



Beatrice Kariuki & Associates Advocates v Gatoka Limited (Miscellaneous Application 65 of 2007) [2023] KEHC 17313 (KLR) (Commercial and Tax) (12 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17313 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 65 OF 2007**

FG MUGAMBI, J

MAY 12, 2023

BETWEEN

BEATRICE KARIUKI & ASSOCIATES ADVOCATES ADVOCATE

AND

GATOKA LIMITED CLIENT

RULING

1. The applicant moved the court by an amended Notice of Motion dated May 1, 2022. The application was brought under section 51(2) of the *Advocates Act* Cap 16 Laws of Kenya, Order 7 of the Advocates Remuneration Order 1962, order 1 rule I of the *Civil Procedure Rules 2010* and all other enabling provisions of the Law.
2. The application was countered by a Preliminary Objection dated November 23, 2022 on the grounds that the court lacked jurisdiction to hear the amended Notice of Motion. It was contended by the respondent that the proceedings were time barred under section 4(4) of the *Limitations of Actions Act*. For the expeditious disposal of the matter, I have considered both the Preliminary Objection and the application together as parties' submissions touched on the two.
3. The applicant vide the amended Notice of Motion sought the following orders;
 - i. That judgment be entered for the advocate/applicant as against the client/respondent for the sum of Kshs 479,791/= being certified costs due to the advocate/applicant
 - ii. That the client/respondent do pay to the advocate/applicant interest on the certified costs at 14% from May 28, 2007 being the date of taxation until payment is made in full
 - iii. That interest in prayer 2 be calculated on the basis of compound interest.



4. The application was premised on the grounds on the face of it and on the supporting affidavit of Beatrice Wairimu Kariuki. The applicant's case was that the advocate had been instructed by the client to act on its behalf in Milimani High Court Civil Suit 391 of 2003 but the applicant withdrew its instructions. The applicant further submitted that the client failed to settle the legal fees forcing the applicant to file a bill of costs for taxation where the taxing master taxed the bill at Kshs 479,791/=. It was her contention that a certificate of taxation was issued on October 13, 2021 and the respondent had not made any payment to that effect. She observed that the certificate of taxation had not been set aside and prayed for Judgement to be entered against the client for Kshs 479,791/= plus interest.
5. In their submissions, the applicant dismissed the preliminary objection raised by the respondent terming it as a misapprehension of law and facts in that the Certificate of Taxation was final and binding and not the ruling on taxation. It was also the applicant's submissions that there was no time limit set for extracting a Certificate of Costs after taxation. With respect to the interest on the taxed bill of costs, the applicant's contention was that interest ought to be computed 30 days from the date the bill of costs was filed.
6. In response to the application, the respondent raised a preliminary objection and submitted that under section 4(4) of the Limitation of Actions Act an action could not be brought after twelve years from the date the judgment was delivered. It was the respondent's submissions that the advocate/client bill of costs was taxed on May 28, 2007 and therefore time barred because the application ought to have been filed within 12 years.

Analysis

7. I have considered the application, the preliminary objection and the rival submissions. In my considered view, there are two issues for determination. The first issue is whether the preliminary objection was sustainable and the second issue is whether judgment should be entered in favour of the applicant in terms of the Certificate of Taxation.
8. I will consider the preliminary objection first as its outcome will determine the fate of the application before court.
9. The respondent's preliminary objection was premised on the ground that the proceedings were time barred under section 4(4) of the Limitation of Actions Act. Section 4(4) of Limitation of Actions Act (Cap 22) at that Act provides: -
 - (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 be recovered after the expiration of six years from the date on which the interest became due."
10. It was the respondent's case that the applicant ought to have filed an application for execution of costs within 12 years from the date of taxation. According to the respondent the applicant had waited for a period of seven years before filing a reference which was dismissed.
11. The applicant in its supplementary affidavit sought to explain the time lapse while maintaining that this application was not time barred. The applicant observed that after the bill was taxed and a ruling was delivered the court file went missing for a long time. It was not until November 25, 2010 that



a certified copy of the ruling was availed to the applicant. Thereafter the applicant filed a reference on April 30, 2014 after protracted negotiations and various mentions for the purposes of recording a settlement. There was also a Notice of Appeal filed by the respondents on January 31, 2017 but the appeal did not see the light of day.

12. I have perused the record and it is not disputed that the taxation ruling was delivered on May 28, 2007. The applicant then filed a reference on the bill of costs dated April 30, 2014 and the ruling on the reference was delivered on January 17, 2017. The Certificate of Taxation was issued on October 13, 2021.
13. On whether the application before court was statute barred, section 4(4) of the Limitation Act prevents bringing in an action after 12 years have lapsed and recovering interest after the expiration of 6 years from the date the interest is due. In the present case, after the ruling was delivered by the taxing master on the bill of costs, an appeal was preferred on the bill of costs. The question therefore is whether time starts running after the initial ruling by the taxing master or after the ruling on the reference was delivered.
14. In *Abincha & Co Advocates v Trident Insurance* (Nairobi Misc App No 527 of 2011) the Learned Judge cited with approval paragraph 879 of Halsbury's Laws of England, 4th Edition, Volume 28. Which reads as follows as regards the recovery of costs by a solicitor:

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. 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. 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.

15. From the foregoing dictum, it is apparent that time started running after the reference was decided as it settled the disputed matters once and for all. This is more so because no further appeal was preferred. In other words, time would be held to have begun from January 17, 2017. Twelve years have not lapsed since the said date consequently the application is not statute barred as it was filed before the statutory limit of twelve years. I find that the preliminary objection is not sustainable and is therefore dismissed.
16. The second issue is whether judgment should be entered in favour of the applicant in terms of the Certificate of Taxation. In the case of *Lubulellah & Associates Advocates vs N. K. Brothers Limited* [2014] eKLR the court observed that;

‘The law is very clear that once a taxing master has taxed the costs, issued a Certificate of Costs and there is no reference against his ruling or there has been a ruling and a determination made and not set aside and/or altered, no other action would be required from the court save to enter judgment. An applicant is not required to file suit for the recovery of costs’.

17. The applicant invoked Section 51 (2) of the *Advocates Act* provides that: -

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.



18. The foregoing provision gives the court the jurisdiction to enter judgment where a Certificate of Costs is issued. It requires that the certificate of taxation should not have been set aside and that there should be no dispute to the retainer. Further, Paragraph 7 of the Advocates Remuneration Order allows an advocate to charge interest on his costs and disbursements as follows:

An advocate may charge interest at 14 per cent per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from the delivery of his bill to the client, provided that such claim for interest is raised before the amount of the bill shall have been paid or tendered in full.

Determination and orders

19. For the reasons stated above, the Preliminary Objection dated November 23, 2022 fails. The application dated May 1, 2022 is granted on the following terms:
20. Judgment is hereby entered for the applicant against the respondent in the sum of Kshs 479,791/= as per the Certificate of Costs together with interest at 14% per annum from January 17, 2017 when the ruling on the reference was delivered. The applicant shall have costs.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 12TH DAY OF MAY 2023

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

