



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KISII**

**MISCELLANEOUS APPLICATION NO. 106 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. 1324 OF 2003**

**TIMOTHY MOSOTA MATARA .....APPELLANT**

**VERSUS**

**DAKIANG'A DISTRIBUTORS.....RESPONDENT**

**RULING**

1. The subject of this ruling is a preliminary objection raised by the respondent against the applicant's Bill of Costs filed on 24<sup>th</sup> July 2019. The respondent argues that the taxation cause is statute barred and no award can be made on the Bill of Costs.

2. Winnie Awuor Paul, the respondent's Chief Manager, Legal Department, also swore an affidavit on 22<sup>nd</sup> October 2019 opposing the applicant's Bill of Costs. She averred that the applicant had represented the respondent's insured in Kisii CMCC No. 1324 of 2004 the matter of Timothy Mosota Matara v Dakianga Distributors Limited to finality and raised a Final Fee Note to the respondent sometime in the year 2006. The respondent considered it and paid the applicant the acknowledged sum in final settlement of legal fees and was therefore not indebted to the applicant in professional fees.

3. She further deposed that the taxation cause was irredeemably incompetent for being statute-bared, as it has been brought outside the six-year limitation period permitted in law for taking out such a cause. The court's jurisdiction was denied for the reason that applicant rendered services to the respondent pursuant to a contract for provision of legal services, the last bit of which was rendered in the year 2005, or 2006 and the Final Fee Note raised by the applicant in the year 2006 settled fully and accepted by the applicant on 30<sup>th</sup> March, 2006. Therefore, it would be unjust and disproportionate to tax the bill.

4. Alex Musango Musyoki, an advocate practicing under the applicant law firm swore an affidavit in response to the preliminary objection on 21<sup>st</sup> July 2020. He stated that the relationship between the applicant and the respondent was established by dint of a retainer agreement established in 2003. He averred that the statute of limitation began running after successful termination of a lawful retainer and in this case

the retainer had never been terminated. Counsel deposed that the preliminary objection raised matters of both law and fact which were disputed and had to be proven through evidence. He stated that while the applicant represented the Respondent in Kisii CMCC No. 1324 of 2004 in the matter of Timothy Mosota Matara versus Dakianga Distributors Co. Ltd. to finality and raised a fee note of Kshs. 66,700/= on 14<sup>th</sup> December 2004, the said fee note was never fully settled. He denied that the applicant had ever received communication to review or negotiate the consent in connection with the fee note. That in any event, the fee note strictly complied with the Advocates Remuneration Order and to charge otherwise would be to undercut. He therefore urged the court to dismiss the preliminary objection with costs.

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

6. In his submissions, the respondent's counsel emphasized that the taxation proceedings were statute barred as the relevant retainer came to an end in 2006. The applicant had not controverted the deposition that their final fee note had been settled in or around March 2006. Counsel submitted that although the retainer ended in 2006 when the fee note was settled, the cause had been filed about 13 years after the retainer came to an end.

7. To demonstrate that the contract for provision of legal services, had ended in 2006, counsel pointed to item 10 which was raised in respect of service of 55 letters @ 200/= each on 8<sup>th</sup> February, 2006; item 11 which was raised in respect of drawing the Bill of Costs on 19<sup>th</sup> June, 2008; item 12 which was raised in respect of filing the Bill of Costs on 4<sup>th</sup> May, 2006; item 13 which was raised in respect of attendance to taxing that Bill of Costs on 4<sup>th</sup> May, 2008 and item 14 which was raised in respect of procuring a certificate of costs on 6<sup>th</sup> July, 2009. Counsel submitted that the cause should have been filed, latest, by the end of the year 2012, but had been filed nearly 7 years out of time. He relied on 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 & Parckh v Kenindia Assurance Company Limited [2019] eKLR** in support of these 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, 4<sup>th</sup> 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 CMCC No. 1324 of 2004 the matter of Timothy Mosota Matara versus Dakianga Distributors Co. Ltd. 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 14<sup>th</sup> 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 as follows 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 14<sup>th</sup> July 2003, is still valid and was valid as at the time the applicant's bill of costs was filed herein on 24<sup>th</sup> 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 14<sup>th</sup> 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 Mithoga <sup>1</sup>/<sub>a</sub> Mithoga & 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 CMCC NO. 1324 OF 2003, the case giving rise to these proceedings and therefore has no bearing on the matter before this court.

15. Although it is not clear from the Bill of Costs or the depositions when Kisii CMCC NO. 1324 OF 2003 was settled, both parties agree that the matter was prosecuted to finality. The applicant avers that they raised a final fee note on 14<sup>th</sup> December 2004 which was not fully settled. On the other hand, the respondent annexed a credit note demonstrating that it had paid the applicant a sum of Kshs. 41,760/= in March 2006 and insisted that it was not indebted to the applicant. Oddly, the most recent item on the applicant's Bill of Costs is procurement of a certificate of costs on the subject Bill of Costs which is dated 6<sup>th</sup> July 2009. From the Bill of Costs and the parties' averments referred to above, it is apparent that the matter giving rise to the taxation cause was finalized before 6<sup>th</sup> July 2009 however, if that date was taken to be the date from when time began to run, the applicant's Bill of Costs should have been filed by 6<sup>th</sup> July 2015. The Bill of Costs was however filed on 24<sup>th</sup> July 2019 outside the statutory period of 6 years and is statute barred. Consequently, this court finds that the respondent's preliminary objection is merited.

16. The preliminary objection is upheld with costs to the respondent.

**Dated, Signed and Delivered at Kisii this 29<sup>th</sup> day of April 2021.**

**R.E. OUGO**

**JUDGE**

**In the Presence of;**

**Applicant Absent**

**Mr. Odero For the Respondent**

**Ms. Rael Court Assistant**