



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 204 OF 2014**

**MOHAMMED FAKI KHATIB**

**T/A KHATIB & COMPANY.....APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF MOMBASA as a Successor of**

**MUNICIPAL COUNCIL OF MOMBASA.....RESPONDENT**

**CONSOLIDATED WITH**

**MISC. CIVIL APPLICATION NO. 205 OF 2014**

**AND**

**MISC. CIVIL APPLICATION NO. 206 OF 2014**

**R U L I N G**

1. Before court for determination is the Notice of Motion dated 26/5/2015 by the client/applicant seeking orders that this file as well as nos. 205 and 206 both of 2014 be consolidated for determination of the issue raised against the bills of costs and that the bills of costs be ordered struck out for having been filed when statute barred.
2. The application essentially faults the bills of costs filed for taxation before the Deputy Registrar as not lying and seeks that the same be struck out on the basis that the County Government of Mombasa did not take over the assets and liabilities of the defunct Municipal Council of Mombasa; and that there exist an elaborate process of such take over to establish the Assets and Liabilities of the defunct local authorities.
3. The application was supported by the Affidavit of one Jimmy Waliaula which reiterated the grounds and annexed documents which include an excerpt of Hansard for the Senate of 8/5/2014 as well as correspondence from the transition Authority, now defunct, revealing attempts on how to have the liabilities settled. Of note is the correspondence that asked the County Governments to prepare and avail an inventory of all assets and liabilities.
5. The application was opposed by a Replying Affidavit sworn and filed by one MOHAMED FAKI KHATIB whose gist is that having rendered legal services to the Respondent as a client, and having not been paid, he has filed the proceedings to determine the quantum of fees paid to him by the respondent. To the advocate the only purpose and goal of the application is to frustrate the endeavors to ascertain fees payable and not to meet the ends of justice.
6. When the application came up before the Deputy Registrar as the taxing office, the Deputy Registrar ordered, on the authority of *Abincha & Co. Advocates vs Trident Insurance Company Ltd [2013] eKLR* that the application be determined by the court.
7. By directions of the court, parties filed written submissions. The submissions by the client/applicant are dated 24/8/2018 while those by the Advocate are dated 24/9/2018.
8. Essentially the question for determination by the court is whether or not the bill is statute barred by operation of the provisions of limitation of Actions of Act and Public Authorities Limitation of Actions Act.

9. That simple issue for determination begs the question is whether or not on the 25/6/2014 when the bills of costs were filed the same were statute barred. That is a question of fact to be determined based on evidence availed to court to show when the instructions to counsel were withdrawn or when he concluded the work he was instructed to execute.

10. The client relies on the bill of costs to show that the instructions were terminated on 20/11/2003. To the contrary the advocate contends that the advocate client relationship has not been terminated owing to the fact that no evidence was shown that the instructions were withdrawn or was there evidence of filing a notice of charge.

11. A court of law must make its determination based on evidence and not hypothesis. As much as the last item in the bill of costs shows that the last action by the advocate was attendance in court for hearing, no evidence was availed to show what became of that hearing and whether a determination was rendered and if the litigation was brought to close and in what way.

12. The burden of proof remains that he who alleges, has the duty to prove. In this matter it is the client alleging bar by statute hence it was its duty to prove when the instructions terminated. There being no evidence in that critical aspect, it would not be proper for the court to find on the objection raised without the danger of appearing to walk in the dark.

13. In coming to this conclusion, I am guided by the citation and reliance by Waweru J, *in Abincha & Co. Advocates (supra)* of *Halsbury's Laws of England* that the cause of action for recovery of advocates fees from client accrues on the termination of action in which he is retained or on the lawful end of the retainer.

14. I am also persuaded by the decision by Nyamweya J, in *Mercy Nduta Mwangi vs Invesco Insurance Co Ltd [2016] eKLR* for the proposition that it is the client to avail evidence when the retainer ended to prove the date the cause of action accrued.

15. That being my finding, I do conclude by stating that the objection was improperly taken without facts and cannot be sustained but is hereby dismissed with costs.

16. Upon dismissal, and it having been agreed by consent that the decision herein bind Mombasa Miscellaneous Application No. 205 and 206 of 2014, it is directed that all the three bills be placed before the taxing master for taxation in the usual manner.

**Dated and delivered at Mombasa this 1<sup>st</sup> day of February 2019.**

**P.J.O. OTIENO**

**JUDGE**