



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NYERI**  
**HC CIVIL CASE NO. 59 OF 2009**

JOHN GITHAIGA GACHUNGWA )  
WINFRED WANGECHI THEURI )  
MARTIN KANYAKI WAIHIGA )  
SAMUEL NDUNG'U GICHURE ) **Suing on behalf of themselves and over  
three hundred and ninety five former staff workers of the defunct  
Tetu Coffee Co-operative Society Limited)**.....PLAINTIFFS

VERSUS

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT....1ST DEFENDANT  
MBURU MUNGAI & ASSOCIATES..... ..2ND DEFENDANT  
THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

**RULING**

1. Counsel for the 3rd respondent in this suit raised as preliminary, an objection that this suit is statute barred by dint of section 3(2) of Public Authorities Limitation Act which provides that the suit must be brought within 3 years of the accrual of the cause of action. According to Mr. Muthuri, the pleadings show the cause of action accrued in July, 1999 yet the suit was filed on 8th April, 2009 almost ten years later. No application for extension of time was made prior to the filing of the suit hence according to Counsel, the suit is statute barred and should be struck out.
2. Mr. Muthui Kimani for 2nd defendant argued that his client had been wrongfully joined in the suit since by a variation order dated 14th June, 2006 the Commissioner of Cooperatives, Mr. F. F. Odhiambo removed the 2nd defendant and replaced him with a Mr. Geoffrey Karuku. According to counsel, therefore, the 2nd defendant ceased to be the liquidator.
3. Mr. Muthigani for the plaintiffs in opposing the preliminary objection argued that section 64 of the Co-operative Societies Act import certain provisions of the Companies Act which include section 228 and that provisions of this section operate as a stay of action against a company under liquidation. According to counsel therefore, time does not run once a company is placed under liquidation. Counsel submitted that Tetu Co-operative Society was put under liquidation vide gazette notice No. 1584 of 2000 and the 2nd defendant appointed as the liquidator and from the 1st defendant's pleadings, the process is on going.
4. Concerning joinder of the 2nd defendant, Mr. Muthigani submitted that he was duly gazetted as the liquidator and his removal without gazetment was a private communication between the Commissioner and himself. No official notice has been published removing him as the liquidator. Counsel further submitted that the appointment of Mr. Geoffrey Karuku as his replacement was also a private communication as it was never published in the gazette. To this extent counsel

- submitted that the 2nd defendant is properly joined in the suit.
5. Tetu Coffee Growers Co-operative Society Limited was placed under liquidation on 10th March, 2000 vide gazette notice number 1584 of 2000. The plaintiffs in this suit brought action against the Commissioner of Co-operatives and liquidator on 8th April, 2009 claiming among others, salaries arrears from July, 1999 upto the period the Co-operative Society was placed under liquidation. That is to say the plaintiffs are each claiming salary and benefits for approximately 7 months prior to placement of the society under liquidation.
  6. According to the affidavit of Samuel Ndung'u Gichure, the 2nd plaintiff in the suit sworn on 28th September, 2012, upon placement of the society under liquidation and the 2nd defendant appointed as liquidator, the 2nd defendant prepared a status report on the society which included a summary of the arrears of staff salaries highlighting the distribution of the liabilities in respective constituent factories. The report is attached to his affidavit and marked "SNG 2(a)". He further depones that the 2nd defendant prepared an exhaustive list of all the 399 former staff of the society and tabulated their respective entitlements. The list is not dated but the court presumes it was contemporaneous to the stated report marked SNG 2(a) and dated 26th August 2005.
  7. Mr. Gichure further depones that a proposal was put forward to the 1st defendant by the Nyeri Provincial Co-operatives Officer by a letter dated 13th November, 2007 and marked "SNG 6" as annexure to his affidavit. And by a letter marked as annexure "SNG 6", the 1st defendant approved the proposal by the Provincial Co-operative Officer.
  8. I have deliberately attempted to make a chronology of events relying on the depositions in Mr. Gichure's affidavit together with annexures in order to resolve the question whether this suit was filed outside the period stipulated by section 3(2) of the Public Authorities Limitation Act hence statute barred as argued by Mr. Muthuri for the 3rd defendant.
  9. It would seem that upon placement of the society under liquidation, there was a beehive of activity on how to settle the society's liabilities including the plaintiffs' salaries and related benefits. The question then is: From what point should limitation begin to run? Is it from July, 1999 when default in salaries began or is it sometime around November, 2007 when it became apparent to the plaintiffs that the 1st defendant was not settling their dues?
  10. July, 1999 was the beginning of the default in payment of the plaintiffs' salaries and this continued up to March, 2000 when the society was put under liquidation. Their claim subsequently became a vital aspect of the liquidation process and was live at every discussion. To this extent it would be pedantic to restrict the cause of action to July, 1999 or even March, 2000 when the society was put in liquidation. The plaintiffs claims were a vital component of the liquidation process which the 1st defendant as at April, 2009 when it filed the defence, admitted was still on going.
  11. Statutes of limitation seek to hold a balance between two competing interests: the interest of claimants in having maximum opportunity to pursue their legal claims, and the interests of the defendants in not having to defend stale proceedings however, where it is unclear as to the exact point when the cause of action actually accrued, the court ought to be circumspect in invoking the law of limitation to shut out the plaintiffs. Perhaps the best test in such cases is for the court to seek to determine the point at which the plaintiffs had or ought to have been expected to have knowledge of the accrual of the cause of action.
  12. Lord Donaldson of Lymington MR in the case of *Halford v Brookes [1991] 1 WLR 428* noted that knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice and collecting evidence...in other words, the claimant must know enough for it to be reasonable to begin to investigate further.
  13. The plaintiffs in this matter were until around November, 2007 under the impression that the issue of their salaries and terminal dues were under consideration as part of the liquidation process. To this extent, it is when it became clear thereafter that no payment was coming forth that they sued. The cause of action therefore accrued in November, 2007 and the filing of the suit in April, 2009 was still within the limitation period stipulated under section 3(2) of Public Authorities Limitation Act. The preliminary objection by the 3rd defendant's Counsel therefore fails and is hereby disallowed.
  14. Concerning the issue of misjoinder raised by the 2nd defendant, the court is in agreement that if actually the 2nd defendant is no longer the liquidator then his substitution is inevitable since his

joinder was in his official capacity which if he is no longer clothed of, it would not be right to keep him in the suit.

15. Whereas gazettment is the official expression of an official act, it itself does not constitute the act. This court recently held in the case of Mundia Gateria Vs Embu County Government & Others Petition No. 116 of 2013 that:

**“Section 85 of the Evidence Act provides (in paraphrase) that“...the production of a copy of the Gazette containing any notice purporting to be made in pursuance of a written law... shall be prima facie evidence in all courts and for all purposes whatsoever of making and tenor of such...notice...what this implies is that, in absence of proof to the contrary, the Gazette notice becomes a formal expression of the existence of the notice or law in question....The Gazette does not as it were constitute the notice or the law itself but rather the official announcement of its existence or coming into force”.**

1. The removal of the 2nd defendant as liquidator may well have not been gazetted but omission to gazette his removal does not mean he continues to be notionally in office while factually he is not. To this extent the courts order his substitution with the correct liquidator within 30 days from the date of this ruling. No order will be made with regard to cost in that respect since the joinder was circumstantially innocent yet justified in absence of confirmation of whether removal was gazetted or not.
2. There is one last issue which although not canvassed by the parties but was slightly broached on by Mr. Muthigani. This is fact that certain provisions of the Companies Act apply to the Co-operative Societies Act. He particularly mention section 228 of the Companies Act which provides as follows:

***“When a winding-up order has been made or an interim liquidator has been appointed under section 235, no action or proceedings shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose”***

1. Whereas the society was put under liquidation in March, 2000; the suit was filed in April 2009. I have perused the file herein and I have not come across any application for leave prior to commencement of the present suit. It may be missing in the file considering the matter has been around since 2009. However if such leave was never sought prior to the commencement of this suit, its competence comes into issue in the light of section 228 of the Companies Act.
2. The rationale for the requirement of leave is that all claimants against a company in liquidation ought to lodge proof of debt unless such claimant can show why bypassing that procedure is warranted. The reason for control over litigation is that in most cases liquidators and receivers do not have sufficient funds to defend court actions.
3. In this particular case I have noted that the plaintiffs' respective claims have been identified as acknowledged by Mr. Gichure in his affidavit sworn on 28th September, 2014. That being so, the court is not quite clear what purpose this litigation is serving and wonders whether this claim can be dealt with administratively by the Commissioner of Co-operatives, the 1st defendant herein and the liquidator. Wages and salaries are ranked as priority claims under section 311 of the Companies Act hence it would be advisable if the plaintiffs claims could be pursued in that respect.
4. That having been said, the preliminary objection by the 3rd defendant is hereby disallowed while the objection by 2nd defendant succeeds to the extent that he be substituted with the correct liquidator within 30 days from the date hereof.
5. It is so ordered.

***Dated at Nyeri this 19th day of June, 2014.***

**ABUODHA N. J**

**JUDGE**

*Delivered in open court in the presence of Mr. Muthigani Advocate for the Plaintiffs and in the absence of Mr. Muthuri for the Attorney General and in the absence of Mr. Muthui Kimani Advocate for the Respondents.*

**ABUODHA N. J**

**JUDGE**