



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO.319 OF 2018

JOSEPH NGACHA T/A CAPRICE

CLEARING AND FORWARDING AND HAULERS.....PLAINTIFF

VERSUS

KIRINYAGA DISTRICT COOPERATIVE UNION LIMITED....1ST DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. Before this Court are the two (2) applications for determination. The first is the Notice of Motion dated **21st September 2018** in which **THE HONOURABLE ATTORNEY GENERAL** (the 2nd Defendant herein) sought the following Orders:-

“1. THAT the Plaintiff’s suit against the 2nd Defendant be struck out as it does not disclose any reasonable cause of action or at all against the 2nd Defendant.

2. THAT the Plaintiff bears the costs of this application.”

This application was premised upon **Order 2 Rule 15** of the **Civil Procedure Rules, Section 3A of the Civil Procedure Act, Section 12** of the **Cooperatives Act** and other enabling provisions of the law.

2. The second application for determination is the Notice of Motion dated **24th January 2019** in which **KIRINYAGA DISTRICT CO-OPERATIVE UNION LIMITED** (the 1st Defendant) seeks for orders:-

“1. THAT the Plaintiffs suit against the 1st Defendant/Applicant be struck out or dismissed as it does not disclose a reasonable cause of action in law against the 1st Defendant/ Applicant.

2. THAT the Plaintiffs suit against the 1st Defendant/Applicant is otherwise an abuse of the court process.

3. THAT the Plaintiff bears the costs of this application.”

3. This application was brought under **Order 2 Rule 15** of the **Civil Procedure Rules, Sections 3A of the Civil Procedure Act** and all other enabling provisions of the law. The grounds upon which the application was premised were as follows:-

“THAT the Plaintiff’s claim with the 1st Defendant was settled and discharge voucher executed by the Plaintiff discharging the 1st Defendant from the debt and any claims arising out of the said contract subject of the suit file.”

4. The court directed that both applications (which were opposed by the Plaintiff) be canvassed by way of written submissions. The Plaintiff filed its submissions on **12th March 2019**. The 1st Defendant filed its written submissions on the **11th March 2019**, whilst the 2nd defendant filed its submissions on **18th January 2019**.

BACKGROUND

5. On or about **4th August 1989** the Plaintiff supplied and delivered fertilizer worth **Kshs.3,500,000/=** to the 1st Defendant. The 1st Defendant made a payment of **Kshs.1,627,000/=** leaving a balance of **Kshs.1,873,000/=**.

6. Later the Plaintiff was charged in a criminal case being **Case No.395 of 1990** upon allegations that the fertilizer had been stolen from Government Stores. During the pendency of the trial the 1st Defendant acting upon the instructions of the Financial Secretary at the Treasury withheld this balance of **Kshs.1,873,000**. On **14th December 2010** the criminal charges against the Plaintiff were withdrawn. The 1st Defendant then paid out to the Plaintiff the withheld sum of **Kshs.1,873,000/=**. The Plaintiff contends that by withholding this sum of **Kshs.1,873,000/=** from the 1st Defendant for a period of over 26 years the 1st Defendant deprived the Plaintiff of the income which that sum would have generated over the 26 year period.

7. Accordingly on **13th November 2018** the Plaintiff filed their Amended Plaintiff dated **12th November 2018** in which it sought judgment against the 1st and 2nd Defendants jointly and severally for **“Compound interest, and re-investment amounting to Kshs.105,880,885,345/= plus costs of the suit and interest thereon at 14% per annum.”**

8. On their part the 1st Defendant/Applicant avers that following the withdrawal of the criminal suit against the Plaintiff they proceeded to pay the balance due and owing to the Plaintiff in full. The Defendant further avers that the Plaintiff acknowledged receipt of this payment and in fact signed a Discharge Voucher dated **7th November 2011**. According to the 1st Defendant the effect of this Discharge Voucher was to discharge the Defendant from any and all future claims arising out of the said contract. As such the 1st Defendant submits that the Plaintiff's suit is a non-starter and ought to be struck out.

ANALYSIS AND DETERMINATION

9. I have carefully considered the submissions filed by all parties in this case, the annexures thereto as well as all relevant statute and case law.

In my view the issues which arise are as follows:-

1. Is the suit time – barred?
2. Ought the present suit be struck out.

LIMITATION OF TIME

10. The Plaintiff's suit is grounded upon the supply and delivery of goods which took place sometime in August 1989. That is almost thirty (30) years ago. **Section 4 of the Limitation of Actions Act** provides that actions to recover monies founded on a contract cannot be brought after six (6) years from the date when the cause of action accrued.

In this case the cause of action accrued over in 1989. The suit herein was filed in August 2018. This is a period of over 29 years after the cause of action accrued. On this basis alone the suit ought to be struck out as the same is time – barred.

11. Secondly the Plaintiff was paid the sum of **Kshs.1,873,000/=** due to it and signed the Discharge Voucher dated **7th November 2011**. The Discharge Voucher which was signed by the Plaintiff read as follows:

“I, JOSEPH NGACHA KARANI T/A CAPRICE CLEARING, FORWARDING AND HAULIERS of P O Box 15348-00100 Nairobi HEREBY ACKNOWLEDGE RECEIPT of the sum of Kenya Shillings One Million Eight Hundred Seventy Three Thousand only (Kshs.1,873,000/=) from Kirinyaga District Co-operative Union Limited of P O Box 50-10300 Kerugoya (hereinafter referred to as “the Union”) vide cheque Nos.008156 and 008157 each for Kenya Shillings Nine Hundred Thirty Six Thousand Five Hundred Only (Kshs.936,500/=). I HEREBY ACCEPT the aforesaid sum in full and final settlement for all the claims for the outstanding debt and interest thereon, loss and damages present and future and of whatsoever nature together will all costs arising out of sale of fertilizer transaction which took place sometimes in 1989 between myself and the union under LPO NO.351 AND I HEREBY CONFIRM that the aforesaid payment of **Kshs.1,873,000/= by the union is the full and final settlement of the matter. I also confirm that the said payment by the union shall in no way amount to an admission of liability for the delay in paying the said amount as I fully know and acknowledge that the said delay was occasioned by the Government of Kenya through the Treasury which had stopped the said payment.”**

IN CONSIDERATION of the aforesaid payment, I undertake not to make any other claim or claims arising out of the said sale transaction.”

12. The terms of the Discharge Voucher are clear and unequivocal which terms bound the Plaintiff. He accepted payment of **Kshs.1,873,000/=** in full and final settlement of the sum owed which included all claims for any loss and damages **“present and future”** arising from the said sale transaction. More pertinently the discharge voucher provided that the 1st Defendant was protected from any action due to delay in making the payment. Having signed that discharge voucher and acceded to those terms the Applicant is estopped from filing and suit based on delay in remitting the payment to themselves. Therefore Plaintiff's action in bringing this suit 29 years after signing the discharge voucher cannot be entertained by the court.

13. Likewise the Plaintiff's claim against the 2nd Defendant is equally a non-starter as in the same Discharge Voucher the Plaintiff undertook to make no other claim arising from said sale transaction.

14. On the basis of the foregoing I find that the Plaintiff's suit is non-starter. The same is hereby struck out with costs to the Defendants.

Dated in Nairobi this 11th day of October 2019.

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Justice Maureen A. Odero