REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 114 OF 2005

1. PATRICK TARZAN MATU……..1ST PLAINTIFF

2. JOYCE MANYASI MATU……..……..2ND PLAINTIFF

VERSUS

1. NASSIM SHARIFF NASSIR ABDULLA……1ST DEFENDANT

2. LILY K. MUSINGA……..…….2ND DEFENDANT

3. JOSEPH MUNYITHYA both trading as MUSINGA MUNYITHYA & CO. ADVOCATES……..3RD DEFENDANT

RULING

I have before me an application by the defendant, Naseem Shariff Nassir (hereinafter "*the applicant*") for one order, apart from costs that the plaint herein be struck out as it fails to disclose a reasonable cause of action. The application is brought under the provisions of Order VI Rule 13 (1) (a) of the Civil Procedure Rules and section 3 (3) of the Law of Contract Act.

In the plaint sought to be struck out, the plaintiffs principally claim a declaration that a sum of Kshs. 650,000/= paid by the applicant to the plaintiffs' advocates as deposit towards purchase of LR No. Mombasa/Block XXVI/1007 hereinafter ("*the suit property*") has been forfeited to the plaintiffs in view of the applicant's breach of a sale agreement in respect of the suit property. The plaintiffs further seek general damages for breach of contract. Those reliefs are claimed against the applicant because she called off the sale of the suit property in breach of the agreement of sale.

The genesis of the plaintiffs' claim as can be gathered from the pleadings is that sometime in October 2004, the applicant approached the plaintiffs and expressed her desire to purchase the suit property which property was then offered to her by the plaintiffs at the consideration of Kshs. 6,500,000,/= and the said sum of Kshs. 650,000/= was on 17th November 2004 deposited in part performance with the plaintiffs' advocates. The plaintiffs executed the agreement but the applicant instead of completing the contract called off the sale and demanded the said deposit. In those premises, the plaintiffs contend that the said deposit has been forfeited as the applicant is in breach of contract. In the same premises, the plaintiffs claim general damages for breach of contract.

The defendant has delivered a defence in which she avers that the deposit of the said sum of Kshs. 650,000/= was made to the plaintiffs' advocates as stake holders and the plaintiffs did not acquire any rights over the same. She denies being in breach of any agreement as none had been executed and further denies that the plaintiffs are entitled to the reliefs claimed in the plaint. In the premises, the applicant contends that the plaintiffs have no cause of action against it.

The applicant's objection to the plaintiffs' case is that it discloses no reasonable cause of action because no agreement of sale was signed between her and the plaintiffs and the suit is therefore not maintainable in Law as against her. As the application has been brought under Order VI Rule 13 (1) (a) of the Civil Procedure Rules, affidavit evidence is not permissible and none was relied upon.

In his submissions in support of the application counsel for the applicant argued that as no agreement of sale was signed by the applicant the plaintiffs have no cause of action against the applicant. Counsel invoked the provisions of Section 3 (3) of the Law of Contract Act for that proposition. Counsel also invoked the decision of the Court of Appeal in Machakos District Co-operative Union Limited – v Philip Nzuki Kiilu [CA No. 112 of 1997] (UR).

Resisting the application, counsel for the plaintiffs submitted that the suit disclosed breach of a sale agreement by the applicant for which the plaintiffs are entitled to the reliefs claimed in the plaint. To buttress his argument, he invoked two decisions of the High Court and one decision of the Court of Appeal. The first High Court decision was Misc. Application No. 462 of 2006 between Leo Investments Limited and Estaurine Estates Limited (UR) in which the applicant sought to strike out and dismiss a suit for specific performance and general damages on the main ground that the suit was incompetent for lack of a valid agreement of sale as it was not signed by the applicant. Aganyanya J, as he then was dismissed the application as he was of the view that the suit disclosed a reasonable cause of action. The Learned Judge further declined to order the removal of a caveat lodged against the subject piece of land by the respondent. The applicant appealed and simultaneously applied for a mandatory injunction directed at the respondent to withdraw the said caveat. The injunction was declined. The second High Court decision invoked by the plaintiffs' counsel was Civil Case No. 156 of 2007 between Kenya Institute of Management and Kenya Reinsurance Corporation in which Nambuye J, granted an injunction to the plaintiff restraining the defendant from among other things advertising for sale, offering for sale of the suit property notwithstanding that there was no agreement which had been executed by the parties. the Learned Judge held that the material which the plaintiff had availed to the court had satisfied the requirements of section 3 (3) of the Law of Contract Act and a prima facie case with a probability of success for specific performance had been demonstrated.

Having considered the pleadings, the application, the replying affidavit and the submissions of counsel, I take the following view of the matter. Does the plaint disclose a reasonable cause of action? When considering that issue, the pleadings are the primary documents to be considered. The following statement of the Law in Halsbury's Laws of England, 4th Edition, Volume 36 page 73 has been cited in decisions of this court and the Court of Appeal.

"In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exists, the court will strike it out. A pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious case."

So, what are the plaintiffs' complaints in the plaint which are not contested? The pertinent ones are that the applicant expressed a desire to purchase the suit property at Kshs. 6,500,000/= and made a deposit of Kshs. 650,000/=. She did not only complete the transaction but did not even execute an agreement of sale and by her letter dated 4th April 200 she called off the sale. Was the applicant's action in breach of any agreement of sale between her and the plaintiffs? Section 3 (3) of the Law of Contract Act is in the following terms:-

"No suit shall be brought upon a contract for disposition of an interest on land unless;

a) the contract upon which the suit is founded is

i. in writing

ii. signed by all the parties thereto

b) the signature of each party has been attested by a witness who is present when the contract was signed by such a party."

The plaintiffs' claim arises from a failed agreement of sale of the suit property. It is therefore founded upon a contract for the disposition of an interest in land. The plaintiffs admit that the agreement was not executed by the applicant. The agreement did not therefore meet the requirements of sub-section 3 (a) (ii) of section 3 of the Law of Contract Act. The plaintiffs contend that correspondence exchanged between their advocates and the applicant's advocates constitute a memorandum upon which they base their action. I have perused the correspondence exhibited by the plaintiffs. The same does not support the plaintiff's stand-point. In any event such correspondence is contra sub-section 3 (b) of section 3 of the said Act. The plaintiffs' suit therefore contravenes the express provisions of the Law of Contract Act aforesaid.

The Court of Appeal considered a similar scenario in Machakos District Co-operative Union Limited – v – Philip Nzuki Limited Kiilu [C.A. No. 112 of 1997]. In that case, the respondent was alleging an agreement of sale between himself and the appellant in respect of the suit property which had been breached by the appellant. He therefore claimed a declaration that he was entitled to a transfer of the said property to himself and an order for specific performance of the sale agreement. The court found that there was no agreement between the parties which satisfied the provisions of section 3 (3) of the Law of Contract Act aforesaid. The respondent had relied on a letter of offer which was not signed by the respondent but a representative of the appellant. The Court held that the letter of offer could not qualify as a contract because it was not signed by the respondent. The Court further found as irrelevant the fact that the total purchase price had been paid.

The decision of the Court of Appeal in Machakos District Co-operative Union Limited – v – Philip Nzuki Kiilu (supra) is of binding authority. The case conclusively determined the issues in dispute between the parties thereto unlike the decisions in Leo Investments Limited – v – Estaurine Estates Limited (supra) and Estauarine Estates Limited – v- Leo Investments Limited (supra) and Kenya Institute of Management – v – Kenya Reinsurance Corporation (supra). The latter two were interlocutory rulings at which definitive findings of fact or law could not be made. The decision in Leo Investments Limited – v – Estauarine Estates Limited is distinguishable from this case. In that case Aganyanya J, was of the firm view that a part from specific performance, the plaintiff's claim for general damages was maintainable and therefore held that a trial was necessary to determine issues raised by the parties. The decision is in any event only of persuasive value. The applicant in this case has satisfied me that there is no agreement between her and the plaintiffs in terms of the provisions of section 3 (3) of the Law of Contract Act which the plaintiffs can enforce against her. The plaintiffs are urging the view that their claim for damages for breach of the contract of sale is sound. With respect, that view cannot be correct. Their claims are made pursuant to an agreement that is contra statute or at the very least does not comply with the Law. So, the very foundation of their claim is untenable. Further, the Court of Appeal has held time without number that general damages are not recoverable for breach of contract since such damages are clearly ascertainable. (See for example Habib Zurich Finance (K) Limited – v – Muthoga and Another [2002] 1 E.A. 81).

Striking out is a draconian remedy. It can be devastating to the party whose pleading is struck out hence the courts' reluctance to apply the remedy and does so only where a pleading is incontestably bad and may not benefit from amendment. A trial on merits is always the preference of courts. (See D.T. Dobie & Company (K) Limited – v – Muchina [1982] KLR 1). I have considered the remedy in that light and I have been unable to find how the plaintiffs' claim can be saved. If the plaintiffs had material that would

salvage their claim, they would have no doubt laid the same before the court. A trial can not be held for the sake of holding one. That would not be proper use of judicial time. I see nothing to go to trial in the cases and must therefore allow the defendant's application dated 24th August 2006. The plaint herein is struck out as it does not disclose a reasonable cause of action. The plaintiffs shall pay costs of the suit and costs of this application.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Khatib for the 1st defendant and Obura for the plaintiffs.

F. AZANGALALA

JUDGE

8TH OCTOBER 2009