



V Chokaa & Company Advocates v County Government of Mombasa as a Successor to Municipal Council of Mombasa (Environment and Land Miscellaneous Application E085 of 2022) [2024] KEELC 643 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEELC 643 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E085 OF 2022
SM KIBUNJA, J
FEBRUARY 14, 2024**

BETWEEN

V CHOKAA & COMPANY ADVOCATES APPLICANT

AND

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

RULING

1. The applicant filed the application dated the 29th June 2023 seeking for the setting aside of the taxing master’s decree made on 14th June 2023 and costs to be provided for. The application is premised on the three (3) grounds that, the taxing master did not have jurisdiction to hear and determine the objections to the bill of costs by the respondent, as the judge is the one seized with jurisdiction; that a bill of action is not an action to which section 4 of the Limitation of Actions could apply. The application is supported by the affidavit sworn by Dr. Vincent Chokaa, advocate, on the 29th June 2023 inter alia deposing that that he filed a bill of cost on 29th November 2022 against the respondent under section 51 (1) of the *Advocates Act*; that the respondent raised objection to the bill that it was time barred under section 4 of the Limitation of Actions Act; that though a bill of costs under section 51(1) of the *Advocates Act* is not an action or a suit, the Deputy Registrar agreed with the respondent and struck out the bill of costs; that if the legality of the bill of costs was in question, that matter ought to have been referred to the judge for determination as the Deputy Registrar is without jurisdiction to deal with it.
2. The application is opposed by the respondent, through the replying affidavit of Jimmy Waliaula, the County Attorney, sworn on the 29th November 2023, and the preliminary objection, dated the 30th November 2023. The preliminary objection raises two grounds that the application offends section 4 of the *Limitation of Actions Act*, and the bill of costs dated 22nd November 2022 is bad in law, incurably defective and time barred having been filed more than six years from the end of the Advocate/



Client relationship. It is the respondent's case that the applicant had not filed the relevant documents, pleadings and instruction note with the bill of costs; that the bill of costs was filed outside the six year after the end of the advocate-client relationship; that the applicant retainer was between 2007 to 2009 as seen in the letters dated 25th July 2007 and 17th April 2009; that the letters dated the 8th May 2023, 14th June 2023, 27th October 2010 and 12th January 2011 to the applicant seeking for copies of letter of instructions, correspondences and or documents or pleadings filed thereof did not elicit any response.

3. The applicant filed his submissions dated the 16th October 2023 that the court has considered. Then on the 13th December 2023, the court directed the application and preliminary objection to be canvassed together through submissions. The respondent was directed to file submissions in three (3) days but none has been traced.
4. The following are the issues for the determinations by the court:
 - a. Whether the applicant's Advocate/Client bill of costs dated the 22nd November 2022 was statute time barred.
 - b. Whether the Deputy Registrar had jurisdiction to hear and determine the respondent's preliminary objection dated 8th May 2023.
 - c. Whether the applicant has met the threshold for setting aside of the Taxing Master's ruling delivered on 14th June 2023.
 - d. Who meets the costs of this application/reference?
5. The court has carefully considered the grounds on the application, affidavit evidence, the ground on the preliminary objection, submissions filed, superior courts decisions cited thereon, the record and come to the following findings:
 - a. That the heading of the bill of costs for Kshs.174,358.09, dated the 22nd November 2022 shows that advocates-client bill of costs arose from "Municipal Council of Mombasa Block No. XXV/123 Lease to National Social Security Fund." This is the first property listed in the letter to Transition Authority dated the 20th May 2014 that is the last document attached to the respondent's replying affidavit, and indicates the outstanding legal fees as Kshs.174,358, which is more or less similar to the amount in the bill of costs.
 - b. On receipt of the bill of costs, the respondent filed the preliminary objection dated 8th May 2023 and replying affidavit by Jimmy Waliaula sworn on 15th May 2023. The preliminary objection set out four grounds marked (a) to (e) that can be summarized as follows; that the bill of costs was statute time barred in view of the provision of section 4 of the *Limitation of Actions Act*; that the bill of costs suffers from material non-disclosure; and the applicant was without instructions and hence has no locus to commence the proceedings.
 - c. The learned counsel for the applicant and respondent filed their written submissions dated the 23rd May 2023 and 6th June 2023 respectively. In his ruling of 14th June 2023, the learned Taxing Master considered the decisions cited by counsel and the law before inter alia pronouncing himself as follows;

“...In the present case, the respondent does not dispute having instructed the Applicant to defend its interests. A perusal of the bill of costs show that the last service was delivered by the Applicant on the 18th January 2011 when the Applicant wrote a demand letter for the recovering of outstanding rates. The bill of costs was filed on 22nd November 2022 which is 11 years later.



It would therefore appear that the work that the Applicant was instructed to undertake by the respondent was finalised more than 6 years ago, and 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*.

There was a retainer agreement which is equivalent to a contract between the Applicant and Respondent for that reason any action between the parties is governed by section 4(1)(a) of the *Limitation of Actions Act*. However, I am alive to the fact that the Applicant has not brought any evidence to show the end of their retainer in respect of this bill of costs.

For this reason, I do find that the bills of costs filed by the Applicant was time barred. The preliminary objection dated 8th May 2023 is found to have merit and is hereby upheld. The bill of costs dated the 22nd September 2022 is hereby struck out.”

This is the decision that is the subject matter of the instant application/reference.

- d. The applicant has submitted inter alia that the Deputy Registrar exercises the power under Order 49 Rule 7(1) of the *Civil Procedure Rules*, and that of taxation as a Taxing Master under section 13A of the *Advocates (Remuneration) Order*. That section provides as follows;

“ 13A. For the purposes of any proceedings before him, the taxing master shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers, and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

The counsel cited the decision in the case of *Abincha & Company Advocates versus Trident Insurance Company Limited* [2013] eKLR, where the court held that;

“ 15. If the Deputy Registrar heard the matter as such, not as a Taxing Officer, the application was clearly outside the ambit of Order 49 Rule 7(1) of the *Civil Procedure Rules* that sets out applications that a Deputy Registrar of the court may hear and determine.”

Addressing what the expression “any other matter in dispute before him” in section 13A of the *Advocates Act*, the court held that;

“ 16.Any matter in dispute before him” must mean any matter connected with or concerning the taxation of any item in the Bill of Costs. It cannot mean any issue that challenges the taxing master’s jurisdiction to tax the bill of costs.”

The court further stated that;

“ 17. The main issue of the Notice of Motion dated 20th February 2012 were challenging the Taxing Officer’s jurisdiction to tax the Bill of Costs before him. Those issues were whether the Advocates Bill of Costs was statute-barred under the Limitation of Actions Act and whether the Advocate was estopped from claiming any further costs. Did the Taxing Officer have jurisdiction to deal with those issues?



18. those issues were raising one fundamental issue to wit, whether there were costs due to the Advocate that the Taxing Officer could tax. I hold that this was an issue that could only be determined by a judge. It is the kind of issue the Taxing Officer, with the consent of both parties should have referred to the opinion of the High Court.”
- e. The learned counsel further referred to the case of *V. Chokaa & Company Advocates versus County Government of Mombasa* ELC MISC. AAL. No. E016 of 2022 that dealt with a similar matter to the instant one and Matheka J, held as follows;

“In the present case, the respondent disputes having instructed the applicant to defend its interests. Its case is that the applicants bill of costs is time barred having been brought after 6 years. On perusal of record, I find various letters way past 2009 between the parties on the issue of payment of fees to the applicant. There is no evidence before the 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 respondent preliminary objection is not merited and I find this application is merited and is granted as prayed.”

The laid down procedure of challenging a decision of a taxing master on taxation of an advocate/client bill of costs is laid down in section 11(1) and (2) of the [Advocates \[Remuneration\] Order](#), which states;

1. “Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he 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.”

The above procedure apply when the bill of costs has been taxed. What is being objected to here is an order striking out the bill of costs before taxation. The applicant is challenging, not an order of taxation, but rather the decision of the taxing master to strike out the entire bill of costs on the ground that the same was statute barred. The [Advocates \[Remuneration\] Order](#) grants a taxing master the jurisdiction to tax the bill of costs in accordance with the applicable schedule so long as there is an established client/ advocate relationship; where there is no dispute as to retainer and where costs have been awarded by the court.

- f. The Taxing Master’s jurisdiction under section 13A of the [Advocates \(Remuneration\) Order](#) to ‘make a determination of any matter in dispute before him’ only relates to the taxation of any item on the bill of costs and nothing else. It cannot mean that the taxing master has jurisdiction to hear and determine an objection to his jurisdiction to tax the bill of costs. The court in in the case of [Hezekiel Oira T/A H. Oira Advocate versus Kenya Broadcasting Corporation](#) [2015] eKLR held that;

“Under paragraph 13A of the Advocates Remuneration Order, the taxing officer, for the purposes of any proceedings before him, relating to taxation, has power to determine any matter in dispute before him,” only in relation to the powers of the



taxing officer on the items in the bill of costs and which cannot be interpreted to mean any issue that challenges the taxing officer's jurisdiction to tax the bill of costs."

In the instant matter, the taxing master considered the respondent's preliminary objection, which challenged his powers to tax the applicant's bill of costs, which was outside his jurisdiction under section 13A of the Advocates (Remuneration) Order.

- g. That having considered the provision of section 13A of the Advocates Act, the finding of the court in the case of Abincha & Company Advocates versus Trident Insurance Company Limited [supra], and Hezekiel Oira T/A H. Oira Advocate versus Kenya Broadcasting Corporation [supra], on the extent of the Deputy Registrar's powers when exercising the powers of a Taxing Master, which I agree with, then it follows that the taxing master was without jurisdiction to deal with the respondent's preliminary objection dated 8th May 2023 to the bill of costs dated 22nd November 2022. The taxing master ought to have referred the preliminary objection for the opinion of the judge with the consent of both parties.
 - h. Further to the finding in (g) above, I find the Applicant had documented his outstanding fees in his letter dated the 20th May 2014 to the Transition Authority. The respondent's advocate wrote to the Applicant on 8th May 2023 when this matter was pending in court. For the court to make a finding whether or not the bill of costs was time barred where instructions is not in dispute, evidence of the date the Advocate/Client relationship was terminated, if disputed, is essential. This would mean the preliminary objection would need to be pursued through an application for affidavit evidence to be tendered. The preliminary objection by the respondent was through a notice, and no evidence would be expected to be attached to it. A notice of preliminary objection is an appropriate process for raising preliminary objections on grounds that are pure points of law that would not require evidence to be tendered. In the instant matter, no evidence of termination of the Advocate/Client relationship had been availed by the parties upon which a determination that the bill of costs filed herein was time barred could have been based on.
 - i. That having found merit in the application, the obvious step would be for me to allow the application and remit the bill of cost to the Taxing Master. That process will mean more delay as the Taxing Master will need to refer the same preliminary objection to a judge for an opinion. In obedience to the dictates of Article 159 (2) (d) of the Constitution of Kenya, I find justice will be better served if the court proceeds to make a determination on the respondent's preliminary objections so as to enable the Taxing Master to deal with the taxation aspect of the bill of costs dated the 22nd November 2022.
6. That flowing from the above determinations, the court finds and orders as follows:
- a. That the Respondent's preliminary objections dated 8th May 2023 and 30th November 2023 to the bill of costs dated 22nd November 2022, and the Notice of Motion dated 29th June 2023 respectively are without merit and are rejected.
 - b. The Applicant's notice of motion dated the 29th June 2023 has merit and is allowed with costs.
 - c. The Taxing Master ruling delivered on the 14th June 2023 is hereby set aside.
- The Applicant's bill of costs dated the 22nd November 2022, be placed before the Taxing Master for further directions.

It is so ordered.



DATED AND VIRTUALLY DELIVERED ON THIS 14TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA

IN THE PRESENCE OF:

Applicant: Dr. Chokaa

Respondent : Mr. Otieno

Wilson – Court Assistant

S. M. KIBUNJA, J.

ELC MOMBASA.

