REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Misc Appli 137 of 2008

MOSES GATHIRIMU KIMARI ..... APPLICANT

VERSUS

CHARLES MUCHEMI KARIUKI Alias MUCHEMI KARIUKI

TIMOTHY KAGONDU KARIUKI.....RESPONDENTS

R U L I N G

Before me is an application by way of Notice of Motion dated 4th July 2008. It seeks extension of time within which the applicant should file suit against the respondents to recover consideration paid and or enforce a contract of sale of land entered into between the applicant and respondents between the years 1993 and 1999. The applicant too asks for costs. The application is expressed to be brought under section 26(c) of the Limitation of Actions Act.

The application is anchored on the grounds that the applicant paid the 1st respondent cash as consideration and constructed a shop for the 2nd respondent in terms of the sale agreement. That thereafter the applicant took possession and has developed his portion of 3.3 acres out of land parcel **Githi/Igana/788**. That the period within which action to recover the consideration paid and or enforce terms of the contract including compensation for developments therein has elapsed. That though he had filed a suit in the chief magistrate's court along those lines, the said suit had been dismissed for want of prosecution.

The application was further supported by the affidavit of the applicant. In the main the applicant deponed:-

2. That the 1st Respondent is the registered proprietor of LR Githi/Igana/788 from which parcel of land the 1st Respondent was to sell to me 2.8 acres while from the 2nd Respondent out of his interest in the aforesaid parcel of land I was to get 0.5 acres.

4. That from the 2nd Respondent the consideration was that I construct shop premises which I did and from the 1st Respondent the consideration was cash payment.

5. That between 1994 to 1999 I paid the 1st Respondent Kshs.249,000/= in part payment of the purchase price.

6. That during the year 1994 I filed Nyeri SPMCC No. 347 of 1994 to compel the Respondents to perform their part of the contract.

8. That on the 4th April 1996 the court on its own motion referred the matter to the land disputes tribunal with remarks the suit touches on land disputes.

9. That after being informed I and the Respondents attended the Mukurwe-ini land disputes tribunal where the dispute was heard.

10. The Respondents appealed against the decision of the land disputes tribunal to the Central Province Appeals Committee and eventually to the High Court at Nyeri in civil appeal No. 64 of 1999.

11. That the high court upheld the Respondents appeal on the ground that the appeals committee which had upheld the land disputes tribunal award had no jurisdiction to hear the matter.

12. The Magistrate (sic) court during the pendancy of the appeal dismissed Nyeri SPMCC No. 347 of 1994 on 14.4.2003 under order 16 rule 6 on its own motion.

13. That I am informed by my advocate that under the land control Act the transaction consideration paid is recoverable as a debt as consent had not been given.

16. That I verily belief it was an honest mistake for the matter to have been referred to a body which had no jurisdiction by the court and an honest mistake on my part for not challenging the order after I was informed as ordered by the court.

At the hearing of the application, **Mr. Kiminda**, learned counsel for the applicant orally submitted that the decision by the Chief Magistrate's Court to refer the dispute to arbitration **suo moto** was an honest mistake on the part of the court. The tribunal made an award which did not please respondents who in turn appealed. The matter eventually ended in the High Court which held that the tribunal had no jurisdiction. In the meantime the lower court had dismissed the suit for want of prosecution.

The application was opposed. In a replying affidavit dated 24th October 2008 and sworn by **Charles Muchemi Kariuki**, on his own behalf and on behalf of the 2nd respondent, he deponed:-

"**4. That the applicant herein has been purporting to buy my land from the 2nd respondent without my authority simply because I don't live on the subject land.**

5. That the applicant had filed Nyeri PMCC 347 of 1994 claiming the same land but which suit was eventually dismissed for want of prosecution.

6. That while it may be true that the honourable lower court acted suo moto in referring the matter to the L.D. Tribunal, the applicant herein was aware of the want of jurisdiction abandoned the lower court matter thereby risking the dismissal for want of prosecution.

7. That I have never executed any agreement for sale of land, and all his (sic) agreement as they relate (sic) me as owner of land are forgeries.

8. That having occupied my land illegally and built on it, I have no intention of paying him anything and he should remove his development.

9. That the agreement dated 24/4/1994 is clean forgery with he applicant herein signing on my behalf.

10. That the applicant is attempting to revive the now dismissed lower court suit through this

application therefore rendering the current application as abuse of the court process.

In his oral submissions in support of the application, **Mr. Karweru**, learned counsel stated that the applicant had failed to show that he failed to institute the suit because of a mistake. The decision by the court to refer the dispute **suo moto** to the tribunal ought to have been challenged by way of appeal or review. This application, to counsel is seeking to resuscitate a suit which was dismissed for want of prosecution under another cover. The pendancy of the appeal was not a bar from filing another suit if the applicant was so minded.

I have now had the opportunity to carefully consider the application, the supporting and replying affidavits and the annextures thereto. I have also borne in mind the respective oral submissions and the law.

Under section 26(c) of the Limitation of Actions Act, time within which to file suit may be extended if the court is satisfied that failure to file suit in time was as a result of a mistake. It is the contention of the applicant that the court made a mistake in referring the suit he had filed against the respondents in the Senior Principal Magistrate's court being SPMCCC No. 347 of 1994 **suo moto** to the land Disputes tribunal. I do not see how the decision to refer the matter to the land disputes tribunal can be termed a mistake. And even if it was, the applicant went along with the decision mistaken though it may have been. He cannot now resile from that position and seek to reopen the proceedings by claiming that the decision of the court to refer the proceedings to arbitration was a mistake. He is estopped by his conduct from challenging the decision of the learned magistrate. Once the referral was made, the applicant willingly participated in the proceedings before Mukurwe-ini land disputes tribunal until the award was made in his favour. The respondents were aggrieved by the award hence they moved to Provincial Land Disputes Appeals Committee, Central Province by way of appeal. It would appear that the Provincial land disputes appeals committee upheld the decision of Mukurweini land disputes tribunal when it gave effect to the sale agreement between the parties and ordered the respondents' land to be subdivided. Again the applicant did not see the alleged mistake. Still dissatisfied with the award of the Provincial Land Disputes Appeals Committee, the respondent moved to this court by way of final appeal. The respondents this time succeeded in their endeavours when this court ruled that the Central Province Land Disputes Appeals Committee had no jurisdiction to make the award complained of. The court accordingly proceeded to set aside the award. It is then that the applicant all of a sudden realised the mistake by the learned magistrate in referring the matter to arbitration **suo moto.** It would appear therefore that for as long as the awards made were in favour of the applicant, he chose to see no evil, hear no evil least of all the alleged mistake.

The alleged mistake has only come to the fore after the respondents succeeded against him in the appeal. In my view and considering all the circumstances of this case, I am unable to hold that the applicant was unable to institute the suit in time out of bonafide and or genuine mistake. If there was such mistake, the applicant is equally to blame as the court, since he actively participated in the execution of the decision without raising a finger. The applicant in any event if he felt aggrieved by the decision to refer the suit to arbitration by the court **suo moto** had opportunity to challenge the same by way of either review and or appeal. He chose not to exercise any of those options open to him at his own peril.

Further it is noted that the matter having been referred to arbitration, the applicant chose to sit on his laurels until the Chief Magistrate's court on its own motion dismissed the suit for want of prosecution. That was on 14th April 2003. In the circumstances of this case I would agree with submissions of **Mr. Karweru** that this application is seeking to resuscitate a suit which was dismissed for want of prosecution under another cover. The pendancy of the appeal was not a bar to the applicant from filing another suit if he was so minded.

I think I have said enough to show that this application is unmerited. Accordingly it is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 20th day of November 2008

M. S. A MAKHANDIA

JUDGE