



**V.Chokaa & Co. Advocates v County Government of Mombasa Successor
of Municipal Council of Mombasa (Environment and Land Miscellaneous
Application E083 of 2022) [2024] KEELC 4896 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4896 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E083 OF 2022**

LL NAIKUNI, J

JUNE 11, 2024

BETWEEN

V.CHOKAA & CO. ADVOCATES APPLICANT

AND

**COUNTY GOVERNMENT OF MOMBASA SUCCESSOR OF MUNICIPAL
COUNCIL OF MOMBASA RESPONDENT**

JUDGMENT

I. Introduction

1. This Honorable Court is tasked to make a final determination in form of a Judgement emanating from a reference onto five (5) Notice of Motion applications being ELC Miscellaneous/E080 of 2022; ELC Miscellaneous/E081 of 2022; ELC Miscellaneous/E083 of 2022; ELC Miscellaneous/E107 of 2022; and ELC Miscellaneous/E112 of 2022 respectively from a decision delivered by the Deputy Registrar, as the Taxation Master on 23rd August, 2023. For good order, although they were not consolidated, the instant application dated 30th August, 2023 was used as a lead matter and the final decision to apply “Mutatis Mutandis” to all of them.
2. These motions were instituted by the Law firm trading in the names and style of Messrs. V. Chokaa & Co. Advocates, the Applicant herein. It was under the provision of Rule 11 (1) of the Advocates (Remuneration) Order and Section 3A of the *Civil Procedure Act*, Cap. 21. Additionally, and at the same time, the Honourable Court was tasked with the mandate to make a determination of the Notice of Preliminary objection dated 5th February, 2024 raised by the County Government of Mombasa, a Successor of Municipal Council of Mombasa, the Respondent herein unto all these Notice of Motion applications respectively.



3. Upon service of the application to the Respondent, responded through a 17th paragraphed Replying Affidavit sworn by Mr. Jimmy Waliaula, the County Attorney, County of Mombasa on 5th February, 2024. For ease of process, the Honourable Court decided to deal with both the motions and the objections simultaneously but eventually deliver an omnibus Judgement on both issues.

II. The Applicant's case

4. The Applicant sought for the following orders:-
 - a. That the Decree by the Deputy Registrar/Taxing Master made on 23rd August 2023 be set aside.
 - b. That the Cost of this Application be provided for.
5. The application by the Applicant herein was premised on the grounds, testimonial facts and averments made out under the 8 Paragraphed Supporting Affidavit of –Dr. Vincent Chokaa, an Advocate of the High Court of Kenya Practicing in Nairobi and Mombasa under the Law firm trading in name and style of Messrs. V. Chokaa & Co. Advocates. The affidavit herein was sworn and dated 31st January, 2024. The Applicant averred that:
 - a. On 10th November 2022 he filed Advocates/Clients Bill of Costs against the Respondent under the provisions of Section 51(1) of the Advocates Act, Cap. 16 for taxation.
 - b. In response to the said Application the Respondent raised an Objection to the filed Bill of Costs. The objection was made under the provision of Section 4 of the Limitation of Actions Act, Cap. 22 to the effect that the cause of action was time barred.
 - c. The argument was that the application for Taxation under the provision of Section 51(1) of the Advocates Act was not an Action that is a suit.
 - d. Indeed, the Deputy Registrar agreed with the Respondent and struck out the Bill of Costs. Annexed and marked as 'VCA - 1' a copy of the Reasons and the Ruling.
 - e. If the legality of the Bill of Costs was under the question it's a matter that would had been referred to the Judge and the Deputy Registrar had no Jurisdiction to deal with it.
 - f. The affidavit was made in support of he application that the order made by the Deputy Registrar be set aside so that the Bill of Costs could proceed to taxation.

III. The Responses by the Respondent

6. The Respondent opposed the Notice of motion application dated 30th August, 2023 through a 17th paragraphed Replying Affidavit sworn by JIMMY WALIAULA, the County Attorney of the County Government of Mombasa, the Respondent herein sworn on 5th February, 2024. The deponent averred as follows:-
 - a. The facts and matters deponed to herein were derived partly from his own knowledge and partly from the information received by him from the Respondent's Advocates on record. Messrs. Otieno B.N & Associates Advocates (Respondent's Advocates). To the extent that any statement made herein was based on information or belief.
 - b. He had read and understood where necessary had been explained to, the meaning and import of the Notice of Motion application dated 30th August, 2023, filed in reference to the decision of the Deputy Registrar, Taxing Master made on 23rd August, 2023.



- c. Being an Advocate Clients Bill of Costs with no record of the transactions, it was indeed imperative that the Applicant filed in these proceedings the relevant material culminating to the subject Bill of cost. These would include copies of the documents and pleadings and correspondences issued in execution of the alleged instructions, including the instructions note. This was an onus the Applicant failed and/or declined to discharge, an explicit indication devoid of instructions on their part.
- d. In the absence of the requisite lawful instructions the Applicant herein was indeed bereft of the requisite Locus Standi to institute the proceedings of instance.
- e. The Bill as brought being an Advocate-Clients Bill suffered from material non-disclosure of facts and evidence on the alleged instructions.
- f. The Respondent herein is a creature of the Kenyan Constitution promulgated in the year 2010 as well as the County Government's Act 2012 which rendered the Municipal Council of Mombasa defunct way back in 2010.
- g. The Bill of costs was incurably defective and time barred having been filed more than six (6) years from the end of the Advocate -Client relationship and as such had been caught up with the Limitations of Actions Act. Cap. 22. Laws of Kenya and consequently the Application was an abuse of the court process and it should be dismissed on the face of it.
- h. The instant dispute oscillated around a Bill of Costs/Accounts filed way more than six (6) years from the end of the Advocate -Client relationship and as such it offends the mandatory provisions of the limitation period set out in the provision of Section 4(1)(a) of the Limitation of Actions Act, Cap. 22.
- i. Further, that the Bill of Costs of instance otherwise the subject of reference herein was null and void within the provision of Section 4 of the Limitation of Actions Act, cap. 22 having been filed more than 10 years after the alleged finalization of the primary suit and or execution of the alleged instructions bearing in mind that the defunct Municipal Council of Mombasa ceased to exist in the year 2010 upon promulgation of the New Constitution 2010 as well as County Governments' Act, 2012 and since the relationship between the Advocate and Client was contractual and within the provisions of Law of Contract Act, Cap. 23.
- j. Further the Bill of Cost of instance as drafted in relation to the alleged services to the defunct Municipal Council of Mombasa flies against the provisions of the Intergovernmental Relations Act 2012 and the Transition to Devolved Government Act. vis-à-vis the verification and validation provisions thereof under which provisions the Transitional Authorities in a successive process was required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities and to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. That the alleged Bill in respect of the defunct Municipal Council of Mombasa if at all was alien and was never subjected to the stipulated due process so as to validate the same.
- k. In the circumstances, this Honourable Court was in any event seized with the requisite jurisdiction to determine the application of instance as well as the issue of time Limitation raised vis-à-vis the Bill of Costs of instance as was held by the Honourable Judge in "Miscellaneous Civil Application No. 12 of 2016 between Akide & Company Advocates v Kenindia Assurance Co. Limited".



- i. In view of the fact that the Bill of Costs otherwise the subject of this reference, suffered deficit of Jurisdiction by reason of Time Limitation as held by the Deputy Registrar. It would beat the Logic to set aside the Decision of the Deputy Registrar simply for referral of the question to this Honourable Court as in so doing would suffice as being so mechanical and not a substantive decision.
- m. The Bill of Costs of instance is indeed Time barred having been lodged way over Ten (10) years from the date of termination of the retainer between the Parties herein and in particular:-
 - i. That the retainer of the applicant herein was only for the period between the years 2007 and 2009 as evidenced by a letters referenced Prequalification for Legal Services dated 25th July, 2007 and 17th April, 2009 which was more than 13 years ago. Annexed in the affidavit and marked as annexure “JW – 1” and “JW – 2” being copies thereof.
 - ii. That as late as 23rd July, 2013 no evidence of any work and or pleadings filed in furtherance of the alleged retainer to recover rates had been furnished to the Respondent by the Applicant despite several requests for the same as evident in the Respondent's letters to the applicant dated 08th May, 2023 and 14th June, 2023 annexed hereto and marked as “JW – 3” as well requisition by the Respondents vide their letters dated 27th October, 2010 and 12th January, 2011 marked as “JWS – 2 (a) and (b)” respectively.
 - iii. That no material evidence was furnished nor tabled by the Applicant at all or which could suffice to reveal any evidence of any action that outlived the alleged instructions over the subject property herein, not even a demand letter nor pleadings filed in respect thereof.
 - iv. That as at 20th May, 2014 a summary of outstanding fees had been submitted to the Transition Authority for verification and validation save for the fact that o evidence has been tabled indicative of verification and validation of the Bills. However this was a clear indication that the alleged Bill if at all, had crystalized for action even by then.
 - v. That other than the general correspondences no evidence had been tabled of any specific task done towards the recovery of rates in respect of the above captioned property despite specific requisition for the same vide their interrogatory letter to the applicant dated 08th May, 2023.
 - vi. That in fact there was no evidence of any pending task that outlived the retainer period of the year 2007 to 2009.
- n. Consequently the Bill of Costs of instance which was the subject of reference herein was time barred. Thus, it was fatally and incurably defective and hence should be struck out by this Honourable Court. The Court should be inclined to uphold the Decree by the Deputy Registrar/Taxing Master made on 23rd August, 2023 as this Honourable Court's Jurisdiction in that regard is not, in any way fettered.
- o. He made and swore the affidavit in opposing the Bill of Costs of instance and urge this Incurable Court to dismiss the same with cost.



IV. The Notice of Preliminary Object by the Respondent

7. In addition to the afore going, the Respondent raised a 2 Paragraphed Preliminary Objection dated 5th February, 2024 to the Applicant's Notice of Motion application dated 30th August, 2023. The objection was under the following terms:-
 - a. "The claim herein is time-barred pursuant to the *Limitation of Actions Act*.
 - b. Further, that the Bill of Costs herein is null and void within the provision of Section 4 of the *Limitation of Actions Act* having been filed more than 10 years after the alleged finalization and execution of the alleged instructions, bearing in mind that the Defendant Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the new Constitution 2010 as well as the *County Governments Act* 2012 and since the relationship between the Advocate and the Client is contractual and within the provisions of Law of Contract".
8. It contended as a preliminary point of law to be determined in limine:-
 - i. The said application offended the mandatory provisions of the limitation period set out in the provision of Section 4 (1) (a) of the *Limitation of Actions Act*, Cap. 22 which states:-

“(1)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.....”
 - i. The said Bill of Costs as taxed and the Certificate of Taxation thereof as well as the application herein dated 30th August, 2023 were bad in law and incurably defective and time barred having been filed more than six (6) years from the end of the Advocate - Client relationship. As such had been caught up with the limitations of Actions Act. Cap 22, Laws of Kenya. Consequently the application was an abuse of the court process and it should be dismissed on the face of it.

V. Submissions

9. On 6th February, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th August, 2023 be disposed of by way of written submissions. Pursuant to that all the parties obliged and on 11th March, 2023 a Judgment date was reserved on 11th June, 2024 by Court accordingly.

A. The Written Submissions by the Applicant

10. The Applicant through the Law firm of Messrs. V. Chokaa & Company Advocates for the Applicant filed their written submissions dated 6th February, 2024. Dr. Chokaa Advocate commenced the submissions by stating that the Advocate's/Applicant's Bill of Costs dated 17th November 2022 came up for taxation before the Deputy Registrar, as the Taxation Master, on 2nd August 2023. Before that and in response to the said Bill of Costs, the Respondent filed an Affidavit sworn by one Jimmy Waliula on 10th July 2023 and a Preliminary Objection dated 8th May, 2023. The Preliminary Objection was based on the already set out above terms.
11. The Learned Counsel submitted that in view of the Preliminary Objection raised, when the matter came up for taxation, the Deputy Registrar did not proceed to taxation. Instead, he directed parties



to file and address him on the Preliminary Objection. Thereafter, on 14th June, 2023, he rendered a decision striking out the Bill of Costs on the ground that it was barred under the provision of the Law of Limitations of Actions. The issue raised in the Preliminary Objection was a point of law and that could be raised as a Preliminary Objection for as stated by Law J. A. in “Mukisa Biscuit Manufacturing Co. Limited v West end Distributors Ltd [1969] EA 699”:

“So far as I am aware, a Preliminary Objection consists of a part of law which had been pleaded, or which arises by clear implication out of the 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 contract giving rise to the suit to refer the dispute to arbitration.”

12. However, at this point the Learned Counsel wished to raise an issue to the effect that a Preliminary Objection having been raised, did the Deputy Registrar have jurisdiction to deal with that issue? To answer this question, it was necessary to examine the powers of the Deputy Registrar. On the powers of the Deputy Registrar, the Learned Counsel submitted that the Deputy Registrar who is also a Taxing Master wears two hats. When the Deputy Registrar hears a matter not as a Taxing Officer, but a Deputy Registrar per se, he exercises the powers given to him under the provision of Order 49 Rule 7 (1) of the Civil Procedure Rules, 2010 which are appealable to a Judge in Chambers under Sub-rule (2) thereof. This matter was discussed in the case of “Abincha & Co. Advocates v Trident Insurance Co. Limited [2013] eKLR” where the Court stated:-

“If the Deputy Registrar heard the matter as such, not as a Taxing Officer, the application was clearly outside the ambit of Order 49 Rule 7 (1) of the Civil Procedure Rules that sets out applications that a Deputy Registrar of the Court may hear and determine”.

13. When exercising the powers of taxation, the Deputy Registrar, who is also a Taxing Master exercises his power, not under the Civil Procedure Rules, but under the *Advocates Act* and the Advocates (Remuneration) Order. The powers of the Taxing Officer are set out under Paragraph 13A of the Advocates (Remuneration) Order as follows:-

“13A For the purposes of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the productions of books, papers, and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him”

14. And in the said case of “Abincha & Co. Advocates (Supra)” referred to above, the Court stated as follows with regard to the expression “any other matter in dispute before him”.

“Any other matter in dispute before him” must mean any matter connected with or concerning the taxation of any item in the Bill of Costs. It cannot mean any issue that challenges the taxing officer’s jurisdiction to tax the bill of costs”

15. The Court then went on to state as follows: -

“17 The main issue of the Notice of Motion dated 20th February 2012 were challenging the Taxing Officer’s jurisdiction to tax the Bill of Costs before him. Those issues were whether the Advocates Bill of Costs was statute - barred under the *Limitation of Actions Act* and whether the Advocate was estopped from claiming any further costs. Did the Taxing Officer have jurisdiction to deal with those issues?



18 Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax. I hold that this was an issue that could only be determined by a Judge. It is the kind of issue the Taxing Officer, with the consent of both parties should have referred to the opinion of the High Court”.

16. In the case of “V. Chokaa & Company Advocates v County Government of Mombasa ELC Miscellaneous Application Number E016 of 2023”, Justice Nelly A. Matheka observed:-

“In the presence case, the Respondent disputes having instructed the Applicant to defend its interests. Its case is that the Applicants Bill of Costs is time barred having being brought after 6 years. On perusal of Record, I find various letters way past 2009 between the parties on the issue of payment of fees to the Applicant. There is no evidence before the court that the retainer had been terminated in 2009 and in the absence of such information this court cannot proceed on the assumption that the bill was filed outside the limitation period. For the foregoing reasons, I find that the Respondent preliminary objection is not merited, and I find this application is merited and is granted as prayed.”

17. Paragraph 12(1) of the Advocates Remuneration Order provides that with the consent of both parties, the Taxing Officer may refer to any matter in dispute arising out of taxation of a bill of costs for the opinion of the Court. The Preliminary Objection raised by the Respondent was whether there were any costs payable to the Advocate/Applicant in view of the assertion that recovery of such costs was barred under law. It also raised the issue as to whether such fees, if any, were payable by the Respondent in view of the fact these were owed, not by the Respondent, but by the defunct Municipal Council of Mombasa. These were fundamental issues which should have been referred to a Judge in Chambers for opinion and could not have been dealt with by the Taxing Officer. The Learned Counsel submitted that the ruling and order of 14th June, 2023 be set aside, and the matter be referred to the Judge for determination.

B. The Written Submissions by the Respondent

18. The Respondent through the Law firm of Messrs. Otieno B. N. & Associates filed their submissions dated 10th July, 2023. Mr. BN Otieno Advocate submitted that those were the written submissions made on behalf the Respondents in opposition of the Bill of Costs dated 10th October, 2022 filed on 6th December, 2022 and in support of the Preliminary Objection dated 8th May, 2023 by the Respondent as well as the Respondent's replying affidavit herein Sworn by the County Attorney Jimmy Waliaula on 15th May 2023. Vide the said Preliminary Objection, the Respondent contended that this Honourable Court lacks the Jurisdiction to hear and determine this matter, as the Bill of Costs as currently instituted is time barred pursuant to the *Limitation of Actions Act*.
19. On the background, the Learned Counsel averred that the Applicant pursuant to the Bill of Costs of instance alleges to have received instructions from the defunct Municipal Council of Mombasa to demand and recover outstanding rates of a sum of Kenya Shillings Three Million Four Thirty-Three Thousand Hundred and Twelve (Kshs. 3,433,212.00/=) due to the defunct Municipal Council from Kamiti Tanners (K) Limited the Lease owner of Municipal Council of Mombasa Block and or Plot NO. VMN/682. However no evidence was furnished to exhibit the same. However no evidence was furnished to exhibit the same. The Bill of Costs was thus brought on the basis of the alleged value and nature of the matter including alleged attendance on client, telephone calls, all correspondences, general care and Conduct of the matter.



20. The Learned Counsel further asserted that in response to the said Advocates/Client Bill of Costs, the Respondent filed herein Preliminary Objection dated 8th May 2023 wherein the Respondent raised inter-alia the following points of Law:-

“That this court lacks jurisdiction to entertain this claim on merit for the reasons that:

- a. The claim herein is time barred pursuant to the *Limitation of Actions Act*.
- b. Further, that the Bill of Costs herein is null and void within the provision of section 4of the *Limitation of Actions Act*, having been filed more than 10 years after the alleged finalization and or execution of the alleged instructions bearing in mind that the defunct Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the New Constitution 2010 as well as County Governments’ Act, 2012 and since the relationship between the advocate and client is contractual and within the provisions of *Law of Contract Act*.
- c. That the Applicant was never ceased with the requisite instructions hence is bereft of the requisite Locus Standi to institute the proceedings of instance.
- d. The Bill as brought being an Advocate-Clients Bill suffers from material non-disclosure of facts and evidence on the alleged instructions....”

21. The Response by the Respondent was further reinforced vide the Replying affidavit Sworn by the County Attorney, Jimmy Waliaula on 15th May 2023 and filed herein vide e-filing, wherein the Respondent further contends further ‘inter-alia” that :-

That in view of non-existence of any instructions in favour of the Applicant by the Respondent on the alleged matter of instance, the Respondent’s Advocates on record issued correspondences to the Applicant herein seeking to be furnished with the respective instruction letters if at all together with copies of the correspondences issued and or pleadings filed in respect of the alleged instructions to no avail. I annex hereto and mark as “annexture JM 2” a copy of the said correspondences.

That this being an Advocate Clients Bill of Costs with no record of the transactions it was indeed imperative that the Applicant files in these proceedings the relevant material culminating to the subject Bill of cost including copies of the documents and pleadings and correspondences issued in execution of the alleged instructions, including the instructions note, an onus the Applicant has failed and or declined to discharge, an explicit indication of devoid of instructions on their part.

That in the absence of the requisite lawful instructions the Applicant herein is bereft of the requisite Locus Standi to institute the proceedings of instance.

That the Bill as brought being an Advocate-Clients Bill suffers from material non-disclosure of facts and evidence on the alleged instructions.

That the Respondent herein is a creature of the Kenyan Constitution promulgated in the year 2010 as well as the County Government’s Act 2012 which rendered the Municipal Council of Mombasa defunct way back in 2010.

That to this end, I am advised by the Respondent’s Advocates on record which advised I verily believe to be true that the Bill of costs is incurably defective and time barred having



been filed more than six (6) years from the end of the Advocate-Client relationship and as such had been caught up with the Limitations of Actions Act. Cap.22, Laws of Kenya and consequently the Application is an abuse of the court process and it should be dismissed on the face of it.

That the instant dispute oscillates around a Bill of Costs/Accounts filed way more than six (6) years from the end of the Advocate-Client relationship and as such it offends the mandatory provisions of the limitation period set out in section 4(1) (a) of the Limitation of Actions Act.

of the Limitation of Actions Act, having been filed more than 10 years after the alleged finalization of the primary suit and or execution of the alleged instructions bearing in mind that the defunct Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the New Constitution 2010 as well as County Governments' Act ,2012 and since the relationship between the advocate and client is contractual and within the provisions of Law of Contract Act.

That further the Bill of Cost of instance as drafted inrelation to the alleged services to the defunct Municipal Council of Mombasa flies against the provisions of the Intergovernmental Relations Act 2012 and the Transition to Devolved Government Act, vis-à-vis the verification and validation provisions thereof under which provisions the Transitional Authorities in a successive process was required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities and to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government' and local authorities. That the alleged Bill in respect of the defunct Municipal Council of Mombasa if at all is alien and was never subjected to the stipulated due process so as to validate the same.

22. On the issues for determination, the Learned Counsel submitted that the Preliminary objection only raised one issue for determination by this Honourable Court. This was whether this Honourable Court had the requisite jurisdiction to entertain this matter which found its anchorage on the Limitation of Actions Act, Cap. 22. The Replying Affidavit raises the issues of Lack of the Requisite instructions otherwise core in the institution of the Bill of instance. Lack of verification and validation of the Bill under the auspices of the provisions the Intergovernmental Relations Act 2012 and the Transition to Devolved Government Act and the ramifications thereof.
23. On the analysis and whether the Advocate - Client bill of costs dated 10th November, 2022 filed on 06th December, 2022 was incompetent for being time barred. The Learned Counsel submitted that the relationship between an Advocate and a client was contractual and was therefore governed by the Law of Contract thus the provisions of Section 4 (1) (a) of the Limitations of Actions Act is applicable. Such a relationship is therefore subject to the Limitation of Actions Act, specifically Section 4 (1) of the Limitation of Actions Act which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.
24. In establishing when the statutory time starts to run, in this we merely follow Justice Waweru in on the case of "Abincha & Co. Advocates v Trident Insurance Co. (Supra)" where the Court stated as follows:-

"An Advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in Section 4(1) (a) of the



Limitation of Actions Act. In this connection see also Halsbury's Laws of England, 4th Edition, and Volume 28 at paragraph 879 (page 452) which states -

“879.Solicitor's Costs. 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 only of items included in the bill are statute - barred, the solicitor may recover in respect of the balance.”[Emphasis theirs on the underlined]

25. According to the Learned Counsel, it was notable that whereas the Respondent through their Advocates on record vide their letter dated 26th April, 2023 annexed to the Replying affidavit as “JW – 2”, sought to be furnished with pleadings and correspondences if any including but not limited to the instructions note in this matter, none was furnished an indication of lack of instructions in the matter. It was however notable that in various similar matters such as “ELCMISC. No. E096 of 2022; ELCMISC No. E102 of 2022; ELCMISC No. e094 of 2022; v Chokaa & Co Advocates v County Government of Mombasa, ELCMISC No. E092 of 2022}}; ELCMISC No. E093 of 2022; all between V. Chokaa & Co Advocates v County Government of Mombasa, the Applicant vide a Replying affidavit Sworn by Dr. Vincent Chokaa on 23rd May, 2023 together with the annexed documents being documents also annexed to the Further Affidavit by the County Attorney Jimmy Waliaula Sworn on 10th February, 2023, which we also attach hereto in respect of which the Bill such as the instant one is anchored, and from which the following are explicit:-
 - i. That the retainer of the applicant herein was only for the period between 2007 and 2009 as evidenced by a letters referenced Prequalification for Legal Services dated 25.07.2007 and 17.04.2009 more than 13 years.
 - ii. That as late as 23.07.2013 no evidence of any work and or pleadings filed in furtherance of the alleged retainer to recover rates had been furnished to the Respondent by the Applicant despite several requests for the same as evident in the Respondent's letter to the applicant dated 23.07.2013 annexed to the Applicant's Replying affidavit as “VCA1.”
 - iii. That the perusal of the annexed documents does not reveal any evidence of any action that outlived the alleged instructions over the subject property herein, not even a demand letter nor pleadings filed in respect thereof.



- iv. That as at 20th May, 2014 a summary of outstanding fees had been submitted to the Transition Authority for verification and validation save for the fact that no evidence has been tabled indicative of verification and validation of the Bills, however this is a clear indication that the alleged Bill if at all, had crystalized for action even by then.
 - v. That other than the general correspondences no evidence has been tabled of any specific task done towards the recovery of rates in respect of the above captioned property despite specific requisition for the same vide our interrogatory letter to the applicant dated 18.05.2023 annexed to the Respondent's Replying affidavit as annexure JW - 2.
 - vi. That in fact there is no evidence of any pending task that outlived the retainer period of 2007 to 2009.
 - vii. That in any event the Claim of instance was never submitted to the transitional authority with no evidence of verification and validation of the same.
 - viii. Annexed general rates statement is for Plot No. XXV/123 and not the subject property herein an indication that the Applicant is not even seized of the relevant rates statement in respect of rates allegedly tasked to be recovered
26. The assumption then was that other than the foregoing general documents used literally in all similar matters, the Applicant has no other pleading, correspondence and or documents that can aid the Court and the Parties in dealing with the Bill of Costs of instance.
27. On alleged relationship with Mombasa High Court Civil Case No. 13 of 2011. The Learned Counsel submitted that it was alleged from the bar at paragraphs 7 of the Applicant's submissions that the Bill of Costs of instance relates to the civil Suit "Mombasa High Court Civil Case no.13 of 2011" which allegedly is still pending in Court. Nothing can be further from the truth. It is indeed suspect that the Applicant would file series of separate Bill of Costs allegedly emanating from the same Suit. It was notable that Bill of Costs filed in the following series to wit:- ELC MISC.NO. 103, 104, 105, 107, 109, 110, 111, 112 of 2022, are all alleged to relate to "Mombasa High Court Civil Case No. 13 of 2011. Indeed only a Single Bill by way of a Miscellaneous Application can emanate from the said alleged Suit. The Contrary as alleged would of no doubt suffice as Multiplicity of Suits and or Applications hence bad in Law. In this present case, they thus strongly submitted that the applicant's bill of costs was time barred having being brought almost twelve (13) years after their last correspondence as well as the end of the Retainer in the year 2009. The Respondent contended that in litigious proceedings, the limitation period begins to run from the date of termination of the action or of the lawful ending of the retainer of the solicitor.
28. In applying the principles herein above, the Learned Counsel submitted as follows:-
- a. Limitation period begun to run from the date of termination of the action; from the Applicant's bill of taxation on record, and the documents supplied, there was no evidence of any pending task that outlived the retainer period of the years 2007 to 2009 which was more than 13 years.
 - b. Limitation period begins to run from the lawful ending of the retainer of the solicitor; that the letter of instruction submitted by the Applicant in his list of documents, specifically -stated that the retainer was limited to the year 2009 which was more than 12 years.
29. According to the Learned Counsel it was notable that the Applicant herein had lodged in Court various bill of costs in respect of the defunct Municipal Council of-Mombasa whereby



the Court did uphold their Preliminary Objection:- "thereby dismissing the Applicant's Various: Bill of Costs for being Time Barred. These various "matters" inter-alia are as follows:-

- i. ELCMISC No. E096 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
 - ii. ELCMISC No. E102 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
 - iii. ELCMISC No. E094 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
 - iv. ELCMISC No. E092 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
 - v. ELCMISC No. E094 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
 - vi. ELCMISC No. E093 of 2022; - Versus - Chokaa & Co Advocates – Versus - County Government of Mombasa;
30. On the issue of action vis – a vis bill, the Learned Counsel submitted that the argument at paragraph 6 of the Applicant's Submissions was that a Bill of Costs was an application not sufficing as an action envisaged under the Provisions of the *Limitation of Actions Act* was self-defeating and misplaced. The learned Counsel reiterated the pronouncement by the Superior Court in "Abincha & Co. Advocates-Versus -Trident Insurance Co. Ltd (Supra)" where the Court stated as follows:-
- “ An advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in Section 4(1) (a) of the *Limitation of Actions Act*. In this connection see also Halsbury's Laws of England, 4th Edition, and Volume28 at paragraph 879 (page 452) which states’
31. The Learned Counsel averred that indeed they had not been furnished with any contrary decision and or authority to support the Applicant's assertion. The same was thus erroneous misinterpretation of the law and should be disregarded.
32. On the Jurisdiction vis – a vis time limitation, the Learned Counsel opined that it was their submissions that in finding that the Bill of Costs was time barred as submitted herein, the Court could only down its tools by rejecting the bill of costs of instance in totality. That the issue of time limitation is a jurisdictional issue as was pointed out in the decision of "Anacleat Kalia Musau – Versus - Attorney General & 2 Others [2020] eKLR", Civil Appeal 111 where the court was emphatic that:-
- “ The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-bared a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:



“40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were [2014] eKLR. The Learned Judge drawing from the Court of Appeal precedent in Owners and Masters of The Motor Vessel “Joey” v Owners and Masters of The Motor Tugs ‘Barbara’ and ‘Steve B’ [2008] 1EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied).

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga v Makerere University [1972] E.A 62, where it was stated that;

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the suit must be rejected.”(Our emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to down tools for want of jurisdiction.”

33. The Learned Counsel asserted that the importance of jurisdiction needs no belaboring. Jurisdiction is said to be ‘everything’. A Court without jurisdiction cannot proceed with the matter neither can it arrogate itself jurisdiction. Further, jurisdiction is not a mere technicality, but a substantive question of the Court’s power and authority to deal with a matter. The locus classicus in this regard is the Court of Appeal’s exposition in “Owners of the Motors Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR” where it opined that:-

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

34. Jurisdiction was conferred expressly either by statute or by *the Constitution*. A court of law cannot arrogate to itself a jurisdiction which is not expressly conferred upon it. The Supreme Court in the case of “Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR” rendered itself thus:-

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

35. The Learned Counsel further submitted that entirely on a without prejudice to the foregoing, there was absolutely no evidence of work or task done or executed in furtherance of the retainer vis-à-vis the subject matter herein. None was availed despite requisition or interrogatories in respect thereof. Not even a specific letter of instructions in respect of the subject matter of instance to merit the amount sought in the Bill. Absolutely no evidence of a letter of



instructions, nor demand letter nor pleadings from which the value of the subject matter can be deciphered. The Bill of Costs was thus footless as it does not find anchorage in any letter of instructions demand, pleadings, judgment nor settlement as a matter of law and procedure. There is thus no basis o determining instruction fees in the matter.

36. According to the Learned Counsel determination of the value of the subject matter is very pertinent in the ascertainment of the instruction fees. In a matter where the applicant has filed bill a bill of Costs on the premises of alleged instructions to recover rates over the property of instance, evidence of a specified letter of instructions, demand notices issued, pleadings filed, settlement or judgment rendered in the matter is imperative in the determination of the value of the subject matter and by extension instruction fees. The learned Counsel made reference was made to the decided case of “Joreth Limited v Kigano & Associates [2002]1 E.A. 92”, this Court addressed the issue thus;

“We would at this stage point out that the value of the subject matter of a suit for the purposes of taxation of a Bill of costs ought to be determined from the pleadings, Judgment or settlement (if such be the case), but if the same is not so ascertainable the taxing officer is entitled to use his discretion to assess such instruction fee as he considers just, taking into account, amongst other matters, the nature and the importance of the cause or the matter, the interest of the parties, general conduct of the proceedings, any direction by the trial judge and all other relevant circumstances.”

37. According to the learned Counsel there were two limbs of this passage which the Learned Counsel wished to emphasize. First, in taxing an Advocate’s Bill of Costs, the value of the subject matter must be ascertained a priori. Where the value of the subject matter of a suit was known or can be determined from the pleadings, Judgment or settlement, the Taxing Officer has no discretion in assessing instruction. However where the value of the subject matter was unknown or could not be ascertained, then the Taxing Officer was expressly permitted, in exercising his or her discretion to take into account any such matters as he or she may consider to assess instructions fees. Indeed even in the exercise of the Court’s discretion material evidence of the work done was paramount. The passage also stressed the three levels from which the value of the subject matter may be ascertained. Before the hearing of an action, from the pleadings, or at the end of a trial, from the Judgment or where a suit has been compromised, from a settlement. (See “Peter Muthoka & another v Ochieng & 3 Others [2019]eKLR”, “Kamunyoru & Co Advocates v Development Bank of Kenya Limited [2015] eKLR”, and “Lucy Waithira & 2 others v Edwin Niagi T/A E.K Njagi & Company Advocates [2017] eKLR”.)
38. According to the Learned Counsel, the Taxing Master had to consider the following factors as settled in “First American Bank of Kenya (supra)” the nature and importance of the cause or matter, the amount or value of the subject matter involved, the interest of the parties, the general conduct of the proceedings and any directions by the trial Judge.”
39. The Learned Counsel submitted that the Applicant had miserably failed to provide a basis for the determination of the value of the subject matter and by extension instruction fees. Besides general Prequalification for retainer, instruction notes on the specific issues the applicant was tasked to execute by the Respondent’s predecessor indicative of the nature and value attached to such instructions are of imperative without which the Court was bereft of any lawful judicious basis for exercise of discretion in Applicant’s favour. Needless to state that



Prequalification did not automatically imply that the specific Advocate would automatically handle all Respondent's matters. Specific instruction was mandatory.

40. In conclusion, the Learned Counsel, held that that in light of the foregoing, this Honourable Court suffered deficit of the requisite jurisdiction to hear and determine the Bill of Cost of instance. Consequently, the Bill of Costs herein was fatally and incurably defective hence should be struck out and or dismissed with costs.

VI. Analysis & Determination.

41. I have carefully read and considered the pleadings herein by the Applicant, the filed written submissions together with the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
42. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
- a. Whether the Preliminary objection dated 5th February, 2024 on the mandatory provisions of the limitation period set out in Section 4(1) (a) of the Limitation of Actions Act is merited?
 - b. If the answer to the issue (a) is on the negative whether Notice of Motion application dated 30th August, 2023 to set aside the Decree by the Deputy Registrar/Taxing Master made on 23rd August 2023 has any merit.
 - c. Who will bear the Costs of Notice of Motion application dated 30th August, 2023 and the Notice of Preliminary objection dated 5th February, 2024.

IssueNo. a). Whether the Preliminary objection dated 5th February, 2024 on the mandatory provisions of the limitation period set out in Section 4(1) (a) of the Limitation of Actions Act is merited.

43. Under this sub - title, the Honourable Court shall examine the merits of the Preliminary objection. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal preposition has been made graphically clear in the now famous case of Mukisa Biscuits Manufacturing Co. Limited (Supra) where Lord Charles Newbold P. held that a proper preliminary objection constitutes a pure points of law. The Learned Judge then held that:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. A preliminary Objection is in the nature of what used to be a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”



44. In furtherance of this point, I wish to cite the case of “Attorney General & Another v Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection inter alia:-
- i. A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - ii. A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - iii. The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
45. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. Ideally, the Respondent opposed the applicant’s application dated 30th August, 2023 on the ground that it is statute barred. An objection on the ground that a matter is caught up by the law of limitation of actions is a pure point of law as was held by Law JA in the case of “Mukisa Biscuit Manufacturing Co. Limited (Supra)” further stated:-
- “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 the 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” Thus, the issues raised by Respondent being of time limitations herein are serious and pure issues of law which this court is duty bound to critically venture to be heard and determined prior to them being set down the case for full trial on its own merit. The issues are not fanciful nor remote.”
46. For these reasons, therefore, I find that the objection raised by the Respondent was properly filed hereof. It constitutes matters akin to be determined at the preliminary level before embarking on the hearing of the case on its own merit in conformity to the case of Mukisa Biscuits Manufacturing Co. Limited (Supra). Therefore, I shall proceed to consider them and determine them accordingly.

IssueNo. b). Whether Notice of Motion application dated 30th August, 2023 to set aside the Decree by the Deputy Registrar/Taxing Master made on 23rd August 2023 has any merit

47. Under this Sub - heading the Honourable Court has been moved to set aside the decision of the Deputy Registrar made on 23rd August, 2023. While doing so, this Court would be sitting under the Appellate Jurisdiction as it is well founded in Law. A perusal of the Parties’ pleadings before this court reveals that the only issue that arises for my determination singular in nature. That is whether the Advocate -Client’s Bill of costs dated 17th November, 2022 is incompetent for being time barred subsequently, the taxing master’s ruling delivered on 23rd August, 2023 which the Applicant is contesting herein. As already pronounced above, an objection on the ground that a matter is caught up by the law of limitation of actions is a pure point of law which can be properly raised as a preliminary objection.
48. Prior to this, its critical that the Honourable Court proceed to venture into the indepth jurisprudential and legal background of this very pertinent issue. It is instructive to note that its an issue that keeps on emerging in different Jurisdiction and times. The general principles governing interference with the



exercise of the Taxing Master's discretion were authoritatively stated by a South African court in the case of:- "Visser v Gubb 1981 (3) SA 753 (C) 754H – 755C" as follows: -

"The court will not interfere with the exercise of such discretion unless it appears that the taxing master has not exercised his discretion judicially and has exercised it improperly, for example, by disregarding factors which he should properly have considered, or considering matters which it was improper for him to have considered; or he had failed to bring his mind to bear on the question in issue; or he has acted on a wrong principle. The court will also interfere where it is of the opinion that the taxing master was clearly wrong but will only do so if it is in the same position as, or a better position than, the taxing master to determine the point in issue . . . The court must be of the view that the taxing master was clearly wrong, i.e. its conviction on a review that he was wrong must be considerably more pronounced than would have sufficed had there been an ordinary right of appeal."

49. Therefore, based on the above authoritative decision, it follows that before interfering with a decision of a Taxing Master, the court must be satisfied that the Taxing Master's ruling was clearly wrong, as opposed to the court being clearly satisfied that the Taxing Master was wrong. Ordinarily, the court will not interfere with the decision of the taxing master in every case where its view of the matter in dispute differs from that of the Taxing Master. It only interferes when it is satisfied that the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate the ruling. In that rare of rarest circumstances when a court reviews a taxation, it is vested with the power to exercise the wider degree of supervision. This means that the Court must be satisfied that the Taxing Master was clearly wrong before it will interfere with a ruling made by him/her. Otherwise, I reiterate, that the Court will not interfere with a ruling made by the Taxing Master in every case where its view of the matter in dispute differs from that of the Taxing Master, but only when it is satisfied that the Taxing Masters view of the matter differs so materially from its own that it should be held to vitiate his ruling. In this case, the taxing master made a decision considering the Respondent's preliminary objection on the limitations of actions concerning retainer agreements.
50. It is common ground that a relationship between an Advocate and a client having been formed by a retainer agreement is contractual and the same creates a contract for service, terms and conditions stipulated thereof. As such, like in all contracts where parties attain consideration, an Advocate is entitled to remuneration for the professional services rendered if the claim is made timeously. Indeed, the contract is enforceable within six (6) years after completion of service as provided for under the provision of Section 4(1), (a) of the *Limitation of Actions Act*, Cap. 22.
51. This position was pronounced in the "Abincha & company Advocates –(supra)", by Waweru .J observed that:-
- “879. Solicitor's Costs. 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 only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

52. In Halsbury’s Laws of England, 4th Edition, volume 28 at paragraph 879 it is stated as follows as regards of 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;

- (a) 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;
- (b) 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 only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

53. On this significant point, I am persuaded by the contrasting finding in the case of “Martin Mugambi Mithega v/a Mithega & Kariuki v Invesco Assurance Company Ltd Misc Application Civil No 60 of 2017 [2019] eKLR” where the court held:

- “ 10. It is no answer for the Applicant to latch on to the fact of his alleged continued general retainer with the Respondent. The reference point in this instance is the bill of costs raised in connection with Githunguri Civil Case No 65 of 2005 and not any other cases in respect of which the Applicant may have been instructed. Therefore, the fact that the Applicant’s name is still in the panel of advocates retained by the Respondent is of no moment in this case. As stated in Abincha and Co. Advocates v Trident Insurance Co. Limited [2013] eKLR,



any bill of costs filed more than 6 years after completion of the work which an advocate was retained by the client to do, or after termination of retainer in respect of such work, is statute barred.” (Emphasis is Mine).

54. Without belaboring the standards on the basic principles of Preliminary objection being on pure matter of Law as opposed to matters of facts, I wish to digress slightly. In order to give the Applicant some benefit of doubt for whatever its worth, the documentary evidence presented by the Applicant before this Court are in form of letters. The last one is dated 20th May, 2014. According to the Applicant, they contended having concluded their professional service with the Respondent in the year 2014. As such, to them, by this time they were still in retainer and the panel of Advocates of the Respondent. At this juncture, and a avoidance of being perceived as splitting hairs, it is extremely important to make a distinction between the two legal terms – “A Retainer” and “A Retainer Agreement”. The Black Law Dictionary defines “Retainer” as being:-

“A client’s authorization for a lawyer to act in a case before making a settlement offer. It is fee (also known as engagement fees) that a client pays to a lawyer (whether there is work or not) simply to be available when the client needs legal help during specified period or on a specified matter. In the works of “Mortimer D. Schwartz & Richard C. – “Problems in Legal Ethics, 2nd Edition, 1988; Pages 100 & 101” stated:-

“Over the years, Attorneys have used the term “Retainer” in so many conflicting senses that it should be banished from the legal vocabulary.....if some primordial urged drives you to use the term “retainer” at least explain what you mean in terms that both you and the client will understand”

The Court of Appeal in the case of “Omulele & Tollo Advocates v Mount Holdings Limited [2016] eKLR” while discussing the difference between a retainer and retainer agreement. It defined retainer in the following terms:-

“It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties.”

55. Such a contractual relationship between An Advocate and the Client is therefore subject to the Limitation of Actions Act, specifically Section 4 (1) of the Limitation of Actions Act which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. Being that the Respondent retained the Applicant in the year 2011 for services rendered during that period, on quick arithmetic computation, makes it almost 11 years after the retainer agreement was executed and the bill of cost filed. Therefore, for whatever its worth, it would appear that the work that the Applicant was instructed to undertake by the Respondent was finalized more than 6 years ago. This still does not rescue nor salvage the case by the Applicant as an action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act.
56. The Applicant averred that on 10th November 2022 he filed Advocates/Clients Bill of Costs against the Respondent under the provisions of Section 51(1) of the Advocates Act. In response to the said Application for taxation the Respondent raised an Objection to the Bill of Costs under the provision of Section 4 of the Limitation of Actions Act that the Action was time barred. The application for Taxation under Section 51(1) of the Advocates Act is not an Action i.e., a suit, but nevertheless the Deputy Registrar agreed with the Respondent and struck out the Bill of Costs. Annexed and marked ‘VCA - 1’ was a copy of the Reasons and the Ruling.



57. The Applicant further argued that the legality of the Bill of Costs was under the question it's a matter that would have been referred to the Judge and the Deputy Registrar had no Jurisdiction to deal with it.
58. The Respondent on the other hand argued that being an Advocate Clients Bill of Costs with no record of the transactions it was indeed imperative that the Applicant files in these proceedings the relevant material culminating to the subject Bill of cost including copies of the documents and pleadings and correspondences issued in execution of the alleged instructions, including the instructions note. To the Respondent, the Applicant failed on this onus and/or declined to discharge, an explicit indication devoid of instructions on their part. In the absence of the requisite lawful instructions the Applicant herein was indeed bereft of the requisite Locus Standi to institute the proceedings of instance.
59. The Bill as brought being an Advocate-Clients Bill suffered from material non-disclosure of facts and evidence on the alleged instructions. The Respondent herein is a creature of the Kenyan Constitution promulgated in the year 2010 as well as the County Government's Act 2012 which rendered the Municipal Council of Mombasa defunct way back in 2010. The Bill of costs is incurably defective and time barred having been filed more than six (6) years from the end of the Advocate-Client relationship and as such had been caught up with the Limitations of Actions Act. Cap. 22. Laws of Kenya and consequently the Application is an abuse of the court process and it should be dismissed on the face of it. The instant dispute oscillates around a Bill of Costs/Accounts filed way more than six (6) years from the end of the Advocate-Client relationship and as such it offends the mandatory provisions of the limitation period set out in section 4(1) (a) of the [Limitation of Actions Act](#).
60. Further, that the Bill of Costs of instance otherwise the subject of reference herein is null and void within the provision of section 4 of the [Limitation of Actions Act](#), Cap. 22 having been filed more than 10 years after the alleged finalization of the primary suit and or execution of the alleged instructions bearing in mind that the defunct Municipal Council of Mombasa ceased to exist in 2010 upon promulgation of the New Constitution 2010 as well as County Governments' Act, 2012 and since the relationship between the advocate and client is contractual and within the provisions of [Law of Contract Act](#). Further the Bill of Cost of instance as drafted in relation to the alleged services to the defunct Municipal Council of Mombasa flies against the provisions of the [Intergovernmental Relations Act](#) 2012 and the [Transition to Devolved Government Act](#). vis-à-vis the verification and validation provisions thereof under which provisions the Transitional Authorities in a successive process was required to prepare and validate an inventory of all the existing assets and liabilities of government, other public entities and local authorities and to come up with the criteria to determine the transfer of previously shared assets, liabilities of the government and local authorities. That the alleged Bill in respect of the defunct Municipal Council of Mombasa if at all is alien and was never subjected to the stipulated due process so as to validate the same.
61. In the circumstances, this Honourable Court is in any event seized with the requisite jurisdiction to determine the application of instance as well as the issue of time Limitation raised vis-à-vis the Bill of Costs of instance. That legal position was held by the Honourable Judge in the case of:- "Miscellaneous Civil Application No. 12 of 2016 between Akide & Company Advocates v Kenindia Assurance Co. Ltd".
62. From the Bill of Costs and the parties' averments referred to above, it is apparent that the matter giving rise to the taxation cause was finalized before the year 2014. From the record, that is when the last letter was sent by the Applicant to the Respondent. Ideally, if that date was taken to be the date from when time began to run, the applicant's Bill of Costs should have been filed by 6th May, 2020. On the contrary, the Bill of Costs was filed on 17th November, 2022 outside the statutory period of 6 years and hence it is graphically statute barred. Consequently, this court finds that the Respondent's preliminary



objection is merited. Consequently, this Honourable Court will not proceed to examine issue (b) as the answer in issue (a) was in the affirmative. Therefore, the Court will also proceed to affirm and uphold the decision of the Taxing Master delivered on 23rd August, 2023.

63. Further, I have also taken notice of a critical issue raised by the Applicant which cannot go unaddressed. The underlying fact that the Taxing Master had no jurisdiction to determine the preliminary objection that brought about the subsequent notice of motion application. On this fundamental issue, I wish to state out my reservation to the said objection by the Applicant under six (6) grounds as follows:- Firstly, the objection ignores the fact it is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. The standard of proof, in essence can loosely be defined as the quantum of evidence that must be presented before a court prior to a fact can be said to exist or not exist. Secondly, the Applicant cannot simply allege that to be paid without proving its allegations to the required standard and expect the burden to shift to the other party to rebut. Thirdly, cases are decided on the legal burden of proof being discharged (or not). Lord Brandon in the case of:- “Rhesa Shipping Co SA v Edmunds {1955} 1 WLR 948 at 955” remarked: -

“No Judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.”

64. Forthly, whether one likes it or not, the legal burden of proof is consciously or unconsciously the acid test applied when coming to a decision in any particular case. Fifthly, whoever desires a court to give judgement as to any legal right or liability, dependent on the existence of fact which he asserts, must prove that those facts exist. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. Sixthly, the burden of proof as to any particular fact lies on that person who wishes the court to believe its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person. The onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. Where the onus rests on the Plaintiff, he can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the Defendant is therefore false or mistaken and falls to be rejected.
65. For these reasons, taking that the preliminary objection before the Taxing Master squarely concerned and/or revolved around the pith and substance of the Bill of cost, the Taxing Master all reason to deal with it first and fore most. To that effect, I discern that he/she had the jurisdiction to determine the objection first and foremost before determining the bill of costs, assuming the objection was sustained.

IssueNo. c). Who will bear the Costs of Notice of Motion application dated 30th August, 2023 and the Notice of Preliminary objection dated 5th February, 2024.

66. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh v Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
67. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. I find this to be an appropriate case where the



Respondent shall have the costs of the application and the preliminary objection, the provision of section 27 of the Civil Procedure Act chapter 21 of the Laws of Kenya notwithstanding.

VII. Conclusion & Disposition

68. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties' interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus applications, this court arrives at the following decision and specifically makes the orders below:-
- a. That the Notice of Motion application dated 30th August, 2023 be and is hereby dismissed for being limited by the provision of Section 4 (1) (a) of the Limitation of Actions Act, Cap. 22.
 - b. That the Notice of Preliminary objection dated 5th February, 2024 be and is hereby found to have merit and the same is upheld, the claim herein is time-barred pursuant to the Limitation of Actions Act, Cap. 22 and therefore dismissed.
 - c. That costs of the Notice of Motion application dated 30th August, 2023 and the Notice of Preliminary Objection dated 5th February, 2024 to be awarded to the Respondent to be borne by the Applicant herein.
 - d. That these orders shall apply "Mutatis Mutandis" to ELC. Miscellaneous/E080 of 2022; E081 of 2022; E107 of 2022; and E112 of 2012 respectively.

It is so Ordered Accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 11TH DAY OF JUNE 2024.

.....

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Judgment delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.**
- b. Dr. V. Chokaa Advocate for the Applicants**
- c. Mr. Onduso Advocate for the Respondent**

