



**Kamunda Njue & Co Advocates v County Council of Narok (Miscellaneous Application E232 of 2022) [2024] KEHC 3530 (KLR) (Civ) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3530 (KLR)

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

**MISCELLANEOUS APPLICATION E232 OF 2022**

**CW MEOLI, J**

**MARCH 19, 2024**

**BETWEEN**

**KAMUNDA NJUE & CO ADVOCATES ..... APPLICANT**

**AND**

**COUNTY COUNCIL OF NAROK ..... RESPONDENT**

**RULING**

1. Daniel Njue Kamunda t/a Kamunda Njue & Co. Advocates (hereafter the Applicant) filed a Bill of Costs dated 19.04.2022 against County Council of Narok (hereafter the Respondent). The Respondent thereafter filed a Preliminary Objection (PO) dated 28.06.2022, based on grounds that the bill of costs offends Section 4(1) of the Limitation of Act as interpreted and applied in various court pronouncements and that the impugned Advocate-Client Bill of Costs is an abuse of the court process and a waste of precious and constrained judicial time and should be struck off with costs.
2. In response to the PO the Applicant filed a relying affidavit dated 19.07.2022. Stating that the Respondent engaged the Applicant to act for it in litigation involving two matters, namely, Civil Suit No. 1565 of 2000 in the High Court of Kenya at Nairobi – Livingstone Kunini Ntutu v County Council of Narok & 2 Others and the resultant appeal being Civil Appeal No. 109 of 2014 in the Court of Appeal - Livingstone Kunini Ntutu v County Council of Narok & 2 Others. He goes to depose that during and after litigation in the two matters, the Respondent requested and obtained an opinion from the Applicant on 14.10.2014 via a letter addressed the County Secretary, Narok County Government, based on which, the Applicant was given the greenlight to proceed with litigation in the matters. The Respondent making a deposit as a sign of commitment of representation, and subsequent periodical payments, accepted by the Applicant on the implied mutual understanding that County finances depended on the release of funds from the National Treasury.



3. Counsel cited various correspondence between parties pertaining to payment of legal fees exemplifying the Respondent's admission of the debt in respect of which payment in partial settlement was made by the Respondent, the last payment being made on 16.05.2016. He asserts that on account of this conduct, the Respondent is estopped from pleading limitation under Section 4(1) of the [Limitation of Actions Act](#). Hence the Bill of Costs was filed on 19.04.2022 was not time barred. In conclusion he deposed that the Respondent's PO is based on inaccurate information, is vexatious and a waste of judicial time and resources.
4. Directions were thereafter taken to canvass the PO by way of written submissions.
5. Counsel from the Respondent stated that the Bill of Costs arises from Civil Suit No. 1565 of 2000 in the High Court of Kenya at Nairobi – Livingstone Kunini Ntutu v County Council of Narok & 2 Others and that the appeal therefrom was heard and determined vide a judgment delivered on the 24.04.2015. While calling to aid the celebrated decision in Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696 as cited in Wakini Kiarie & Co. Advocates v Kenya Orient Insurance Co. Ltd [2021] eKLR counsel contended that an objection based on limitation comprises a pure point of law. Further he asserted that a claim arising on advocate-client relationship falls under the provisions of Section 4(1)(a) of the [Limitation of Actions Act](#), being an action founded on contract therefore the Bill of Costs herein may not be brought after the end of six (6) years from when the cause of action accrued.
6. Concerning computation of time, counsel anchored his submission on the decisions in *Abincha & Co. Advocates v Trident Insurance Co. Ltd* [2013] eKLR and *Gathiga Mwangi & Co. Advocates v Jane Mumbi Kiano* [2016] eKLR and asserted that the matter before the Court of Appeal was determined vide a judgment delivered on 24.04.2015. Rendering the impugned Bill of Costs statute barred as it was filed more the seven (7) years after completion of work and delivery of the judgment on 24.04.2015. In conclusion the court was urged to strike out the Bill of Costs with the attendant costs being awarded to the Respondent.
7. On the part of the Applicant, counsel addressed the sole question whether the Respondent was estopped from pleading limitation. He too cited the case of Mukisa Biscuit Manufacturing Co. Ltd (supra). While placing reliance on the decision in *Shiva Enterprises v Mwangi Njenga & Co. Advocates* [2020] eKLR and the provisions of Section 39(1)(b) & (2) of the [Limitation of Actions Act](#), counsel contended that the Respondent is estopped from pleading limitation having waived that defence by admission of the debt in respect of legal fees and partially settling the same.
8. Further citing Section 120 of the [Evidence Act](#), Section 23(3) of the [Limitation of Actions Act](#), Halsbury's Laws of England, Vol. 16, 4<sup>th</sup> Ed. and the decision in *Washington Nyakongo Odongo t/a Nyakongo Odongo v Tasha Enterprises (K) Limited* HCCC No. 31 of 2013 counsel argued that the Respondent's PO is caught up by promissory estoppel. Based on promises for payment it made to the Applicant and admission of debt through correspondence. Citing the date of the last payment made by the Respondent, counsel contended that the Applicant's claim is well within the limitation period of six (6) years. The decisions in *David Stephen Gatune v Headmaster Technical High School & Another* [1986] eKLR and *Peter Maina Munina v Anne Wanjiru Wachira (suing as Attorney of Samuel Nduati Njuguna)* [2020] eKLR were called to aid in the latter regard. In summation, the court was urged to take guidance from Section 23(3) of the [Limitation of Actions Act](#) and dismiss the PO with costs.



9. The court has considered the material canvassed in respect of the preliminary objection. In *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, Law J. A. stated that:

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”

10. In the case of *Oraro v Mbaja* (2005) KLR 141, Ojwang J (as he then was) reiterated the foregoing by stating that;

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

11. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where the latter court emphasized that: -

“(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Civil Application No. 14 of 2014, [2014] eKLR).”

12. The Respondent’s preliminary objection is premised on Section 4(1) of the *Limitation of Actions Act*, which 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;
- (c) actions to enforce an award;



- (d) 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;
- (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

13. First, it is pertinent to observe that a preliminary objection based on limitation is not a technicality but a matter that goes to the root of the Court’s jurisdiction; no court has jurisdiction to hear a matter that is time barred. The Court of Appeal in *Thuranira Karauri Vs. Agnes Ncheche* [1997] eKLR held that:

“We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit”.

14. In determining whether the Applicant’s bill of costs was filed out of time, the court must contemporaneously determine when the cause of action arose. There is no dispute that the advocate’s claim for costs in respect of Civil Suit No. 1565 of 2000 in the High Court of Kenya at Nairobi – Livingstone Kunini Ntutu v County Council of Narok & 2 Others and is founded on the contract for professional services between the parties. There is no dispute that subject matter was concluded on 19.03.2014 when a ruling was delivered in the suit as can be gleaned from the Bill of Costs. The said date was the date of completion of work and the enforcement of the 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 contract for professional services rendered, ought to have been filed by way of a bill of costs or otherwise, within a period of six years upon the accrual of the cause of action, namely the date of completion of the work on 19.03.2014.

15. This court concurs with Waweru J. in *Abincha & Co Advocates v Trident Insurance Co Ltd* [2013] eKLR where he stated 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”

16. The foregoing accords with *Halsbury’s Laws of England, 4<sup>th</sup> Edition*, Volume 28 at Paragraph 879 where it is stated concerning when time starts to run 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;
  2. 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.”

17. The Applicant only filed the bill of costs on 19.04.2022, some eight (8) years after the delivery of the ruling in Civil Suit No. 1565 of 2000 in the High Court of Kenya at Nairobi – Livingstone Kunini Ntutu v County Council of Narok & 2 Others and seven (7) years after the decision of the Court of Appeal in respect of the resultant appeal, which was delivered on 24.04.2015. Sections 23 and 24 (1) & (2) of the *Limitations Act*, Section 120 of the *Evidence Act* and or estoppel which the Applicant has cited do not aid his case. An acknowledgement of debt as envisaged in the former sections and in the provisions of 25(5) & (6) is the equivalent of an admission of debt.
18. According to *Black’s Law Dictionary*, Tenth Edition an acknowledgement of debt is:
 

“Recognition by a debtor of the existence of a debt. An acknowledgement of debt interrupts the running of prescription”.
19. The Applicant’s submission in this regard was that by the fact of the Respondent’s “correspondences and periodic settlement with the last payment being made on 16.05.2016, there was a fresh accrual of the right of action against the Respondent...”. This proposition is untenable, and contrary to the clear provisions of sections 23, 24 and 25 of the *Limitation of Actions Act* which do not cover the situation in this case concerning an advocate-client contract. In my view, the Applicant’s proposition conjures absurd outcomes where, mere exchange of correspondence or subsequent payments would be construed as synonymous with an acknowledgment of the debt, hence a fresh accrual of the cause of action, and a defence against the plea of limitation.
20. The facts in the case of *Washington Nyakongo Odongo t/a Nyakongo Odongo v Tasha Enterprises* (K) Limited HCCC No. 31 of 2013 cited by the Applicant are distinguishable from those in the instant matter. The Applicant cannot rely on that decision in this instance and the argument that a fresh cause of action had accrued after the last payment on 16.05.2016 cannot stand. In the result, the court finds that the preliminary objection raised by the Respondent has merit and is hereby upheld. The Applicant’s bill of costs is time barred and incompetent by dint of the provisions of section 4(1) (a) of



the *Limitation of Actions Act*. A taxing master would have no jurisdiction to entertain it. The bill of costs dated 19.04.2022 is accordingly struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19<sup>TH</sup> DAY OF MARCH 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Kamunda

For the Respondent: Mr. Osongo

C/A: Carol

