



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 107 OF 2019

IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA

AND

IN THE MATTER OF THE ADVOCATES(REMUNERATION) AMENDMENT ORDER 1997

AND

IN THE MATTER OF COSTS BETWEEN ADVOCATE AND CLIENT

BETWEEN

MIGOS-OGAMBA & CO. ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE CO. LTD.....RESPONDENT

ARISING FROM KISII CMCC NO. 281 OF 2004

PETER OWITI ONDIGO.....PLAINTIFF

VERSUS

SONY SUGAR CO. LTD.....RESPONDENT

RULING

1. This ruling disposes of a preliminary objection raised by the respondent against the applicant's Bill of Costs. The respondent contends that the applicant's taxation proceedings are statute barred and no award can be made on the applicant's Bill of Costs filed on 24th July 2019.
2. The respondent's Chief Manager, Legal Department, Winnie Awuor Paul also swore an affidavit in response to the applicant's Bill of Costs. She averred that the applicant had represented the respondent's insured in Kisii CMCC No. 281 of 2004 the matter of Peter Owiti Ondigo v South Nyanza Sugar Co. Ltd to finality and raised a final Fee Note to the respondent on 14th December, 2004. The respondent examined the Fee Note, revised it and agreed to settle the Final Fee Note, at Kshs. 28,280/=, which sum was also subject to withholding tax.
3. The respondent paid the applicant Kshs. 24,500/= which was the agreed fee less withholding taxes by a cheque dated 27th April 2005, for Kshs.173, 500/= which sum included other amounts due as final professional fees in respect of other cases where the applicant had represented the Respondent's insured. Those cases included Kisii CMCC No. 278 of 2004 the matter of Joseph Oyugi Omboya v South Nyanza Sugar Company Limited; Kisii CMCC No. 279 of 2004 the matter of Charles Onyango Ondiek v South Nyanza Sugar Company Limited and Kisii CMCC No. 282 of 2004 the matter of Samwel Onditi Owala v South Nyanza Sugar Company Limited. The respondent was therefore not indebted to the applicant in professional fees, at all.
4. The respondent's manager also asserted that the taxation cause was irredeemably incompetent for being statute-barred, as it had been brought outside the six-year limitation period allowed in law for taking out such a cause. She averred that the applicant had rendered services to the respondent, pursuant to a contract for provision of legal services, the last bit of which was rendered in the year 2004 or 2005, and a Final Fee Note raised to the respondent, by the applicant in the year 2005 and which fee was settled fully and accepted by the Applicant as such, on 27th April, 2005.

5. It was further deposed that the cause is duplicitous and *res sub judice* since it is identical to the claim in Kisii High Court Misc. Application No. 93 of 2019 the matter of Migos - Ogamba & Company Advocates v Kenindia Assurance Company Limited, between the same parties. She thus urged the court to strike out the Bill of Costs.

6. The respondent's counsel filed written submissions dated 19th June 2020 reiterating that the applicant's retainer came to an end in 2005 when the applicant's final fee note was raised and settled in or around April 2005. This cause had been filed about 14 years after the retainer came to an end yet it should have been filed by the end of 2011 latest. Counsel relied on the cases of *Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR*, *Cannon Assuranc (K) Ltd v Musembi Ndolo & Co. Advocates [2018] eKLR* and *Shah & Parckh v Kcnindia Assurance Company Limited [2019] eKLR* in support of his submissions.

7. The applicant did not file any response or submissions in opposition to the respondent's preliminary objection.

ANALYSIS AND DETERMINATION

8. The two issues of preliminary significance raised by the respondent are that the suit is statute barred and *sub judice*. On the first issue, the applicant argues that the taxation proceedings instituted by the applicant are statute barred. The respondent also claims that the proceedings are *sub judice*. These are pure points of law and are properly raised as a preliminary objection which was defined by Law JA in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696* thus:

“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 the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

9. An advocate's relationship with his or her client is a contractual relationship for profession services. It is thus subject to the Limitation of Actions Act, specifically **Section 4** of the **Limitation of Actions Act** which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In the seminal persuasive authority of *Abincha & Co Advocates vs Trident Insurance Co Ltd [2013] MISC APPLICATION NO 527 OF 2011 eKLR* the court referred to the Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879 (page 452) where the authors indicate;

“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;

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 only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

10. The applicant filed his Bill of Costs on 24th July 2019 with respect to Kisii CMCC No. 281 of 2004 where he had represented the respondent's insured. From the Bill of Costs, it is not clear whether the suit giving rise to the taxation proceedings was concluded. Although the most recent item in the bill is a letter dated 28th March 2006, written more than 13 years before the Bill of Costs was filed, the respondent did not prove its assertion that the suit had been prosecuted to finality nor did the applicant concede that the suit had been finalized. The respondent has also not demonstrated that it had a retainer agreement with the applicant which has since elapsed. It was upon the respondent to substantiate its claim that the proceedings herein are statute barred but this has not been shown to the satisfaction of the court.

11. The second objection raised by the respondent is that these proceedings are identical to Kisii High Court Misc. Application No. 93 of 2019 and are thus *sub judice*. The doctrine of *sub judice* prohibits courts from entertaining and adjudicating upon matters pending before courts of competent jurisdiction. The doctrine is codified in **section 6** of the **Civil Procedure Act** thus:

“6. No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed”

12. The respondent has annexed a copy of its response to taxation proceedings in Kisii High Court Misc. Application No. 93 of 2019 where the applicant had similarly instituted a cause against it for representation in the case of arising from Kisii CMCC No. 281 of 2004 the matter of Peter Owiti Ondigo against Sony Sugar Co. Ltd. That suit is clearly identical to the present suit as it concerns the same issue against the same parties and has also been filed before this very court. The applicant did not file a response to demonstrate otherwise. I therefore find

that this matter is *sub judice*.

13. The upshot is that the respondent's preliminary objection is merited and is upheld with costs to the respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 29TH DAY OF APRIL 2021.

R.E. OUGO

JUDGE

In the Presence of;

Applicant Absent

Mr. Odero For the Respondent

Ms. Rael Court Assistant