



**JM Njenga & Co Advocates v Assia Pharmaceuticals Ltd t/a Phibro
Animal Health Corporation (Miscellaneous Application 35 of 2014)
[2022] KEHC 10817 (KLR) (Commercial and Tax) (27 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION 35 OF 2014**

A MSHILA, J

MAY 27, 2022

BETWEEN

JM NJENGA & CO ADVOCATES APPLICANT

AND

**ASSIA PHARMACEUTICALS LTD T/A PHIBRO ANIMAL HEALTH
CORPORATION RESPONDENT**

RULING

1. The Notice of Motion dated October 22, 2020 was brought under section 51 of the *Advocates Act* and Order 50 Rule 1 of the *Civil Procedure Rules*; The Application was supported by the Supporting Affidavit sworn by Jeremy Njenga and sought for the following orders;
 - a. Judgment for the sum of Kshs.1, 108,570 /- plus accrued interest thereon at 14% from 10th September 2014 until payment in full be entered in favour of the Applicant as against the Respondent.
2. The applicant stated that the Advocate/Client Bill of Costs dated January 30, 2014 was taxed at Kshs.1, 108,570/- on 10th September 2014 and a Certificate of Taxation subsequently issued.
3. The client/respondent despite repeated demands is yet to settle the same many years since the bill was taxed. There is no stay nor challenge on the taxed amount and nor has the Certificate of Taxation been set aside, varied and/or reviewed. There is also no dispute on the Advocates retainer.
4. The respondent filed its response to the Application vide Grounds of Opposition dated November 30, 2020 and stated that the application was time barred by dint of section 4 (1) of the *Limitation of Actions Act*. The Bill of Costs was taxed on September 10, 2014 and the instant application herein has been filed



approximately six (6) years one (1) month and twelve (12) days after taxation. Therefore, the applicant was guilty of laches and this instant application should be dismissed with costs to the Respondent.

5. There had never been any attempt by the applicant to pursue the taxed amount. Therefore, equity should not aid the applicant's indolence. Further, the Application is defective and contrary to the provisions of section 48 (2) of the *Advocates Act*, which requires that a suit be instituted for the recovery of costs owed to an Advocate.
6. On September 16, 2004, the defendant in Civil Case Number 1605 of 1999-Assia Pharmaceuticals Ltd vs Kenya Alliance Insurance Co. Ltd, deposited Kshs.15, 490, 127 in a joint interest earning account held by the applicant and the defendant's advocate at an interest of 8% per annum.
7. The applicant should first account for the said monies before the Application can be determined. The Application lacks merit and is otherwise an abuse of the court process and the same ought to be dismissed with costs.

APPLICANT'S CASE

8. The applicant submitted that whereas an advocate/ client relationship is based on contract thus the claim for any legal fees ought to be raised within 6 years of completion of work or termination of the contract; it was the Applicant's view that the Advocate/applicant duly complied with the said timelines and the client/respondent's allegations to the contrary are null and void.
9. The advocate/client relationship and/or the advocates instructions ended on January 22, 2014 when the firm of Anjarwalla & Khanna took over conduct of the matter via Notice of Change of Advocates filed on the said date. The Advocate/applicant then duly filed its Bill of Costs on January 30, 2014 which was within a week or so, thus the Advocate/applicant's claim was duly lodged in time as it was filed within 6 years after the instructions ceased.
10. It was the applicant's case that the same position was reiterated in the case of Nairobi HCCC MISC APPL No. 527 of 2011 *Abincha & Co. Advocates vs Trident Insurance Co. Ltd* where the court 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*.
11. The Application at hand for entry of judgment is not the beginning of the claim for fees since the claim for fees was already done vide the Advocate/Client Bill of Costs dated January 30, 2014 and taxed on September 10, 2014. The orders for entry of judgment will only help the Applicant law firm to execute for the amount due as despite demand being made vide the demand letters the client/respondent has failed to release the said amount hence the instant Application for entry of judgement of the taxed sum, so that the same can pave way for execution.
12. In the circumstances, the issue of limitation only applies to the date of filing of the Bill of Costs and not otherwise. The Advocate/applicant's claim for fees is therefore not time barred. Thus, the Applicant prayed that judgment is entered for the sum of Kshs.2, 115,880 as there is no pending reference or any stay or any challenge of the taxed amount.
13. The Client/Respondent had contended that the Application at hand was defective for it was filed in contravention of section 48 of the *Advocates Act*. This section is not applicable as the same deals with suits filed for recovery of costs and it was applicant's view that the Advocate/applicant herein did not have to file a suit where the Bill of Costs had already been taxed.



14. The Bill of Costs in issue herein was instituted pursuant to the provisions of paragraphs 13 and 69 of the *Advocates Remuneration Order*. In other words, section 48 applies to filing of suits for recovery of costs and does not apply to matters filed under paragraph 13 of the *Advocates Remuneration Order*.
15. It is evident that Section 48 refers to actions for recovery of costs and not to taxation of Bill of Costs, which is the subject matter of the instant Application, and for which the applicable procedure is set out in the *Advocates Remuneration Order*.
16. In the circumstances, the applicant submitted that the Advocate/applicant's Application was properly before the court and urged this court to grant the Application.

RESPONDENT'S CASE

17. In response the respondent submitted that the Application was time-barred considering that this was an action based on a contract between an advocate and a client and the same should not be entertained by this court. Furthermore, the Applicant in its supplementary affidavit dated March 22, 2021 had admitted that the advocate-client relationship ended on 22nd January 2014. It is also not in dispute that the Applicant's Bill of Costs was taxed on September 10, 2014 and a Certificate of Taxation applied for and issued on October 15, 2020, six (6) years one (1) month and twelve (12) days after taxation. Hence, the Applicant is guilty of laches.
18. The respondent relied on the cases of *Abincha & Co Advocates versus Trident Insurance Co Ltd* [2013] eKLR and *Samson Masaba Munikah practicing as Munikah & Company Advocates versus Harambee Co-operative Savings and Credit Society Limited* [2020] eKLR where the courts held the view that any claim or action for an advocate's costs is subject to the statute of limitation. As already noted 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 of Costs it began to run against the applicant on the date the taxation was concluded.
19. It is not in dispute that the applicant's Bill of Costs was taxed in accordance with paragraph 13 of the *Advocates Remuneration order*. However, the Respondent submitted that from the very onset a Certificate of Taxation is neither a judgment nor a decree that is capable of being executed.
20. It was aptly described by the court in the case of *L N Ngolya & Co Adv v Jackson Muithi Kilango* [2008] eKLR, that;

“Once costs were taxed, then section 48 and Section 49 of the Act then became operational and the advocate then should have followed the steps for instituting a suit for recovery of costs and thereafter proceed to obtain a judgment and decree capable of being executed.”
21. It was the respondent's submission that the Application is time-barred and had also not met the requirements of sections 48 and 49 of the *Advocates Act*; and therefore prayed the application be dismissed with costs.

ISSUES FOR DETERMINATION

22. After considering the Application, the Grounds of Opposition and the written submissions by the parties; the court has framed the following issues for determination;
 - a. Whether the Application is time barred;
 - b. Whether the Certificate of Costs should be adopted as the judgment of the court;



ANALYSIS

Whether the Application is time barred;

23. The Respondent raised Grounds of Opposition to the Applicant's Application stating that the said Application was time barred according to section 4(1) of the *Limitations of Actions Act*.
24. An Advocate-Client relationship is contractual in nature and as such, any action by each of them against each other must be brought within six (6) years of the termination of their relationship or from the date on which the cause of action accrued.
25. The applicable law is found at section 4(1) (a) of the *Limitations of Actions Act* which stipulates as follows: -
 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.
26. It was the applicant's case that the advocate/client relationship and/or the advocates instructions ended on January 22, 2014 when the firm of Anjarwalla & Khanna took over conduct of the matter via Notice of change of Advocates filed on the said date. The Advocate/Applicant then duly filed its Bill of Costs on January 30, 2014 which was within a week or so, thus the Advocate/Applicant's claim was duly lodged in time as it was filed within the six (6) year period after the instructions ceased.
27. It is also not in dispute that the advocates instructions ceased on January 22, 2014 and that the Bill of Costs was filed on 30th January 2014. That the same was taxed on September 10, 2014 and a Certificate of Taxation was issued on October 15, 2020. Thereafter, this instant Application was filed on October 22, 2020.
28. The applicant's contention is that the Application herein was brought within 6 years after the completion of the work which he was retained by the client to do whereas the respondent argued that the Application was filed six (6) years one (1) month and twelve (12) days after taxation.
29. When did limitation begin to run in this Application is the question that begs an answer? The court in the case of *Gathiga Mwangi & Co Advocates v Jane Mumbi Kiano* (2016) eKLR made reference to the Halsbury Laws of England and stated:

“ This citation must have been making reference to the Solicitors Act, 1974 which applies in England Court, in the absence of any Local Statutory Provision on this issue, it remains the closest indication of when time begins to run against the filing of an Advocate/Client Bill of Costs. It is instructive that time started running from the date the judgment was delivered assuming that Counsel was then still on record and not from the date Counsel ceased acting after the delivery of the Judgment”.
30. In this case the Client changed the representation before judgment was delivered. The applicant then filed a Bill of Costs on January 30, 2014 which was taxed on September 10, 2014.
31. Referencing the above mentioned case, this court's considered view is that time started running against the filing of the Bill of Costs. The said Bill of Costs was taxed on September 10, 2014 which therefore means that the instant Application was filed six (6) years one (1) month which then makes the applicant guilty of laches.



32. This court is satisfied that the applicant is guilty of laches and finds that the application for the adoption of the Certificate of Costs as a judgment of the court is incompetent for reasons of being statute barred by the limitation of action.

FINDINGS AND DETERMINATION

33. In the light of the forgoing reasons this court makes the following finding and determination;

- i. The application is hereby found to be incompetent as it is statute barred and it is hereby struck out with costs;
- ii. The applicant shall bear the costs of the application.

Orders accordingly.

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF MAY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Kimani holding brief for Wambua for the Applicant

Kanja holding brief for Odhiambo Obonyo for the Respondent

Lucy-----Court Assistant

