



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MISCELLANEOUS APPLICATION NO. 46 OF 2014

Muturi Mwaniki & Wamiti Advocates.....Applicant/ Advocate

Versus

EdwardMukundi Karanja.....1st Respondent/Client

Veronica Wanjiku Karanja.....2nd Respondent/Client

Emmanuel Mwangi Karanja.....3rd Respondent/Client

JUDGMENT

BACKGROUND:

On 17th March 2016, the parties through Counsel filed Consent before the Taxing Master which was adopted as an order of the Court. Written submissions were filed for determination of pending issues by Taxing Master. Ruling was delivered on 1st September 2016.

The Applicant herein filed on 6th September 2016 an application under certificate of urgency brought under **Articles 50 & 159 COK 2010; Sections 51 & 52 of Advocates Act, Rules 1 2& 3 of Advocates Remuneration Order, Section 1A,1B, 3A & 63 of Civil Procedure Act, Order 51 Rules 17 3 of Civil Procedure Rules.**

The Applicant sought the application be certified urgent and heard *exparte*, pending hearing and determination, there be a stay of execution of the extracting and enforcing the Certificate of Taxation pursuant to the Ruling of 1st September 2016.

The Notice of Preliminary Objection of 7th April 2016 be referred to the High Court for determination pursuant to Rule 12 (2) of Advocates (Remuneration) Order.

Consequently Counsel for the parties appeared in this Court on 24th October 2016 and by Consent agreed to file written submissions on the issue of Preliminary Objection. On 16th January 2017 the matter was mentioned by Counsel holding brief for the Counsel for respective parties.

APPLICANTS' CASE:

The Applicant's written submissions detailed the following;

A Bill of Costs dated 10th March 2014 was taxed on 13th August 2014 at Kshs 12,682,818.50 and a certificate of taxation issued on 28/08/14. The Clients/ Respondents thereafter approached the Advocates/Applicants seeking the setting aside of the taxation. Upon that request, the Advocates agreed and the Clients signed consent dated 19th February 2016(hereinafter the consent) in which parties agreed to set aside the consent. This consent was as follows:

“The Taxation of 13th August 2014 and the resultant certificate of taxation dated 28th August 2014 be and is hereby set aside subject to the conditions that:

1. The Applicant/ Advocate Bill of Costs dated 10th March 2014 be re-taxed limited to determining the quantum of items 2,36,37,45,47,49,54,59,74,102,12,130,137,138 and 139. (Emphasis ours)

2. The rest of the items on the Bill of Costs, save for the items numbered in 1 above, are agreed and to be taxed as drawn. (Emphasis ours)”

The Court adopted the Consent as an order of the Court on 17th March 2016 in the presence of both parties thereby making it binding. The court on that day also ordered that both parties to file written submissions on the items not agreed on as a way of complying with the agreement to re-tax “limited to determining the quantum”. Contrary to the express orders in the Consent, the Clients on 11th April 2016 served the Advocates with a Preliminary Objection dated 7th April 2016. In the Preliminary Objection, the clients ought to have the Bill of Costs; that they had by consent, freely admitted before the court struck out. In the same consent order, the Clients had admitted that they owed at least Kshs. 96,610 to the Advocates being the items agreed to be taxed as drawn. The Consent Order had not been set aside or nullified by any court, to date, and is therefore still valid and binding.

The Applicants argued that the signed Consent amounted to an acknowledgement of debt and therefore a fresh right of action arose. They further submitted that **Part III of the Limitation of Actions Act, Cap 22** deals with the ‘*Extension of Periods of Limitation*’. **Section 2** provides that a fresh accrual of right of action arises on acknowledgement of debt. **Section 23 (3) of Limitation of Actions Act** provides:

“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..., the right accrues on and not before the date of acknowledgement...”

Relying on the above provisions, they argued that the clients, by signing the Consent, acknowledged being indebted to the Applicant up to Kshs 96,610 and for a quantum to be determined on other items. Consequently the Advocate’s right of action accrues afresh on the date of the acknowledgement. The matter cannot therefore be time -barred.

Pursuant to **Section 24 of the Limitation of Actions Act** which provides that for the acknowledgment to be binding it should be in writing, and signed by the person making it or its agent, the Consent Order which was in writing and signed by the Clients’ Agent (their advocates) was therefore an acknowledgement of the debt and a fresh right of action accrued once they signed it.

In **Civil Appeal 283 of 2011 Kisii County Government v Masosa Construction Company Ltd (2015) eKLR** Court of Appeal upheld the decision of the High Court Judge Hon. O. Muchelule, J who held as follows:

“Any acknowledgement not only extends the limitation period but also revives an otherwise statute barred action falling within section 23 of the Limitation of Actions Act (Cap 22). If the limitation period ended three years after 26th November, 2002 it was extended by this acknowledgement.”

The Clients/Respondents quoted the case of

Nairobi Misc. App. No. 1 of 2016 P..M Wamae & Co. Advocates v Ntothia M’Mithiaru delivered on 21st September 2016 in which Lady Justice Aburili upheld the preliminary objection that the bill of cost was time barred. The Respondent blatantly made a misleading submission by stating that the court in the said decision held that Section 23(3) of the Limitation of Actions Act does not apply in the case of a time barred bill of costs. In fact Justice Aburili clearly indicated in her ruling in that matter why Section 23(3) did not apply, namely that there was no acknowledgement of debt. In paragraph 28 and 29, page 14 and 15 she states

“I do not find any single document wherein there was a mention of payment or even mutual agreement for settlement of the Advocate’s legal fees”

The Respondents/applicants relied on the case of **Rose Wakanyi Karanja & 3 others vs Geoffrey Chege Kirundi & Another [2016]** where the Court held that consent could not validate an illegality; to oust the statutory requirement of the Land Control Board. The Applicant stated that the situation in the above case totally different from the present scenario.

It was submitted that the Consent Order is a binding agreement between the parties since it is trite law that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation has already commenced, bring it to an end. That when it complies with the requisites and principles of contracts, it becomes a valid agreement which has the force of law as between the parties. That consent once given judicial approval, becomes more than a contract. Having being sanctioned by the court it becomes a determination of the controversy and has the force and effect of a judgment. This position was held by the court in the case **Agrafin Management Services Ltd V Agricultural Finance Corporation & 5 Others (2012) eKLR**

The circumstances in which a consent judgment maybe interfered with were considered by this Court in **Hirani vs Hirani (1952) 19 EACA** where the following passage from Set on Judgment and Order 7th Ed Vol 1 pg 125 was approved;

Prima facie, any order made in the presence and with consent of Counsel is binding on all parties to the proceedings or action, and on those claiming under them...and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to public policy of the Court..or if consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts , or in general for a reason which would enable the Court to set aside an agreement.

In **Flora Wasike v Destino Wamboko (1982-88) 1 KAR** the Court of Appeal (Hancox J) stated:-

“it is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled...”

The consent was further given judicial approval and adopted as a court order in the presence of both parties on 17th March 2016. In emphasizing the need of upholding a consent order by the parties, the court in **Superior Home s(Kenya) Ltd v East Africa Portland Cement Company Ltd [2014] eKLR** held that;

“the grounds on which a consent order or judgment can be varied and/or set aside have been restated in various court decisions, which have held that a consent judgment or order has contractual effect and can only be set aside on the ground that would justify the setting aside of a contract...”

The court further quoted the case of **Kenya Commercial Bank Ltd v Specialised engineering Company Ltd[1982] KLR 485** where it held that:-

“The making by the court of a consent order is not an exercise to be done otherwise than on the

basis that the parties fully understand the meaning of the order either personally or through their advocate and when made, such an order is not lightly to be set aside or varied save by consent or on one or either of the recognized grounds.”

The case of **Ismail Surnderji Hirani v Noorani Esmail Kassam [1952] 19 EACA 131** where the court cited with approval the following passage; from ‘**Set on Judgments and Orders, 7th Edition Vol.1 p. 124**’

The Applicants stated that the Respondents by their conduct are estopped from raising Preliminary Objection. By entering into Consent with the applicants through their Counsel and admitting that Ksh 96,610/= is payable pending quantum on other items to be determined, they cannot raise the issue of limitation of the claim.

In the case of **Sonko & Another vs Patel & Another (1955) 22 EACA 23** it was held;

for we hold that the 1st Respondent is estopped by his conduct from now questioning the form or substance of the decree...It was as we have said submitted to his advocate and approved without reservation. That was an express representation that he accepted the decree as being correct in form and substance....In these circumstances it would be unjust to allow the 1st Respondent to approbate and reprobate and this objection fails

Similar sentiments were held in **Air Alfaraj Ltd vs Raytheon Aircraft Credit Corporation & Anor Civil Appeal (Application) No 29 of 1999**

But he is an advocate of the high court of Kenya and therefore an officer of the Court... That is not being honest and amounts to a radical departure from the conduct expected of Counsel. The conduct and etiquette at the Bar demands that Counsel ought not to approbate and reprobate

See also the case of **Behan & Okero Advocates vs National Bank of Kenya [2007]** on the same point and relied on the case of **Sonko & Another vs Patel & Another (1955) 22 EACA 23**.

The Applicants claim that the Preliminary Objection was brought in bad faith and is lacking in honesty and relied on the case of;

Peter George Anthony D'Costa vs Attorney General & Anor Nairobi Petition No 83 of 2010 where the Court observed;

The process of the Court must be used properly, honestly and in good faith and must not be abused. This means that the Court will not allow its function as a court of law to be misused and will summarily prevent its machinery from being used as a means of vexation or oppression in the process of litigation.

Finally, the Applicants relied on the Principle of *functus officio*. The principle operates to prevent reopening of a matter that has been rendered final. The Applicants contend that there is a binding consent order on record that has not been set aside. the consent order includes certain amount of monies owed to the Advocates by the Client's Respondents. The Preliminary Objection seeks to strike a bill that the client has partly admitted to some items and also agreed that the Court should determine quantum of the rest of the items. Unless the Consent is set aside, the matter on whether the Bill should be taxed or not and whether any monies are owed or not are *functus officio*.

In the case of **Michael Kioko Ndumbi vs Daniel Mutunga Kateta & Anor [2016]** the Court held;

The appellant did not seek to set aside, review or correct the said judgment and/or order by Hon. Justice Onyancha which is therefore still on record.....It was in this respect also held in Ngugi vs Kinyanjui [1989] KLR 146, that law will not allow any dispute between same parties to be

reopened while the judgment still remains on record. This Court accordingly has no jurisdiction in the circumstances to interfere with the said judgment and/or orders

RESPONDENTS/CLIENTS CASE:

The submissions by the Respondents disclosed the following;

The Respondents submitted that a grant of letters of administration of the Estate of the late John Joseph Karanja was confirmed on 26th October 1993.

The advocates were instructed to file objection proceedings and on 16th September 2008, a ruling was delivered in **Re Estate of Joseph Karanja (deceased) [2008] eKLR** by Justice Rawal (as she then was) who held as follows [page 38]

“I therefore order that the grant of representation issues to the Administrators on 26th October 1993 be revoked forthwith.

As this matter has been delayed under unfortunate circumstances, I direct that a fresh grant be issued to Edward Mukundi Karanja and Veronica Wanjiku Karanja without the process of filing of petition and consequent process.

The previous Administrators are once again ordered to file the Accounts of the estate from the date of issuance of the grant of representation. i.e. 26th October, 1993 up to the date of this ruling within 3 months hereof.

The previous Administrators also shall pay costs of the objection proceedings personally and not from the estate.”

Summarily, the Respondents submitted that

The Advocates admitted that they were paid **Kshs 25,000** for instructions to lodge the objection proceedings as evidenced in the Advocate Client Bill of Costs dated 10th March 2014.

The minimum cost for objection proceedings in the 2006 Advocates Remuneration Order under Schedule X paragraph 1(f) was **Ksh 4,500**.

As per the Advocate Client Bill of Costs, item 1 shows that the Advocate was instructed on **12th October 2005**.

The Advocate’s firm’s instructions were withdrawn on 1st December 2006 which was slightly over a year later.

Legal work was completed by the Advocates on **1st December 2006** and any Bill of Costs should have been filed by **1st December 2012**.

The Bill of Costs was filed on **10th March 2014**. On the face of it the entire Bill of Costs is time barred. The costs were taxed on 13th August 2014.

Consent was filed setting aside the entire Certificate of Taxation and subjecting various items to taxation and other minor items were agreed. It is not in dispute that the Advocates had been paid Ksh. 25,000 upon being instructed in 2005.

The Client on 1st April 2016 filed submissions dated 29th March 2016 raising the issue of limitation which was followed by a Notice of Preliminary Objection dated 7th April 2016.

The Respondents opined that issues for determination were ;

a) **Does the filing of a consent amount to an acknowledgment and Estoppel against statute?**

b) **Should the Advocate/Client Bill of Costs be struck out for being time barred?**

An advocate's retainer is subject to the limitation period of 6 years as set out in **Section 4 of the Limitation of Actions Act** which provides as follows;

“4(1) 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...

(3) An action for an account may not be brought in respect of any matter which arose more than six years before the commencement of the action.

(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 which the interest became due.”

By the time the Bill of Costs was filed on 10th March 2013 the same was time barred. The filing of consent did not amount to a concession that the fees were due. It merely set aside the bill of costs and indicated that certain items were to scale but that did not take away the plea of limitation that was statutory right.

Section 52 of Advocates Act (Remuneration of Advocates) provides;

no order shall be made if the right to recover the costs is barred by statute.

A party cannot be held in limbo with the threat that after the limitation period he/she is faced with litigation. Public policy demands closure especially where the matter relates to deceased person, the distribution of the estate has taken place and accounts are closed. The advocate as a professional is well versed on the law and must not file bills of costs after limitation period. The Respondent stated that the doctrine of Estoppel cannot oust statute. Relying on the case of **J.K.Chatrath & Anor vs Shah Cedar mart [1967] E. A. 93** which states;

The doctrine that there can be no estoppel against a statute simply means that an estoppel cannot render valid something that law makes invalid....

The Respondent asserted that limitation cannot be ousted by Consent which mainly set aside the Certificate of Taxation by consent rather than filing a formal application to set aside the same. the Respondents relied on the case of **Rose Wakanyi Karanja & 3 Others vs Geoffrey Chege Kirundi & Anor [2016]** which considered whether a judge can validate the consent obtained from Land Control Board outside the period of limitation. This Court found the case not relevant to the matter at hand as it relates to Consent to facilitate sale of land whereas the Consent in issue is a mutual agreement of parties through their respective Counsel on matters in Court with a view to expeditiously resolving and concluding the matter. In other words the Consent contemplated in the instant case is a valid order of the Court.

In the case of **Abincha & Co Advocates vs Trident Insurance Co Ltd [2013]** it was held by Justice Hatari Waweru;

An Advocates's claim for costs would be based on the contract for professional services between

him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act. In this connection Halsbury's Laws of England, 4th Edition, Volume 28 paragraphs 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.

See also on the same point;

Kenya Orient Insurance Limited vs Oraro & Co Advocates [2014] Mbugua & Mbugua Advocates vs Kenindia Assurance Co Ltd [2016]

The Bill of Costs should have been filed from the date of termination of the action or of the lawful ending of the retainer of the Advocate.

DETERMINATION:

The issues for analysis and determination in this matter are as follows;

- 1) Is the consent of 19th February 2016 which parties set aside the taxation of the Bill of Costs and resultant certificate of taxation valid judgment of the Court or not?**
- 2) Is the Preliminary Objection dated 7th April 2016 (it is stated that prior to these proceedings a preliminary Objection was raised but was not part of the Court record as at the time the Taxation of the Bill of Costs Ruling of 1st September 2016 was delivered) upheld or dismissed vis a vis the Consent of the parties adopted as an order of the Court.**

The uncontested facts of this matter are that the Respondents engaged legal services of the Applicant /Advocate with regard to the **Succession Cause In Re Estate of Joseph Karanja (deceased) [2008]** in 2005 and instructions were withdrawn in 2006.

The Respondents paid the Applicant Ksh 25,000/-. On 10th March 2014 the Applicants filed the Bill of Costs which was taxed on 13th August 2014 at Ksh 12,682,818.50 and Certificate of Taxation was issued on 28th August 2014.

The Respondents and Applicant through Counsel sought to set aside by Consent the taxation and did so on 19th February 2016 and on 17th March 2016 was adopted as an order of the Court. Parties filed written submissions on the items not agreed upon for retaxation. It is at this point that the Respondent raised Preliminary Objection and sought to have the Bill of Costs struck out.

The Respondents filed the instant application against the Taxing Officer's Ruling of 1st September 2016 which taxed the Bill of Costs at Ksh. 2,601 485. 82/= The contested issues are that the Respondents' submissions coupled with Notice of Preliminary Objection were not part of the Court record and as such the submissions were taken into account in order to arrive at the Ruling of 1st September 2016.

A cursory glance through the Court record it is apparent that the Respondents written submissions and the Notice of Preliminary Objection were not placed before the Taxing Officer or placed in the Court record before the determination of the taxation of the items not agreed on in the Bill of Costs. The record confirms the Respondent's instant application filed on 6th September 2016 as the first time the Preliminary Objection was raised. The lack of complete record before taxation proceedings were undertaken and determination occasioned injustice to the Respondents. The Taxing Master was deprived all relevant pleadings facts and evidence to aid in just outcome of the taxation proceedings. Therefore in

order to ensure each party has their day in Court, to present evidence for the Trial Court to consider and comply with mandatory provision of fair trial **Article 50 (1) of COK 2010**; which provides;

Every person has the right to have any dispute that can be resolved by the application of law in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body

For the above reasons the Ruling of 1st September is hereby set aside.

The Consent dated on 19th February 2016 and filed on 24th February 2016 and adopted as an order of the Court on 17th March 2016 is a regular lawful and legal order of the Court. With a valid order of the Court and in the absence of setting aside the said order, review and/or appeal against the order it remains an order of the Court and ought to be complied with.

A consent is binding to the parties and attracts contractual obligations by and to each party to the Consent. It may be set aside on grounds of fraud, collusion, contrary to public policy, given without sufficient material facts, misapprehension or ignorance as espoused by litany of cases led by **Hirani vs Kassam supra**. The parties have not cast aspersions that they did not voluntarily enter into the consent, that there were any issues to vitiate their consents to the Court consent. In the absence of any of the grounds for setting aside consent alleged by either party, this Court confirms validity of the Consent.

The Respondents submitted that Consent cannot oust compliance of mandatory statutory provisions. The Consent confirmed taxation of agreed items to be taxed as drawn that amount to Ksh 96,610/= and the rest of the items to be taxed limited to determining quantum. At this point no issue was raised with regard to the limitation espoused by Limitation of Actions Act. Thereafter when the Respective Counsel lodged written submissions in court, the Respondents raised the issue of limitation of action vide **Section 4(1) of the Act**. Matters founded on contract ought to be filed within 6 years from which the cause of action arose. The instant case the from the record legal work was completed by the Advocates on **1st December 2006** and according to the Respondents the Bill of Costs should have been filed by **1st December 2012**.

The Bill of Costs was filed on **10th March 2014**. On the face of it the entire Bill of Costs is time barred. The costs were taxed on **13th August 2014**.

The Respondents aver that the Consent filed could not invalidate the issue of limitation. The claim under Bill of Costs ought to have been brought within the limitation period which started running after the work was completed or when instructions to the advocate from the clients were terminated. Be that as it may, the Bill of Costs was taxed and its certificate of taxation set aside by Consent which consists of admission of the items to be taxed as drawn amounting to Ksh. 96,610/-

The 2nd part of the Consent of 19th February 2016 were agreed to be taxed as drawn. The 1st part of Consent was that the Applicant's Bill of Costs dated 10th March 2014 be retaxed limited to determining quantum.

To the 2nd part the items in the Bill of Costs amounts to an admission under **Order 13 rule 2 of Civil Procedure Rules 2010 which provides;**

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the Court for such judgment or order as per admission, he may be entitled to, without waiting for the determination of any other question between the parties, and the Court may upon such application make such order or give such judgment as the Court may think just.

The parties approached the Trial Court with Consent that was later adopted by the Court as judgment of the Court. The 2nd part of the Consent was is not subject to a hearing or further intervention by the Trial Court save to confirm the items as outlined in the Bill of Costs. Consequently, by admission of these

items "**as agreed and to be taxed as drawn**", the Respondents waived their right to challenge the Consent and/or further proceeding with regard to the amount admitted. Secondly, a preliminary Objection is raised as a matter of law at the outset or earliest opportunity in a suit for the Court to determine whether the suit before the Court is competent or not in reliance to the landmark case of **Mukisa Biscuit Company vs Westend Distributors(1969) E.A.696**. This objection goes to the root of the suit and must always be dealt with first so as to confirm a valid suit or claim or to strike it out. Even if for argument's sake, if the Preliminary Objection raised now were to apply to the admitted items in the Bill of Costs; there are no proceedings with regard to the admitted portion of items agreed on in the Bill of Costs. That part of the suit or proceedings is complete and there is judgment on admission to the extent of the agreed items in the Bill of Costs. There is no suit or proceeding to stop or halt or even strike off the Bill of Costs or Consent as from the admission the forum or opportunity to determine the same on its merits is spent as the items and the resulting amount are agreed and determined by the parties through the Consent. So if the Preliminary Objection would not appropriately apply, the admitted part of the Consent is upheld as valid judgment of the Court after the court adopted the Consent as order of the Court. The admitted part of the Consent remains due and owing under **Section 23 (3) and 24 of Limitation of Actions Act** which provides that fresh accrual of right of action arise on acknowledgement of debt which is binding if it is in writing and signed by the person making it or its agent.

With regard to the 1st part of the Consent; that the Applicant/advocate Bill of Costs dated 10th March 2014 is to retaxed limited to determining quantum of items 2,36,37,45,47,49,54,59,74,75,102,127,130,137,138 & 139. Naturally, there are pending proceeding to determine pending items. These proceedings are preempted by the preliminary Objection; that the Bill of Costs was filed after the limitation period of 6 years from when the cause of action arose.

The Applicant posits that there is a valid Consent and adopted as order of the Court which has not been set aside. The Consent is a binding contract and the Respondents are estopped from renegading from the Consent and judgment of the Court. As long as the Consent is on record and not set aside the Court is *functus officio*.

The Respondents through Counsel sought to set aside the Certificate of taxation and enter into a Consent which the Applicant in good faith obliged. Thereafter, the Respondents filed the Preliminary Objection. This was in bad faith and dishonest and Counsel ought not to approbate and reprobate.

On the other hand, the Respondents claim that a Consent obtained outside the limitation period cannot validate an illegality that the Bill of costs was filed outside the limitation period of 6 years and cited **Masai vs Kosgei [2004]eKLR** on whether a decree could be enforced after 12 years and **Karuri vs Gituru [1981] KLR 247** where the Court confirmed that it is not "precluded from enquiring into the validity of the consent to determine whether it was regularly and properly given".

The Applicant does not allude any issue with regard to limitation period; does not deny or confirm that instructions from the Respondents was from what date and services terminated on what date. According to the Respondent instructions were given on 12th October 2005 and withdrawn on 1st December 2006. Therefore Bill of Costs should have been filed in 2012 and not 2014 as in the instant case.

In the absence of any rebuttal as to limitation period by the Applicant's Bill of Costs, this Court shall rely on the dates and period outlined by Respondents and clearly the Bill of Costs was filed after 6 years and the Consent provided for the conduct of the pending proceedings in determining quantum of the pending items in the Bill of Costs. These pending proceedings are vitiated by statute of limitation. I am inclined to agree that the Consent cannot validate breach of statutory obligation. The pending proceedings are not competent for determination of the quantum of the pending items of Bill of Costs.

DISPOSITION

1. The preliminary objection filed on 7th April 2016 is partially upheld with regard to the pending proceedings of Bill of Costs of 10th march 2014 limited to determining quantum. The pending Bill of Costs is struck off.

2. The Preliminary Objection in relation to admitted and agreed items of the Bill of Costs is dismissed and the amount of Ksh 96,610/= shall be paid by Respondents to the Applicant.

3. Each party to bear own costs.

It is hereby ordered.

DELIVERED SIGNED & DATED IN OPEN COURT IN NAIROBI ON 30TH OCTOBER, 2017.

M.W.MUIGAI

JUDGE