



V Chokaa & Co Advocates v County Government of Mombasa (Environment & Land Miscellaneous Case E015 of 2022) [2024] KEELC 4229 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4229 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND MISCELLANEOUS CASE E015 OF 2022**

SM KIBUNJA, J

MAY 15, 2024

BETWEEN

V CHOKAA & CO ADVOCATES PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

1. The plaintiff filed the application dated 15th May 2023 seeking for orders that:
 - a. THAT the judgment be entered for the plaintiff as against the Defendant/Respondent in the sum of Kshs 227,550.70 in accordance with the certificate of taxation of costs filed with the plaintiff.
 - b. THAT the Defendant/Respondent to pay the plaintiff/applicant the said sum together with interests therein at 14% per annum with effect from 14th February 2022 until payment in full.

The application is premised on the five (5) grounds on its face marked (a) to (e) and supported by the affidavit of Dr. Vincent Chokaa, advocate for the applicant, sworn on the 15th May 2023. It is the applicant's case, that the taxed costs has not been set aside and under section 51(2) of the *Advocates Act*, the applicant is entitled to have judgement entered in his favour. That the respondent has no defence to the claim.

2. The Respondent countered the instant application through the notice of preliminary objection dated 20th November 2023 and replying affidavit of Jimmy Waliaula, County Attorney, sworn on the 29th November 2023. The preliminary objection raises the ground that the application was filed over 6 years after advocate client relationship ended, which offends section 4(1) of the *Limitation of Actions Act*. It is further the respondent's case that the applicant did not attach any execution documents, including pleadings and the instruction note; the bill of costs above mentioned was never subjected to the vetting process under the *Intergovernmental Relations Act* 2012 and the *Transition to Devolved Government*



Act; this Court has no jurisdiction to listen to this matter as the application is time barred and the applicant was only retained for the duration between 2007 and 2009.

3. The learned counsel for the applicant and respondent filed their submissions dated the 30th November 2023 and 29th November 2023 respectively, which the court has considered.
4. The issues for determination by the court are as follows;
 - a. Whether the applicant's claim was statute time barred as claimed through the preliminary objection.
 - b. Whether the applicant has made a case for judgement to be entered in his favour.
 - c. Who pays the costs?
5. The court has carefully considered the grounds on the application, the preliminary objection, affidavit evidence, submissions by counsel for the parties, superior courts decisions cited thereon and come to the following determinations:
 - a. A preliminary objection was discussed in Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696 to consist of:

“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 may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Newbold, JA stated that:

- a. “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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.
- b. Ordinarily, preliminary objections requires to be determined first, as if upheld, they are likely to determine the application or suit before the court. In this matter, there are disputed facts, like when the cause of action arose. The applicant has submitted that the cause of action arose after the taxation of his bill of costs. The counsel cited section 51 (2) of the Advocate Act which states as follows:

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

The respondent's counsel submitted that the cause of action arose when the applicant was prequalified for legal services on 25th July 2007 and 17th April 2009, and therefore, by the time the bill of costs was



filed and taxed, a period of over six years had lapsed. That the applicant's claim is therefore statute time barred under section 4 (1) of the Limitations of Actions Act that states as follows:

“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; actions to enforce a recognizance;
 - b. actions to enforce an award;
 - c. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
 - d. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”
- c. I have perused the record and noted the applicant's bill of costs dated the 14th February 2022 was taxed through the ruling delivered on the 9th November 2022 at Kshs. 277,550.70. The respondent did not participate in the taxation. The taxing officer at paragraph 1 of the said ruling observed that “The bill was unopposed and the court proceeded to tax having been satisfied that the service was conducted vide the affidavit of service sworn by a process server Sammy M. Makau on 31st October 2022.” There has been no application for review/setting aside or appeal/reference on the said taxation ruling filed by the respondent to date, and the applicant cannot be faulted for moving the court for judgement in terms of the certificate of costs issued thereof.
- d. In the case of *Abincha & Co. Advocates v Trident Insurance* (Nairobi Misc. App. No. 527 of 2011) the Learned Judge cited with approval paragraph 879 of Halsbury's Laws of England, 4th Edition, Volume 28, that reads as follows as regards the recovery of costs by a solicitor:

“In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action.

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. 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.”

Though Counsel for the Applicant submitted that the cause of action began after the taxation ruling, section 51 (2) of the *Advocates Act* that he relied on, provides that after the taxing master issues a certificate of taxation, this court can give any orders as to the final judgment with relation to such costs. Parties are bound by their pleadings and the instant application speaks of costs used to recover rates arrears of Kshs. 1,950,670 and penalties of Kshs. 7,935,576 in respect of parcel L.R No. MN/I/5628.

- e. Based on the *Abincha* case above, the cause of action arose when the respondent terminated the applicant's professional engagement, or put differently, when the applicant's engagement by the respondent came to an end. For the respondent to succeed in showing that the applicant's claim was statute time barred, it behoved it to prove that the relationship was terminated over six (6) years before the filing of the bill of costs. That opportunity was afforded during the



taxation of the bill of costs before the Deputy Registrar but the respondent though served, did not participate. The respondent could have used that opportunity to inter alia, file a replying affidavit in opposition, raise the issues of limitation and others for determination.

- f. In the upshot of the above, the respondent's belated attempt to oppose the applicant's bill of costs, that was taxed on 9th November 2022, without any opposition by itself, is coming too late in the day. Equity does not aid the indolent. The court finds the applicant's application dated the 15th May 2023 has merit, and is granted in terms of prayer 1.
 - g. On prayer 2 of the application that seeks interest at 14%, no basis for that percentage has been presented to the court and the interest shall be at court rates, from the date of taxation, 9th May 2022, until payment in full.
 - h. That flowing from the provision of section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, to the effect that costs should follow the events unless where otherwise ordered for good cause, the applicant is granted costs herein.
6. From the above conclusions, the court finds for the applicant and orders as follows:
- a. The application dated the 15th May 2023 is allowed in terms of prayer 1, with interests at court rates from 9th November 2022 until payment in full.
 - b. The applicant is also awarded costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED ON THIS 15TH DAY OF MAY 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT : Dr. Chokaa

RESPONDENT : Mr. Onduso.

LEAKEY – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

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