



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**CONSTITUTIONAL & JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW NO. 65 OF 2017**

**IN THE MATTER OF: AN APPLICATION BY LUCY NYAMOITA MOMANYI T/A L. N. MOMANYI &  
COMPANY ADVOCATES FOR LEAVE TO APPLY FOR JUDICIAL ORDERS OF MANDAMUS**

**AND**

**IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORMS ACT CAP 26 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF: THE ADVOCATES ACT, CAP 16 LAWS OF KENYA**

**AND**

**IN THE MATTER OF: THE TAXATION OF ADVOCATE CLIENT COSTS**

**BETWEEN**

**LUCY NYAMOITA MOMANYI.....APPLICANT**

**AND**

**1. THE MANAGING DIRECTOR, KENYA RAILWAYS CORPORATION**

**2. KENYA RAILWAYS CORPORATION.....RESPONDENTS**

**RULING**

**The Application**

1. By Notice of Motion application dated 4<sup>th</sup> December, 2017 and filed here on 9<sup>th</sup> December, 2017 the Ex parte Applicant prays for the following orders:

(a) **AN ORDER OF MANDAMUS** be and is hereby issued compelling the 1<sup>st</sup> Respondent to settle, from the 2<sup>nd</sup> Respondent's resources, the Decree issued by this Court against the 2<sup>nd</sup> Respondent dated **06/03/2017** decreeing that the 2<sup>nd</sup> Respondent pays to the Applicant the Advocate- Client Costs taxed by the Court in the sum of Kenya Shillings 4, 350,000/- in **Mombasa High Court Miscellaneous Civil Application No. 80 of 2013; L. N. Momanyi & Company Advocates vs. Kenya Railways Corporation** within 7 days of service of this Court Order upon the 1<sup>st</sup> and the 2<sup>nd</sup> Respondents.

(b) The 2<sup>nd</sup> Respondent bears the Costs of these Proceedings.

2. The application is pursuant to leave granted on 27<sup>th</sup> November, 2017 upon the hearing of the Ex parte Chamber Summons filed on 27<sup>th</sup> November, 2017 by the Ex parte Applicant.

3. The application is based on the grounds set out in the said Ex parte Chamber Summons filed on 27<sup>th</sup> November, 2017. It is also supported by the Statement filed on 27<sup>th</sup> November, 2018 as well as by the Verifying Affidavit of Lucy Nyamoita Momanyi sworn on 25<sup>th</sup> November, 2017. The Ex parte Applicant's case is that the Applicant was engaged by the 2<sup>nd</sup> Respondent to represent it in Mombasa **CMCC No. 1090 of 2001; Mombasa Municipal Council vs. Kenya Railways Corporation**. This matter was finalized pursuant to a Consent Judgment recorded in Court between the Parties on **31/05/2001**. Following the failure of the 2<sup>nd</sup> Respondent to settle the Applicants Legal Fees, the Applicant filed an Advocate- Bill of Costs dated **14/05/2013** for Taxation. This Bill was subsequently taxed at **KES. 4,350,000/-** in the Applicants favour and a Certificate of Costs issued on **18/01/2017**.

4. The Applicant states that on **18/01/2017**, the 2<sup>nd</sup> Respondent, through its Advocates on record M/s Ndegwa, Muthama & Katisya Advocates, was served with the Certificate of Costs. However, the 2<sup>nd</sup> Respondent failed to pay the taxed costs. Consequently, the Applicant filed an Application for Summary Judgment against the 2<sup>nd</sup> Respondent for **KES. 4,350,000/-**.

5. The Application was allowed with the Court entering Judgment in favour of the Applicant for **KES. 4,350,000/-** against the 2<sup>nd</sup> Respondent. The Applicant served the consequential Order and the Decree upon the 2<sup>nd</sup> Respondent through its Advocates on Record, M/s Ndegwa, Muthama & Katisya Advocates for satisfaction. Through her Counsel, the Applicant states that she also advised the 2<sup>nd</sup> Respondent on where to effect the payment. Despite being served with the Order and the Decree, the 2<sup>nd</sup> Respondent has without any valid legal reasons, failed and/or ignored to satisfy the Decree. This default is alleged to have continued despite diligent efforts of the Applicant to engage with the 2<sup>nd</sup> Respondent on this matter.

6. The Applicant states that on **01/08/2017** through her Advocates, Munyao, Muthama & Kashindi Advocates wrote directly to both the 1<sup>st</sup> Respondent and the Corporation Secretary of the 2<sup>nd</sup> Respondent giving notice of her intention to institute Legal proceedings against the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to enforce the Decree. However, the Respondents failed to respond to the Notice. The Applicant now avers that the failure by the 2<sup>nd</sup> Respondent to satisfy the decree has caused the Applicant to incur and continue incurring damage, thereby rendering these further proceedings necessary. By these Proceedings, the Applicant seeks to compel the 1<sup>st</sup> Respondent, who is the Chief Executive Officer of the 2<sup>nd</sup> Respondent and consequently its accounting Officer, to settle the Decree as ordered by the Court. The Applicant's case is that if the 1<sup>st</sup> Respondent is not compelled to immediately settle the Decretal Sum, the Applicant shall continue to be subjected to loss and damage. In addition, the authority of the Court which issued the decree and the rule of law shall continue to be undermined. These are the reasons giving rise to these proceedings.

### **The Response**

7. In opposition to the application the Respondents filed a Notice of Preliminary Objection on 10<sup>th</sup> January, 2018, raising the following issues:

(a) The claim arises from legal services rendered by the Applicant to the 2<sup>nd</sup> Respondent in *Msa CMCC No. 1090 of 2001; Mombasa Municipal Council Versus Kenya Railways Corporation*. The matter was finalized pursuant to a Consent Judgment recorded in Court on 31/5/2001.

(b) The Certificate of Costs giving rise to the claim for Kshs. 4,350,000.00 arises from the Advocate-Client Bill of Costs filed on 14/5/2013 which is over 12 years from 31/5/2001 when the matter was finalized.

(c) The claim is time barred by virtue of Section 4(1)(a) of the Limitation of Actions Act which prohibits filing of contractual claims after the end of 6 years from the date on which the cause of action accrued.

(d) The Order of Mandamus cannot issue to compel the 1<sup>st</sup> Respondent to pay money to the Applicant from the 2<sup>nd</sup> Respondent's funds because the 1<sup>st</sup> Respondent is not the Accounting officer of the 2<sup>nd</sup> Respondent.

The Statutory responsibilities of the 1<sup>st</sup> Respondent are clearly set out under Section 10 of the Kenya Railways Corporations Act.

The court directed that the said Preliminary Objection would be determined together with the application.

8. In response to the said Preliminary Objection the Ex parte Applicant filed Grounds of Opposition on 8<sup>th</sup> March, 2018 stating that the Respondent's Notice of Preliminary Objection is challenging the Certificate of costs issued in **Mombasa High Court Misc. Application No. 80 of 2013; L.N Momanyi & Company Advocates Versus Kenya Railways Corporation**. The Applicant's case is that the current Judicial Review cannot be used by the Respondents as platform to challenge and consequently appeal against the Certificate of Costs and the decision of the Honourable Deputy Registrar. In this instance. The Applicant's case is that if the Respondents wished to challenge the Bill of Costs, there is an established avenue for such through a Reference to the Judge.

9. The Applicant further states that the duty of the 1<sup>st</sup> Respondent as an accounting officer of the 2<sup>nd</sup> Respondent is a question of fact which cannot be dispensed with by way of a Preliminary Objection. The Applicant states that the statutory responsibilities of the 1<sup>st</sup> Respondent set out in Section 10 of the Kenya Railways Corporations Act are neither mandatory nor exhaustive. The Applicant referred the court to the wording of Section 10: "*Subject to the Directions of the Board, the Managing Director MAY...*" and that Section 9 of the Kenya Railways Corporation Act expressly provides that Control and executive management of the corporation shall be vested in the Managing Director.

Effectively, the Applicant avers, the question of whether an order can issue to compel the 1<sup>st</sup> Defendant to pay money to the Applicant from the 2<sup>nd</sup> Respondents funds is a question of facts not dispensable by way of a Preliminary Objection.

### **Submissions**

10. **Mr. Ngoya** for the Applicant submitted that Section 88(e) of Kenya Railway Corporation Act prohibits attachment of Kenya Railways Corporation Assets but that the Managing Director can pay the funds of the corporation and in that regard the 2<sup>nd</sup> Respondent can be compelled to pay the decree. Counsel further submitted that the decree arises out of a certificate of costs pursuant to a taxation of bill of costs which was adopted as Judgment of the court in a participatory way. Therefore the submission by Mr. Masila that the suit herein was time barred had not basis.

11. **Mr. Masila** for the Respondents submitted that the Preliminary Objection raises a point of law that the suit is time barred. This then goes to the issue of jurisdiction and that the court which issued the certificate of costs herein had no jurisdiction to do so since the contractual relationship between the parties went beyond the six years permitted in contract. The Bill of Costs was filed on 14<sup>th</sup> may, 2013 which is a period of more than twelve (12) years since the suit MSA CMCC No. 1090 of 2001 was concluded. Counsel submitted that the cause of action arose when the said case was filed in 2001. That means that the Bill of Costs filed herein was filed out of time.

### **The Determination**

12. Having considered the submissions and the authorities I raise the following issues for determination.

- (i) Whether the cause of action herein is time barred.
- (ii) Whether the Managing Director of Kenya Railways Corporation can be compelled to satisfy the decree.
- (iii) Whether the Respondents Preliminary Objection is sustainable.

### **WHETHER THE 2<sup>ND</sup> RESPONDENT SHOULD PAY THE APPLICANT THE OUTSTANDING LEGAL FEES.**

13. It has not been disputed by the Respondents that the Applicant's Law Firm was engaged to represent Kenya Railways Corporation in **Mombasa CMCC No. 1090 of 2001; Mombasa Municipal Council vs. Kenya Railways Corporation.**

It is further not disputed by the Respondents that the Applicant represented Kenya Railways Corporation to the final conclusion of the matter.

### **Analysis of Evidence in Favor of the Claimants**

#### ***1. The Applicant's Case against the 2<sup>nd</sup> Respondent, the Kenya Railways Corporation;***

The Applicant through her Verifying Affidavit sworn on 27<sup>th</sup> November, 2017 adduced evidence which can be summarized as follows:

- a) The Applicant has produced a copy of the Plaint dated 28<sup>th</sup> March, 2001 and filed in Court on 29<sup>th</sup> March, 2001 in respect of Mombasa **CMCC No. 1090 of 2001; Mombasa Municipal Council vs. Kenya Railways Corporation** as LNM-1. This evidence has neither been challenged nor rebutted by the Respondents.
- b) The Applicant filed an itemized Advocates-Client Bill of costs for Taxation being Mombasa High Court Misc. Application No. 80 of 2013; L.N Momanyi & Company Advocates Versus Kenya Railways Corporation in respect of Mombasa CMCC No. 1090 of 2001; Mombasa Municipal Council -VS- Kenya Railways Corporation which has been produced as exhibit LNM-2. This evidence has also not been challenged by the Respondents.
- c) The Applicant has produced numerous letters being correspondences to the 2<sup>nd</sup> Respondent in demand it her legal fees as LNM-3.
- d) The Applicant has produced a Ruling on the Bill of Costs by the Honorable Deputy Registrar dated 12<sup>th</sup> January, 2017 and the resultant Certificate of Costs taxed at Kshs. 4, 350,000/- dated 18<sup>th</sup> January, 2017 as LNM-4. It is key to not that the Certificate of Costs was never challenged by the 2<sup>nd</sup> Respondent either by way or a Reference or otherwise.
- e) The Applicant has further produced as evidence a letter dated 18<sup>th</sup> January, 2017 forwarding for service the Certificate of Costs upon the 2<sup>nd</sup> Respondents Advocates, M/S Ndegwa Katsiya Sitonik Advocates. The same is marked as exhibit LNM-5.
- f) The Applicant has also produced as evidence Exhibit LNM-6 being the Order and Decree made by the Honorable Court.
- g) Finally, the Applicant has produced a Notice of intention to institute Legal Proceedings against the respondents for recovery of her legal fees dated 1<sup>st</sup> August, 2017. The said Notice is marked as exhibit LNM-7.

#### ***The Applicant's Case against the 1<sup>st</sup> Respondent, the Managing Director of Kenya Railways Corporation;***

The Applicant's case against the 1<sup>st</sup> Respondent is founded upon Section 88 (a) of the Kenya Railways Corporation Act. This Section while prohibiting any execution or attachment against the 2<sup>nd</sup> Respondent or its immovable property by a judgment creditor goes on to state that the Managing Director of Corporation shall cause to be paid out of the revenue of the 2<sup>nd</sup> Respondent Corporation, such amounts as may be awarded against the Corporation to the person entitled thereto.

14. This court notes that the Respondents have not filed any response or document to challenge the evidence tendered by the Applicant. The Respondents have not denied that the Applicant is owed her legal fees by the 2<sup>nd</sup> Respondent nor have the Respondents alleged that indeed the legal fees was paid. This court finds that by way of evidence, the Applicant has indeed demonstrated that she is owed the amount claimed as legal fees for rendering her professional services.

15. The Respondents have not denied issuing the Applicant instructions to defend the 2<sup>nd</sup> Respondent in the primary suit. The Respondents have also not denied that the Applicant is owed the sum of Kshs. 4, 350,000/- on account of unpaid legal fees. The Respondents have raised a Preliminary Objection alleging that the Claim is time barred as the Certificate of Costs arises from a Bill of Costs that was filed on 14<sup>th</sup> May, 2013 and the subject matter was finalized on 31<sup>st</sup> May, 2001. Further, the Respondents claim that the 1<sup>st</sup> Respondent being the General Manager of the 2<sup>nd</sup> Respondent cannot be compelled to pay money from the funds of the 2<sup>nd</sup> Respondent as he is not the Accounting Officer of the 2<sup>nd</sup> Respondent. The essence of a preliminary objection was given by **Charles Hewbold P. in Mukhisa Biscuits manufacturing Co. Ltd vs. West End Distributors (1969) E. A 696** at page 700 law J.A. stated that:

**“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication of pleadings or which arises by clear implication of 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 a contract giving rise to the suit to refer the dispute to arbitration.”**

Sir Charles Hewbold P added as follows page 701:-

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion”.**

In **Attorney General & Another Versus Andrew Maina Githinji and Anor [2016] eKLR** the Court observed that, **“The test to be applied in determining whether the appellants' Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the Mukisa Case (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”**

16. It is the finding of the court that if is expressly provided for in **Section 88(a) of the Kenya Railways Corporation Act, CAP 397**. This Section expressly states that, **“... Where any judgment or order has been obtained against the Corporation, no execution or attachment, or process in nature thereof, shall be issued against the Corporation or ..., but the Managing Director shall, without delay, cause to be paid out of the revenue of the Corporation such amounts as may, by the judgment or order, be awarded against the Corporation to the person entitled thereto.”**

17. It is therefore clear from the Act that it is in order for this Court to issue an Order of mandamus to the 1<sup>st</sup> Respondent who is the Managing Director of the 2<sup>nd</sup> Respondent to pay the Applicant from the funds of the 2<sup>nd</sup> Respondent in compliance with an order and Decree of the Court. Further, the statutory responsibilities of the 1<sup>st</sup> Respondent that are set out in **Section 10** of the Kenya Railways Corporations Act are neither mandatory nor exhaustive. The wording of Section 10 is, **“Subject to the Directions of the Board, the Managing Director MAY...”** Further, **Section 9** of the **Kenya Railways Corporation Act, CAP 397** expressly provides that Control and executive management of the corporation shall be vested in the Managing Director. Effectively, the question of whether an order can issue to compel the 1<sup>st</sup> Defendant to pay money to the Applicant from the 2<sup>nd</sup> Respondents funds is a question of facts not dispensable by way of a Preliminary Objection.

#### **Whether the cause of action herein is time barred**

18. The Respondent's second limb of the Preliminary Objection is challenging the Certificate of costs issued in **Mombasa High Court Misc. Application No. 80 of 2013; L.N Momanyi & Company Advocates vs. Kenya Railways Corporation** on account of the Bill of Costs having been filed allegedly out of time. The Applicant has urged that the current dispute should not be used by the Respondents as a platform to challenge and consequently appeal against the Certificate of Costs and the decision of the Honourable Deputy Registrar. The Applicant submitted that the dispute before this Court is not the question of the Validity of the Certificate of costs. The Applicant is seeking an order to enforce the Certificate of Costs awarded by this Court, not to interpret the Certificate of Costs. The Applicant avers that for the Respondents to raise a Preliminary Objection in this court and allude that the Bill of Costs that gave rise to the Certificate Of Costs that this suit seeks to enforce is simply a clever way of asking this Court to determine this Suit as a Reference to the Certificate of Costs. It is important to note that the Respondents did not object to the Certificate of Costs issued by the Honorable Deputy Registrar. The Respondents did not file a reference to challenge the Certificate of Costs. This court accepts the submissions by the Applicant that this Court is not sitting over a Reference but is sitting as a Judicial Review Court to determine the Judicial Review suit currently before it on its merits. The validity of the Bill of Costs is not what is before the court. The forum to determine that issue is long past, and both parties participated in that process.

19. It must be noted that the Decree for the Taxed Costs, being a judgment of the Court, can only be caught up by limitation at the expiry of 12 years from the date of issue, which *is not* the case. In any event the question of limitation of time, as is now quite clear, *is a* contested fact. It has not been admitted by the Applicant. Therefore, *it cannot* constitute a Preliminary Objection on a pure point of law as envisaged *Mukisa Biscuits versus Kituyi*. Given the relevance of dates, it ought to have been raised by way of a Replying Affidavit so that the Applicant

*had* sufficient notice of it to enable her respond to it by way of a Further Affidavit. It is the finding of this court that the cause of action herein is not time barred.

20. From the foregoing the application before the court is allowed as prayed.

**Dated, Signed and Delivered at Mombasa this 24<sup>th</sup> day of July, 2018.**

**E. K. O. OGOLA**

**JUDGE**

In the presence of:

Mr. Ngoya for Applicant

Ms. Nyambu holding brief Mr. Masila for Respondents

Mr. Kaunda Court Assistant