



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 255 OF 2012

CANNON ASSURANCE (K) LTD.....CLIENT/APPLICANT

VERSUS

MUSEMBI NDOLO & CO. ADVOCATES.....ADVOCATE/RESPONDENT

RULING

1. This is a reference to this Court from a decision of the Taxing Officer on the Respondent's Bill of Costs dated 5th March, 2012. The Applicant's Chamber Summons Application dated 16th October, 2017 is brought under the provisions of Rule 11, 12 and 13 of the Advocates (Remuneration) order. It seeks the following orders:-

- 1. That the Honourable Court be pleased to set aside the Deputy Registrar's Ruling on Taxation of the Advocate Bill of Costs on all items delivered on 16th March, 2017**
- 2. That the Honourable Court be pleased to strike out the Bill of Costs dated 5th March, 2012**
- 3. The costs of the reference be awarded to the client**

2. The motion is premised on the grounds that

- a) The Bill of Costs is statute-barred as the relationship between the advocate and the client is a contract and the Bill of Costs was filed after 6 years.**
- b) The Bill of Costs as drawn is incurably defective as each cause ought to have been filed as a miscellaneous cause under Rule 13 of the Advocate Remuneration Order.**

The Application is supported by an Affidavit sworn on 16th October, 2017 by Martha Mutoro, the client's legal officer who reiterates the grounds on the face of the Application. Attached to the Affidavit is a letter marked **MM1** requesting for the Taxing Master's reasons on the Taxation and the response thereof marked **MM2**.

In support of the Application, the client relies on the following authorities:

- i. Evans Thiga Gaturu Advocate Vs Kenya Commercial Bank Ltd (2015) eKLR**
- ii. Busia HCMisc. Application No. 64 of 2015 Otieno Ragot & Co. Advocates v National Bank of Kenya Ltd**
- iii. Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR**

3. The Application is opposed on the basis of grounds of a Replying Affidavit sworn by Mr. Musembi Ndolo, advocate on 1st November, 2017 in which he avers that the matters giving rise to the Bills of Costs in issue were finalized on 4th November, 2011 by a ruling delivered by Ali – Aroni J in **Kisumu Misc. Application No. 82 of 2005** marked **MN 1**. He further avers that time started to run on 4th November, 2011 and the Bills of Costs were filed on 20th July, 2012 which was 8 months after work was completed and that the Advocate had by a ruling marked **MN 2** been allowed to consolidate the Bills of Costs to save on Court's time. In opposing the Application, the advocate placed reliance on the following authorities:

i. Laws of England Vol. 16 Paragraph 233

ii. Ruling in Kisumu Misc. Application No. 161 of 2012 Musembi Ndolo & Co. Advocates V Cannon Assurance (K) Ltd

iii. Abdul Aziz Suleiman v Igembe Farmers' Co-operative Society Ltd & Anor 1966 EA 351

SUBMISSIONS BY PARTIES

4. I have carefully considered the reference in the light of the Affidavits and Submissions for both parties. The client holds the view that the Advocate's claim for costs, being a claim founded a contract for provision of legal services, falls within the purview of Section 4 of the Limitation of Actions Act, and is therefore time-barred since the ruling in 7 of the 13 cases that are the subject matter of the Bill of Costs was filed. The client also holds the view that the advocate ought to have filed separate bills for each. The advocate on the other hand holds the view that time begun to run on 4th November, 2011 when the ruling in **Kisumu Misc. Application No. 82 of 2005** was delivered. The advocate also holds the view that the Bills of Costs arose out of **Kisumu Misc. Application No. 82 of 2005** which was consolidated.

5. The first issue for determination therefore is whether the Bill of Costs is defective. Paragraph 13 of the Advocates (Remuneration Order) provides as follows:

(3) The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.

6. While it might have been appropriate to file separate Bills of Costs for each cause, I find that the Taxing Master acted judiciously when he ruled that consolidation of the Bills of Costs would allow the Court to expeditiously dispose of the bills. On the other hand, the client has not satisfied the Court that the consolidation has caused it any prejudice. I therefore decline the invitation to interfere with the discretion of the Taxing Master since there is no evidence that it was erroneous in principle.

7. The second issue for determination therefore is whether the Bill of Costs is time barred. Faced with an almost similar situation, Waweru J in the case of **H. C. Misc Application No. 527 of 2011 at Nairobi Abincha & Co. Advocates v Trident Insurance Co. Limited** cited by the Applicant herein held:-

“An advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in Section 4 (1) (a) of the Limitation of Actions Act.”

8. Therefore, this being a contractual relationship, the Limitation of Actions Act and specifically Section 4 (1) (a) is applicable to the Bill of Costs herein and time begun to run from the date when work was completed. (See **Halsbury's Laws of England, 3rd Edition, and Volume 36 at paragraph 233**).

9. There is no doubt that the Bill of Costs was filed on 7th December, 2012. The record of appeal annexed to the advocate's supplementary Affidavit filed on 22nd February, 2018 contains a chamber Application filed by the advocate on 21st October, 2005 in **Kisumu Misc. Application No. 82 of 2005**, which is the subject of the ruling delivered on 4th November, 2011.

10. **Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879 (page 452)** states –

“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.

11. From the material before me, I find and hold that the advocate's retainer was still in force as at 4th November, 2011 when the ruling on the application in **Kisumu Misc. Application No. 82 of 2005** was delivered. Accordingly, I find and hold that the Bill of Costs filed on 7th December, 2012 was filed with the 6 year period and is therefore not time-barred.

12. As a result, the Applicant's Chamber Summons Application dated 16th October, 2017 is considered and found to have no merit and is dismissed with costs to the advocate.

DATED AND DELIVERED ON THIS 12th DAY OF April, 2018

T. W. CHERERE

JUDGE

Read in open Court in the presence of

Court Assistants: Felix & Caroline

For the Advocate: Mr. Musembi

For the Client: Mr. Ojoro

Mr. Ojoro

I pray for leave to Appeal and leave for 30 days.