



REPUBLIC OF KENYA



**Gitwany Investments Limited v Joseph & another (Civil Case
E014 of 2025) [2025] KEHC 13640 (KLR) (Civ) (2 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 13640 (KLR)

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

**CIVIL
CIVIL CASE E014 OF 2025**

**JN MULWA, J
OCTOBER 2, 2025**

BETWEEN

GITWANY INVESTMENTS LIMITED PLAINTIFF

AND

KANGETHE GEORGE JOSEPH 1ST DEFENDANT

KANGETHE & COMPAY ADVOCATES 2ND DEFENDANT

RULING

1. By an Originating Summons dated 21/01/2025, Gitwany Investments Ltd (hereafter the Plaintiff) seeks the following orders against Kangethe George Joseph and Kangethe & Co. Advocates (hereafter the 1st & 2nd Defendant)-:
 - a. That the Defendants do pay to the Plaintiff the sum of Kshs. 67,500,000 with interest at Court rates (12%) from 22/10/2009 to date;
 - b. That the Defendants engaged in professional misconduct in withholding monies due to their client, the Plaintiff herein.
 - c. That the costs be borne by the Defendants.
2. The summons is premised on the provisions of Order 52 Rule 4 of the Civil Procedure Rules (CPR) and Section 51 of the *Advocates Act* with the grounds thereto being amplified in the supporting affidavit dated 19/12/2024 sworn by Elizabeth Gitiri Gacanja. The gist of her deposition is that the 1st Defendant while practicing in the style and name of the 2nd Defendant acted for the Plaintiff in Nairobi HCCC No. 1114 of 2002 – Gitwany Investments Ltd v TAJ Mall Ltd & The Attorney General. That vide a consent filed on 09/11/2009 and adopted as an order of the Court on 08/06/2011, the aforesaid matter was concluded on terms inter alia that the Government of Kenya through the Attorney General



- would pay the Plaintiff an agreed sum of Kshs. 67,500,000/-. She goes on to depose that pursuant to the said order the Defendants were paid the aforesaid sums, in tranches of Kshs. 28,000,000/- and 39,500,000/- respectively.
3. That despite the Defendants receiving the aforesaid sum on behalf of the Plaintiff, they proceeded to withhold the entire full amount completely renegeing on their obligation to transfer the same to the client. That the said sum was not the Defendants to withhold as such they had misconducted themselves in failing to adhere to the Advocates rules, which obligate an Advocate to pay into a client's account all client's money held and received by on behalf of a client.
 4. The deponent goes on to depose that in spite of demand, the Defendants have refused to comply and transmit to the Plaintiff the said monies therefore it is in the interest of justice that the Defendants do deliver to the Plaintiff a cash account in respect of the funds and pay the same over to the latter's current counsel or deposit the same in Court. In conclusion she states that the Defendants have defaulted on their obligation for more than a decade, thereby visiting immense financial prejudice on the Plaintiff.
 5. The Defendants oppose the summons through an Amended Preliminary Objection dated 18/06/2025 and a replying affidavit dated 20/06/2025 sworn by Kangethe George Joseph. The Defendants objection to the summons is premised on the grounds that; this Court lacks the requisite jurisdiction to adjudicate upon this matter; that the matter is barred by statute of limitations Act to wit, Sections 4 (4) as the same was concluded over 12 years ago and by reason thereof no action can be brought to enforce the judgement; that without prejudice to the above, and in alternative, the Originating Summons is in violation of the provisions of Section 4(1)a of the Limitations of Action Act; that this suit is offensive to the provisions of Orders 3, 7 and 11 of the CPR;
 6. Further the Defendants state that there is material non-disclosure in the entire Originating Summons of critical relevant facts; that there exists in favour of the Respondents herein an inalienable right of lien on the proceeds of the settlement alluded to in the Originating Summons; that the Defendants have an inalienable right of set-off and/or counterclaim upon all the Plaintiff's claims, proceeds etc in the Originating Summons as well as other associated files; that the affidavit of the director in the Originating Summons is fatally defective and by reason thereof the entire Originating Summons is fatally defective.
 7. Additionally the Defendants state that this matter has no merit to warrant being adjudicated under any certificate of urgency; that there is a compelling necessity to lift the corporate veil; that there is an overriding necessity to interrogate the effect of the Partnership deed relating to the Defendants herein vis a vis the Plaintiff; that there is overwhelming evidence of prejudicial selectiveness in the instigation of this suit; that there is real and apparent bad faith, malice and prejudice in the institution of the Originating Summons; and that the allegations contained in the Originating Summons are matters capable of resolution outside the court.
 8. In his rather lengthy affidavit, Kangethe George Joseph iterates that the summons is statute barred having been filed more than seventeen (17) years since judgment was entered in the matter and more than six (6) years since termination of the contractual Advocate-Client relationship therefore the Court lacks jurisdiction to entertain the matter. He further contends that there is material non-disclosure and bad faith on the part of the Plaintiff as there has been long-standing communication on the matter whereas the sum claimed includes both Party-Party and Advocate-Client costs.
 9. The Defendants depose further that there has been a deliberate failure by the Plaintiff's advocate to disclose the fact that he has an interest in the matter by reason of the latter being one of the director/ secretary in the Plaintiff's company thereby manifesting a conflict of interest.



10. He asserts that one Mr. Paul Chuchu Njuguna – Advocate is a necessary party to the instant proceedings by dint of the 2nd Defendant’s partnership deed given that he is the partner having custody of the subject file in question and other associated files touching on the Plaintiff. That in the year 2000, one Mr. Wilson Gachanja, - spouse to the deponent of the Plaintiff’s affidavit, gave instructions to the 2nd Defendant to act for him in multiple matters. That upon receipt of the settlement dues, the 2nd Defendant, through Mr. Paul Chuchu Njuguna, duly advised the Plaintiff that the said settlement was inclusive and composite of both Client and Advocate costs, to wit, the Defendants would hold as a legitimate lien the funds and files relative thereto in line with the provisions of the Advocate’s Act.
11. He asserts that the Plaintiff was equally advised that it owes the Defendants a sum in excess of Kshs. 585,000,000/- and that the sums received would be set-off and counter-claimed against both Mr. Wilson Gachanja and the Plaintiff. That throughout the period of the Advocate-client relationship, the Plaintiff never paid any deductible consideration to the Defendants and persists to default despite numerous demands for payment of fees due.
12. The Defendants further take issue with the fact that the deponent of the affidavit in support of the summons lacks the legal capacity and competence to represent the Plaintiff as there exists no board resolution of the Plaintiff’s company authorizing her to represent the Plaintiff. That further to the fore stated the summons is fatally defective for the reason that the signature of the deponent in the affidavit in support has been lifted which is indicative of the fact that the affidavit was not signed before a Commissioner for Oaths.
13. In any event, the defendants state that the issues in the summons are matters fit for settlement via Alternative Dispute Resolution mechanisms. In summation, he urges the Court to strike out the summons however maintains that if the Court sustains the same the Court ought to recognize his lien, right to set-off and intended counterclaim as against the Plaintiff.
14. As a house-keeping issue and for the benefit of the parties herein, directions were initially taken on disposal of the Defendant’s Preliminary Objection on 10/03/2025 whereafter on 09/04/2025, this Court duly confirmed compliance on filing of written submissions by the respective parties and thus reserved a ruling date.
15. However, the Defendants filed a motion seeking to amend their Preliminary Objection, to wit, this Court issued directions on 11/06/2025 that the Defendants amend their Preliminary Objection, serve the same and file submissions within 10 days of the aforesate date. The Plaintiff was equally accorded corresponding leave to file its submissions within 10 days upon service.
16. Pursuant to the latter directions, the Defendants filed their submissions on 18/06/2025 whereas the Plaintiff filed its submissions on 12/09/2025, in contravention of the timelines directed by this Court. Nevertheless, a cursory review of the latter’s submissions, the Court notes that they canvass the substantive Chamber Summons and not the amended Preliminary Objection, as such the same, have no bearing to the issue at fore noting that the Plaintiff had earlier filed submissions on the Defendants Preliminary Objection on 03/04/2025, prior to amendment of the Preliminary Objection.

Issues for determination concerns -:

- a. Whether the Defendants Preliminary Objection is merited?
- b. Who ought to bear costs?



Whether the Defendants Preliminary Objection is merited?

17. As to the nature of a preliminary objection, the same has since been settled within our jurisdiction in the celebrated decision of Mukisa Biscuits Manufacturing Company Ltd. It was held therein 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 objections 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.”

See also-; Oraro v Mbaja [2005] KLR 141, Kigwor Company Limited v Samedy Trading Company Limited [2021] KECA 810 (KLR) and Mulemi v Angwenye & Another (Civil Appeal 170 of 2016) [2021] KECA 214.

18. Ex facie, the Court garners that in limine the Defendants preliminary objection saliently crystalizes on provisions of Section 4(1)(a) and Section 4(4) of the *Limitation of Actions Act*. The former which provides that-;

“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;

19. Whereas Section 4(4) of the *Limitation of Actions Act* on its part provides that-;

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.

20. At the outset, it is pertinent to observe that a preliminary objection based on limitation is not a technicality but a matter that goes to the root of the Court’s jurisdiction. No Court has jurisdiction to hear a matter that is barred by limitation of time. This position was earlier fortified by the Court of Appeal in Thuraira Karauri v Agnes Ncheche [1997] KECA 77 (KLR) wherein it was stated-;

“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”.



21. In determining whether the Plaintiff's suit has been caught up by limitation of time, this Court must contemporaneously determine when the cause of action arose. Without any laborious examination of the rival affidavit material before this Court, it is not in dispute there existed an Advocate-Client relationship as between the Plaintiff and the Defendants, to wit, the latter acted for the Plaintiff in Nairobi HCCC No. 1114 of 2002 – *Gitwany Investments Ltd v TAJ Mall Ltd & The Attorney General*.
22. It is further not in dispute that vide a consent filed on 09/11/2009 and adopted as an order of the Court on 08/06/2011, the aforesaid matter was concluded on terms inter alia that the Government of Kenya through the Attorney General would pay the Plaintiff an agreed sum of Kshs. 67,500,000/-. Lastly, it is not disputed that the entirety of the sum was received by the Defendants in two (2) tranches, for which the Plaintiff now claims from the Defendants vide the instant proceedings.
23. Concerning application of Section 4(4) of the *Limitation of Actions Act* to the aforesaid set of facts, notably what is before the Court are proceedings presented pursuant to Order 52 Rule 4 of the CPR. At the risk of repetition, while it is not in dispute that Nairobi HCCC No. 1114 of 2002 was concluded successfully in favour of the Plaintiff, the instant proceeding presents as a dispute anchored on an Advocate-Client relationship and not one appertaining to the award in Nairobi HCCC No. 1114 of 2002.
24. Simply put, by the latter proceedings, the judgment debtor would have been the Government of Kenya through the Attorney General, it cannot be stated, by the instant suit, that the Plaintiff has brought an action on the premise of the consent judgment rendered in Nairobi HCCC No. 1114 of 2002. Consequently, this Court reasonably believes that Section 4(4) of the *Limitation of Actions Act* has no application in the instant matter, to wit, the objection premised on the said provisions cannot sustain in the circumstance.
25. As to application of Section 4(1)(a) of the *Limitation of Actions Act*, the Defendants argument is unpretentious, that the relationship between the parties herein was contractual therefore the instant suit is caught up by limitation having been filed outside six (6) years therefore the Court lacks jurisdiction to entertain it. The decisions in *Abincha & Company Advocates Vs Trident Insurance Company Ltd* [2013] eKLR, *Iga vs. Makerere University* [1972] EA 65, *Gathoni –vs- Kenya Co-operative Creameries Ltd*, [1982] KLR 104, *Divecon vs Samani* [1995-1998] 1 EA 48 as cited in *Samson Wanyoike Kimani v Bliss Flora Limited* [2018] eKLR and *Kenya Power and Lighting Company Ltd v. Musingi & 2 Others* [2014] eKLR were called to aid in the forestated regard.
26. Meanwhile, citing the decisions in *Kenya Orient Insurance Limited v Oraro & Co. Advocates* [2015] eKLR, *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] eKLR, *John Karungai Nyamu & Another v Muu & Associates Advocates* [2008] eKLR, *Kaur v Donald Odhiambo Rabala t/a Rabala & Co. Advocates* [2025] KEHC 542 (KLR) and *Sammy Thuo Kangea t/a Kangea & Associates & 7 others v National Bank of Kenya Ltd* [2014] eKLR, the Plaintiff's riposte is that the nature of an Advocate-Client relationship is a fiduciary one, to wit, where an advocate is holding client's money, the aforesaid relationship is continuous until the said funds are released to the client. Therefore, Section 4(1)(a) of the *Limitation of Actions Act* cannot crystallize provided the Client funds are still withheld in trust.
27. To that end, the fiduciary duty attached to the retained funds means that an advocate cannot extricate himself from his obligation simply by ceasing active engagement of his client's matter. It was further argued that until all the client's funds have been rightfully accounted for and disbursed, the advocate remains bound by his professional and legal responsibilities that govern the said relationship.



28. While I agree with the Plaintiff that an Advocate-Client relationship is fiduciary in nature, Courts within our jurisdiction have repeatedly held that the said relationship is equally contractual in nature. Given the latter, causes of action between Advocate-Client are subject to the limitation period as set out in Section 4(1)(a) of the *Limitation of Actions Act*. What the Plaintiff has sought by way of the instant suit is payment of sums received by counsel in the course of an existing Advocate-Client relationship.
29. In my estimation, work done by counsel was completed upon recording of the consent judgment in Nairobi HCCC No. 1114 of 2002 on 22/11/2009. Therefore, the Plaintiff's claim being one based on a contract for professional services rendered though presented pursuant to Order 52 Rule 4 of the CPR, it ought to have been filed within a period of six (6) years upon accrual of a cause of action, namely the date of completion of the work on 22/11/2009.
30. Addressing themselves on a claim or action seeking advocate's costs and when time begins to run, the authors in Halsbury's Laws of England, 4th Edition, Volume 28 at Paragraph 879 observed 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;
 2. 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;
 3. 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 the items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”
31. In retrospect, this Court believes with respect to a claim, civil in nature, a client may have as against an advocate, time begins to run upon completion of work, to wit, any claims as against counsel, may be caught up by limitation if filed six (6) years after work was completed. By filing this suit close to seventeen (17) years since counsel completed work, the Court is inclined to agree with the Defendants that the Plaintiffs' suit has since been caught up by limitation. Nevertheless, it is not lost on the Court that there may exist a live dispute between the parties herein concerning the funds received by counsel pursuant to the consent order recorded in Nairobi HCCC No. 1114 of 2002.
32. That said, while the instant suit is caught up by limitation, there is still recourse for the Defendants via other complaint mechanisms through the Attorney General and Law Society of Kenya to have the dispute resolved.
33. In the end, the Plaintiff's suit is time barred and incompetent by dint of the provisions of Section 4(1) (a) of the *Limitation of Actions Act*, to wit, the Court lacks the requisite jurisdiction to entertain the same. Consequently, the Plaintiffs' suit is struck out with no order as to costs.



Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 2ND OCTOBER, 2025.

.....

JANET MULWA.

JUDGE

