



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 742 OF 2012

SAMSON MASABA MUNIKAH practicing as **MUNIKAH &
COMPANY ADVOCATES.....PLAINTIFF**

-VERSUS-

**HARAMBEE CO-OPERATIVE SAVINGS AND CREDIT
SOCIETY LIMITED.....DEFENDANT**

JUDGMENT

1. The plaintiff, **Samson Masaba Munikah** has practiced law since 1977. He practices under the name of **Munikah & Company Advocates**. On or about 3rd September 1991 the plaintiff was appointed into the panel of advocates of **HARAMBEE CO-OPERATIVE SAVINGS AND CREDIT SOCIETY LIMITED**, the defendant. In that capacity the plaintiff was appointed by the defendant to provide professional legal services on behalf of the defendant. He was appointed to provide legal services in sale transactions of the defendant's housing project referred to as Ushirika Estate. The defendant has submitted that was a very large project involving Ksh 358,000,000.

2. The plaintiff filed an advocate/client bill of cost which was taxed on 7th April 1998, by consent. The amount in the certificate of taxation dated 24th April 1998 is for Ksh 34,727,763. The defendant did not settle that taxed amount and hence this case which was filed for the recovery of Ksh 47,412,031.40, with interest at 14% from 31st October 2012 until payment in full.

3. During the trial learned counsels informed me that the only issue for determination is whether or not this suit is time barred. That indeed will be the only issue to be determined because the bill of costs was taxed by consent and to date it has not been set aside or reviewed and a certificate of costs was issued. In this regard I wish to refer to the decision of Justice Janet Mulwa in the case **Wilfred Nyaundi Konosi t/a Konosi & Company Advocates v John Lokorio (2015) eKLR** as follows:

“14. Having analysed the submissions by both counsel and the legal provisions governing an Advocate-client bill of costs, this court finds and hold that:

(1) A certificate of costs, arising from a taxation before a taxing master, and the certificate of costs being by consent of both the client upon a Reference to the Judge, it cannot be challenged unless it is set aside or varied by a court order.

(2) That the Advocate may opt to recover the said taxed costs within the **Misc. Application** giving rise to the certificate of costs by way of summary manner, by application for judgment based on the certificate of costs, or by filing a recovery suit against the respondent and applying for summary judgment thereof based on the certificate of costs – as provided under **Section 51 (2) of the Advocates Act**.

(3) That as long as the certificate of costs is unchallenged as is in this appeal, (a consent certificate of costs having been recorded on a Reference) there can be no valid defence challenging the validity or otherwise of the certificate of costs, more so where the certificate was obtained by consent of both parties.

(4) That once a certificate of costs is issued and has not been set aside or altered, no other action would be required from the court save to enter judgment upon application.”

4. This court is empowered by section 51 (2) of the advocates Act, Cap 16, to enter judgment on a certificate of taxation which has not been set aside or altered by the court. Justice Fred A. Ochieng considered that section in the case **Owino Okeyo & Company Advocates v Fuelex Kenya Limited [2005] eKLR** and had this to say:

“That section has many parts to it. First, it attests to the finality of a certificate of taxation which had not been set aside or altered by the court. Secondly, it confirms that the sum so certified is deemed to be due. And, finally, it states that the advocate was entitled to judgment in the taxed costs, provided only that the retainer was not disputed.”

5. It follows, as rightly stated by the learned counsels, in this matter, that the only issue for determination is whether this suit is barred by limitation of action. If I determine in the negative on that issues the plaintiff will be entitled to entry of judgment, in view of my discussion above.

6. The parties in this matter are in agreement that the plaintiff’s action is founded in contract. It follows that **Section 4 of the Limitation of Actions Act, Cap 22**, is applicable. It provides:

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;

7. The plaintiff contends that time did not begin to run, for purpose of reckoning time, until applications that were filed by the defendant, challenging his costs, were determined.

8. Those actions were an Originating Summons filed on 4th December 1998 and an Amended Notice of Motion application dated 4th December 1998. Neither of these were prosecuted. This is because the plaintiff successfully filed applications for their dismissal for want of prosecution. The Originating Summons was dismissed on 20th April 2009. The Amended Notice of Motion was dismissed on 9th June 2009.

9. This is what the plaintiff pleaded in his plaint:

“By reason of the said applications filed by the Defendant to challenge, inter alia, the project accounts and taxed costs the plaintiff was since 1998 to year 2011, for over 11 years or about, rendered unable to pursue his claims against the Defendant. Time is therefore deemed to have started running against the plaintiff after the disposal, by way of dismissal, of the aforesaid Amended Notice of Motion and Originating Summons filed by the Defendant against the plaintiff.

It was only logical of the plaintiff to await the outcome and conclusion of the originating summons and the Amended Notice of Motion so as to determine the level of the Defendant’s claim against the plaintiff vis-a-viz.

Inadvertently the law firm of Hamilton Harrison & Mathews did not inform the plaintiff immediately or shortly after the dismissal orders in respect of the originating summons and the Amended Notice of Motion were given and or issued, until the plaintiff inquired regarding progress. No appeals have so far been preferred by the defendant.”

10. By the dismissed Originating Summons the defendant sought the following prayers against the plaintiffs:

“THAT the Respondent do:

a. Deliver a Cash Account and/or Statement of Account on Ushirika Housing Estate Nairobi/Block 360/273, L.R 104/309, L.R104/519, LR 104/307 and LR 104/440 between the Respondent and the Applicant.

b. Pay forthwith ksh 91,039,564.35/= and interest as at 30th September 1998 being money wrongful held by the Respondent on account of the Applicant and any other money that the court may deem fit and due to the Applicant.

c. The delivery to the Applicant of a list of the money and securities which the Respondent is holding on Ushirika Estate (Main Titles LR. 104/273, LR 104/519, LR 104/440, LR 104/309, 104/307 and 360/ 273) or control on behalf of the Applicant.

d. The delivery of papers and documents to which the Applicant is entitled on Ushirika Estate more particularly all sale Agreements. Documents of company incorporated titles and generally all documents that came in possession of the respondent whilst acting for the Applicant.”

11. By the dismissed Amended Notice of Motion the defendant sought the prayer for review or setting aside of the taxation by consent.

12. The plaintiff argued that defendant’s challenge to his taxation amounted to acknowledgment as provided under **Section 23 (3) of Cap 22**, which provides:

23.(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

13. Although the learned counsel for the plaintiff stated that there were negotiations whereby parties agreed that no further action should be taken while those negotiations proceeded, that is not supported by any documentation nor did the plaintiff allude to it at trial. It therefore remains that the reason the plaintiff did not file this action as provided under section 4 of Cap 22 is because his certificate of taxation was under challenge.

14. The defence in submitting that the plaintiff's case was filed 14 years after the cause of action accrued relied on the case **Otieno Ragot & Co. Advocates v Kenindia Assurance Co. Ltd (2017) eKLR** where Justice E. N. Main, in determining when limitation begins to run in case of advocate's fees relied on Halsbury Laws of England 4th Edition Vol 28 paragraph 674 as follows:

“Solicitor's costs. If a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of the termination of the action or of the lawful ending of the employment 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.

These rules apply only to such continuous work as bringing and prosecuting or defending an action. In respect of miscellaneous work done by a solicitor, the statute runs 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 the items included in the bill are statute barred, the solicitor may recover in respect of the balance.”

15. Justice Ngaah in the case **Gathiga Mwangi & Co Advocates v Jane Mumbi Kiano (2016)eKLR** considered the above paragraph from Halsbury Laws of England and said:

“This citation must have been making reference to the Solicitors Act, 1974 which applies in England Court, in the absence of any Local Statutory Provision on this issue, it remains the closest indication of when time begins to run against the filing of an Advocate/Client Bill of Costs. It is instructive that time started running from the date the judgment was delivered assuming that Counsel was then still on record and not from the date Counsel ceased acting after the delivery of the Judgment”.

ANALYSIS

16. There is no evidence before me that shows that ‘**acknowledgment**’ as stated in section 23 (3) of Cap 22 was present in this matter. The plaintiff therefore cannot find refuge in that section.

17. The plaintiff, in my view cannot also take refuge in the fact that there was challenge to his certificate of costs by the applications filed by the defendant. There is simply no provision of law that extends time on the basis of applications that are pending.

18. I do find and hold that time began to run against the plaintiff on the date the taxation was concluded. That after all that was when the plaintiff knew what he could claim from the defendant. That is when his claim crystallised. That being so the six years provided under section 4 of Cap 22 began to run from 7th April 1998. The plaintiff's claim for the taxed costs became time barred in April 2002. This suit was filed in the year 2012.

19. The court of appeal in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017) eKLR** had this to say on the Limitation in section 4 of Cap 22

24. It is common ground that the cause of action in this matter was based on contract and that **section 4** of the **Limitation of Actions Act** prohibits suits filed after the end of six years from the date on which the cause of action accrued. As **Potter, JA** observed in the case of **Gathoni vs Kenya Cooperative Creameries Limited (Civil Application No. 122 of 1981):**

“The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in **Divecon vs Samani (1995-1998) EA 48** stated as follows:-

“...to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that the wording of section 4 (1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked”

20. In view of the above finding the plaintiff's case fails because it is barred by limitation of action and is dismissed.

21. The defendants will not be awarded costs, even though the case has failed because the plaintiff's costs were taxed by consent of their appointed advocate. Had it not been that the court has found this suit is time barred judgment would be entered for the plaintiff as prayed.

CONCLUSION

22. In the end and for the reasons set out above this case is dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of APRIL, 2020.

MARY KASANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19 pandemic** and in light of the directions issued by **his Lordship, the Chief Justice on 15th March, 2020**, this decision has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

MARY KASANGO

JUDGE