



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. CIVIL APPLICATION NO. 146 OF 2017

OTIENO RAGOT & COMPANY ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. This application has been brought by the Client, KENINDIA ASSURANCE COMPANY LIMITED, seeking the striking out of the Bill of Costs which was lodged in court by the Advocate, OTIENO, RAGOT AND COMPANY ADVOCATES.
2. It is common ground that the Client did give instructions to the Advocate in the case of PHILIP ONONO VS JAMES KIONGO MUHUNYA & ANOTHER, WINAM SRMCC NO. 126 OF 2003.
3. It is the client's case that the case before the Magistrate's Court was concluded in the year 2006, whereupon the advocate raised a proforma invoice dated 9th June 2006.
4. The said proforma invoice was for the sum of Kshs 39,092/=
5. The client said that it remitted to the advocate, the sum of Kshs 26,300/=, in settlement of the client's invoice.
6. According to the client, there was an agreement between representatives of the two parties, pursuant to which the bill would be settled in the sum of Kshs 26,300/=.
7. On the other hand, the advocate insists that the sum of Kshs 26,300/= was only in respect of part-payment of the invoice.
8. That payment was made by way of a cheque dated 17th July 2006, which the advocate acknowledged receipt of on 27th July 2006.
9. Between July 2006 and November 2013, the parties did not engage each other, in respect to either the case or the proforma invoice.
10. On 26th November 2013 the Client wrote to the advocate, giving them instructions, to make an application for the dismissal of the suit for want of prosecution.
11. By a letter dated 6th December 2013 the advocate informed the client that judgment had been entered, and that the client had already settled the decretal sum.
12. The advocate then drew the client's attention to the fact that the professional fee raised by the advocate, had not yet been settled.
13. The advocate attached their proforma invoice, for the sum of Kshs 60,870/=. The invoice showed that the advocate had given to the client, a credit for the sum of Kshs 26,300/= which had been paid in the year 2006.
14. On 28th June 2017, the advocate filed their ADVOCATE-CLIENT BILL OF COSTS, which is in the sum of Kshs 78,870.10. The advocate has given credit for the sum of Kshs 26,300/= which they received in 2006.
15. It is that Bill of Costs which the client asked this court to strike out.

16. When canvassing the application, Miss Julu advocate said that the client had settled the professional fees, after the advocate and the client had agreed on the amount to be paid.

17. I have not had the benefit of reading the letter, (if any) by which the client had forwarded the payment cheque. If I had seen the terms (if any), which accompanied the cheque, the court could have been able to ascertain the same.

18. On the other hand, Mr. Ragot advocate submitted that because the client had not canvassed the assertion that the limb of the application which urged the court to hold that the Bill of Costs was time-barred, the said limb is deemed to have been abandoned.

19. The advocate submitted that although the Bill of Costs was filed more than six (6) years after the cause of action accrued, the client gave an acknowledgment in writing thereafter. The said acknowledgement has been described as having given rise to a new cause of action.

20. The advocate's further submissions were that by paying a sum that was less than appearing on the face of the proforma invoice, the client triggered a dispute.

21. In her words, advocate Ms Moreen Alinaitwe said;

“5. THAT I know of my own knowledge that the respondent only paid a sum of Kshs. 26,300.00 which was only part of the professional fees and the fact that they only paid a portion of the bill then presented, constitutes a dispute as to what they considered to be appropriate fees to be paid for our legal services, while on our part, we held a different view as per that bill of costs therefore rendering it suitable for taxation to resolve that dispute....”

22. The reason why the advocate felt entitled to bring forward a Bill of Costs is because there was allegedly a dispute between them and the client.

23. I have searched throughout the material placed before me but I did not find any signs of any dispute between the advocate and the client.

24. It is true that the client sent payment of an amount that did not match the figure shown on the proforma invoice.

25. If the advocate did not want to accept that sum unless the client had agreed that it was only in part-payment of the fees, the advocate could have said so.

26. Instead, the advocate received the money, and then remained silent until after client gave them instructions to apply for the dismissal of the suit.

27. The silence on the part of the advocate did not, and cannot have given rise to a dispute. If anything, the lack of any protestation by the advocate is more in tandem with acquiescence than with objections.

28. By dint of the provisions of **Section 23(1)** of the Limitation of Actions Act, an acknowledgement or a part payment can give rise to a cause of action.

29. The said cause of action;

“...accrues on and not before the date of the acknowledgement or payment.”

30. **Section 23(3) of the Limitation of Actions Act** provides thus;

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or of the last payment.”

31. In this case, the only payment was made by the client in July 2006. Therefore, if that is what triggered the accrual of the cause of action, the same would be time-barred if the advocate had not taken steps within 6 years from that date.

32. But the advocate has invoked acknowledgement as the step which the client took and which therefore triggered the accrual of the cause of action.

33. I have carefully read the letter dated 26th November 2013, and found not even an iota of any acknowledgment by the client. The said letter constituted instructions to the advocate, to apply for the dismissal of the suit, for want of prosecution.

34. The letter made absolutely no reference to the proforma invoice raised by the advocate.

35. And by their letter of 6th December 2013, the advocate drew the client's attention to the fact that judgment had been entered in the case, and that the client had settled the decretal sum.

36. As the settlement cheques were sent by the client on 18th July 2006, the matter was pretty much brought to a close.

37. Indeed, the advocate did acknowledge, in the Replying Affidavit sworn by Ms Moreen Alinaitwe, that the letter dated 26th November 2013;

“.....constituted additional legal consultation in the matter, based on the previous instructions in the same matter....”

38. I find that the said additional legal consultations did not have the effect of either acknowledging or reviving the cause of action which the advocate may have had against the client.

39. Accordingly, I find that the filing of the Bill of Costs in 2017 was a step which was taken long after the limitation of actions had kicked in, to bar the advocate from raising a Bill in respect to work that had been done in 2006.

40. In the result, I find merit in the client’s application, and I order that the Bill of Costs herein be struck out.

41. The advocate will pay to the client, the costs of the application dated 20th April 2018.

DATED, SIGNED and DELIVERED at KISUMU

This 27th day of **September** 2018.

FRED A. OCHIENG

JUDGE