Kibuchi & Company Advocates v Kenindia Assurance Company Limited (Miscellaneous Civil Application 707 of 2018) [2022] KEHC 15682 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15682 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION 707 OF 2018

CW MEOLI, J

NOVEMBER 24, 2022

BETWEEN

KIBUCHI & COMPANY ADVOCATES ..... APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED ..... RESPONDENT

RULING

1. Kibuchi & Co Advocates (the applicant) filed a bill of costs dated December 14, 2018 against Kenindia Assurance Company Limited (the respondent). When the bill of costs came up for taxation, the respondent raised a preliminary objection dated July 27, 2021 to the effect that the bill was statute-barred, having been filed outside the limitation period prescribed in section 4(1) of the *Limitation of Actions Act*. Because it was in respect of a contract for professional services rendered in Nairobi CMCC No 4675 of 2004, (hereafter the primary suit) which suit was finalized on July 23, 2010, and that the claim for costs was brought more than eight years after the termination of the suit. And therefore, the taxation proceedings herein are an afterthought and or abuse of the process of the court.

2. The preliminary objection was argued of by way of written submissions. The respondent's counsel contended that the relationship between the advocate and the client herein was based on a retainer contract for professional services which was enforceable within six years of the completion of the work as provided under section 4(1) the *Limitations of Actions Act*. Citing several decisions including *Abincha & Company Advocates v Trident Insurance Company Limited* [2013] eKLR, *Akide & Company Advocates v Kenindia Assurance Co Ltd* [2017] eKLR, *Migos Ogamba & Co Advocates v Kenindia Assurance Co Ltd* [2021] eKLR and *Martin Mugambi Mithega t/a Mithega & Kariuki v Invesco Assurance Company Ltd* [2019] eKLR counsel reiterated that the claim the primary suit which was concluded in July 6, 2010 when the matter was dismissed for want of prosecution. However, the applicant only filed the bill of costs on December 20, 2018 some eight years after the primary suit was

concluded. It was counsel's submission that the bill of costs is therefore statute barred and ought to be dismissed with costs.

3. Counsel for the applicant in opposing the preliminary objection relied on the decision in *Galaxy Paints Company Limited v Falcon Guards Limited* Court of Appeal Case No 2019 of 2018 in arguing that the objection raised by the respondent is a mere technicality raised to defeat the claim by the applicant. He cited *Mukhisa Biscuits Manufacturing Co Ltd v West End Distributors Limited* on the nature of a true preliminary objection. Counsel asserted that since the conclusion of the primary suit, the applicant had sent several demand letters to the respondent for settlement of fees, without eliciting payment. That the cause of action herein accrued when the final demand for payment was made to the respondent on December 3, 2013, which letter was acknowledged by the respondent and hence the bill of costs was filed within the time prescribed by statute. In support of the foregoing submission, counsel cited the case of *Shah & Parekh v Kenindia Assurance Company* Misc 110 of 2018. He stated that the Applicant should not be denied the fruits of their labour.

4. The court has considered the parties' respective submissions 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."

5. 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."

6. 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."

7. First, it is the position in law is 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".

8. To determine whether the bill of costs was filed out of time the court must ascertain when the cause of action arose. There is no dispute that the advocate's claim for costs is based on the contract for professional services between them and their client. The enforcement of such a contract by way of an action is therefore subject to the limitation period as set out in section 4(1) (a) of the *Limitation of Actions Act* and the applicant's claim being one based on contract 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, in this case, at the completion of the work.

9. This court agrees with the observations of Waweru J in *Abincha & Co Advocates v Trident Insurance Co Ltd* [2013] eKLR to the effect 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"

10. The above passage is consistent with Paragraph 879 of *Halsbury's Laws of England*, 4 Edition, Volume 28 where it is stated concerning the running of time 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.
>
> 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."

11. The bill of costs dated December 14, 2018 indicates that the last action in respect of the primary suit was the court attendance by the advocate applicant on July 23, 2010 when the matter was dismissed for want of prosecution. The applicant did not file the bill of costs until December 19, 2018, some eight years after dismissal of the primary suit. Sections 23 (3) and 24 (1) of the *Limitations Act* which the applicant has cited do not aid his case. An acknowledgement of debt as envisaged in the sections and pursuant to the provisions of 25(5) amounts to 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".

12. The applicant's submission in this regard was that by the fact of the respondent "acknowledging the receipt of the letter dated December 3, 2013, there was a fresh accrual of the right of action against the respondent...". This proposition is contrary to the clear provisions of sections 23, 24 and 25 of the *Limitation of Actions Act*. The said provisions do not contemplate the mere act of acknowledgement of receipt of a demand letter to be acknowledgement of the debt claimed therein. Secondly, the proposition conjures absurd outcomes where the mere acknowledgement of receipt of a demand letter is construed as synonymous with an acknowledgment by the recipient, of the debt claimed in such letter of demand; and a means to deflect the defence of limitation.

13. The facts in the case of *Shah & Parekh v Kenindia Assurance Company Limited* called to aid by the Applicant are distinguishable from those in the present matter. In that case, an acknowledgement of debt in keeping with section 23(3) and 24(1) and (2) of the *Limitation of Actions Act* had been communicated in writing to the Advocate and part payment made towards the acknowledged debt.

The Applicant cannot rely on that decision in an attempt to salvage the claim herein that is clearly statute barred. the argument that a fresh cause of action had accrued in December 2013 holds no water, therefore.

14. In the result, the court finds that the preliminary objection raised by the respondent has merit and it is hereby upheld. The applicant's bill of costs is time barred and therefore 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 the bill of costs dated December 14, 2018. Accordingly, the bill of costs is hereby struck out with costs to the respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH NOVEMBER 2022

C.MEOLI

JUDGE

In the presence of:

Ms. Nambirige h/b for Mr. Kibuchi for the Applicant

Ms. Wanyangu for the Respondent

C/A: Carol