# Kamunda t/a Kamunda Njue & Co Advocates v County Council of Narok (Miscellaneous Application E233 of 2022) [2024] KEHC 3528 (KLR) (Civ) (19 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3528 (KLR)

**REPUBLIC OF KENYA**

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

**CIVIL**

**MISCELLANEOUS APPLICATION E233 OF 2022**

**CW MEOLI, J**

**MARCH 19, 2024**

**BETWEEN**

**DANIEL NJUE KAMUNDA T/A 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 the county Council of Narok (hereafter the Respondent). In response, the Respondent filed a Preliminary Objection (PO) dated 28.06.2022 on grounds the bill of costs offends the limitation of actions as provided by Section 4(1) of the *Limitation of Actions Act*; that there is settled jurisprudence regarding the question; and that the Advocate-Client Bill of Costs dated 19.04.2022 amounts to 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. Therein asserting that the Respondent had engaged the Applicant to act for it in 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 Civil Appeal No. 109 of 2014 in the Court of Appeal - *Livingstone Kunini Ntutu v County Council of Narok & 2 Others*. And that during and after the litigation, the Respondent requested for an opinion on legal fees payable for both matters, which opinion was issued by the Applicant on 14.10.2014 via a letter addressed the County Secretary, Narok County Government; that on the basis of legal fees opinion, the Applicant was given the greenlight to proceed with litigation of the matters; and that the Respondent paid a deposit as a sign of commitment of representation.

3. He further deposed that the Respondent periodically issued payments which the Applicant would accept based on the implied mutual understanding that County finances were dependent on the release of funds from the National Treasury. That subsequent correspondence between the Applicant and the Respondent pertaining to payment of legal fees amounted an admission of debt by the Respondent. He asserted that for this reason the Respondent is estopped from pleading limitation, more so having periodically made payments, resting with payment made on 16.05.2016, which would be the date when time began to run under section 4(1) of the *Limitation of Actions*. He maintains that the Bill of Costs having been filed on 19.04.2022 bill is not time barred. In conclusion he deposes 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 began by reiterating that the instant Bill of Costs arises from Civil Appeal No. 109 of 2014 in the Court of Appeal - *Livingstone Kunini Ntutu v County Council of Narok & 2 Others* which appeal 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 as to time is a pure point of law. Further he submitted that a claim arising from an advocate-client relationship falls under the provisions of Section 4(1)(a) being an action founded on contract . Therefore, the Bill of Costs could 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 to argue that since the matter before the Court of Appeal was determined vide a judgment delivered on 24.04.2015, the work was completed then, and the Bill of Costs dated 19.04.2022 is statute barred. It was particularly contended that the Bill of Costs 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 singular issue of estoppel. Citing the cases of Mukisa Biscuit Manufacturing Co. Ltd (*supra*) and *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 pursuant to its own conduct from pleading limitation, having waived that defence through admission of the debt 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, 4th 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 defeated by promissory estoppel, based on the Respondent's promises on payment made to the Applicant. Moreover correspondence between the parties in respect of fees due and the subsequent payments were an admission of debt which was partially settled by instalments resting with the last one on 16.05.2016. Counsel thus asserted that on account of the date of the last payment, Section 4(1) of the *Limitation of Actions Act* is not applicable and the Applicant's claim was 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 JA 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 v 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 Appeal No. 109 of 2014 in the Court of Appeal - *Livingstone Kunini Ntutu v County Council of Narok & 2 Others* is based on the contract for professional services between him and the client (Respondent); that the litigation was concluded on 24.04.2015 when the judgment was delivered in by the Court of Appeal. The date of judgment is therefore the date when the work was completed 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 a 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 24.04.2015.

15. In that regard, the 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*."
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> > "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*, 4th 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;
> 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.
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> 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.
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> 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 seven (7) years after the judgment in Civil Appeal No. 109 of 2014 in the Court of Appeal - *Livingstone Kunini Ntutu v County Council of Narok & 2 Others* was delivered. Sections 23 and 24 (1) & (2) of the *Limitations Act*, Section 120 of the *Evidence Act* and or estoppel which the Applicant has called to his aid are to no avail in this case. An acknowledgement of debt as envisaged in the sections and pursuant to the provisions of 25(5) & (6) is the equivalent of an admission of debt. 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".

18. 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 cannot stand and is contrary to the clear provisions of sections 23, 24 and 25 of the *Limitation of Actions Act* which do not contemplate the scenario as herein proposed by the Applicant regarding an advocate-client contract. In my view, the proposition conjures absurd outcomes where mere correspondence or subsequent payments would be construed as synonymous with an acknowledgment of the debt or fresh accrual of the cause in respect of the debt, and to provide a defence against the plea of limitation.

19. 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 in 16.05.2016 falls flat on its face. 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 hereby struck out with costs to the Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 19Th DAY OF MARCH 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Mr. Kamunda

For the Respondent: Mr. Osongo

C/A: Carol