



V. Chokaa & Co. Advocates v County Government of Mombasa as a Successor of Municipal Council of Mombasa (Environment and Land Miscellaneous Application E076 of 2022) [2023] KEELC 21906 (KLR) (30 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21906 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E076 OF 2022
NA MATHEKA, J
NOVEMBER 30, 2023

BETWEEN

V. CHOKAA & CO. ADVOCATES APPLICANT

AND

COUNTY GOVERNMENT OF MOMBASA AS A SUCCESSOR OF MUNICIPAL COUNCIL OF MOMBASA RESPONDENT

RULING

1. The application is dated 30th August 2023 and is brought under Rule 11(1) of the *Advocates (Remuneration) Order* and Section 3A of the *Civil Procedure Act* seeking the following orders;
 1. That the Decree by the Deputy Registrar/Taxing Master made on 23rd August 2023 be set aside.
 2. That the Cost of this Application be provided for.
2. It is made on the grounds that the Deputy Registrar/Taxing Master did not have Jurisdiction to hear and determine the objections made by the Respondent to the Applicant's Bill of Costs. It is only by a Judge who is seized with jurisdiction to hear the said objections. A Bill of Costs is not an 'Action' to which section 4 of the Limitation of Actions could have applied.
3. The Respondent stated that being an Advocate Clients Bill of Costs with no record of the transactions it was indeed imperative that the Applicant files in these proceedings the relevant material culminating to the subject Bill of cost including copies of the documents and pleadings and correspondences issued in execution of the alleged instructions, including the instructions note. an onus the Applicant has failed and or declined to discharge, an explicit indication of devoid of instructions on their part. That in the absence or the requisite lawful instructions the Applicant herein was indeed bereft of the requisite locus standi to institute the proceedings of instance.



4. That the Bill or costs is incurably and time barred having been filed more than six (6) years from the end of the Advocate-Client relationship and as such had been caught up the *Limitations of Actions Act*, Cap. 22 Laws of Kenya and consequently the Application is an abuse of the court process and it should be dismissed on the face of it. Further, that the Bill of Costs or instance otherwise the subject of reference herein is null and void within the provision of section 4 of the *Limitation of Actions Act*, having been filed more than 10 years after the alleged finalization to- the primary suit and or execution of the alleged instructions bearing in mind that the defunct Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the New *Constitution* 2010 as well as *County Governments Act* 2012 and since the relationship between the and client is contractual and within the provisions of *Law of Contract Act*.
5. This court has considered the application and the submissions therein. The procedure for the challenge of a Taxing Master's decision is provided under Rule 11 of the *Advocates Remuneration Order* which provides as follows:
 - “(1) Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which the objects.
 - (2) The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.”
6. The Respondent had raised a preliminary objection opposing the bill of costs before the taxing master on the ground that it is statute barred. An objection on the ground that a matter is caught up by the law of limitation of actions is a pure point of law as was held by Law JA in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696:

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”
7. The taxing master determined that the advocate-client bill of costs was incompetent for being time barred and struck it out. The Applicant has now brought this reference before me.
8. A relationship between an advocate and his or her client is a contractual relationship for professional services. The Court of Appeal in the case of *Omulele & Tollo Advocates vs Mount Holdings Limited* (2016) eKLR while discussing the difference between a retainer and retainer agreement defined retainer in the following terms:

“It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties.”



9. Such a relationship is therefore subject to the *Limitation of Actions Act*, specifically Section 4 (1) of the *Limitation of Actions Act* which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

10. In the case of *Abincha & Co Advocates vs Trident Insurance Co. Ltd* (2013) eKLR, considered the question of when does time start to run in an action for recovery of legal fees quoted with approval *Halsbury's Laws of England* 4th Edition Volume 28 page 452 at paragraph 879 where the learned authors state as follows:

“879. Solicitor’s Costs. In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action;

1. if a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor;
2. if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided;
3. if judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute.

In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.

A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill. If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

11. In the present case, the Respondent does not dispute having instructed the Applicant to defend its interests. Their case is that the Applicant’s bill of costs is time barred having being brought after 6 years. As I have ruled in similar cases I find that the statute of limitation only begins to run from the date of termination of the action or of the lawful ending of the retainer of the advocate. On perusal of the record I find various letters way past 2009 between the parties on the issue of payment of fees to the Applicant. The Applicant has attached a rate cases letter dated 27th October 2010, two letters of list of property rates defaulters dated 12th January 2011 and 14th January 2011 and another rates cases letter dated 2nd August 2013. I find that the Taxing Master erred when he found that that the last service in the bill of cost signalled the end of the retainer. I find that there is no evidence before this court that the retainer had been terminated in 2009 and in the absence of such information this court cannot proceed on the assumption that the bill was filed outside the limitation period. For the foregoing reasons, I find that the application is merited and I grant the following orders;

1. That the ruling by the Deputy Registrar/Taxing Master made on 23rd August 2023 be set aside.
2. The bill of costs to be taxed by a different Taxing Master.



3. Each party to bear its own costs.
12. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 30TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

