



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

MISCELLANEOUS APPLICATION NO. 108 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 SRMCC NO. 1227 OF 2004

DANIEL ATUTI MOKWERI.....PLAINTIFF

VERSUS

OURU DISCOUNT CENTRE.....RESPONDENT

RULING

1. This is a ruling with respect to the respondent's Preliminary Objection to taxation proceedings commenced by the applicant. The respondent contends that the claim is statute barred and thus 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 swore an affidavit on 22nd October 2019 in support of the Preliminary Objection. She averred that the applicant had represented the respondent's insured in Kisii CMCC No. 1227 of 2004 the matter of Daniel Atuti Mokweri v Ouru Discount Centre to its finality, and raised a Final Fee Note sometime in the year 2004, or 2005. The respondent considered the fee note and paid the applicant a sum of Kshs. 48,000/= in final settlement of legal fees on 6th September, 2005 which payment was acknowledged in the applicants Bill. Therefore, the respondent was not indebted to the applicant in professional fees at all.
3. The respondent's manager further averred that the taxation cause was fatally incompetent for being statute-bared, as it had been brought outside the six-year limitation period allowed in law for taking out such a cause. She stated that this Court lacked jurisdiction to entertain this cause on merit for the reason that the applicant rendered legal services to the Respondent, the last bit of which was rendered in the year 2004 or 2005 and a Final Fee Note was raised in the year 2005, settled fully and accepted by the applicant, on 6th September, 2006. It would therefore be unjust and disproportionate to the Respondent, to tax the Bill.
4. In response, Alex Musango Musyoki, an advocate practicing under the applicant firm, averred that the relationship between the applicant and the respondent had been established by dint of a retainer agreement dated 2003 which had never been terminated. Counsel pointed out that the statute of limitation only began to run after successful termination of a lawful retainer. He averred that the preliminary objection raised matters of both law and fact which were disputed and had to be proven through evidence.

5. He further deposed that the applicant had represented the respondent in Kisii CMCC No. 1227 of 2004 the matter of Daniel Atuti Mokweri vs Ouru Discount Center to finality and raised a fee note of Kshs. 79,750/= on the 9th August 2005 which had never been fully settled. That the applicant had never received communication to review or negotiate the consent with respect to the fee note which strictly complied with the Advocates Remuneration Order. He therefore urged the court to dismiss the applicant's preliminary objection with costs.

6. The parties took directions to dispose of the application by way of written submissions. The respondent's counsel filed submissions in support of its case while the applicant's counsel filed a list of authorities.

7. The respondent's counsel submitted that the depositions in its replying affidavit that the applicant's retainer came to an end in the year 2006 had not been controverted. Counsel argued that the applicant's fees were paid in September 2006 and this cause which had been filed on 24th July 2019 had been filed 7 years out of time. He cited the cases of *Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR*, *Cannon Assurance (K) Ltd v Musembi Ndolo & Co. Advocates [2018] eKLR* and *Shah & Parekh v Kenindia Assurance Company Limited [2019]eKLR* in support of his submissions.

8. The applicant's counsel on the other hand referred this court to the cases of *Migos Ogamba & Company Advocates v Kenindia Assurance Limited [2018] eKLR*, *Tom Mutei Advocates -vs- National Bank of Kenya Ltd [2017] eKLR*, *Mwangi Kengara & Co. Advocates -vs- Invesco Assurance Co. Ltd. [2017] eKLR*, *Mukisa Biscuits Manufacturers Ltd. -vs- West End Distribution Ltd [1969] EA 696*, *Kenya Orient Insurance Ltd -vs- Oraro & Co. Advocates Misc. Cause No. 701 Of 2012*, *Kenya Union of Employers of Voluntary & Charitable Organization (Kuevco) -vs- Board of Governors Pumwani Secondary School [2014] eKLR*, *Nzele David Nzomo -vs- Moses Namayi Anyangu & Another [2009] eKLR*.

ANAYLSIS AND DETERMINATION

9. Law JA in the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696* defined a preliminary objection 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”

10. The respondent has raised a preliminary objection opposing the taxation cause instituted by the applicant herein on the ground that it is statute barred. An objection on the ground that a matter is caught up by the law of limitation of actions is a pure point of law which can be properly raised as a preliminary objection. An advocate's relationship with his or her client is a contractual relationship for professional 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.

11. 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.”

12. The applicant instituted these proceedings for costs having represented the respondent's insured in Kisii SRMCC No. 1227 of 2004 the matter of Daniel Atuti Mokweri versus Ouru Discount Centre. The applicant's position is that his relationship with the respondent was established by a retainer agreement in 2003 which has not been terminated. He annexed a letter from the respondent dated 14th July 2003, by which the applicant firm was empaneled in the respondent's panel of external lawyers in Nairobi area and its environs. To buttress this position, the applicant referred this court to the case of *Migos Ogamba & Company Advocates v Kenindia Assurance Limited MISC. CIVIL CASE NO. 49 OF 2017 [2018] eKLR* where the court held thus on a similar retainer:

“[8] It is however, the applicant's contention that its relationship with the respondent remains intact as it is yet to be terminated. That to date, the applicant's name is still on the respondent's list of its external lawyers in Nairobi.

The applicant thus, implies that its contract with the respondent based on the retainer expressed in the respondent's letter dated 14th July 2003, is still valid and was valid as at the time the applicant's bill of costs was filed herein on 24th June 2014. Therefore, the present preliminary objection is without merit as the statute of limitation would not apply in the circumstances.

[9] In this court's opinion, the statute of limitation would only apply if the applicant's bill of costs was filed six years after the termination of the retainer or agreement between the applicant and the respondent. However, there is nothing cogent from the respondent establishing that the retainer was indeed terminated. It did not matter that the applicant discharged its duty with regard to the primary suit and was paid for the services rendered. It did not matter that the applicant discharged its duty with regard to the primary suit and was paid for the services rendered. This is because the letter creating the retainer (i.e. **Exhibit marked "DOM 1"**) was not specific with regard to which matters or matter were to be handled by the applicant. There was no other letter showing that the applicant was specifically retained to handle a particular matter. The retainer made in favour of the applicant vide that letter of 14th July 2003, was therefore a general retainer which gave the applicant the leeway to handle any matter at any time as long as necessary instructions were forthcoming.

And, just as the retainer was made in writing, its termination was also expected to be in writing. Herein, the respondent has not exhibited any written notice of termination of the retainer made in favour of the applicant.

[10] It is for all the foregoing reasons that this court must find that the present preliminary objection by the respondent is without merit and is clearly an abuse of the court process intended to buy time or avoid the payment of taxed costs to the applicant for services lawfully rendered."

13. The decision of the court in the foregoing authority is a decision of a court of concurrent jurisdiction and not binding on this court. I am persuaded by the contrasting finding in the case of **Martin Mugambi Mithega ¹/_a Mithega & Kariuki v Invesco Assurance Company Ltd Misc Application Civil No 60 of 2017 [2019] eKLR** where the court held:

10. It is no answer for the Applicant to latch on to the fact of his alleged continued general retainer with the Respondent. The reference point in this instance is the bill of costs raised in connection with **Githunguri Civil Case No 65 of 2005** and not any other cases in respect of which the Applicant may have been instructed. Therefore, the fact that the Applicant's name is still in the panel of advocates retained by the Respondent is of no moment in this case. As stated in **Abincha and Co. Advocates v Trident Insurance Co. Ltd [2013] eKLR**, any bill of costs filed more than 6 years after completion of the work which an advocate was retained by the client to do, or after termination of retainer in respect of such work, is statute barred.

14. The letter of empanelment presented to this court is omnibus and merely informs the applicant that he had been selected to be part of the respondent's external lawyers. The letter does not specifically mention Kisii SRMCC NO. 1227 OF 2004, the case giving rise to these proceedings and has no bearing on the matter before this court.

15. The statute of limitation began to run from the date of termination of the original suit. The Bill of Costs indicates that judgment was entered in Kisii SRMCC NO. 1227 OF 2004 on 30th June 2005. Attendance to court to take judgment on 30th June 2005 was the most recent item in the applicant's Bill of Costs. The applicant ought to have filed his Bill of Costs by 30th June 2011 but he instead filed it on 24th July 2019, well outside the statutory period of 6 years. Consequently, this court finds that the respondent's preliminary objection is merited.

16. The preliminary objection is therefore 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