



**REPUBLIC OF KENYA**

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

**MISC. CIVIL APPLICATION NO. 351 OF 2017**

**IN THE MATTER OF GITONGA MURIUKI & COMPANY ADVOCATES**

**GITONGA MURIUKI & CO ADVOCATES.....ADVOCATE/APPLICANT**

**VERSUS**

**TELEPOSTA SAVINGS & CREDIT CO-OPERATIVE**

**SOCIETY LTD.....CLIENT/RESPONDENT**

**RULING**

1. The Respondent filed the Notice of Preliminary Objection 28<sup>th</sup> May, 2018 in which it raised the following grounds:

***i. The bill of costs is statute barred as it contravenes the clear provisions of Section 4 (1) (a) of the Limitation of Actions Act, Cap 22, Laws of Kenya and should be struck out with costs;***

***ii. The bill of costs is incompetent and constitutes a gross abuse of the court process.***

2. The Notice of Preliminary Objection is supported by the Replying Affidavit of the Chief Executive Officer, of Teleposta Savings & Credit Co-op Society Ltd, Maryanne Ndekei sworn on 26<sup>th</sup> April, 2018. She averred that the Applicant served the Respondent with a notice of taxation of the bill of costs sometime in October 2017 which emanated from **Co-operative Tribunal Case No. 67 of 2007** where the Applicant supposedly had instructions from the Respondent to act on their behalf.

3. She argued that the Respondent was never a party in the afore-mentioned suit and hence she never issued any instructions to the Applicant.

4. She averred that on 4<sup>th</sup> April, 2018, their advocates on record M/s Kabugu & Company Advocates followed up with the Co-operative Tribunal registry with the for purpose of establishing the status of the tribunal case. She averred that the Executive Officer of the Co-operative Tribunal confirmed that the Respondent was never a party in the said suit vide letter dated 10<sup>th</sup> April, 2018. She urged this court to strike out the bill of costs with costs.

5. The Notice of Preliminary Objection was opposed by the Applicant who filed the Grounds of Opposition dated 11<sup>th</sup> June, 2018 arguing that the preliminary objection did not fall within the threshold as held in the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696**. He stated that the objection filed was based on facts and not based on points of law. It was averred that the limitation of action applied to matters which have been fully concluded or where the parties agreed or disagreed and six years had lapsed. He averred that the bill of costs are dealt by the Deputy Registrar as a tax matter and that the objection was devoid of merit and urged this court to dismiss it with costs.

6. In his written Submissions, the Applicant argued that he had filed as Advocate/Client Bill of Costs arising from the proceedings in **Co-operative Tribunal Case Number 67 of 2007** between **Teleposta Savings and Credit Co-operative Society Limited vs Peninah Wachera Mathenge and 556 Others** in which the Respondent herein sought to recover Kshs., 23,586,552.13 as dues owing from retrenched Telkom Kenya Limited employees.

7. He argued that the Respondent instructed him to act on their behalf in the aforementioned matter on or about 13<sup>th</sup> February, 2007 in which he filed a statement of claim and an application for an injunction with the Cooperative Tribunal on 14<sup>th</sup> February, 2007.

8. He argued that he had instructions from the Respondent and made reference to the letter dated 26<sup>th</sup> March, 2007 in which the Respondent stated that some 15 members from the suit did not owe them any money and sought that their assets not to be attached for recovery of funds. He argued that the Respondent took out an advertisement of the suit in the Daily Nation and paid some Kshs. 208,243 for the advertisement.

9. He argued that instructions do not have to be written and can be issued either orally or by implication. He stated that it was only fair that the Respondent settle the bill of costs as they had clearly issued instructions to the Applicant who had acted on their behalf in the above-mentioned suit at the Cooperative Tribunal. He urged the court to allow the bill of costs in the amount of Kshs. 3,712,420.50 as being payment for services rendered by the Applicant to the Respondent.

10. In his Reply to the Respondent's Replying Affidavit sworn on 17<sup>th</sup> May, 2018, the Applicant averred that the said suit was filed on 14<sup>th</sup> February, 2007 and adduced copies of receipts of the charges incurred during the filing of the said suit in the amount of Kshs. 30,360. He averred that the filed statement of claim and replying affidavit were deponed by the then **Chief Executive Officer/GM**, Jacktone Osondo in which the court granted orders for use of substituted service.

11. He averred that he procured the advertisement in the Daily Nation on behalf of the Respondent under the name of his firm. He averred that the Respondent wrote to him vide letter dated 26<sup>th</sup> March, 2007 over the positive response and payment being made by the loan defaulters. He urged this court to sustain the taxation of the bill of costs.

12. I have considered the grounds stated on the face of the Notice of Preliminary Objection and the facts deponed in the affidavits and written submissions filed in support and against the Notice of Preliminary Objection. The Respondent argued that the bill of costs were statute barred as the claim for payment had exceeded the statutory 6 years' timeframe.

13. It was further argued that the Applicant was not a party to the Cooperative Tribunal suit.

14. On the other hand, the Applicant argued that the Preliminary Objection was not properly before the court as it was not based on points of law. He also argued that the suit at the Co-operative Tribunal was yet to be concluded hence the bill of costs was not statute barred. He also argued that he did indeed represent the Respondent and was right in claiming payment of the bill of costs.

15. The definition of a preliminary objection was stated by **Sir Charles Newbold, Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696** *inter alia* as follows:

***"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 fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop"***

16. The evidence adduced before this court does not meet the requirements for it to be treated as preliminary objection since it is not based on purely on points of law. The Respondent has failed to demonstrate that the suit at the Co-operative Tribunal had been finalised rendering the Applicant's claim statutorily barred as stipulated under Section 4 (1) (a) of the Limitation of Actions Act, Cap 22, Laws of Kenya which provides:

***The following actions may not be brought after the end of six years from the date on which the cause of action accrued—***

***(a) actions founded on contract.***

17. Further, **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 28 at paragraph 879 at page 452** states:

***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;***

18. The Applicant has adduced evidence that show he acted on behalf of the Respondent in the suit at the Cooperative Tribunal. He has adduced *inter alia*, copies of the filing receipts a copy of the statement of claim, a copy of the supporting affidavit signed by the then CEO/GM, a copy of the court order to use substituted service, a copy of the advertisement in the Daily Nation and the requisite payment vouchers for the advertisement made under his law firms name.

19. The Respondent on the other hand, has not disproved nor controverted the Applicant's claims.

20. For the above reasons, the Notice of Preliminary Objection is hereby found to be without merit. It is dismissed with costs. The matter is referred to the Deputy Registrar to finalise the taxation of the Applicant's bill of costs.

**Dated, Signed and Delivered in Nairobi this 28<sup>th</sup> day of September, 2018.**

.....

**J.K. SERGON**

**JUDGE**

***In the presence of:***

..... *For the Advocate/Applicant*

..... *For the Client/Respondent*