



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU.

MISCELLANEOUS CIVIL APPLICATION NO. 165 OF 2016.

WAIGANJO MWANGI T/A WAIGANJO & CO. ADVOCATES.....APPLICANT

-VERSUS-

EDITH GATHONI KURIA AND JULIE WANJIRU NJOGU (being the administrators/

legal representative of the estate of the late PETER NJOGU GACHIGI)....RESPONDENTS

RULING

1. The application for determination is the one dated 07/06/2016. It is brought under Order 2 Rule 15 of the Civil Procedure rules and Section 4 of the Limitations of Actions Act and the inherent powers of the Court. It has been filed by the Legal Representatives to the estate of the Late Peter Njogu Gachigi (Deceased). It seek for orders that:

- a. The bill of costs dated 26/04/2016 and filed on the same day be struck out.
- b. The cost of the application be borne by the Applicant in the bill of costs.

2. The brief background to the Application is as follows. Waiganjo Mwangi T/A Waiganjo & Co. Advocates (hereinafter, "the Advocate") was instructed by the late Peter Njogu Gachigi to represent him in the Succession Cause known as ***In the Matter of Rahab Wanjiru Evans (Nakuru High Court Succession Cause No. 96 of 2000)***. The Late Peter Njogu Gachigi was the 3rd Administrator in the Cause. That much is uncontested. Also uncontested is that the Advocate took up the representation all the way to the determination of the Cause at the High Court vide a Judgment which was delivered on 10/07/2007.

3. One of the beneficiaries to the estate filed an appeal to the Court of Appeal. The Legal Representatives to the estate of the Late Peter Njogu Gachigi have attempted, in the present application, to argue that no instructions were given to the Advocate to represent the Late Peter Njogu Gachigi in the appeal. Their argument is that the Advocate's retainer/instructions must be taken to have ended on the date the judgment in the High Court was rendered. The advocate insists that he remained on the brief until the Court of Appeal rendered its judgment on 18/12/2014. The Legal Representatives to the estate of the Late Peter Njogu Gachigi have challenged the Advocate to show his field entry of appearance at the Court of Appeal or any other documents he filed at the Court to show that he was still seized of instructions. The Advocate's response is that the other parties to the litigation continued to serve him with all the Court documents even after the demise of the Late Peter Njogu Gachigi.

4. This seemingly trivial controversy is quite consequential: it will determine when time started running for purposes of the Statute of Limitations. Since a Bill of Taxation is an action in contract law, by dint of the Statute of Limitations, it must be brought within six years of the action arising. It is therefore important to begin by stating the correct legal position as established by our practice and case law.

5. Both parties cited a decision by Hatari Waweru J. in ***Abincha & Co. Advocates v Trident Insurance (Nairobi Misc. App. No. 527 of 2011)***. In that decision, the Learned Judge cited with approval paragraph 879 of ***Halsbury's Laws of England, 4th Edition, Volume 28***. **That paragraph reads as follows** as regards the recovery of costs by a solicitor:

In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action.

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.

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.

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.

6. I find the reasoning by Waweru J. to be sound and I do not wish to depart from it. However, there is a twist in the present case. While it is true that the Advocate's brief is taken to have continued after the appeal was filed, what would be the effect of the death of the Late Peter Njogu Gachigi during the pendency of the appeal?

7. It is uncontested that the Late Peter Njogu Gachigi died on 7th February, 2010 while the appeal was still pending at the Court of Appeal. The judgment in the appeal was eventually given on 18/12/2014. The Advocate would have us take that as the magical date from which the Statute of Limitations started running. To demonstrate that he remained under instructions even after the demise of the Late Peter Njogu Gachigi, the Advocate submitted that he appeared by the Learned Anyara Emukule in the Succession Cause on 07/05/2013. During that scheduled hearing, the Advocate says he informed the Learned Judge that his client had passed on.

8. On their part, the Legal Representatives to the Estate of the Deceased point out that in the absence of action by the Estate of the Late Peter Njogu Gachigi respecting the appeal, the appeal against the Late Peter Njogu Gachigi must be taken to have abated one year after his demise. Mr. Githui, counsel for the Legal Representatives to the Estate of the Deceased, therefore argues that for purposes of the Statute of Limitations, time must be taken to have started running from the date the appeal abated – and not from the date judgment was finally given in the matter.

9. Rule 99 of the Court of Appeal Rules, 2010 provides as follows:

Death of party to appeal

99 (1) An appeal shall not abate on the death of the appellant or the respondent but the Court shall, on the application of any interested person, cause the legal representative of the deceased to be made a party in place of the deceased.

(2) If no application is made under sub-rule (1) within twelve months from the date of death of the appellant or respondent, the appeal shall abate.

(3) The person claiming to be the legal representative of a deceased party to an appeal may apply for an order to revive an appeal which has abated; and, if it is proved that the legal representative prevented by sufficient cause from continuing the appeal, the court shall revive the appeal upon such terms as to costs or otherwise as it deems fit.

10. I would agree with Mr. Githui that in the absence of any action by the Legal Representatives to the Estate of the Late Peter Njogu Gachigi, the position cannot be that the Advocate remained on retainer until judgment was given in the appeal. This is because the appeal against the Late Peter Njogu Gachigi abated by operation of law by dint of Rule 99 reproduced above. In that case, the operative date of end of the Advocate's retainer will have to be exactly one year after the death of the Late Peter Njogu Gachigi. This is the date the appeal against him abated by operation of law.

11. According to the Certificate of Grant of Letters of Administration, the Late Peter Njogu Gachigi died on 07/02/2010. The Advocate does not dispute this. Since no action was taken by the Legal Representatives to his estate to be made a party to the Appeal filed against the High Court Judgment, the appeal against the Late Peter Njogu Gachigi abated on 07/02/2011.

12. Consequently, time started running on 07/02/2011 for purposes of the Statute of Limitations. The Advocate/Client Bill of Costs was filed by the Advocate on 26/04/2016. This was 5 years, 2 months, and 19 days since the date the appeal abated against the Late Peter Njogu Gachigi. This, therefore, means that the Advocate/Client Bill of Costs is not time-barred as it was filed before the statutory limit of six years.

13. With the above conclusion, nothing else needs to be said other dismissing the Application dated 07/06/2016 with costs which I hereby do. The Advocate/Client Bill of Costs shall proceed for taxation.

14. Orders accordingly.

Dated and delivered at Nakuru this 30th day of May, 2019

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JOEL NGUGI

JUDGE