



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CAUSE NO. 227 OF 2015

OTIENO RAGOT & CO. ADVOCATES..... APPLICANT/ADVOCATE

VERSUS

KENINDIA ASSURANCE CO. LTD. RESPONDENTS/CLIENT

RULING

This matter was placed before me to determine whether the Advocates bill of costs here is time barred. According to Mr. Okong'o, Advocate for the Client the bill is statute barred as it seeks to recover Advocates costs earned between 20th August 2000 and 27th November 2001. He submitted that the relationship between an Advocate and the Client is contractual and the cause of action arose when the last item was charged on 1st July 2007; that accordingly the bill ought to have been filed within six years. He argued that the bill of costs filed after that period – in 2015 – is time barred. He further argued that there is no provision for a supplementary bill of costs and the bill filed subsequent to the initial one ought to be struck out.

On her part, Miss Ainaitwe, Advocate, for the Advocate urged the Court to peruse the documents filed on 16th June 2016 and argued that the same got to show that the Advocate still continued to act for the Client up to 15th June 2012. She submitted that judgment in the parent file was entered against the Client in 2007 but the Client did not settle the decree until 2012 when the execution took place. The Client instructed the Advocate to forestall execution which the Advocate did and even defended the ensuing Auctioneer's bill of costs. She argued that the Client has never filed a Notice of Change of Advocates which he had liberty to do under Order 9 rule 5 of the Civil Procedure Rules. She further argued that it is a matter of convenience that a bill is filed at the end of the proceedings although costs are payable upon instructions. She urged this Court to find that time did not start to run after delivery of the judgment in 2007 and stated that in any event a judgment has a twelve years limit and the judgment here is only five years old.

She contended that the Advocate remained on record even after the judgment was delivered. Relying on Section 89 of the Civil Procedure Rules she submitted that an Advocate/Client bill of costs is in the nature of a civil claim and the Civil Procedure Rules ought to apply; That as such the O principle should be injected into this matter and we should not give undue regard to technicalities. She based her argument on **Kenya Commercial Bank Limited V. Kenya Planters Co-operative Union [2013]1EA 136**. She contended that as it is the Advocate is aiding the O principle by filing another bill. She urged the Court to find that the Client is entitled to the fees charged.

In reply Mr. Okong'o, for the Client, submitted that **Misc. Cause 156 of 2011** is not the same as the primary suit which is **CMCC 246 OF 2011**. He clarified that the Client's objection to the bill is limited to the items for work done up to the year 2007. He sought to distinguish the case of **Kenya Commercial Bank V. Kenya Planters Co-op Union** and stated that the same was in regard to an application for

extension of time. He submitted that limitation is not a technical issue but a defence. He urged this Court to uphold his objection.

I have considered the submissions by Learned Counsel. Let me begin by stating that limitation is not a technical issue but an issue of law. Mr. Okong'o correctly submitted that it is a defence open to parties to take up. There are two bills the first has items for work done beginning 20th August 2000 up to 1st July 2007. The same is dated 28th August 2015 and was filed on 1st September 2015. The second bill is dated 15th June 2016 and was filed on 16th June 2016. It is headed Supplementary Bill of Costs and has additional items the last one being for work done on 19th June 2012.

Clearly this second bill seeks to amend the initial bill by adding items for work done since the last bill t
wit, 1st July 2007. The Advocates Remuneration Order clearly provides that a bill once filed cannot be amended – see Clause 70 of the Advocates Remuneration Order. Ms Alinaitwe's submission is that this second bill was filed pursuant to the O-Principle to save time and costs and argued that the same should be looked at in light of the Civil Procedure Act and Rules. I beg to differ. An Advocates Bill of Costs is a matter under the Advocates Act and the Advocates Remuneration Order which in itself is a complete code. As I have stated the Advocates Remuneration Order prohibits amendment of a bill of costs once filed and the supplementary bill being an amendment to the initial bill is for striking out. In any event even were we to consider the supplementary bill and ignore the initial bill the result would be the same and it is that the items for work done up to 1st July 2007 are statute barred.

An Advocate/Client relationship is contractual. A Client instructs an Advocate to provide professional services for which, once done, he/she is paid. Either party is entitled to file a bill of costs for taxation as did the Advocate in this case. The relationship being contractual it is governed by the law just like any other contract and likewise it is subject to the Law of Limitation. In our case Section 4(1)(a) of the Limitation of Actions Act provides that actions founded on contract may not be brought after six years. With due respect we are here concerned only with the Advocates fees not the judgment entered against the Client's insured in the primary suit. True this bill of costs arises from services rendered in the suit culminating in that judgment but it is not the judgment that is in issue here. The Advocate here has not brought an action in respect of that judgment but in respect of his fees.

So when does limitation begin to run in respect of an Advocate's fees? Halsburys Laws of England, 4th Edition Volume 28 Paragraph 674 Page 303 states -

“Solicitor's costs. If a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of the termination of the action or of the lawful ending of the employment 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.

These rules apply only to such continuous work as bringing and prosecuting or defending an action. In respect of miscellaneous work done by a solicitor, the statute runs 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 of the items included in the bill are statute barred, the solicitor may recover in respect of the balance.”

From the above time begins to run from the date of the termination of the action or of the lawful ending of the Advocates employment. In the instant case these two times are clear. The action for which the Advocate acted terminated in the year 2008 (the exact date was not disclosed) and the lawful ending of the employment of the Advocate was on 1st July 2007 when he wrote a letter (2 folios) to the Client (see

item 82 of the initial bill of costs). There was no appeal to the judgment and if there was Ms Alinaitwe did not disclose it to the Court. In any event nothing in the bill of costs discloses that the Advocate to act as such in an appeal. Time therefore began to run on 1st July 2007 when the Advocate wrote a letter to the Client. My finding is supported by the Advocate's own documents which clearly shows that whatever work he did after that arose from a separate retainer. I am referring to the Notice of Appointment of Advocates dated 9th November 2011 and which was filed in the preliminary suit on 10th November 2011. That Notice of Appointment was in respect of the matter of

Assessment of Auctioneer's charges arising from **Kisumu High Court Civil Suit No. 246 of 2000** which was the primary suit. It is not correct therefore to state that the Advocate was employed throughout. This Notice of Appointment is proof that after the termination of the primary suit the Advocate's employment ended. Were the contrary true there it would not have been necessary to file a fresh Notice of Appointment. It is my finding that if there were any subsequent items of costs incidental to the business of action – after 1st July 2007, they do not take the items before that out of the statute of limitation and the bill as filed initially is statute barred as are the items in the supplementary bill that are for work done up to the year 2007.

Waweru J, dealt with a similar issue in **Abincha & Company Advocates V. Trident Insurance Co. Ltd [2013]eKLR** and he found as follows -

“28. As already seen, any claim or action for an 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 retained. Time does not begin to run from the date of delivery of the bill. Section 48(1) of the Advocates Act therefore cannot offer any defence against limitation.

.....

30. I therefore hold that any of the various bills of costs filed by the Advocate more than six (6) years after completion of the work which he was retained by the Client to do, or after the lawful termination of the retainer in respect of such work, is statute-barred by virtue of Section 4(1)(a) of the Limitation of Actions Act.”

That is also my finding in this case but as stated in the Hallsbury's passage cited above since only the items included in the bill (I am now referring to the Supplementary bill of costs) are time barred the Advocate may recover in respect of the balance. However as I have struck out the supplementary bill of costs he may consider filing a fresh one in respect of the work done. Orders accordingly.

E. N. MAINA

JUDGE

31/5/2017

Ruling signed, dated and delivered this 31st day of May 2017

In the presence of

Mr. Osoro for the Applicant

Miss Aron for the Respondent

CC: Serah Sidera