REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

CIVIL CASE NO. 861 OF 2009

GEORGE MUTURI MUNGAI………...................................……………...……PLAINTIFF

VERSUS

FRANCIS MBUGUA GIATHI……...............................…………....…...…… DEFENDANT

RULING

By this application which is brought by way of a Chamber Summons dated 14th July, 2010, and taken out under Order VI Rule 13 (1) (a) and (d) of the Civil Procedure Rules, the Defendant prays from the court the following orders –

(1) That the suit filed by the Plaintiff herein be struck out for nto disclosing a reasonable cause of action and being an abuse of the process of the court.
(2) That the Defendant be heard on the counterclaim.
(3) The costs of this application and the main suit be borne by the Plaintiff.

The application is supported by the annexed affidavit of Francis Mbugua Giathi, the Applicant himself, sworn on 14th July, 2010. It is based on the ground that the suit is based on a sale agreement made on 14th March, 1994, enforcement whereof is time barred under the Limitation of Actions Act.

Opposing the application, the Respondent swore a replying affidavit on 30th September, 2010, by which he concedes that the suit arises out of an agreement of sale for land by the Applicant borne in an agreement for sale dated 14th March, 1994. A copy of the said agreement is attached to this application. In terms of the said agreement, the purchase price was agreed at Kshs 610,000/-. The sum of Kshs 460,000/- was instantly paid to the applicant on the date of execution of the agreement of sale receipt of which he acknowledged. The Respondent avers that he made a further payment of Kshs 100,000/- to the Applicant towards of the fulfillment of the terms of the sale agreement, a copy of the receipt of which is attached to his replying affidavit. He further states that on 16th May, 2002, he paid Kshs 50,000/- in full and final settlement of the purchase of the plot to the Applicant a copy of which receipt is also attached to the replying affidavit. The Respondent, therefore, denies that there is any balance of the purchase price due and payable to the Applicant and alleges that the gross misconduct of the applicant in failing to effect performance of the sale agreement amounts to fraud which is not permissible in a quest for limitation of actions. He therefore urges this court to dismiss the application with costs.

At the oral canvassing of this application, Mr Mwaura for the Applicant argued that the suit was filed in court on 29th November, 2009, which was almost 16 years after the sale agreement was entered

into in 1994. He therefore contends that the suit should be struck out as it was filed out of time. Secondly, he contended that the replying affidavit does not address the issue of limitation of time. He relied on the case of **DIVECON LTD** v **SHIRINKHANU SADRUDIN SAMNI,** Civil Appeal No. 142 of 1997, and submitted that where a cause of action based on contract is time barred, the court has no jurisdiction to extend that time. He therefore, urged the court to go by that authority and grant the prayers sought in the application.

Opposing the application on behalf of the Respondent, Mr. Marete argued that the suit was not vexatious or an abuse of the process of the court as it was brought within the confines of the law. He submitted that it is not disputed that the agreement was made on 14th March, 1994 and that the Defendant received Kshs 460,000/- . The transaction was supposed to be finalized within three months. He maintained that on 11th May, 1994, his client paid to the Applicant a sum of Kshs 140,000/- and that it is evident from the face of the application that the Applicant denies receipt of the said sum of Kshs 140,000/- and claims that it is still due and payable. He referred to a receipt dated 11th May, 1994, acknowledges receipt of Kshs 100,000/- received from him in payment of the purchase of the commercial plot at Limuru as per agreement.

Mr. Marete finally submitted hat the applicant had not been forthright in this matter and there was an element of fraud under Section 26 (a) and (b) of the Limitation of Actions Act. He argued that the key word was an unconscionable act as pleaded in Paragraph 12 of the prayer. The several factors which have led to this state of affairs constitute misconduct on the part of the Respondent. He also contended that Section 26 ousts the limitation period in circumstances such as this.

Finally, he submitted that the authority relied on by the Applicant was distinguishable as it related to extension of time in cases of contract. In this case however, the Respondent is not applying for an extension of time but relying on the law as it stands. Where there is an allegation of fraud time does not run until fraud is discovered. The Respondent is therefore left with no alternative but to come to court and seek specific performance. He asked the court to dismiss the application. Mr. Mwaura did not reply to these submissions since, in his view, no points of law had been raised.

Having considered the pleadings and the rival submissions of the respective counsel, I find that the first issue to be determined is the competence of the application before the court. In the first instance, I note that this application basically seeks the striking out of the Plaint under Order VI Rule 13 (1) (a) and (d) of the Civil Procedure Rules. For the purposes of this application, that Rule stipulates as follows –

"(**13). (1) (a) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that –**
(a) it discloses no reasonable cause of action or defence; or
(b) …
(c) …
(d) it is otherwise an abuse of the process of the court…"
(2). No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made."

(The above provisions of this rule are now reproduced verbatim in Order 2 Rule 15 of the current Civil Procedure Rules, 2010).

Although this point seems to have escaped the attention of the learned counsel for the Applicant, the inclusion of the Applicant's affidavit sworn on 14th July, 2010, in support of the application is an affront to Rule 13 (2) of the Civil Procedure Rules as stated above. The said sub rule does not allow for affidavit evidence in support of applications for striking out pleadings on the ground that they do not disclose a reasonable cause of action. If the application had been brought solely on the ground that the suit was an abuse of the process of the court, it would have been accommodated. However, since the application is based not only on the failure to disclose a reasonable cause of action but also an alleged abuse of the process of the court, the same is incurably defective and cannot be entertained.

For that reason, I find that the application is incompetent and it is hereby struck out with costs to the Respondent.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 13th day of April, 2011.

L. NJAGI
JUDGE