***(b) that the person attempting to plead limitation is estopped from so doing.***

***(2) For the purposes of subsection (1), "estopped" includes estopped by equitable or promissory estoppel."***

Mr. Namada maintained that the defendant was estopped from making this application to strike out the Plaint on the limitation point. I didn\'t quite understand what his submission in relation to promissory estoppel amounted to. I did not interpret the said letter of 14 September 2010 as containing any reference of a promise to pay the balance of the purchase price for the suit property. Regretfully, I do feel that Mr. Namada was grasping at straws in order to try and ward off the defendant\'s application. I do not consider that in this matter there was any such promissory estoppel. It would seem then that there is little need for me to consider the point raised by Mr. Kigen as to whether Mr. Namada could raise these defects to the

application in terms of the same being a sword or a shield.

10. Where I am more concerned, is as regards the fact that the defendant herein accepted a part payment of the balance of the purchase price. As I have detailed above, there would seem to be little doubt that the plaintiff tendered the amount of KShs. 300,000/- and the same was accepted by the Plaintiff. What was the effect of such acceptance on the question of limitation? To my mind, it brings into play not so much the doctrine of **Denning LJ** in the **High Trees** case which was mentioned in the **Ryan Murray** text put before the court by the advocates for the defendant but that of **Hughes v Metropolitan Railway Company (1876 – 1877) L.R. 2 App Case 439** again mentioned in the said **Ryan Murray** text. Further, I believe that over and above the principles of promissory estoppel as propounded in the **High Trees** case that **Denning LJ's** dictum in the **Hughes** case is more pertinent.The House of Lords accepted in that case:

***"that an estoppel by representation (a common law estoppel) will have the effect of preventing a party from denying the truth of its representation of fact. However, the House of Lords made it clear that such a principle will only apply to a representation of existing fact. The principle could not be used so as to give effect to a statement about the future."***

According to the **Ryan Murray** text, **Denning LJ** responded to this by stating as follows:

**"the law has not been standing still since Jordan v Money. There has been a series of decisions over the last 50 years which, although they are said to be cases of estoppel, are not really such. They are cases in which a promise was made which was intended to create mutual relation and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases in the courts have said that the promise must be honoured."**

11. Perhaps more pertinent still to the case before me was the dictum of **Denning LJ** in the case of the **Combe v Combe (1951) 2 KB 215** when he stated (and such is very persuasive):

**"the principle, as I understand it, is that, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave a promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration but only by his word.**

***Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action***."[Emphasis added].

Taking into account the provisions of **section 36** of the *Limitations of Actions Act*, it seems that this Court has jurisdiction to refuse any relief available under the Act on the grounds of acquiescence or otherwise. To my mind, the fact that the defendant accepted further part payment of the purchase price for consideration for the purchase by the plaintiff of the suit property, such amounted to acquiescence and waiver of any limitation right.

12. I do not find myself in agreement with the submission of Mr. Kigen that **section 23** of the Limitation of Actions Act lends any assistance to his client in avoiding the fresh accrual of the plaintiff\'s right of action upon part payment of the balance of the purchase price. I have commented upon this point above. To my mind, it would be a ridiculous situation for this Court to scrap the agreement between the parties in a situation where 97.5% of the purchase price as agreed had already been paid. The defendant has available to him alternative remedies to enforce payment. For this reason among others, I am not prepared to strike out the Plaint herein as prayed for in the defendant\'s application. Accordingly I dismiss the same with costs to the plaintiff.

**DATED and delivered at Nairobi this 17th day of July, 2012.**

**J. B. HAVELOCK**
**JUDGE**