

REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT NAKURU

ELRC MISCELLANEOUS APPLICATION NO. E071 OF
2024
(Before Hon. Lady Justice Anna Ngibuini Mwaure)

GORDON OGOLA T/A
M/S GORDON OGOLA, KIPKOECH &
CO. ADVOCATES.....
.....APPLICANT

VERSUS

KENNEDY MUNGAI BARASA.....
.....RESPONDENT

RULING

Introduction

1. The Respondent filed a notice of Preliminary Objection dated 15th May 2025 against the Applicant’s Bill of Costs dated 11th December 2024 on the following grounds that:

- 1. The Applicant herein filed his Bill of Costs dated 11th December 2024.*
- 2. The Bill of Costs dated 11th December 2024 offends the provisions of section 4(1)(a) of the Limitation of Actions Act.*
- 3. The Bill of Costs relates to a claim founded on a contract for the provision of legal services done*

in the year 2017 in Nakuru ELRC Petition No. 7 of 2017

4. The judgment in the said matter was issued on the 7th December 2017, this being over 7 years ago.

5. The Bill of Costs herein is defective and ought to be strike out as it falls under the purview of section 4(1)(a) of the Limitation of Action Act, hence it is time-barred.

2. Parties herein canvassed the P.O. by way of written submissions.

Applicant's submissions

3. The Applicant submitted that a preliminary objection should be based on pure points of law and not on the disputed facts to be contested by way of hearing or adducing of evidence. The Applicant relied on the case of ***Mukisa Biscuits Manufacturing Company Ltd V West End Distributors (1969) EA 696***, where the court stated that a preliminary objection is a pure point of law arising from the pleadings that, if argued successfully, can dispose of the entire suit, such as objections to jurisdiction, limitation, or arbitration clauses. It must be based on the assumption that all facts pleaded by the opposing party are true and cannot involve factual disputes or require judicial

discretion. Improperly raising such objections leads to unnecessary costs and confusion, and the practice should be discouraged.

4. In ***Oraro V Mbaja [2005] KEHC 3182 (KLR)***, Ojwang J reiterated, stating that a preliminary objection must strictly concern a point of law and cannot involve any factual disputes or require evidence. If a claim labelled as a preliminary objection includes facts needing proof or calls for evidentiary support, it is not legally valid as such. Courts should not entertain preliminary objections that require factual investigation or rely on contested information.
5. In ***Kigwor Company Limited V Samedy Trading Company Limited [2021] KECA 810 (KLR)***, the Court of Appeal reaffirmed that a valid preliminary objection must be based on a clear point of law applied to undisputed facts. The Applicant submitted that the Respondent's objection relies on ***section 4(1)(a) of the Limitation of Actions Act***, which bars contractual claims after six years. However, for the objection to be properly raised, the date of accrual of the cause of action must be established. The Respondent contends that the cause of action arose on 7th December 2017, when the Applicant concluded his legal representation in ELRC Petition No. 7 of 2017.

Since the Bill of Costs was filed seven years later, the Applicant submits that it is time-barred and legally untenable.

6. The Applicant submitted that the cause of action accrued on two distinct dates, with the first being 7th December 2017, when judgment was delivered in ELRC Petition No. 7 of 2017. The Applicant relied on the case of ***Abincha & Co Advocates V Trident Insurance Co. Ltd [2013] KEHC 6821 (KLR)***, where the court cited ***Halsbury's Laws of England 4th Edition Volume 28 page 452 at paragraph 879***, it is argued that time begins to run from the termination of the action or retainer. The Applicant filed the Bill of Costs on 24th April 2018 in Nakuru Misc. Application No. 5 of 2018. However, the presence of factual disputes and the need for evidence, such as determining the actual accrual date, indicates that the matter does not meet the threshold of a pure preliminary objection.

7. The Applicant argues that the Respondent should have filed a substantive application rather than a Preliminary Objection, which is improperly raised and riddled with factual disputes. The Applicant maintains that the original Bill of Costs was filed within time but was later withdrawn on 11th December 2024 following a mutual agreement with all Respondents, including

Respondent Item No. 37, to settle fees by consent. The Bill was dismissed on 5th February 2025, during which time the limitation period was suspended. The Applicant claims the second cause of action arose when the Respondent reneged on the agreed payment, prompting a fresh Bill of Costs. Consequently, the Applicant asserts that determining the accrual date of the cause of action requires factual enquiry, making the Preliminary Objection unsuitable as it does not raise a pure point of law and should therefore be dismissed.

8. The Applicant submitted that the Bill of Costs dated 11th December 2024 is valid and timely, having been filed after the Respondent failed to honour a prior agreement to settle fees following the withdrawal of an earlier application. The initial cause of action arose on 7th December 2017 and was acted upon in 2018, with time effectively paused during proceedings until dismissal in February 2025.
9. The Applicant emphasizes that the Preliminary Objection is flawed, as it is based on contested facts and seeks to evade payment for undisputed legal services rendered. Also, the Applicant submitted that the Preliminary Objection is characterized as an abuse of court process, and urges its dismissal with costs.

Respondent's submissions

10. The Respondent submitted that the provision of legal services constitutes a contractual relationship, and therefore any claim for fees is subject to the six-year limitation period under **section 4(1)(a) of the Limitation of Actions Act**. The Respondent relied on the case of **Rachier & Amollo LLP V Development Bank of Kenya Limited, KEHC 5446 (KLR)**, the Court, aligning with Justice Waweru in **Abincha & Co Advocates V Trident Insurance Co. Ltd (supra)**, affirmed that claims for advocate's costs are governed by the statute of limitations. Specifically, time begins to run from the date the legal work was completed or the retainer lawfully ended, not from the date the bill is delivered. Therefore, any bill of costs filed more than six years after the completion of work is time-barred under **section 4(1)(a) of the Limitation of Actions Act**, and **Section 48(1) of the Advocates Act** cannot be used to override this limitation.

11. A valid preliminary objection must raise a pure point of law, as clarified in **Mukisa Biscuits Manufacturing Co. Ltd V West End Distributors(supra)**, and cannot involve factual disputes or require judicial discretion. In **Rachier & Amollo LLP V Development Bank of Kenya**

Ltd(supra), the court emphasized that a preliminary objection based on limitation directly affects jurisdiction, citing **Owners of the Motor Vessel "Lillian S" V Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)** and **Thuranira Karauri V Agnes Ncheche [1997] KECA 77 (KLR)**. The court held that the cause of action for advocate's fees accrues upon completion of work or termination of retainer, and any claim filed beyond six years is time-barred under **Section 4(1)(a) of the Limitation of Actions Act**. In that case, the Applicant's Bill of Costs filed in 2021 was struck out for being filed 17 years after the work was completed in 2004.

12. The Respondent argued that the Applicant's Bill of Costs, referencing a judgment delivered on 7th December 2017, is time-barred under **section 4(1) (a) of the Limitation of Actions Act**, having been filed over six years later. Still placing reliance on the case of **Rachier & Amollo LLP V Development Bank of Kenya Ltd(supra)**, the Respondent contends that the Applicant is estopped from raising new claims after previously issuing final fee notes and receiving group settlements.

13. The Respondent submits that the Bill of Costs unfairly targets one individual from a group suit and urges

this Honourable court to dismiss it for lack of jurisdiction. Additionally, the Respondent requests that costs be awarded in his favour, in line with judicial discretion and the principle that costs follow the event.

Analysis and determination

14. The court has considered the preliminary objection together with the rival submissions by both counsels; the issue for determination is whether the preliminary objection is merited.
15. A preliminary objection should be basically on points of law as set out in ***Mukisa Biscuits Manufacturing Company Ltd V West End Distributors (supra), Kigwor Company Limited V Samedy Trading Company Limited***, and ***Oraro V Mbaja [2005] KEHC 3182 (KLR)***, which has been reiterated in the earlier part of this ruling.
16. ***Section 4(1)(a) of the Limitation of Action Act*** provides that actions based on contracts must be filed within six (6) years from when the cause of action arose. In this instant case, the Applicant argued that the cause of action arose when judgment was delivered on 7th December 2017 and later filed the Bill of Costs dated 11th December 2024 after the

Respondent failed to pay the legal fees as agreed upon by both the advocate and client.

17. The court is of the view that the Bill of Costs dated 11th December 2024 is time barred as it arose out of a contractual relationship between the advocate and client, and the contract's time limit is usually six (6) years. Looking at the Bill of Costs, it is indicated that after the delivery of judgment, it is when the Bill of Costs was drawn and then filed in December of 2024, which is seven (7) years down the line. In ***Rachier & Amollo LLP V Development Bank of Kenya Limited*** (Supra), the court stated as follows:

In determining whether the Applicant's Bill of Costs was filed out of time, the court must first determine when the cause of action arose. From the record before this Court, there is no dispute that the Applicant's claim for costs in respect of HC.Comm. Misc. No. 47 of 2004 - Kamunyori & Co. Advocates v Development Bank of Kenya, is premised on a contract for Advocate-Client services, between the Applicant and Respondent herein. The Applicant appears to have been instructed on or about 10.02.2004,

concerning the Bill of Costs that was taxed on 15.04.2004 and a Certificate of Taxation issuing later on 23.04.2004. The foregoing is confirmed by Item 34 in the Applicant's Bill of Costs dated 15.07.2021. Thus, the date of the Ruling as captured in Item 34 above is the date when work was completed. The enforcement of the Advocate-Client contract by way of an action was subject to the limitation period as set out in Section 4(1)(a) of the Limitation of Actions Act. Thus, the Applicant's claim being one based on a Contract for professional services rendered, as counsel, ought to have been filed by way of a Bill of Costs or otherwise, within a period of six (6) years upon the accrual of the cause of action, namely the date of completion of the work on 15.04.2004.

11. In that regard, the Court concurs with Waweru, J. in Abincha & Co Advocates (supra), cited by the Respondent, where he observed *inter alia* that: "As already seen, any claim or action for an advocate's costs is subject to

the statute of limitation. As already seen also, time begins to run from the date of completion of the work or lawful cessation of the retainer. Time does not begin to run from the date of delivery of the bill!

Section 48(1) of the Advocates

Act therefore cannot offer any defence against limitation...I therefore hold that any of the various bills of costs filed by the Advocate more than six years after completion of the work which he was retained by the Client to do, or after the lawful termination of the retainer in respect of such work, is statute-barred by virtue of section 4(1) (a) of the Limitation of Actions Act.”“Even if the statute of limitation did not apply to the Advocate’s bills of costs (and clearly it does!) the Advocate having presented what appeared to be a final fee note upon completion of each brief, and the same having been paid by the Client who then proceeded to archive or destroy its related files, the Advocate is estopped in law and in equity from turning around, between 8 and 11

years later as the case may be, to raise “final” bills of costs”

12. The foregoing accords with Halsbury’s Laws of England, 4th Edition, Volume 28 at Paragraph 879, equally relied on by the Respondent, where it is stated 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;

1. 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;

1. 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 items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

18. This case here there was a bill of cost filed on 24th April 2018 as found in the Applicant’s application. For reasons not clear the bill of costs from 2018 came up to court on 30th July 2024 but for Notice to show cause why the same should not be dismissed and parties did not appear. It was mentioned on 1st October 2024 and so Applicant managed to have a hearing date of the bill of costs. The same was fixed on 23rd October 2024. Again there was non-appearance of the parties and was fixed for hearing on 4th December 2024. Again it appears from court records that the parties were not in attendance and a further mention date was fixed on 26th March 2025.

19. In the meantime, and it is not evident what necessitated this action the applicant on 11th December 2024 withdrew the bill of costs dated 26th May 2018 wholly and with no orders as to costs. That is the bill of costs involving 115 Respondents and is Misc Application E005/2018 emanating from the case **NAKURU ELRC PETITION 7 OF 2017** whose judgment had been issued on 7th December 2017.

20. Without even belabouring the point the bill of costs Misc. 071 of 2024 dated 11th December 2024 is way out of the 6 years stipulated time according to the provisions of Section 4(1) (a) of the Limitations of Actions Act.

The fact that another bill of costs had been in place in 2018 would not cure this particular bill of costs being filed out of time.

21. The first bill of costs involved other respondents and in any case was withdrawn by the Applicant before he filed this particular bill of costs. The applicant who is an advocate has to demonstrate he was forced to withdraw the bill of costs. In the absence of that the court can only find the same was voluntarily withdrawn. In any event it referred to a separate

cause and can be stretched abit far to find if it is the same as this current application.

22. The court finds this bill of costs was filed way after the time provided in filing the same and so is time barred.

Applying the principles of **MUKISA BISCUITS MANUFACTURING COMPANY LTD -VS- WEST END DISTRIBUTORS** (SUPRA) the application for a preliminary objection is merited as the bill of costs is filed out of time and so makes this court be denied of jurisdiction to deal with it. Judgment was passed on 7th December 2017. The application is therefore merited and the bill of costs dated 11th December 2024 is defective and is struck out accordingly.

23. The court orders the parties to each bear their costs of the application.

Orders accordingly.

Dated, Signed and Delivered virtually at Nakuru this 3rd Day of October, 2025.

ANNA NGIBUINI MWAURE
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 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. 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. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE
JUDGE

ORIGINAL