



Wakini Kiarie & Co. Advocates v Keninida Assurance Company Limited (Civil Miscellaneous Application 138 of 2022) [2023] KEHC 22719 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22719 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL MISCELLANEOUS APPLICATION 138 OF 2022**

**FR OLEL, J
SEPTEMBER 26, 2023**

BETWEEN

WAKINI KIARIE & CO. ADVOCATES ADVOCATE

AND

KENINIDA ASSURANCE COMPANY LIMITED CLIENT

RULING

A. Introduction

1. The Client/applicant did file their Advocate/client bill of costs on 13th October 2022 seeking to be paid for legal work undertaken in defending the insured client in Mavoko PMCC No 188 of 2015 Walter Odhiambo Onyango Vrs Athi River Steel Plant Ltd. The respondent advocate upon service did raise a preliminary objection dated November 21, 2022 based on the ground's that;
 - a. That bill of costs is statute – barred, the same having been filed beyond the limitation period set out in section 4 (1) of the limitation of Action Act.
 - b. The Advocate's claim for costs being based on a contract for professional service rendered in Mavoko CMCC No 188 of 2015 is time barred given that the suit was finalized on March 2, 2016 and costs are claimed more than six (6) years after the termination of the suit.
 - c. The taxation proceedings herein are an afterthought and/or an abuse of the process of the court

B.Submissions

2. The client/ respondent submitted that the relationship between the parties herein was formed by a retainer agreement, which was contractual and thus enforceable within a period of six (6) years after completion of services as provided for under provisions of section 4(1) of the limitation of Action Act, which provided that actions founded on contract could not be enforced after the end of six years period from the date which the cause of action accrued.



3. The client/ respondent reiterated that it had been severally held by various citations that an advocate's claim for costs was based on a contract to offer professional services as between the advocate and the client, therefore the provisions of section 4(1) of the Limitation of Actions Act would apply where circumstances dictated so. Reliance was placed on Abincha & co Advocates v Trident insurance company limited (2013) eKLR, Akide & co Advocates v Kenindia Assurance co ltd (2017) eKLR, Nairobi Hc Misc Civil Application No 12 of 2016, Migos -Ogamba & co Advocates v Kenindia assurance Co ltd (2021) eKLR, Kisii Hcc Misc Application No 108 of 2019 & Martin Mugambi Mithega & Kariuki v Ivesco Assurance company Ltd (2019), Kiambu Hcc Misc Application No 61 of 2017
4. The advocate/applicant did oppose the preliminary objection raised and filed submissions in opposition thereto dated 7th March 2023. They did not dispute that the client instructed them to represent their insured in Mavoko CMCC No 188 of 2015, which was a work-related claim and their relationship was contractual. Reliance was placed on Halsbury law of England 4th Edition, Volume 28 at paragraph 879.
5. The issue of limitation could only be computed from the time the primary suit (Mavoko CMCC No 188 of 2015) was concluded and not when the instructions were issued. They confirmed that time started to run from when the judgment was delivered and agreed with the finding in the Abincha case (supra), where the judge held that “ any of the various bills of costs filed by the advocate more than six (6) 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.”
6. The advocate/applicant further submitted that based on the Abincha case (supra) , section 4(1) of the limitation of Action Act would come into play on “completion of work” or on “lawful termination of the retainer”. The advocate herein had been on the legal panel of advocates of the client/respondent for over fifteen (15) years, which echoed a retainer contract, which could only be terminated by either party directly terminating the retainer agreement or by way of an application to cease acting by the advocate.
7. The relationship herein between the advocate and client herein ought to be exempted from provisions of section 4(1) of the Limitation of Actions Act as the parent retainer had not been terminated. Reliance was placed on Nairobi High court civil Misc App No 587 of 2019 Wakini Kiarie v Kenya Orient Insurance Co Ltd. The advocate/ respondent thus prayed that the preliminary objection be dismissed.

C. Determination

8. 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 which is enforceable within six (6) years after completion of service as provided for under section 4(1), (a) under the Limitation of Actions Act.
9. This position was pronounced in the Abincha & company Advocates v Trident Insurance company limited (2013) eKLR , by Waweru .J observed that;

“ An advocate's claim for costs would be based on a 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) of the limitation of Actions. In this connection see also Halsbury's law of England, 4th Edition, volume 28 at paragraph 879 (page 452) 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; ...

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.

10. 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.”

11. The advocate/applicant's contention that they have a parent retainer agreement with the client/respondent which has lasted for over fifteen (15) years and such contractual relationship ought to be exempted from provisions of section 4(1), (a) of the *Limitation of Action Act* has no basis in law. The said retainer agreement was not placed before court for its consideration and the default and correct position is that the retainer was for each file and upon completion of the assignment, the advocate would be entitled to be paid his legal fee.
12. The primary suit, the basis upon which the bill of costs was filed was concluded on 2nd March 2016, when the said suit was withdrawn. The advocate/applicant subsequently filed his bill of costs on October 13, 2022, which was six (6) years and seven (7) months later, after conclusion of the said suit. It is obvious that the said advocate – client bill of costs was instituted seven (7) months after the limitation period had expired and falls foul of the provisions of Section 4(1) of the *Limitation of Actions Act*.

Disposition

13. Taking all relevant factors into consideration I do find that;
 - a. The advocate/client bill of costs dated October 7, 2022 has been filed out of time and the same is struck out with costs to the respondents.
 - b. The costs of this application is assessed at Kes 30,000/= all inclusive.
 - c. It is so ordered.



RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 26TH DAY OF SEPTEMBER, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 26th day of September, 2023.

In the presence of;

.....for Applicant

.....for Respondent

.....Court Assistant

