



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERUGOYA**

**MISCELLANEOUS APPLICATION NO. 19 OF 2015**

**IN THE MATTER OF THE ADVOCATES ACT CHAPTER 16 LAWS OF KENYA AND IN THE  
MATTER OF AN ADVOCATE-CLIENT BILL OF COSTS**

**BETWEEN**

**MURI MWANIKI & WAMITI ADVOCATES.....APPLICANT**

**-VERSUS-**

**GATEWAY INSURANCE CO. LTD.....RESPONDENT**

**RULING**

1. The applicant/Respondent **Gateway Insurance Co. Ltd.**, filed an application dated 28<sup>th</sup> February, 2017 seeking an order that the bill of costs dated 28<sup>th</sup> August, 2015 and filed in Court on 7<sup>th</sup> October, 2015 be struck out on account of estoppels. It is based on the following grounds:

*(a) That the bill of costs herein arises from Kerugoya SPMCC No. 51 "A" of 2006 where the Applicant represented the Respondent's insured.*

*(b) That upon the conclusion of Kerugoya SPMCC No. 51 "A" of 2006, the Applicant herein raised a fee note dated 16<sup>th</sup> August, 2010 for Kshs.110,778.00 which was reviewed downwards to Kshs.94,548 upon agreement between the parties herein.*

*(c) That vide cheque number 044388, the Respondent fully settled the said fee note on 24<sup>th</sup> December, 2010.*

*(d) That it is patently clear that the bill of costs herein was filed about three years after the settlement of the Applicant's final fee note and as such the Applicant is estopped from claiming further costs from the Respondent.*

*(e) That it is only fair and in the interest of justice that this application is granted.*

The application is also supported by the affidavit of Sharon Mwasi the legal officer at **Sanlam General Insurance Limited** (formerly Gateway Insurance Company Limited) who depones that the bill of costs which arose in Kerugoya S.P.M.C.C. No. 51A of 2006 was settled vide Cheque No. 044388 for Ksh.94548/- and the same was cleared. That the bill of costs is filed three years after the settlement and the applicant is stopped from claiming further costs.

2. The Respondent/Applicant Njuguna Muri opposed the application and filed a replying affidavit. He

deposes that he forwarded a fee note of Ksh.110,778 and the client paid Ksh.94,548 leaving a deficit. The applicant failed to pay the deficit despite several reminders. He denies that any agreement was reached settling the costs at Ksh.94,548/-. He contends that the applicant made partial payment and the costs remain unpaid.

3. The application proceeded by way of written submissions. The facts are not in dispute. The first issue which arises is estoppel. The doctrine of estoppel is as provided in the **Evidence Act at Section 120**, it states:

***“When one person by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceedings between himself and such person or his representative to deny the truth of that thing.”***

Estoppel is also defined at **Paragraph 1471 Halsbury’s Laws of England vol. 16 4<sup>th</sup> Edition** to be.....:

***“Where a party lies by his words or conduct waived or made to the other party a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position the party who gave the promise or assurance either by words or conduct cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him. He must accept their legal obligations subject to the qualification which he has himself so introduced either by words or conduct even though it is not supported by any legal agreement.”***

4. The applicant raised a fee note of Ksh.110,778/- but the respondent paid 94,548/- leaving a balance of Kshs.16,230/-. The respondent did not support his allegation that by an agreement the costs were reviewed downwards. The applicant did not consider that the partial payment was in final settlement of the fee note. This is because as shown by the letters annexed to his affidavit, he claimed the settlement of the balance, Annexure K2. The respondent did not respond to the letter and the demand. The respondent cannot on his own volition assert that the payment made was final without entering an agreement with the applicant. The respondent has not shown that an agreement to review the costs downwards was entered as provided under **Section 45 (1)** of the **Advocates Act**. That is to say that for such an agreement to be valid it ought to be

(i) In line with the fees provided under the relevant schedule.

(ii) In writing.

(iii) Signed by the client or the client’s agent.

The respondent has failed to discharge the burden of proof that the amount of Kshs.94,548/- was in full and final settlement of the fee note raised by the applicant. He who alleges must prove. **Section 107 of the Evidence Act** provides:

***“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.***

***When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”***

5. The respondent has not proved that the doctrine of estoppel applies. The fact that the applicant accepted amount less than what he claims in the fee note does not mean he accepted it as the final payment. He did make a demand for the balance. The facts herein are distinguishable from those in **Wambugu, Motende & Co. Advocates -V- Attorney General of Kenya (2013) eKLR.**

Similarly the facts in **Abincha & Co. Advocates -V- Trident Insurance Co. Ltd. Misc. Application No. 527 of 2011** has different set of facts from the facts in the present case as the applicant has raised a final fee note which was not fully settled. My view is that acceptance of a lesser amount than what is raised in the fee note by the advocate does not amount to a waiver, there must be a voluntary relinquishment of a legal right or advantage. That was not the intent. The respondent talked of an agreement which never was and upon demand for the balance; it did not elicit any response by the respondent. The fee note raised was not settled in full. Partial payment of a debt cannot extinguish a claim for the balance. The respondent was made aware that the advocate would proceed to have their fees assessed by way of taxation in Court. The respondent has not proved that the doctrine of estoppel applies.

6. The respondent asserts that the applicant is guilty of laches. He submits that a party is estopped from changing his stand if he makes the other party to believe and act on it. The respondent takes issue with the applicant's delay of one year in responding to the letter revising the fee note downwards and five years to drag the applicant to Court. The conduct of the applicant/respondent is contrived to defeat the law and particularly the equity of redemption of his debt. The conduct is inconsistent with the applicant/respondent's own rights. The respondent/applicant acquiesce and is estopped from reneging on their acquiescence. They rely on **Hermanus Phillipus Steyn -V- Giovanni Gnechi-Ruscione (2013 eKLR)** to contend that failure to cite **Section 48 (1)** of the **Advocates Act** should not be fatal to the respondent's cause. It was stated:

*“It is unfortunate that the applicant has not cited Article 163(5) of the Constitution, as a basis for the proceedings. This is the provision of the law that clearly gives the applicant locus standi before this Court, by referring to ‘review’. It states thus: “163(5) A certification by the Court of Appeal under clause (4) (b) may be reviewed by the Supreme Court, and either affirmed, varied or overturned.” The question then is, whether this omission is fatal to the applicant's case. It is trite law that a Court of Law has to be moved under the correct provisions of the law. We note that this Court is the highest Court of the land. The Court, on this account, will in the interest of justice, not interpret procedural provisions as being cast in stone. The Court is alive to the principles to be adhered to in the interpretation of the Constitution, as stipulated in Article 259 of the Constitution. Consequently, the failure to cite article 163 (5) will not be fatal to the applicant's cause.”*

7. The decision binds this Court by dint of **Article 168** of the **Constitution**. The **Civil Procedure** and **Article 159** of the **Constitution** directs Courts to seek to do substantial justice other than to rely on procedural technicalities. The Court will not look at the provision cited but the content of the application which is clear to the respondent and no prejudice or injustice will be occasioned. The inclusion of **Section 48 (1)** is not fatal.

8. On the issue of **Limitation Section 4 (1)** of the **Limitation of Actions Act** provides:

*“The following actions may not be brought after the end of six years from the date on which the cause of action accrued-*

*-actions founded on contract.”*

The summarized fee note was sent on 16<sup>th</sup> August, 2010 which counsel states that it was immediately upon conclusion of the work. The bill of costs was filed on 28<sup>th</sup> August, 2015 which was within six years. The time began to run when the summarized fee note was settled. This signified the date of the completion of the work. The action accrued when the respondent paid a fee note which was less than what the advocate was claiming it is the correct interpretation of when the cause of action accrued. It cannot be stated to have accrued when the counsel was engaged. In the case of **Abincha & Co. Advocates -V- Trident Insurance Co. Ltd. (2013) eKLR** the Court stated that:

*“As already seen, any claim or action for and 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.”*

This is a persuasive decision. I am in full agreement with my brother Judge Waweru. This claim was filed within time and is not in any way time barred. **Halsbury Laws of England 4<sup>th</sup> Edition volume 28 at paragraph 879 (page 452)** it is stated:

***“In relation to continuous work by Solicitor, such as the bring and prosecuting or depending on action;***

***If a solicitor sues for his costs in an action the Statute of Limitation only begins to un from the date of termination of the action or of the lawful ending of the retainer of the solicitor.”***

9. This being the case the claim by the advocate was not Statute barred.

**10. In conclusion:**

The applicant/respondent has failed to establish that the doctrine of estoppel applies. He cannot pay less than what was raised in the fee note and assert that it was the final payment without proof that he had agreed with the applicant to pay the amount which it paid. There is a balance of Ksh.16,230/= which remains unpaid and was within the applicant’s right to claim. That could only be done by filing the bill of costs in Court for taxation and the taxed costs be less what was already settled. The claim is not time barred. The application is without merits and is dismissed with costs.

***Dated and delivered at Kerugoya this 25<sup>th</sup> day of January, 2018.***

**L. W. GITARI**

**JUDGE**

Ruling read out in open Court, Mr. Maina holding brief for M/S Okoth for Respondent, Muli for applicant absent, court assistant Naomi Murage, this 25<sup>th</sup> day of January, 2018.

**L. W. GITARI**

**JUDGE**

**25.01.2018**