



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI (NAIROBI LAW COURTS)**  
**CIVIL SUIT NO. 1269 OF 2002**

**MAINA MURAGE (t/a Maina Murage & Co., Advocates) .....PLAINTIFF**

**VERSUS**

**MAE PROPERTIES LIMITED.....DEFENDANT**

**RULING**

1. The Defendant has applied by **notice of motion dated 22<sup>nd</sup> March 2011** for dismissal of the Plaintiff's suit for want of prosecution. In the alternative it seeks an order to strike out the suit.
2. The prayer for dismissal for want of prosecution is brought under **Order 17, rule 2(1) and (3) of the Civil Procedure Rules (the Rules)** while that for striking out is brought under **Order 2, rule 15(1) (b), (c) & (d) of the Rules. Sections 1A, 1B, and 3A of the Civil Procedure Act, Cap 21 (the Act)** are also cited.
3. There are eight (8) grounds for the application appearing on the face thereof. The first six anchor the main prayer for dismissal for want of prosecution. The other two anchor the prayer for striking out.
4. The essence of the grounds for the prayer for dismissal for want of prosecution is that since 11<sup>th</sup> May 2004 the Plaintiff has not taken any step towards prosecution of his case, and that pendency of the suit is prejudicial to the Defendant. In any case, further argues the Defendant, it is a principle of public policy that litigation must come to an end.
5. The two grounds for the prayer for striking out are that "the Plaintiff is guilty of failure to comply with the mandatory provisions of **section 48 of the Advocates Act, Cap 16**, and that the plaint as filed is otherwise an abuse of the process of the court.
6. There is a supporting affidavit sworn by one EMMA WACHIRA, the Defendant's Company Secretary/Chief Legal Officer. The affidavit elaborates the grounds for the application.
7. The Plaintiff has opposed the application by grounds of opposition dated 27<sup>th</sup> June 2011 and replying affidavit filed on 17<sup>th</sup> June 2011. The grounds of objection include the following -
  - (i) That save for the issue of dismissal for want of prosecution, the other issues raised in the application are *res judicata* in that they were raised in the Defendant's application by chamber summons dated 22<sup>nd</sup> May 2003 and determined *inter partes* in the court's ruling delivered on 12<sup>th</sup> March 2004.
  - (ii) That the suit was not heard for over eight (8) years (and cannot be heard) until the Plaintiff's bill of costs is taxed.

(iii) That the Plaintiff's bill of costs filed on 20<sup>th</sup> December 2001 (in Nairobi HC Misc. Civil Application No. 1519 of 2001) could not be taxed because of the various proper listed reasons.

The replying affidavit explains the above grounds in detail.

8. Parties filed detailed written submissions backed up by various authorities. I have considered those submissions and the authorities. There were also oral submissions in which the learned counsels highlighted what they considered to be important issues. I have considered those oral submissions.

9. It is my considered view that a background or history of this dispute, given in perspective, will easily dispose of the application. That background is disclosed by the material now before the court and is as follows.

10. The Defendant is the erstwhile client of the Plaintiff. The Plaintiff filed an advocate/client bill of costs for taxation of its professional fees for services rendered. That was before the present suit was filed. At taxation the Defendant denied retainer. By consent that issue (whether or not the Defendant had retained the Plaintiff to act for it) was referred to a Judge for determination. The Judge (Waki, J as he then was) determined that services had been rendered in respect of some of the claims in the bill of costs while none had been rendered in respect of others.

11. Both parties were dissatisfied with the ruling of Waki, J and they appealed to the Court of Appeal. The appeal was eventually heard in October 2010. In a judgment delivered on 3<sup>rd</sup> December 2010 the Court of Appeal held that the Plaintiff had rendered services in respect of all the claims in the bill of costs and directed that the bill be taxed on that basis.

12. In the meantime the Plaintiff had filed the present suit. He says he filed the suit in order to protect its claim for its costs from going stale under the **Limitation of Actions Act, Cap 22**. That in my judgment was a prudent thing to do as the Plaintiff's claim for its professional fees would be based upon its contract with the Defendant (the retainer) to render professional services, and **section 4(1)** of Cap 22 aforesaid sets a time limit (from the date the cause of action accrued) within which to bring claim based on contract.

13. Jurisdiction to enter judgment for taxed costs under **section 51(2)** of the Advocates Act does not appear to oust a defence of statutory limitation if the advocate's claim for fees for services rendered is otherwise out of time, it being a claim in contract.

14. In the meantime, the suit herein must await taxation of the Plaintiffs' advocate/client bill of costs as it is only by such taxation that the Plaintiff's suit will be properly disposed of. The delay in taxation cannot be attributed to the Plaintiff. It was plainly caused by the appeal before the Court of Appeal.

15. The plea that the present suit is a parallel litigation to the bill of costs that is pending taxation is not persuasive at all. I have already stated above the reason why the suit was filed, a reason that I accept. Taxation of an advocate/bill of costs is a process of **ascertaining the quantum** of such costs. Judgment under section 51(2) of the Advocates Act, or judgment entered in a fully-fledged suit such as the present one, would provide an avenue of **recovery** of such costs. These are two different processes.

16. Has there been delay in prosecuting the present suit? I think not. I have already noted that the main delay was caused by the appeal before the Court of Appeal. I have also noted that taxation of the advocate/client bill of costs now pending would provide a convenient and just way of disposing of the present suit. So, the sooner the parties get on with the taxation the better!

17. The issue raised regarding interest on costs is an issue to be dealt with at the time judgment for the (taxed) costs is entered. It will be upon the court at that time to determine if an order for interest is appropriate and just and if so, the rate of such interest.

18. Finally, there is the issue of section 48 of the Advocates Act which lays down a condition precedent

for the filing of suit for recovery of an advocate's costs. That condition is delivery or sending by registered post to the client a duly signed bill of costs, which may be in a summarized form, at least a month before filing action.

**19.** There is no dispute here that the Defendant was served with the bill of costs that featured in the taxation that it objected to, leading ultimately to the appeal before the Court of Appeal. There could not have been any need to again serve the Defendant with the same bill of costs as a preparatory step to filing the present suit.

**20.** For all the above reasons, I find no merit in the Defendant's application by notice of motion dated 22<sup>nd</sup> March 2011. The same is dismissed with costs to the Plaintiff. It is so ordered.

**21.** The delay in preparation of this ruling (and the resultant distress to the parties) is deeply regretted. It was caused by my poor state of health the last few years. But thank God I have now fully regained my health.

**DATED AT NAIROBI THIS 3<sup>RD</sup> DAY OF OCTOBER 2012**

**H.P.G. WAWERU**  
**JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF OCTOBER 2012**