REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO.5944 OF 1993

V. SHAH Trading as

KIAMBU SERVICE STORE.....PLAINTIFF

VERSUS

BARUA ESTATES LIMITED.....1ST DEFENDANT

SAMUEL GITHEGI MBUGUA.....2NDDEFENDANT

JUDGMENT

(1) By the Re-Amended Plaint dated **4th February 2011**, **V. SHAH T/A KIAMBU SERVICE STORE** (the Plaintiff herein) prayed for judgment against the Defendants jointly and severally as follows:-

> **"(aa) As against the 1st Defendant for Kshs.11,462,586.95 together with interest thereon at Court rates of 12% per annum from the date of filing the suit on 16th December 1993 until payment in full.**
>
> **(bb) As against the 2nd Defendant for Kshs.30,000,000 with interest thereon at 12% per annum from 6th January 1993 until the date of re-amendment of the Plaint amounting to Kshs.32,860,000 together with further interest thereafter at the Court rates of 12% per annum from 22nd February 2002 until payment in full.**
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> **(c) In the event of this Honourable Court decreeing judgment in favour of the Plaintiff against the 2nd Defendant, but not otherwise, for Kshs.62,860,000/= with interest thereon from 22nd February 2002 as prayed for in (bb) above the Plaintiff will forego judgment against the 1st Defendant as prayed for in (aa) above.**
>
> **(d) Costs of the suit and interest thereon at Court rates of 12% per annum from the date of filing the suit on 16th December 1993 until payment in full.**
>
> **(e) Such other or further relied as may be appropriate in the premises."**

(2) **BARUA ESTATES LIMITED** (the 1st Defendant) and **SAMUEL GITHEGI MBUGUA** (the 2nd Defendant) filed the Re-Amended defence dated **22nd November 2002** by which they denied the Plaintiff's claim against themselves in total.

(3) This matter has had a long and chequered history. The initial Plaint was filed in November 1993. From that time the suit went through several Judges and was finally heard and concluded on **28th February 2011**. **Hon Lady Justice Joyce Khaminwa** (deceased) gave **7th June 2011** as date for judgment. However before the judgment could be prepared the Hon Judge unfortunately passed away. It was not until **18th April 2013** that the matter next came up for directions at which point the file was allocated to **Hon Justice Ogolla** to prepare the judgment. On **25th April 2013 Justice Ogolla** indicated that he would not be able to take up the matter as he had been gazetted to hear election petitions. The file was referred back to the Presiding Judge of the Commercial and Tax Division for directions. At this point the file apparently went missing and what followed was the dismissal of the suit on **10th October 2017**. By the ruling delivered on **18th July 2018** the suit was reinstated, upon which the file was allocated to this Court to prepare the judgment. Upon perusing the file I discovered that the Plaintiffs bundle of documents were not in the file. These have now been supplied and the court will now proceed to render its judgment.

BACKGROUND

(4) The Plaintiff was a firm carrying on business of Auto Spares and Farm Imputs in Kiambu within the Republic of Kenya. The 1st Defendant was a limited liability company incorporated in Kenya and the 2nd Defendant was the Managing Director of the 1st Defendant. It was admitted that there existed a business relationship between the parties between the years 1976 to 1986. The Plaintiff called one witness in support of their case being **KIRTISH CHANDULAL KARANIA**, a son to the owner of the Plaintiff. **PW1** told the Court that he used to assist his father in the shop and therefore had full knowledge of the operations therein. The Plaintiff avers that the 2nd Defendant in his capacity as a Director of the 1st Defendant placed a continuing order for the supply of hardware and farm inputs from the Plaintiff to the 1st Defendant. The terms were that supplies would be made as and when requested and that in this manner the 1st Defendant collected goods during the period 1976 to 1986 on a running account. The Plaintiff claims that the value of goods so collected was **Kshs.14,773,049.00** out of which the 1st Defendant paid the amount of **Kshs.2,735,000/=** by cheque. The Plaintiff also issued credit notes for goods returned by the Plaintiff amounting to **Kshs.118,310.40.** Thus according to the Plaintiff the amount due and payable by the 1st Defendant was **Kshs.11,462,586/=.**

(5) When the 1st Defendant failed to make payment as required the Plaintiff stopped delivery of goods and made several demands for payment of the outstanding amounts. Vide a letter dated **17th February 1989,** the Plaintiff made a written demand for **Kshs.30,000,000** plus interest thereon. After this demand was made and following the Plaintiffs threat to take legal action **PW1** testified that the 2nd Defendant came to their offices in order to negotiate the matter. The discussions culminated in the 2nd Defendant on **23rd March 1989** signing a guarantee in favour of the Plaintiff for the principal sum of **Kshs.30 Million**. **PW1** told the court that this demand for **Kshs.30 Million** was a round figure of what was owed. He stated that they waited for the 2nd Defendant to confirm this figure in writing but the latter never did so. Despite this the 1st Defendant still failed to clear the outstanding amount. **PW1** argued that what the Plaintiff was claiming was the balance due on the running amount. His position was that the net sum owed by the 1st Defendant was **Kshs.11,919,739.30**. **PW1** further clarified that at no time did the Defendants ever claim that the goods received were defective and no goods were ever returned.

(6) As stated earlier the Defendants denied the claim totally. The first defence witness was **MOSES GITHENGI (DW1)** who was a son to the 2nd Defendant. He told the court that he was a Farm Manager in the 2nd Defendant's Farm. The 1st Defendant's position was that they stopped purchasing goods from the Plaintiffs sometime in 1986 after they received a chemical analysis report from the Ministry of Agriculture indicating that the sprays/pesticides being supplied by the Plaintiffs were not fit for the intended purpose. **DW1** denied that they owed the Plaintiff any money at all. He also denied the existence of a running account and insisted that the 1st Defendant would only collect goods on order. **DW1** maintained that upon collecting or receiving goods from the Plaintiff they would sign against the invoice and remit any payment due within thirty (30) days. **DW1** was categorical that at no time would invoices ever take ninety (90) days without being paid. He insisted that the 1st Defendant made payments regularly and denied that there was ever any accumulation of bills. **DW1** challenged the Plaintiff's claim that only a sum of **Kshs.2,735,000/=** had been remitted as payment during the entire ten (10) year period running from 1976 to 1986.

(7) Additionally **DW1** testified that the chemical spray that they purchased from the Plaintiff affected their coffee plants and when they took the same for testing the relevant authority found said chemical spray to be substandard. Upon informing the Plaintiffs of this **DW1** claims they were promised compensation but no such compensation was ever made. It was at this point, in **July 1986** that the 1st Defendant stopped dealing with the Plaintiff. **DW1** could not confirm whether the letter of demand dated **17th February 1989** was ever delivered to the 1st Defendant or not. On the issue of the Guarantee allegedly executed by his father the position of **DW1** is that he only became aware of the same when they filed their defence on **16th November 1994**.

(8) The second witness for the defence was a **Mr. WILLIAM WACHIRA DW2**. He told the Court that he was a certified Accountant who had been in practice for thirty (30) years, and had been an Accountant with the 1st Defendant since 1989. **DW2** stated that he had examined the Plaintiffs documents and established that the claim made for interest was erroneous. According to **DW2** the value of the actual sales was **Kshs.14,773,066.06**. He stated that there were 36 unsigned invoices totaling **Kshs.327,153.05.** He further stated that there was no agreement between the parties regarding the payment of interest. That the interest on the invoices stated to be 12% was only applicable to overdue accounts. **DW2** also insisted that the Guarantee signed in 1989 made no provision for payment of interest. Although **DW2** testified that the calculation of interest was wrong under cross-examination be admitted that he did not have a correct figure for the tabulation of interest.

(9) Upon conclusion of the hearing parties were directed to file written submissions. The Plaintiffs filed their written submissions on **31st January 2011**, whilst the Defendants filed their submissions on **18th February 2011**.

ANALYSIS AND DETERMINATION

(10) I have considered the evidence on record, the written submissions filed by both parties as well as the relevant statute and case law in this matter. It is important to note at this stage that on **4th February 2011**, the Plaintiff with the consent of the Defendants amended the Plaint by reducing the amount being claimed from **Kshs.11,919,739.30** to **Kshs.11,462,586.95**.

The issues that arise for determination in this suit are as follows:

(i) Is the Plaintiffs claim time barred under the provisions of the **Limitation of Actions Act, Cap 22 laws of Kenya.**

(ii) Is the Plaintiff's claim for **Kshs.11,462,586.95** against the 1st Defendant merited?

(iii) Is the Plaintiff's claim as against the 2nd Defendant for **Kshs.30 Million** with interest at 12% per annum on the basis of the

Guarantee dated **23rd March 1989** merited?

TIME LIMIT

(11) The Defendants have raised the claim that the present suit is time-barred. They rely on **Section 4** of the **Limitations Actions Act, Cap 22 laws of Kenya** which provides:-

> **"4(1) The following action may not be brought after the end of six years from the date on which the cause of action accrued.**
>
> (a) **Actions founded on a contract.**
>
> (b) **Actions to enforce a recognizance.**
>
> (c) **Actions to enforce an award.**
>
> (d) **……**

(12) The Defendants contend based on the above provision that any claim premised upon the law of contract may only be filed within six (6) years from the date when the breach occurred or from the time when the aggrieved party become aware of said breach. According to the Defendants the Plaintiff have claimed that the non-payments occurred between 1979 to 1986. Therefore the time for filing the suit started running from July 1986 which is when the Plaintiffs claim they stopped dealing with the Defendants. The original Plaint in this suit was filed on **15th November 1993** which was well beyond six years from July 1986.

(13) On their part the Plaintiffs counter that their suit was filed within the time prescribed by law. They place reliance on the Guarantee executed by the 2nd Defendant in favour of the Plaintiffs. That Guarantee was executed on **23rd March 1989**. The Plaintiffs submit that this is when the cause of action accrued. The Plaintiffs place reliance upon **Section 23(3)** of the **Limitation of Actions Act**.

(14) Although it was initially averred that the 2nd Defendant never signed the Guarantee of **23rd March 1989** as alleged by the Plaintiff, the Defendants did not dispute the existence of this Guarantee during the hearing or in their submissions. The said Guarantee duly signed was annexed to the Plaintiff's bundle filed in Court on **5th April 2000**. I therefore find on a balance of probability that the 2nd Defendant did in fact execute the said Guarantee.

(15) On the other hand **DW1** claims that the Guarantee only applied to future transactions i.e transactions which occurred after March 1989. This begs the question – what was the scope of that Guarantee? It was the testimony of **DW1** that the 1st Defendant ceased purchase of any goods from the Plaintiff on or about **22nd May 1988** following the receipt of a report from the Ministry of Agriculture which indicated that the chemical spray being supplied by the Plaintiff was not up to the required standard. **DW1** further testified that the 1st Defendant never purchased any goods from the Plaintiff after **23rd March 1989** when the Guarantee was executed. The Plaintiff in their written submissions also confirmed that no transactions took place between the parties after the date of execution of the Guarantee. In the circumstances it can only be logically inferred that the Guarantee applied to goods sold and delivered prior to **23rd March 1989.**

(16) By that Guarantee the 2nd Defendant bound himself to pay all sums due from the 1st Defendant to the Plaintiff at the time the Guarantee was signed as well as any future debts that would arise up to a maximum of **Kshs.30Million**. The said Guarantee was also to cover any indebtedness arising from goods already sold or goods to be sold. The Guarantee expressly provided that the liability of the 2nd Defendant would extend to all moneys owed and liability incurred by the 1st Defendant before or after the date of the Guarantee. The express words used in Para 3 of the Guarantee were as follows:-

> **"….do bind myself/ourselves jointly and severally to pay and satisfy to the traders on demand in writing being made to me/us <u>all sums of money which the Debtor may now or from time to time hereafter owe to the trader</u> either solely or jointly with any other person or persons <u>whether such indebtedness arises from the goods already sold or hereafter to be sold</u>…**"[own emphasis]

(17) This provision contradicts the Defendant's claim that the Guarantee was only applicable for future transactions. The express terms of the Guarantee clearly provide otherwise. The 2nd Defendant limited his liability to an amount of **Kshs.30 Million**. This is the same amount that had been demanded by the Plaintiffs vide their letter of Demand dated **17th February 1989**. The **Kshs.30 Million** limit in the Guarantee was not a figure that was pulled out of a hat. It was clearly informed by the above mentioned demand letter.

(18) It is clearly manifest that by signing that Guarantee the 2nd Defendant in his capacity as the Managing director of the 1st Defendant, in fact acknowledged the 1st Defendants debt to the Plaintiff. In the premises the debt could be said to have accrued afresh on **23rd March 1989** being the date of execution of the Guarantee. This suit was filed in November 1993 four (4) years after the execution of the Guarantee. Therefore the suit was filed well within the time period provided by the Limitation Act and cannot be said to have been time-barred. Section 23(3) of the Limitation of Actions Act provides:-

> **"(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim…and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, <u>the right accrues on and not before the date of acknowledgement or the last payment</u>."** [own emphasis]

(19) **Section 24** of the same Act provides that in order to qualify as an acknowledgment under **Section 23**, the same should be made in writing and must be signed by the person making it. Further that acknowledgement should be made to the person whose claim is being acknowledged. The Guarantee of **23rd March 1989** executed by the 2nd Defendant meets all the above mentioned requirements. Accordingly I find that this suit is **not** time-barred.

CLAIM FOR KSHS.11,462,586.95

(20) The Plaintiff made a claim of **Kshs.11,462,586.95** against the 1st Defendant. However the Plaintiff later made an adjustment of **Kshs.345,107.55** to the sum claimed, being the amount representing unsigned invoices. The Plaintiff also chose to forgo the interest of 3% per month in concession to the current Court rate of 12% per annum. The law on Sale of Goods was aptly captured by **Justice Onguto** (deceased) in the case of **ISAAC MUGWERU KIRABA T/A ISAMU REFRI-ELECTRICALS –VS- NET PLAN EAST AFRICA LIMITED [2018] eKLR** as follows:

> **"It must be common ground that the burden of proof lies on the Plaintiff to establish on a balance of probabilities that he supplied goods to the Defendant and transferred the property in the supplied goods to the Defendant for an agreed money consideration. This is the essence of a contract for sale of goods as defined by S.3(1) of the Sale of Goods Act (Cap 31) Laws of Kenya.**
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> **The Plaintiff's obligation, once a contract is proven, was to deliver the goods and transfer the property in them. The Defendant on the other hand had the obligation to accept the goods and pay the price in exchange of the property granted. In my judgment an action for the price of goods sold and delivered is what is left for any seller of goods once the property in the goods has been transferred to a buyer.**
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> **Consequently, such an action, as in the instant case, implies that property has already passed and the seller who claims ought to succeed if he proves delivery at an agreed or reasonable price and no known defence is set up by the buyer. As was stated in the case of Ex part Gordon [1808] 15 Vs 286, the price is to be claimed after the period due for payment has lapsed and not earlier. Then, the buyer is specifically bound to perform his part of the bargain by paying for the goods."**

The Plaintiff in this case must therefore adduce evidence sufficient to prove that the goods in question were in fact delivered to the 1st Defendant and that property in the said goods was duly transferred to the 1st Defendant.

(21) It is not disputed that there existed a business relationship between the parties during the period 1976 to 1986. The Plaintiffs evidence is that the 1st Defendant maintained a running account with them for supply of hardware and various farm inputs. On the other hand the 1st Defendant vehemently denies the existence of a running account and submits that existence of the same was not satisfactorily proved. It is clear from the pleadings and from the evidence that during the period in question (1976-1986) the 1st Defendant did make orders for supply of various goods by the Plaintiff. **DW1** told the court that the orders made were both in written and oral form. **DW1** also confirmed his signature as well as that of the farm manager on the various invoices and orders. The Defendants concede that the Plaintiffs did supply them with goods but maintain that this supply was made only upon request. Therefore the only point of contention between the parties is the nature of the engagement that existed between them. According to the Plaintiff there was a running account whilst the 1st Defendant says that orders were delivered on a request basis. Whatever the case the parties do agree that the 1st Defendant made various orders for goods which were then supplied by the Plaintiff.

(22) **PW1** gave an account of how the transactions between the parties took place. Prior to 1979 there existed an invoicing system. Each invoice raised had four (4) copies of which the 1st and 3rd copies acted as delivery notes. The duplicate copy would be retained by the Plaintiff whilst the 4th copy remained in the books as a record of the transaction and would be retained by the customers. **PW1** produced as exhibits the originals of invoices and delivery notes for each transaction. **DW1** confirmed that they would sign the invoices once deliveries had been made and that payment against the invoice would be made within 60 days. Therefore a signed invoice was proof that the 1st Defendant had taken delivery of the goods in question. After 1979 the system was as follows. Upon collection of the ordered goods, a delivery note would be signed by the recipient of said goods and Plaintiff retained a copy of the delivery note.

(23) The next question is whether the 1st Defendant fully paid for all the goods which it received. The Plaintiff having proved supply of the goods the evidentiary burden falls upon the 1st Defendant to show that they fully paid for all goods supplied to them. **DW1** testified that payment was not made on delivery. He stated that the 1st Defendant would make payments by cash or cheque within 60 days of delivery. However the 1st Defendant was only able to prove payment of **Kshs.2,735,000/=** through cheques. This could be gleaned from a list prepared by the Plaintiff of cheques received from the Defendants. The Plaintiff admitted to receipt of this sum of **Kshs.2,735,000**. **DW1** insisted that the Defendant had already paid what the Plaintiff had demanded. However he was unable to confirm whether payments had been made for all the goods delivered to the Defendants. The 1st Defendant was totally unable to adduce any evidence to prove that they had fully paid for all supplied goods. **DW1** claims that they had destroyed all the supporting documents which would have proved payment.

(24) I have carefully perused the invoices contained in the Plaintiff's bundle filed on **5th April 2000**. The total sum for all the signed invoices comes to **Kshs.14,705,743.20** less the sum of **Kshs.2,735,000/=** credited by the Plaintiff this leaves a balance of **Kshs.11,970,743.20** as the amount due and owing to the Plaintiff. As stated earlier the Plaintiff amended their claim to the reduced figure of **Kshs.11,462,586.65.**

(25) **DW1** had initially claimed that some of the signatures on the invoices had been forged but he later recanted this part of his evidence and confirmed the signatures. In any event this allegation of forgery was not proved and is rejected by the court. What is pertinent is that **DW1** admitted to the veracity of the invoices and identified his signature and that of their Farm Manager on the various invoices. The Defendants made no objection to the production of the relevant invoices by the Plaintiff. Last but certainly not least on this point there is evidence that

the 1st Defendant acknowledged their indebtedness to the Plaintiff through the Guarantee signed by the 2nd Defendant giving an undertaking to pay up to a limit of **30 Million**. Accordingly I find that the Plaintiff has proved its claim for **Kshs.11,462,586.95** on a balance of probability.

(26) With regard to interest the Plaintiff based its claim upon the delivery notes and invoices. **DW1** confirmed that those invoices did bear an interest clause as follows:-

> **"Interest a 12% per annum will be charged on all overdue accounts."**

Therefore the signature on those invoices indicated consent and agreement with the terms therein and bound the 1st Defendant to those terms including interest. The interest provided for was 12% per annum on any overdue payments and this may be why the Plaintiff decided to forgo its claim for interest at 3% per annum.

THE GUARANTEE

(27) The Plaintiff claimed a sum of **Kshs.30 Million** with interest at 12% per annum from **6th January 1993** until payment in full. This claim was based on the Guarantee signed by the 2nd Defendant on **23rd March 1989**. In rebutting this claim the Defendant submitted that the Plaintiff failed to pursue the original debtor who was the 1st Defendant before pursuing the 2nd Defendant. This is not true. The letter of demand dated **5th January 1993** clearly shows that the Plaintiff did make a demand against the 1st Defendant for amounts owed. The demand letter included a reminder to the 2nd Defendant of the Guarantee he had executed in favour of the Plaintiff. The effect of the Guarantee is that the 2nd Defendant became liable to settle the indebtedness of the 1st Defendant. The 1st Defendant did not pay the outstanding amount and therefore the Plaintiff became entitled to enforce the Guarantee against the 2nd Defendant in its favour. Although the 2nd Defendant signed a guarantee committing himself to cover the 1st Defendants indebtedness up to a limit of 30 Million, this does not mean that the 2nd Defendant is liable to pay to the Plaintiff the entire 30 Million. The Plaintiff has an obligation in law to prove the extent (amount) of indebtedness of the 1st Defendant. The Plaintiff has failed to tender evidence to prove the fact that the Defendant owed them the entire sum of **Kshs.30Million** and therefore I dismiss prayer (bb) of the Plaint. However I am satisfied that the Plaintiffs have adduced evidence sufficient to prove their claim for **Kshs.11,462,586.95.** The Plaintiff's claim amounting to **Kshs.11,462,586.95** falls within the sum of **Kshs.30,000,000/=** guaranteed by the 2nd Defendant.

(28) Accordingly I do make orders as follows:-

(i) Judgment be and is hereby entered as against the 2nd Defendant in favour of the Plaintiff for **Kshs.11,970,743.20.**

(ii) Costs of this suit are awarded to the Plaintiff.

(iii) Interest on (i) & (ii) above at 12% per annum from **16th December 1993** until payment in full.

Dated in Nairobi this 4TH day of October 2019.

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Justice Maureen A. Odero