



**Kenya Overseas Trading Co Ltd & 2 others v Waruhiu K’Owade & Ng’ang’a Advocates  
(Civil Appeal 395 of 2010) [2024] KEHC 4636 (KLR) (Civ) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEHC 4636 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
CIVIL APPEAL 395 OF 2010  
CW MEOLI, J  
APRIL 11, 2024**

**BETWEEN**

**KENYA OVERSEAS TRADING CO LTD ..... 1<sup>ST</sup> APPELLANT  
ISAAC SAMSON GITHUTHU ..... 2<sup>ND</sup> APPELLANT  
FLORENCE WAMAHIGA GITHUTHU ..... 3<sup>RD</sup> APPELLANT  
AND  
WARUHIU K’OWADE & NG’ANG’A ADVOCATES ..... RESPONDENT**

*(Being an appeal from the Ruling of S.N. Riechi (CM) delivered on  
16th August 2010 in Nairobi Milimani CMCC No. 4167 of 2007)*

**JUDGMENT**

1. This appeal emanates from the ruling delivered on 16.08.2010 in Nairobi Milimani CMCC No. 4167 of 2007. The events leading to the ruling were that in 2007, the firm of Waruhiu K’Owade & Ng’ang’a Advocates, the Plaintiff before the trial court, (hereafter the Respondent) sued the Kenya Overseas Trading Co. Ltd, Isaac Samson Githuthu and Florence Wamahiga Githuthu, 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Defendant/Defendants before the trial court, (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> Appellant/Appellants) seeking inter alia judgment in the sum of Kshs. 2,634,134.40 against the Appellants with interest at commercial rates until payment in full; and a further sum of Kshs. 75,523.00 as against the 1<sup>st</sup> Appellant with interest at commercial rates until payment in full; and costs of the suit.
2. The gist of the Respondent’s averments in its plaint was that in 1992 the 1<sup>st</sup> Appellant instructed it to institute HCCC No. 2780 of 1992, and the Respondent duly provided the requisite legal services as solicited and thereafter lodged a claim for fees. That the legal fees and charges were thereafter taxed by the Court against the 1<sup>st</sup> Appellant in respect of HCCC No. 2780 of 1992 in the sum of Kshs.



75,233.00/- . Subsequently, in 1993 the Appellants instructed the Respondent to institute HCCC No. 5469 of 1993 and similarly the Respondent provided legal services as solicited and thereafter lodged a claim for fees. That legal fees and charges therein were taxed by the Court against the Appellants in respect of HCCC No. 5469 of 1993 in the sum of Kshs. 2,634,134.40. It was further averred that despite demand for payment of the taxed sums, the Appellants had refused and or neglected to settle the said taxed costs.

3. The Appellants filed a statement of defence on 12.07.2007 denying the key averments in the plaint. In the alternative and without prejudice to the denials in the statement of defence, the Appellants asserted that the Respondent's claim was hopelessly time barred. They also denied the jurisdiction of the trial court and service of the notice of demand and intention to sue.
4. The Respondent thereafter moved the trial court vide a motion dated 26.10.2007, expressed to be brought inter alia under Order XXXV Rules 1(i)(a) and 2 of the Civil Procedure Rules (CPR) seeking that summary judgment be entered in favour of the Respondent against the Appellants in the sum of Kshs. 2,634,134.40/- being the taxed costs in HCCC No. 5469 of 1993, costs and interest at commercial rates until payment in full. The grounds on the face of the motion were amplified in the supporting affidavit sworn by Alex Ngatia Thangei, who asserted being a partner at the Respondent firm.
5. The gist of his affidavit was that the Respondent provided legal services to the Appellants in HCCC No. 5469 of 1993 and that while the Appellants had not disputed the retainer, they failed and or ignored to settle the fees for the said services despite several demands and requests to pay. That therefore the Respondent lodged a bill of costs for taxation which was taxed and allowed in the sum of Kshs. 2,634,134.40/- but the Appellants had persisted in their refusal to settle the costs, despite demands. The deponent further justified entry of summary judgment on the basis that the Appellants were truly indebted to the Respondent for the sum claimed in respect of legal services rendered as set out in the plaint.
6. The Appellants opposed the Respondent's motion through a notice of preliminary objection dated 10.01.2008 premised on grounds that;- the suit and application offended Section 2, 48, 49 and 51(2) of the Advocates Act; the subordinate court did not have jurisdiction to entertain the suit; and that the provisions of the CPR relied on, being subsidiary legislation, could not supplant the provisions under the Advocates Act relating to recovery of Advocates costs
7. The Appellants filed a replying affidavit dated 15.01.2008 in opposition to the motion. The affidavit was sworn by the 2<sup>nd</sup> Appellant, who asserted being a director of the 1<sup>st</sup> Appellant and was duly authorized by the 3<sup>rd</sup> Appellant to depose. In addition to reiterating the averments in the Appellants' statement of defence regarding jurisdiction and limitation, he swore that the retainer in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants pertaining to HCCC No. 5469 of 2003 was disputed as the suit was filed solely for the benefit of the 1<sup>st</sup> Appellant.
8. He further took issue with the suit before the trial court, with regard to the joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant in contravention of corporate veil under Company law. He asserted that the claimed costs of Kshs. 2,634,134.40/- were irregularly taxed, as the bill had previously been taxed and could not be re-taxed. Therefore, he viewed the certificate of taxation dated 22.07.2003 relied on before the trial court as a nullity.
9. In a rejoinder by way of a supplementary, Alex Ngatia Thangei asserted the Respondent's right to sue for costs arose pursuant to the certificate of taxation. Hence the question of limitation did not arise and that the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant having been parties in HCCC No. 5469 of 2003, were the rightful



defendants in the lower court suit and hence estopped from claiming that the remedies sought therein were solely for the benefit of the 1<sup>st</sup> Appellant. He maintained that the proper procedure in re-taxation of the Respondent's bill of costs was followed and the question of jurisdiction did not arise. Hence, the certificate of taxed costs as issued was valid for purposes of the lower court suit.

10. Thereafter, the Appellants had proceeded to file a motion dated 17.09.2008, expressed to be brought inter alia under Section 3A and 6 of the Civil Procedure Act (CPA), Section 51 of the Advocates Act and Order L of the CPR seeking inter alia that there be a stay of proceedings pending hearing and determination of the Appellants reference to High Court in HC. Misc. Appl. No. 1688 of 2002 - Waruhiu K'Owade & Ng'ang'a Advocates v Kenya Overseas Trading Co. Ltd, Isaac Samson Githuthu & Florence Wamahiga Githuthu. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the 2<sup>nd</sup> Appellant. The gist thereof was that the Appellant had lodged a reference in objection to the entire decision of the taxing officer made on 16.07.2003 and the resultant certificate of taxation dated 22.07.2003. Asserting further that the proceedings in the said suit were entirely premised on the taxing officer's decision that was the subject of the said reference.
11. Parties agreed to dispose of the two (2) motions by way of written submissions. The trial court in its ruling pronounced that from the submissions before it, the Appellants appeared to have abandoned their motion and that the defence filed by the Appellants raised no triable issues to warrant leave to defend the matter. The trial court thus proceeded to enter judgment in favour of the Respondent against the Appellants in the sum of Kshs. 2,634,134.40 with costs of the suit and interest. The ruling provoked this appeal which is based on the following grounds as itemized in Appellants Memorandum of Appeal:-
  - “ 1. That the learned magistrate erred in law by failing to hold that the lower court did not have jurisdiction to entertain the Respondent's claim.
  2. That the learned magistrate erred in law and in fact by not finding that the Respondent's claim was time barred.
  3. That the learned magistrate erred in law and in fact by not holding that the primary suit on which the Respondent based their claim for fees was filed for the benefit of Kenya Overseas Trading Company Limited.
  4. That the learned magistrate erred in law and fact in entering a summary judgment against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant whereas there was no certificate of taxed costs as against them.
  5. That the learned magistrate erred in law and fact in disregarding the Appellants written submissions and case law.” (sic)
12. The appeal was canvassed by way of written submissions. Counsel for the Appellants opened his submissions by citing the decision of *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123 on the duty of this Court as a first appellate Court. Concerning ground 5 of the appeal, counsel contended that summary proceedings were never intended to lock out a litigant who at the very least could show that there was a triable issue or issues in its defence entitling him to unconditional leave to defend. That pursuant to Order XXXV Rule 2 (now Order 36 Rule 2) such defendant could demonstrate either by affidavit or by oral evidence, or otherwise that he should have leave to defend the suit. Hence, the trial court ought not to have limited itself to the Appellants' defence in rendering its decision.



13. It was further contended that the Appellants' preliminary objection and replying affidavit demonstrated that the Respondent's motion did not satisfy the threshold for entry of summary judgment under any circumstance. On grounds that the certificate of taxation did not refer to the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants; the trial court did not have jurisdiction to entertain the suit and by extension the application both which were statutorily time barred; the suit was filed in contravention of order XXIX of the former Civil Procedure Rules; the suit was itself in contravention of Section 2, 48, 49 and 51(2) of the [Advocates Act](#); there was no proof of the taxation of costs in the two matters forming the subject of the suit in the lower court; the plaint was devoid of particulars; the retainer of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant was a disputed issue; and that the extracted certificate of taxation only referred to the 1<sup>st</sup> Appellant.
14. Concerning grounds 1, 2, 3 & 4, it was posited that there several triable issues raised by the Appellants response to warrant unconditional leave to defend the suit. Calling to his aid the decisions in *Patel v E.A Cargo Handling Services Ltd* [1974] E.A 75 at pg. 76, *Sammy Maina v Stephen Muriuki* [1984] eKLR and *Provincial Insurance Company of East Africa Limited (Now UAP Provincial Insurance Company Ltd) v Lenny Kivuti* [1997] eKLR, counsel submitted that the impugned ruling dealt with extraneous issues. While ignoring pertinent issues raised by the Appellants concerning the parties named in the certificate of costs, therefore negating liability against the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants. Citing the case of *Menyee & Kirima Advocates v Kenya Commercial Bank* [2005] eKLR counsel asserted that the question of retainer in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants arose naturally from the certificate of costs relied on by the Respondent. He complained that the foregoing issues were arguable and ought not to have been ignored.
15. Counsel asserted that in view of the disputed issue of retainer, which fell under the purview of the High Court by dint of Section 48,49 & 51 of the [Advocates Act](#), the trial court ought to have declined jurisdiction to entertain the matter. Thus, the trial court erred in law by determining that the Appellants were challenging its ability to adjudicate over recovery proceedings under Section 48(1) of the [Advocates Act](#). Further the Appellants complained that by proceeding to enter judgment against them, the trial court effectively altered the certificate of costs while condemning the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants unheard. Relying on the decisions in *East Africa Packaging Industries Limited v Zoeb Alibhai* [1997] eKLR and *Corporate Insurance Co. Ltd v Nyali Beach Hotel Ltd* [1998] eKLR counsel submitted that where a bonafide triable issue being raised the court ought to refrain from resolving such issues prematurely as happened in this instance. In summation, the Court was urged to allow the appeal by setting aside the decision of the trial court.
16. The Respondent defended the trial court's findings. Addressing ground 1 of the appeal, counsel cited the provisions of Section 48 of the [Advocates Act](#) and the decision in *Wilfred Nyaundi Konosi t/a Konosi & Advocates v John Lokorio* [2015] eKLR to submit that the claim before the trial court involved an action for recovery of legal fees. Hence, pursuant to section 48(2), the trial court had jurisdiction to entertain the suit before it. Concerning ground 2 of the appeal, he defended the trial court's finding that the Respondent's claim was not time barred. Because the subject bill was taxed on 16.07.2003 and a certificate of costs issued on 22.07.2003 while the suit was filed on 17.05.2007, well within the 6-year limitation period for actions based on contract. His position was that an advocate's right to sue for costs crystallizes once the amount claimed is certified by a taxing officer.
17. Submitting on grounds 3 and 4 of the memorandum of appeal, counsel anchored his submissions on the decision in *Kilonzo & Co. Advocates v Hon. John Njenga Mututho* [2012] eKLR and *Konosi & Advocates* (supra) to assert that a certificate of cost having been issued, the Appellants had no reasonable or triable defence and the trial court properly entered summary judgment thereon. Finally, in addressing ground 5 of the appeal, counsel submitted that the trial court considered the respective



parties' submissions in arriving at the decision it did. The Court was thus urged to dismiss the appeal with costs to the Respondent.

18. The Court has considered the record of appeal, the original record of proceedings as well as the submissions by the respective parties. As rightly submitted by the Appellants, the duty of this Court as a first appellate Court is to re-evaluate the evidence adduced before the trial court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. The Court of Appeal for East Africa set out the duty of the first appellate court in *Selle* (supra) in the following terms: -

“An appeal from the High Court is by way of re-trial and the Court of Appeal is not bound to follow the trial judge's finding of fact if it appears either that he failed to take account of circumstances or probabilities, or if the impression of the demeanour of a witness is inconsistent with the evidence generally.

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

See also *Peters v Sunday Post Ltd* (1958) EA 424; *William Diamonds Ltd v Brown* [1970] EA 11 and *Ephantus Mwangi and Another v Duncan Mwangi Wambugu* (1982) – 88) 1 KAR 278.

19. Reiterating the foregoing, the Court of Appeal in *Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR stated that:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

20. The trial court in its ruling delivered on 16.08.2010 expressed itself in part as follows: -

... “From these submissions it appears to me that the Defendants have abandoned their application dated 17.09.2008....

Does the court have jurisdiction to hear and determine this claim arising from taxed costs.....Section 48 which deals with recovery of costs due to an advocate.....This provision in my view donates jurisdiction to any other court of competent jurisdiction (monetary or geographical) to entertain that and determine suits for recovery of costs by advocates. This is a claim for recovery of costs by the plaintiff and in my view this court has jurisdiction to entertain it. The objections to jurisdiction is therefore over ruled. Counsel for the defendant/respondent correctly points out that the relationships between advocate and client is contractual and any claim arising from that relationship must be filed within 6 years otherwise it will be barred by *Limitation of Actions Act*. The bill the subject of this claim was taxed on 16<sup>th</sup> July 2003 and certificate of costs issued on 22<sup>nd</sup> July, 2003. This suit was filed on 17<sup>th</sup> May, 2007 which in my view is within time. The contention that the suit is time barred is in my view misplaced and the cause of action accrues after taxation.



Has the plaintiff/applicant made a case for summary judgment?.....The plaintiff's claim in this suit is liquidated; the defendant in their defence filed on 12.7.07 dated 10<sup>th</sup> July, 2007 denied that the plaintiff lodged a claim for fees which was taxed at Sh. 2,634,134.40; plead limitation and deny jurisdiction of this court . The issue of jurisdiction and limitation have been dealt with above. There is annexed the certificate of stated costs Annexure 'ANT 2' Section 51(2) of the Advocates Act provides.....The provision of Section 51 (2) to me appear clear that the certificate of taxation is conclusive of the amounts of costs covered. Unless it has been set aside or altered by this court. That being so, I do not find any issue to proceed to trial.

I am therefore satisfied that though defendant is truly indebted to the plaintiff, the defence as filed raises no triable issues to warrant this court to grant the defendant leave to defend. I therefore enter judgment for plaintiff against defendant for Kshs. 2, 634,134.40 costs of this suit and interest at court rates" (sic)

21. From matters canvassed before the trial court and before this Court by the Appellants' grounds of appeal and submissions , it appears that the Appellants abandoned their motion dated 17.09.2008, as correctly observed by the trial court.
22. Be that as it may, the grant or refusal of a motion seeking summary judgment entails the exercise of discretion by the court. The Court of Appeal in *Mashreq Bank P.S.C v Kuguru Food Complex Limited* [2018] eKLR observed that :-

“ This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of *Mbogo v Shah*, (supra)

“.....A court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice”. [Emphasis added]

See; *United India Insurance Co. Ltd v. East African Underwriters (K) Ltd* [1985] E.A 898: -

23. The Respondent's motion, in the court below was brought pursuant to Order XXXV Rules 1(1)(a) and 2 of the CPR (now Order 36 Rule 1 of the CPR). Order 36 Rule 1, 2 and 7 of the CPR provides for as follows: -

QUOTE{startQuote “}

1 (1) In all suits where a plaintiff seeks judgment for—

- (a) a liquidated demand with or without interest;
- (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of land and rent or mesne profits.



- (2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.
  - (3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.
2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.
  - 3 ...
  - 4 ...
  - 5 ...
  - 6 ..
  - 7 .

Leave to defend may be given unconditionally, or subject to such terms as to giving security or time of trial or otherwise, as the court thinks fit.”

24. The suit before the lower court originated from taxed costs arising from an advocate-client relationship in HCCC No. 2780 of 1992 and HCCC No. 5469 of 1993. Specifically, the Respondent’s motion sought “summary judgment be entered in favour of the Respondent as against the Appellants in the sum of Kshs. 2,634,134.40/- being the taxed costs against the Appellants in HCCC No. 5469 of 1993 plus costs and interest at commercial rates until payment in full”. Thus, to my mind, this appeal turns on the key question whether summary judgment ought to have been entered against the Appellants in favour of the Respondent given the issues canvassed before the trial court.

25. In *Trikam Maganlal Gohil & Another v John Waweru Wamai* (1983) eKLR the Court of Appeal stated the following:

“The respondent if he wants leave to defend may show he is entitled to it by affidavit or oral evidence or otherwise. Order XXXV rule 2. So, if the applicant has set out in his affidavit(s) in support of his motion and exhibits facts which are probably true and sufficient to warrant the granting of his prayer for summary judgment the respondent must discharge the onus on him of showing his defence(s) raises triable or bona fide issues. They will be ones of law or fact. If they are of fact, then, bare denials by the respondent or his advocate in a pleading or a letter will not do because there must be a full and frank disclosure of the facts before the court which will be proper and sufficient for it to rule that those issues are raised”.

26. Moreover, in *Attorney General v Equip Agencies Ltd* (2006) 1KLR 10 the same Court spelt out the rationale behind the provisions of Order XXXV (now Order 36) as follows:

“The purpose of the proceedings in an application for summary judgment is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim... The summary nature of the proceedings should not, however, be allowed to become a means for obtaining, in effect, an immediate trial of the action, for it is only if an arguable question of law or construction is short and depends on few documents that the procedure is suitable... A defendant who can show by affidavit that there is a bona fide triable issue is to be allowed to defend that issue without condition.”



27. The preliminary questions raised by the Appellants related to jurisdiction and limitation. Those issues were pleaded in the defence statement, and the material presented before the trial court. In a sense, the outcome of the entire motion largely depended on these matters. The Appellants challenged the trial court's jurisdiction to entertain the proceedings before it, citing Section 2, 48, 49 and 51(2) of the Advocates Act. Further that given the disputed issue of retainer, the trial court ought to have declined jurisdiction to entertain the matter which properly fell under the jurisdiction of the High Court. The trial court in addressing the issue of jurisdiction observed by dint of Section 48(2) of the Advocates Act, it was cloaked with the requisite jurisdiction because the definition of "Court" in Section 2 of the Advocates Act did not apply to the provisions of Section 48(2).
28. Section 2 of the Advocates Act defines the word "Court" as used in the Act to mean "High Court" whereas Section 48 (1) as read with Section 48 (2) of the Act provides that; -
- “(1) Subject to this Act, no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.
- (2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction”.
29. The proceedings before the trial court as originally filed sought recovery of taxed costs from the Appellants. In the court's reading, Section 48(2) appears to contemplate such proceedings before the subordinate court having the requisite geographical and pecuniary jurisdiction. If by this section it was intended to confine jurisdiction in respect of proceedings for recovery of costs due to an advocate to the High Court, the drafters of the said Section would have merely used the word "court" without further qualification. Jurisdiction is primordial in every suit (See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1), and it was held in Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR that a court's jurisdiction flows from either the Constitution or legislation or both. In this instance, the suit and the motion were seeking judgment in the sum of Kshs. 2,634,134.40/-. Pursuant to section 5 (a) of the Magistrates' Courts Act 2010 (now repealed), as read with section 48 (2) of the Advocates Act, the trial court, in this case presided over by a magistrate of the rank of Chief Magistrate, potentially had the requisite pecuniary jurisdiction to entertain the proceedings before it.
30. As regards the related question of retainer, the taxed costs for which summary judgment was sought arose from HCCC No. 5469 of 1993. The Respondent's bill of costs having been taxed (see annexure marked ANT 1), the question of retainer was ex facie settled and could not be re-litigated before the trial court. If the Appellants were aggrieved concerning the question, the correct forum in which to address it was by way of a reference to the High Court. No such reference appears to have been filed prior to the recovery proceedings in the subordinate court. Moreover, the issue while not pleaded in the Appellants' statement of defence was raised in the response to the motion for summary judgment. It was not only raised too late, but also in the wrong forum. Consequently, the court agrees with the finding of the trial court that it had the requisite jurisdiction to entertain the recovery proceedings before it.



31. Regarding the question of limitation, it is settled that the provisions of Section 4(1) of the *Limitation of Actions Act* apply in claims arising from an advocate-client relationship, which is one ordinarily founded on contract. In this regard, the Court concurs with the dicta of Waweru, J in *Abincha & Co Advocates v Trident Insurance Co Ltd* [2013] eKLR and the authors in *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 28 at Paragraph 879 as to when time starts to run in such matters. The claim before the subordinate court related to proceedings for recovery of taxed costs and not taxation proceedings. In *Abincha* (supra) it was observed that “time begins to run from the date of completion of the work or lawful cessation of the retainer”. Therefore, any preliminary objection concerning limitation ought to have been first raised before the taxing officer and prior to taxation of the bill of costs in HC Misc. Appl. No. 1688 of 2002.
32. In any event from a review of the bill of costs dated 04.11.2002 which was the subject of the above cause (annexure marked ISG-4 in the Appellants’ replying affidavit to the motion seeking summary judgment) the Respondent’s last action in the matter ( and therefore earliest reckoning date) , appears to have been sometime in the year 2000 as captured in item 35 and 36 of the bill of costs, itself filed 04.11.2002. Thus, the bill of costs was not time barred.
33. The trial court stated inter alia that “The bill the subject of this claim was taxed on 16<sup>th</sup> July 2003 and certificate of costs issued on 22<sup>nd</sup> July, 2003. This suit was filed on 17<sup>th</sup> May, 2007 which in my view is within time. The contention that the suit is time barred is in my view misplaced and the cause of action accrues after taxation.” This finding cannot be faulted; regarding a suit seeking recovery for taxed costs, time begins to run upon taxation of the bill of costs. Thus, grounds 1 and 2 of the appeal must fail.
34. Moving on to the core of the appeal, and in addressing grounds 3 and 4 of the appeal, this Court will consider whether the trial court was justified in entering summary judgment against the Appellants. It is trite that a defendant confronted with a summary judgment application is required to demonstrate to the court that he has a reasonable defence and that he ought to be allowed to defend. A reasonable defence is one that raises a bona fide, hence prima facie triable issue or issues, though not necessarily one that would ultimately succeed. See the definition of such defence in *Olympic Escort International Co. Ltd. & 2 Others –vs- Parminder Singh Sandhu & another* (2009) eKLR.
35. It is undisputed that the Respondent had a certificate of taxed costs in its favour at the material time. (See annexure marked ANT 1). The certificate had not been varied or set aside as of the material time. The Respondent, through counsel swore that his firm had requested the Appellants to settle the said taxed costs but that they failed and or refused to settle the costs. An unchallenged certificate of taxed costs is final as to costs therein. Section 51 of the *Advocates Act* states regarding such certificate that:
- “ 1...
- (2)The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”
36. The Appellants’ replying affidavit at paragraph 8 to 16 asserted that the retainer in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants pertaining to HCCC No. 5469 of 2003 was disputed because the suit was filed solely for the benefit of the 1<sup>st</sup> Appellant; that joinder of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellant in the suit purported to pierce the corporate veil; that Respondent’s claim to costs of Kshs. 2,634,134.40/- as taxed was irregular given that the bill had already been taxed and could not be re-taxed; and hence the certificate of taxation dated



- 22.07.2003 relied on before the trial court was a nullity. Respectfully, the Appellants appeared to be grasping at straws and or seemingly attempting to obfuscate issues, in an endeavor to raise triable issues.
37. Firstly, the Appellants' own depositions clearly narrate how the re-taxation of the bill of costs came about, whereas the law allows for the same by dint of Paragraph 11(2) and (3) of the Advocates Remuneration Order. Secondly, the pleadings in HCCC No. 5469 of 2003 (annexure marked ISG-1 in the Appellants replying to affidavit) listed the Plaintiffs therein as they appeared in the lower court suit and on this appeal. Irrespective of the reliefs sought in the plaint in HCCC No. 5469 of 2003, the Respondent was instructed to act for all the Appellants (as plaintiffs) against the Defendant therein (National Bank of Kenya Limited). Further, these same parties were also parties in HC Misc. Appl. No. 1688 of 2002 in respect of the bill of costs dated 04.11.2002 (annexure ISG-4) and cited in the taxation ruling dated 16.07.2003, (annexure marked ISG-1 as "Kenya Overseas Trading Company Ltd and Two Others".
38. Therefore, it is disingenuous for the Appellants to argue that the retainer in respect of the 2<sup>nd</sup> and 3<sup>rd</sup> Appellants regarding HCCC No. 5469 of 2003 was disputed supposedly because the suit was filed solely for the benefit of the 1<sup>st</sup> Appellant and their joinder to the lower court suit violated the corporate veil. For all intents and purposes, the Certificate of Costs dated 22.07.2003 (annexure marked ANT 1) was in respect of all the Appellants herein and the Respondent was entitled to enjoin all of them in the suit for recovery of taxed costs. Ground 5 of the appeal does not aid the Appellants' quest as a detailed review of the impugned ruling reveals that the trial court considered the respective parties' submissions and case law in respect of the issues for determination.
39. Ultimately, it is the considered view of this court that the findings of the trial court on the matters in dispute were well founded. In the words of Gohil (*supra*), while the Respondent exhibited facts which were probably true and sufficient to warrant the granting of the prayer for summary judgment, the Appellants failed to discharge the onus of demonstrating triable or bona fide issues of law or fact to entitle them to leave to defend. Therefore, the trial court was entitled to enter summary judgment. The appeal is without merit and is accordingly dismissed with the costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 11<sup>TH</sup> DAY OF APRIL 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: N/A

For the Respondent: Mr. Muthama h/b for Mr. Muriithi

C/A: Erick

