



REPUBLIC OF KENYA



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Kabucho t/a Nyahururu Service Station v National Government Constituencies Development Board & another (Civil Case 05 of 2021) [2022] KEHC 507 (KLR) (26 May 2022) (Ruling)

Neutral citation: [2022] KEHC 507 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
CIVIL CASE 05 OF 2021
CM KARIUKI, J
MAY 26, 2022**

BETWEEN

**EDWARD MUNGAI KABUCHO T/A NYAHURURU SERVICE
STATION PLAINTIFF**

AND

**NATIONAL GOVERNMENT CONSTITUENCIES DEVELOPMENT
BOARD 1ST DEFENDANT
NDARAGWA CONSTITUENCIES FUND COMMITTEE 2ND DEFENDANT**

RULING

1. By a Notice of Motion dated 6th July 2021, the Applicant/1st Defendant seeks orders for striking out of a suit for no disclosure of cause of action or alternative for want for the cause of action.
2. The same application is supported by an affidavit of Simon Ndweka sworn on 6th July 2021.
3. Plaintiff/Respondent opposed the same via replying affidavit sworn on 26th November 2021.
4. The parties were directed to canvass applications via submissions.

Applicant's Submissions:

5. The applicant submits that nowhere has the Plaintiff pleaded in his plaint that the 1st Defendant is and was privy to the subject contract; thus, the suit ought to be struck out with costs according to Order 2, Rule 15(1) (a) of the *Civil Procedure Rules, 2010*, for not disclosing a cause of action against the 1st Defendant.
6. By stating:



4. The following actions may not be brought after the end of six years from the date on which the cause of action accrued – (a) actions founded on contract...."
7. It is submitted that no actions founded on the contract may be brought after the lapse of six (6) years from the date the cause of action arose. This is because the provisions Section 4(1) of the *Limitation of Actions Act* bars actions founded on the contract being brought after six years after the cause of action arose.
8. In the instant matter, the cause of action arose in 2012; thus, the suit ought to have been filed the latest before 2018. But instead, it was filed three years later, on 26th May 2021.
9. Since the suit was instituted after the expiration of the limitation period, apparent from the pleading, the claim is statutorily time-barred and ought to be struck out with costs.
10. Further, Section 56 (3) of the *National Government Constituencies Development Fund Act, 2015*, refers to disputes of a civil nature to the National Government Constituencies Development Fund Board in the first instant by providing:
 56. Disputes of a civil nature shall be referred to the Board in the first instance. Where necessary, an arbitration panel whose costs shall be borne by the parties to the dispute shall be appointed by consensus of the parties to consider and determine the matter before the same is referred to Court."
11. Reliance is made on the case of *James Cheruiyot v National Government Constituency Development Fund Manager Nakuru West Constituency & 2 Others* [2018] eKLR.
12. All the issues raised by Plaintiff in the plaint fall within the ambit of the adjudicatory powers of the 1st Defendant according to the mandatory provision of Section 56(3) of the *National Government Constituencies Development Fund Act, 2015*, which ousts this Court's jurisdiction in the first instance.
13. No evidence of compliance with the said provisions is furnished to the Court. Plaintiff's/respondent's Submissions:
14. The respondent submits that it exhausted all avenues in a dispute settlement before coming to Court vide exhibit 'EMK 8'a letter.
15. It is submitted that there is an explicit acknowledgment of Plaintiff's claim made on 31st July 2017, and Plaintiff's claim was instituted on 25th May 2021 within the limitation period. Thus claim is not statutorily time-barred. Reliance is made on the cases of *Co-operative Bank of Kenya Ltd v Pius Kimaiyo Lagat* [2012] eKLR. And *Telkom Kenya Ltd v Kenya Railways Corporation* [2018] eKLR.
16. Six years had not elapsed since the 2nd Defendant acknowledged Plaintiff's claim in 2017, and the suit was instituted in 2021; thus, the case is not statute-barred. Also, section 24 of cap 22 LOK is cited.
17. In addition, Section 56 (2), (5), and (6) of the National Government Constituencies Development Fund Act are cited above. Plaintiff was required to exhaust the avenues under the provision before instituting the instant case to Court. Finally, reference is made to the annexures attached to Plaintiff's replying affidavit dated 26th November 2021, which demonstrate Plaintiff's commitment to adhere to the legal procedures cited above.

Issues, analysis, and determination.

18. After going through the parties' affidavits, annexures, and submissions, I find the issues are; whether there is a cause of action against the 1st Defendant? Whether the Plaintiff exhausted the dispute



settlement mechanism before lodging suit in Court, whether the claim is statutorily time-barred and what is the order as to costs?

19. The respondent plaintiff did not plead that the 1st Defendant is privy to the subject contract, but only the 2nd Defendant. 27. The respondent submits that by virtual of Section 4 of the [National Government Constituencies Development Fund Act 2015](#), which provides for the fund's establishment: 1st Defendant had the duty to disburse funds to the 2nd Defendant from which Plaintiff's claim ought to have been settled. The provisions state;

A fund is established to be known as the National Government Constituencies Development Fund Board.

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It was disbursed by the National Government through the Board to constituencies as a grant to be channeled to constituencies in the manner provided for by the Act.

To be administered by the Board.

20. The Court of Appeal had an opportunity to deliberate on the doctrine of privity of contract at length in [Savings & Loan \(K\) Limited vs. Kanyenje Karangaita Gakombe & Another](#) (2015) eKLR. The Court rendered itself as under: -

“In its classical rendering, the doctrine of privity of contract postulates that an agreement cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & Co Ltd*[1915] AC 847, Lord Haldane, LC rendered the principles thus:

“ My Lords, in the law of England, certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”

In this jurisdiction, that proposition has been affirmed in a line of decisions of this Court, among them *Agricultural Finance Corporation V Lendetia Ltd*(supra), *Kenya National Capital Corporation Ltd vAlbert Mario Cordeiro & Another*(supra) and *William Muthee Muthami vBank Of Baroda*, (supra).

Thus in *Agricultural Finance Corporation vLendetia Ltd* (supra), quoting with approval from *Halsbury's Laws of England*, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was reiterated:

“ As a general rule, a contract affects only its parties. It cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or make him liable. The fact that a person who is a stranger to the consideration of a contract stands in such close relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

21. In our instant matter, nowhere is privity of contract pleaded nor demonstrated between Plaintiff and the 1st Defendant.



22. The only submission raised is the so-called duty under cited provisions of the statute. If at all a statutory duty as alleged owed to the Plaintiff, the Plaintiff ought to have lodged a constitutional or judicial review to enforce it, not a suit as in this case. Thus the Court makes the orders;

(i) The Court finds there is no reasonable cause of action against the 1st Defendant; thus, the plaint is struck out with costs according to Order 2, Rule 15(1) (a) of the *Civil Procedure Rules, 2010*, for not disclosing a cause of action against the 1st Defendant.

(ii) The Court finds it unnecessary to belabor on other grounds raised as the first ground succeeds.

RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT NYAHURURU THIS 26TH MAY 2022

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CHARLES KARIUKI

JUDGE

