



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL AND ADMIRALTY DIVISION
WINDING UP CAUSE NO 28 OF 1996
IN THE MATTER OF LEISURE LODGES LIMITED
AND
IN THE MATTER OF THE COMPANIES ACT
(CHAPTER 486 OF THE LAWS OF KENYA)

Y.A SHRETTA.....APPLICANT

VERSUS

LEISURE LODGES LIMITED.....RESPONDENT

RULING

BACKGROUND

This matter began in 1996 by the Applicant's petition filed on 15th October 1996, as a contributory. The Applicant alleged that the affairs of the Leisure Lodge Company were conducted in an oppressive manner to the Petitioner's disadvantage. In the circumstances it was just and equitable that the Company should be wound up.

These proceedings spanned over 24 years and is contained in 5 Volumes of Court Proceedings, Rulings, Judgments, Orders & Decrees. The dispute(s) oscillated between the High Court in the instant Court File, **HC Misc 559 of 2011 and HC Misc 288 of 2014**. In Court of Appeal the matter was in **CA 83 of 2000** and Arbitration proceedings, Final Award and recognition & enforcement of the Arbitral award, Court proceedings and Orders.

The instant application arises from the judgment by Hon JJA Gicheru, Amollo & Akiwumi in **Civil Appeal 83 of 2000** delivered on 16th February 2001. The judgment at Pg 111-112 of the Applicant's bundle/Application Hon. RSC Omollo JJA granted orders as follows;

The petition to wind up Leisure Lodges Ltd filed by the Respondent Yashvin Shretta be and is hereby dismissed with costs thereof to Leisure Lodges Ltd & Vadag Establishment, [by] the Appellant.

At Pg 134 of the bundle is the Order from the same matter which reads in part;

This Appeal be and is hereby allowed with costs only to the Appellant

The petition in the High Court be and is hereby struck out or dismissed with costs thereof to the Appellant and to Leisure Lodges Ltd (As per Omolo & Akiwumi JJA)

APPLICATION

By application in form of Notice of Motion filed on 25th September 2015,

The Applicant sought that the Bill of Costs dated 21st September ,2015 be struck out with Costs.

The Applicant relied on the following grounds;

- a) The Bill of Costs is for enforcement of the Court of Appeal orders of 16th February 2001.
- b) **Section 4(4) of Limitation of Actions Act** renders the Bill of Costs stale and unenforceable.
- c) The Bill of Costs is filed in a non-existent suit, the Court of Appeal having struck out the Petition on 16th February 2001.
- d) This Court lacks jurisdiction to entertain it. [the Bill of Costs]

SUPPORTING AFFIDAVIT

By Supporting affidavit dated 25th September 2015, sworn by Yashvina A. Shretta, the Petitioner/Applicant herein he stated that as the Petitioner he held 10 % of the allotted shares in the Respondent Company Leisure Lodges Limited at the time he filed the Petition.

That there were other two shareholders, namely Vadag Establishment, which held 60 % of the allotted shares, and Numised AG which held 30 % of the allotted shares.

That he ceased to be a shareholder in 2011 when his shares were bought by the Majority shareholder in the company, Vadag Establishment.

That the Applicant/Petitioner complained about the fact that the company was being run in a manner which contravened his rights as a shareholder and further that, the Respondent Company had decided not to pay him Ksh 43,772,599/- which it had agreed to pay him when it was restructured in 1994.

The Petitioner averred that he had read the Bill of costs of the Appellant herein filed on 22nd September 2015, and in the Bill, the Respondent is claiming from the Petitioner Ksh 60,146,800, which Bill of costs is stale and consequently not enforceable against the Petitioner. The matter relates to the Applicant's sale of shares 10% held in the Respondent Company.

That the reasonable terms were said to be an offer that the price of Petitioner's 10% shareholding and the question of whether or not he was entitled to be paid Ksh 43,772,599/- be referred to Arbitration and the Petition be struck out as to further prosecute it would be an abuse of the court process.

That Hon. Justice Ole Keiwa accepted the contentions of Vadag Establishment. That pursuant to the orders which Hon. Justice Ole Keiwa made, proceedings for framing of the terms upon which the matter would be referred to Arbitration were to be held. Retired Hon. Justice Mbaluto framed up the issues in March, 2000; marked **YAS 4** is a copy of His Lordship's ruling.

That vide order number 2 made on 16th February 2001, the Petitioner's petition was struck out/dismissed with costs to Vadag Establishment and to the Respondent, Leisure Lodges Ltd on 16th February 2001 – 14 years ago.

That it was those awards of costs that both Vadag Establishment and the Respondent Leisure Lodges Limited had set out to enforce through the Bills of costs filed by them on 22nd July 2015 and 22nd September 2015 respectively.

That following those judgments, an arbitration was conducted between 2001 and 2011 and an award with 2 components was made in the Applicant's favour as shown by the Final Arbitral Award annexed and marked as **YAS 7**

That the 1st component of the award was that Vadag establishment was to buy the Applicant's shares at the price fixed by Arbitrators.

The 2nd component was that the Respondent pays the Applicant Ksh 43,772,599/-.

The Applicant was paid for shares bought in 2011. The 2nd component remains due and owing.

That Leisure Lodges Limited applied for the setting aside of the said award but the same was declined. **Marked YAS 8 (a) and (b)** are rulings delivered on 30th May 2014 and 12th February 2015 in **High Court Misc Application No. 559 of 2011** and **High Court Misc Civil Application No. 288 of 2014**.

That a very significant development took place on 21st July 2015 which made Vadag Establishment file a Bill of Costs in the Court of Appeal on 22nd July 2015 and Leisure Lodges Limited filed a Bill of Costs against the Petitioner on 22nd September 2015. The Ruling is marked **YAS 10** delivered in the said Nairobi High Court **Misc Application No. 288 of 2014**.

That the two bills which Vadag Establishment and Leisure Lodges Limited had filed were to ensure that the Petitioner does not benefit from the Ruling which was delivered on 21st July 2015.

That the Petitioner's advocates, M/s Kamau Kuria & Company advised him that:

- a) The order made on 16th February 2001 was stale in so far as the costs are concerned since it was only enforceable within the period of 12 years which had expired;
- b) The Court had held in *Court of Appeal in Nyeri Civil Appeal No. 124 of 2003: Sebastian Nyamu vs Gilbert Kabeere M'Mbijiwe* that indeed judgments and orders become stale after 12 years have expired;
- c) This Court lacks jurisdiction to tax the said Bill of Costs;
- d) The said Bill of Costs is an abuse of the process of this Court;
- e) This Court has inherent jurisdiction to prevent an abuse of its process.

APPLICANT'S SUBMISSIONS

The Applicant relied on Section 4(4) Limitation of Action Act that provides;

(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.

In *Civil Appeal No 3 of 1964 Dhanesvar Mehta vs Minalal M.Shah*

(1965) E.A.321 it was held;

“The overriding purpose of all limitation statutes is based on the maxim interest reipublicae sit finis litium, and it has been the policy of the court to lean against stale claims.....”

In *Civil Appeal (Nyeri) No 4 124 of 2003 MÍkiara M'Rinkanya Sebastian Nyamu vs Gilbert Kabeere M'Mbijiwe* held;

‘that a judgment for possession of land should be enforced before expiry of the 12 years limitation period stipulated in Section 7 of the Act.....’

See also *Willis Onditi Odhiambo vs Gateway Insurance Co Ltd (2014) eKLR* which held;

“In other words the Appellant wanted to execute the said decree against the Respondent out of time. Execution of judgments and/or decrees is governed by Section 4(4) of Limitation of Actions Act which is in the following terms;

The judgment which an Appellant sought to execute was passed on 26th August 1996. The judgment should therefore have been executed on or before 27th August 2008.

The Supreme Court in *SCCA 38 of 2014 Teachers Service Commission vs Simon P.Kamau & 19 others [2014]eKLR* observed;

“We would restate the wisdom of the old principle of Common Law that litigation must come to an end; this has been adopted as a vital principle in Constitutional and statutory laws that prescribe timelines to guide the pursuit of justice in the Courts..... Article 159 (2) (b) of the Constitution cautions Courts against permitting injustice through delays.....This is the context in which Article 258 (8) of the Constitution is to be seen; it thus prescribes;

If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as an occasion arise....

On the Court's lack of jurisdiction to handle the taxation of Bill of Costs due to being statute barred by time, the land mark cases on jurisdiction of the Court were cited. Namely, *Owners of Motor Vessel Lillian S vs Caltex Oil (Ky) Ltd [1989]e KLR 1 & SK Macharia & Anor vs KCB LTD & 2 Anor SCCA No 2 of 2011*. ‘Lilian S’ held that

“jurisdiction is everything and where a Court of law has no jurisdiction it should down its tools’. SK Macharia case held;

‘A Court’s jurisdiction flows from either the Constitution of legislation or both. It cannot arrogate itself jurisdiction exceeding what is conferred upon it be law.’

GROUND OF OPPOSITION

The Respondent filed Grounds of Opposition on 31st January 2020 and raised the following issues;

a) The objection to the Bill of Costs vide **Section 4(4) of Limitation of Actions Act** is not sustainable since a party to Party Bill of Costs is not an action envisioned by **Section 4(4) of Limitation of Actions Act**.

b) **Section 27 of Civil Procedure Act 2010**, gives both subordinate Court and High Court the discretion and jurisdiction to award costs and determine the extent of costs.

c) A party is not prevented to file Bill of Costs in a struck out suit and delay in filing the Bill of Costs does not preclude assessment of the Costs.

RESPONDENT'S SUBMISSIONS

The Respondent submitted that Vadag filed a Party & Party Bill of Costs dated 18th April 2001 ("Vadag's Bill") but is yet to be taxed due to delaying tactics in which the Applicant is proving to be a past-master. A foretaste:

a) On 11th July 2001 when Vadag's Bill initially came up it was adjourned to 15th August 2001 to allow parties to negotiate.

b) On 15th August, 2001 parties could not agree on items to be taxed.

c) On 5th September 2001 when Vadag's Bill came up for taxation a consent was executed between the Applicant's former Advocate and the Advocate on record for Vadag in which certain items were agreed upon while the remaining items would proceed to be determined by way of taxation.

d) By a ruling delivered by Hon. Owino (Mrs) on 4th October 2001 the Applicant's objection to the items in Vadag's Bill was dismissed and directions issued for the disputed items to be fixed for taxation. The Applicant lodged an objection to the said ruling.

e) The Applicant filed another Chamber Summons dated 3rd June 2011 seeking to set aside the Ruling of Hon Owino delivered on 4th October 2001. However, on 8th December 2011 Hon Mutava J.(as he then was) dismissed the said application and directed Vadag to fix its Bill for taxation.

f) At this time the Applicant's Advocate on record Dr G.K.Kuria (SC) was appointed to the Goldenberg Commission of Inquiry and this delayed taxation of Vadag Bill.

g) As demonstrated in a Replying Affidavit filed by Vadag's Advocate, Mr. James Ochieng Oduol, in response to Notice of Motion dated 26th April 2017;

i) Subsequent to the ruling delivered on 8th December 2011 by Mutava J. (as he then was), the Court file was misplaced for a long time at the Registry and therefore he was unable to fix Vadag's Bill for taxation.

h) In a ruling delivered on 25th October 2018 in respect of the Applicant's Notice of Motion dated 26th April 2017, Hon. L. J. Racheal Ngetich found that the Applicant had frustrated efforts to have Vadag's Bill of Costs taxed and dismissed the said application with costs to the Respondents.

It was Respondent's submissions that contrary to the Applicant's contention, the delay in lodging the impugned bill has not and cannot affect the Respondent's right to have the costs that were awarded to it by the Court of Appeal to be determined, which is all that the taxation is about; procedural step within the proceedings in which costs were awarded. A party and Party bill of costs is not action within the meaning of **Section 4 (4) of the Limitations of Actions Act ("the LAA")** so the Applicant's reliance on it is misconceived. An action must be an independent suit. The enforcement of a judgment within the suit in which it was rendered is not a suit:

a) ***W. T. Lamb & Sons Ltd vs Rider [1948] 2 All ER, 402, CA*** on 14th November 1938, Judgment was entered against the Defendant for goods sold and delivered, No steps were taken to enforce judgment until 25th March 1946. The Plaintiff issued summons for leave to proceed with execution, notwithstanding that 6 years had elapsed. The Master refused to grant leave and the Applicant did not appeal. **In 1948, the Applicants filed another summons to enforce judgment after 6 years and the master granted leave.** The Defendants appealed. The Court of Appeal observed per incuriam;

The right to sue on a judgment has always been regarded as a matter quite distinct from the right to execute on it. The 2 conceptions have been the subject of different legislative treatment and the definition of action in S 31 of the Limitation Act 1939 has not the effect of merging the 2 together. Execution is essentially a matter of procedure- machinery which the Court can, subject to the Rules from time in force, operate for the purpose of enforcing judgments or order.

b) ***Natwest Bank vs Powney [1990] 2 All ER 416*** (interpreting section 24 of the **English Limitations of Actions Act, 1980** which is *pari materia* to **section 4 (4)** of the LAA.

On 8th November 1985 a warrant of possession was issued but not executed until 1988 as the proceedings to set aside the warrant were ongoing. On 20th October 1988 the County Court gave judgment on setting aside the warrant as it was contrary to Section 24 of limitation Act of 1980. On appeal by the bank, it was held;

“An application for leave to issue execution of a judgment was not an action within Section 38 (1) of 1980 Act”

DETERMINATION

After consideration of pleadings and submissions by Counsel on behalf of parties the issue(s) for determination is/are;

a) Whether by virtue of Section 4(4) Limitation of Action Act, the Bill of Costs filed on 22nd July 2015 by the Company and the majority shareholder are time barred and ought to be struck out?

Black’s Law Dictionary 10th Ed Pg 34-35 defines an action as;

An action has been defined to be an ordinary proceeding in a Court of justice, by which one party prosecutes another party for enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offence. But, in some sense this definition is equally applicable to special proceedings. More accurately, it is defined to be any judicial proceeding, which if conducted to a determination, will result in a judgment or decree. The action is said to terminate at judgment.

The **Advocates Remuneration Order** prescribes in **Schedule 6 Section 10-17** special proceedings (and therefore an action as defined above) by the Taxing Master/Officer of taxing Bill of Costs for matters conducted in the High Court.

In the instant matter, the judgment by Hon Gicheru, Omollo, Akiwumi JJA was delivered on 16th February, 2001, wherein Respondents were awarded costs after dismissal of the Applicant’s petition.

COURT RECORD

It is on record that the Respondents filed Bill of Costs dated 30th June 2001.

Reference to the Bill of Costs was made before Hon. LJ R Ngetich and Hon DR. E. Tanui.

The Respondent submitted that on 15th August 2001, parties failed to agree on items to be taxed and sought the taxation be stood over to 5th September 2001.

On this day, parties agreed through their Counsel, the Applicant’s former advocate and Vadag’s Advocate entered into a Consent and agreed on certain items and the remaining items were to be determined by way of taxation. The Consent is confirmed by proceedings conducted by parties before Hon. LJ R Ngetich on 20th September, 2017. It remains in force and binds parties as it has not been varied or set aside. See **Flora N. Wasike vs Destimo Wamboko (1982-1988) 1 KAR 625.** These statements of fact were not controverted by the Applicant.

The Court record confirms that on 26th April 2002, Mr Arthur for Ochieng Oduol and Co Advocates for the majority shareholder/Applicant applied for the Bill of Costs to be taxed and was granted 20th May 2002 at 9 o'clock for taxation. Notices were to issue.

The above outline confirms that an action was brought upon the judgment of 2001 before 12 years elapsed. The Bill of Costs was filed on 30th June 2001 as evidenced by the Court record. To my mind, an action brought upon a judgment as outlined by **Section 4(4) Limitation of Actions Act** envisages, an application and/or plaint, petition or originating summons filed to commence and/or institute proceedings to enforce or execute and comply with the judgment of 16th February 2001. The taxation proceedings are judicial special proceedings that will terminate with a judgment and/or decree. So, the action was brought on 30th June 2001 in form of the Bill of Costs. With respect, **Section 4(4) Limitation Act** limits action after judgment brought after 12 years, in this case the Bill of Costs was filed and proceedings instituted in 2001.

On 20th July, 2015 before the Deputy Registrar/ Taxing Officer Mr Awele Holding brief for Mr Amoko for the Applicant confirmed that they filed Bill of Costs and realized it had a grave error and sought leave to amend it within 7 days. Ms Muhoro holding brief for Dr Kuria did not object and the application was granted to be mentioned on 22nd September 2015 for directions.

On 22nd September 2015, Mr Awele confirmed pursuant to leave granted to amend Bill of Costs, they filed Bill of Costs dated 21st September 2015 and filed on 22nd September 2015. Dr K. Kuria sought that the Applicant withdrew the Bill of Costs filed on 30th June 2001. It was agreed by Consent that the Bill of Costs of 30th June 2001 was withdrawn by consent and was now replaced by the instant Bill of Costs sought to be struck off as being statute time barred.

From the facts above from the Court record, the impugned Bill of Costs is not an action as envisaged by **Section 4(4) Limitation of Action Act** as an action was instituted after judgment by filing on 30th June 2001 Bill of Costs which was withdrawn and replaced by the instant Bill of Costs with knowledge and consent of the Applicant. Time could not begin to run from 16th February 2001 when the judgment by C.A was delivered to 2015 when the Bill of Costs sought to be struck out was filed; as the action was brought shortly thereafter by filing of the Bill of Costs of 30th June 2001 the predecessor of the instant Bill of Costs of 21st September 2015.

This Court concedes the legal provisions and case-law cited by both parties through Counsel on limitation of actions in lodging claims in Court and in executing Court judgments, rulings, decrees and orders. However, in the instant circumstances, facts and events do not disclose the action filed or brought after 12 years from the date of judgment. The Bill of Costs was halted due to various reasons attributed to the

parties and/or their Counsel unavailability; various other ongoing proceedings on the same subject matter and the Court misplaced and/or lost the Court file at some point. The inordinate delay cannot be visited solely on the Respondents. **Section 4(4) Limitation Act** prescribes bringing an action; which means starting an action; it does not provide for completion or termination of the action's proceedings within 12 years of judgment. However, it is noted that **Article 159 (2) (b) COK2010** mandates expedition of resolution of disputes.

On 28th October 2015, before the Hon. DR E.Tanui, Mr Ouma holding brief for Mr. Ochieng Oduol for Vadag informed the Court that there were 2 Bills of Costs; one filed on 18th April 2001 and one dated 21st September 2015. Mr Amuka, appearing alongside Mr Awele for the Applicant informed the Court that there was an application filed on 24th September, 2015. Ms Muhoro holding brief for Dr K. Kuria for the Applicant was present. The Court directed the application filed on 24th September 2015 should be heard first before the Judge before the issue of Bill of Costs was resolved.

By Ruling delivered by Hon LJ R Ngetich on 25th October 2018, the Court dismissed the application. This application to strike out the Bill of Costs was denied on grounds that by consent of the parties/through advocates the Bill of Costs was partly taxed and the Applicant also having contributed to the delay in taxation of the Bill should not be allowed to take advantage of provisions of the Limitation of Actions Act.

Earlier, in the proceedings, after arbitration proceedings were concluded, the Applicant sought to set aside the Ruling by Hon Owino of 4th October, 2001, by ruling of Hon Mutava J delivered on 8th December 2011 the court dismissed the application. The Respondent was ordered to fix the Bill of Costs for taxation.

These are Rulings on the subject-matter by Courts of equal, similar and competent jurisdiction as this Court. There is no application to review any of the Rulings. Therefore, this Court lacks requisite jurisdiction to enquire into decisions of Hon Mutava J & LJ R Ngetich J. Until they are successfully appealed against in the Court of Appeal, they remain valid, regular and legal orders of this Court.

It is on the basis of the totality of the evidence in the Court record, pleadings and submissions that this Court finds that the Bill of Costs dated 21st September 2015 should not be struck off on account of being statute time barred by virtue of Section 4(4) of Limitation of Actions Act. The action Bill of Costs was filed on 30th June 2001 after the C.A Judgment of 16th February 2001. There is a subsisting consent of 5th September 2001 partly taxing the Bill of Costs which was later replaced by the instant Bill of costs.

DISPOSITION

- 1. The application of 25th September 2015 is dismissed with Costs**
- 2. The Bill of Costs of 21st September 2015 was filed and replaced the Bill of Costs 30th June 2001 which was withdrawn by Consent of parties through their respective Advocates.**
- 3. The Bill of Costs of 21st September 2015 is not time barred under Section 4(4) of Limitation of Actions Act.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 17TH AUGUST 2020. (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF;

MR DAR FOR THE RESPONDENT

MS NDUTA KAMAU H/B DR KURIA FOR THE APPLICANT

COURT ASSISTANT – TUPET

MS Nduta Kamau: We seek leave to appeal the Ruling.

Court: The Court grants leave to appeal the Ruling. There is a stay of execution within 60 days from today. Certified proceedings/Ruling shall be availed to the parties upon payment of requisite fees.

M.W. MUIGAI

JUDGE