



**Rachier & Amollo LLP v Development Bank of Kenya Limited (Miscellaneous Civil Application E350 of 2021) [2024] KEHC 5446 (KLR) (Civ) (2 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5446 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**MISCELLANEOUS CIVIL APPLICATION E350 OF 2021**

**CW MEOLI, J**

**MAY 2, 2024**

**BETWEEN**

**RACHIER & AMOLLO LLP ..... APPLICANT**

**AND**

**DEVELOPMENT BANK OF KENYA LIMITED ..... RESPONDENT**

**RULING**

1. Rachier & Amollo LLP (hereafter the Applicant) filed a Bill of Costs dated 15.07.2021 against the Development Bank of Kenya Ltd (hereafter the Respondent). In response, and prior to taxation of the Bill of Costs, the Respondent filed a Preliminary Objection (PO) dated 05.12.2022 based on grounds that;-
  - (1) the Bill of Costs dated 15.07.2021 is brought belatedly, contrary to Section 4(1)(a) of the *Limitation of Actions Act*;
  - (2) the Bill of Costs relates to work allegedly done in 2004 in HC.Comm. Misc. No. 47 of 2004 – *Kamunyori & Co. Advocates v Development Bank of Kenya*; and
  - (3) the Certificate of Taxation marking the end of the proceedings in HC.Comm. Misc. No. 47 of 2004 was issued on 23.04.2004, over 18 years ago.
2. Although directions were taken to canvass the PO by way of written submissions, only the Respondent complied.
3. Counsel for the Respondent began his submissions by stating that the Applicant based its Bill of Cost on work done during taxation proceedings in HC.Comm. Misc. No. 47 of 2004 – *Kamunyori & Co. Advocates v Development Bank of Kenya*. That the foregoing Bill of Costs was dated 30.01.2004 and a respective Certificate of Taxation in the matter was issued on 23.04.2004. It was further submitted



that taxation proceedings having concluded some 18 years ago, the instant bill was filed in 2021, which is outside the period stipulated under Section 4(1) of the *Limitation of Actions Act* as interpreted in *Abincha & Co. Advocates v Trident Insurance Co. Ltd* [2013] eKLR.

4. Counsel argued that the Applicant's Bill of Costs ought to have been brought within 6 years after taxation proceedings in HC.Comm. Misc. No. 47 of 2004. That it has been 18 years since the cause of action accrued and 13 years since the cause of action lapsed. Hence the Applicant's Bill of Costs is time barred. In conclusion, counsel placed reliance on this Court's decision in *Martin Mugambi Mithiga v Invesco Assurance Co. Ltd* [2019] eKLR and *Abincha & Co. Advocates (supra)* to submit that the Applicant's cause of action in respect of the Bill of Costs before this Court is stale, incurably defective and bad in law as such ought to be dismissed with costs.
5. The court has considered the material canvassed in respect of the preliminary objection. Regarding what constitutes a true preliminary objection, the East Africa Court of Appeal stated in *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, (per Law JA) that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

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 has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

6. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was) reiterated the foregoing by stating that;

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

7. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR where the latter court emphasized that:

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point



of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

8. Here, the Respondent’s PO is premised on Section 4(1) of the [Limitation of Actions Act](#), which provides as follows: -

“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;
- (c) actions to enforce an award;
- (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

9. First, it is appropriate to observe that a PO based on limitation is not a technicality but a matter that goes to the root of the Court’s jurisdiction. It is trite that no Court has jurisdiction to hear a matter that is time barred. See; - *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1. The Court of Appeal in *Thuranira Karauri Vs. Agnes Nchebe* [1997] eKLR observed that:

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

10. In determining whether the Applicant’s Bill of Costs was filed out of time, the court must first determine when the cause of action arose. From the record before this Court there is no dispute that the Applicant’s claim for costs in respect of HC.Comm. Misc. No. 47 of 2004 – [Kamunyori & Co. Advocates v Development Bank of Kenya](#), is premised on a contract for Advocate-Client services, between the Applicant and Respondent herein. The Applicant appears to have been instructed on or about 10.02.2004, concerning the Bill of Costs that was taxed on 15.04.2004 and a Certificate of Taxation issuing later on 23.04.2004. The foregoing is confirmed by Item 34 in the Applicant’s Bill of Costs dated 15.07.2021. Thus, the date of the Ruling as captured in Item 34 above is the date when work was completed. The enforcement of the Advocate-Client contract by way of an action was subject to the limitation period as set out in Section 4(1)(a) of the [Limitation of Actions Act](#). Thus, the Applicant’s claim being one based on a Contract for professional services rendered, as counsel, ought to have been filed by way of a Bill of Costs or otherwise, within a period of six (6) years upon the accrual of the cause of action, namely the date of completion of the work on 15.04.2004.

11. In that regard, the Court concurs with Waweru, J. in [Abincha & Co Advocates](#) (*supra*), cited by the Respondent, where he observed *inter alia* that:

“As already seen, any claim or action for an advocate’s costs is subject to the statute of limitation. As already seen also, time begins to run from the date of completion of the work or lawful cessation of the retainer. Time does not begin to run from the date of delivery of the bill! Section 48(1) of the [Advocates Act](#) therefore cannot offer any defence against limitation...I therefore hold that any of the various bills of costs filed by the Advocate more



than six years after completion of the work which he was retained by the Client to do, or after the lawful termination of the retainer in respect of such work, is statute-barred by virtue of section 4(1) (a) of the *Limitation of Actions Act*.”

“ Even if the statute of limitation did not apply to the Advocate’s bills of costs (and clearly it does!) the Advocate having presented what appeared to be a final fee note upon completion of each brief, and the same having been paid by the Client who then proceeded to archive or destroy its related files, the Advocate is estopped in law and in equity from turning around, between 8 and 11 years later as the case may be, to raise “final” bills of costs”

12. The foregoing accords with *Halsbury’s Laws of England, 4<sup>th</sup> Edition*, Volume 28 at Paragraph 879, equally relied on by the Respondent, where it is stated that:

“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;
  1. if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided;
  1. if judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute.

In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.

A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill. If some of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

13. The Applicant only filed the Bill of Costs on 19.07.2021, some seventeen (17) years after the taxation Ruling in HC.COMM. MISC. No. 47 of 2004 – Kamunyori & Co. Advocates v Development Bank of Kenya was delivered. In the result, the court finds that the preliminary objection raised by the Respondent has merit and it is hereby upheld. The Applicant’s Bill of Costs is time barred pursuant to the provisions of section 4(1) (a) of the *Limitation of Actions Act*. A taxing master would have no jurisdiction to entertain it. The bill of costs dated 15.07.2021, is hereby struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2<sup>ND</sup> DAY OF MAY 2024.**

**C.MEOLI**



.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of:

For the Applicant: N/A

For the Respondent: Mr. Nyboma

C/A: Erick

