REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 36 OF 2016

MAINA NJUGUNA & ASSOCIATES ……….........……..APPLICANT

VERSUS

CHEGE GICHURU T/A EXODUS TRANSPORTERS…..RESPONDENT

RULING

1. When does the Statute of Limitations begin to run with respect to an advocate-client costs arising from instructions given by the latter to the former to bring a suit against a third party? Specifically, concerning a claim by an advocate against his client for services rendered in successfully bringing a suit, does the Statute of Limitations begin to run from the date of entry of judgment in the suit filed pursuant to the instructions or at a later point in time if execution proceedings ensue? This is the question raised by the Preliminary Objection by the Respondent in this case.

2. The main facts are not in dispute. The Respondent instructed the Applicant to file suit and recover monies on his behalf from Jipsy Civil Building Contractors, a corporation. Pursuant to these instructions the Applicant filed Thika PMCC No. 956 of 2006 vide a Plaint dated 14/11/2006. The Applicant successfully prosecuted the suit and obtained a judgment in favour of the Respondent. The judgment was entered on 02/06/2009. There appears to be a dispute as to the principal sum awarded in the judgment: the Applicant says it was for Kshs. 1,092,160/= while the Respondent contends that it was for Kshs. 728,000/=. However, for purposes of this ruling, the actual amount is not relevant. What is relevant is that judgment was entered on 02/06/2009.

3. It is also not in dispute that the Respondent gave instructions to the Applicant to recover the judgment debt. While there is some dispute about the actual amounts eventually recovered from the judgment-debtor, it is not in dispute that the Applicant actioned on the instructions – at least to some extent. Indeed, it is not disputed that the Applicant recovered some money and transmitted part of it to the Respondent.

4. There are other areas of dispute respecting the actions taken in furtherance of the execution instructions but that contestation is not relevant for the determination of the Preliminary Objection.

5. The uncontested facts as stated above lay the ground for the Preliminary Objection. It is thus: The Respondent insists that the portion of the Bill of Costs related to instructions to file an action for the recovery of the monies is time-barred. In making this argument, the Respondent relies on what he says is the plain wording of the Statute of Limitations as well as how it has been interpreted in our decisional law.

6. Section 4(a) of the Limitation of Actions Act (Chapter 22 of the Laws of Kenya) is plain that actions founded on contract may not be brought after the end of six years from the date on which the action accrued.

7. Since it is plain that an advocate-client relationship is contractual, any claim for payment of fees by an advocate for services offered by the Advocate must be brought within six years of the completion of the work. Our case law has been clear about that. In ***Abincha & Co. Advocates v Trident Insurance Co. Ltd [2012] eKLR***, the Court put it this way:

Any of the various Bills of Costs filed by an Advocate more than six years after the 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) of the Limitations of Actions Act.

8. Here, the Respondent argues that time begins running for purposes of the Statute of Limitations when one of two events occurs: either the termination of the law suit or the formal termination of the retainer. In this case, the Respondent says that termination of the law suit happened first and therefore, the clock started running from the date of entry of judgment. That would be 02/06/2009. This would mean that any claim for fees against the Respondent became time-barred six years after that is on 01/06/2015.

9. To aid in his argument, the Respondent has cited ***Mercy Nduta Mwangi T/A Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited [2016] eKLR***. In this case, the Learned Justice P. Nyamweya remarked thus:

A perusal of the Bill of Costs shows that the last service delivered by the Respondent before the filing of the Bill of Costs was on 20th July, 2005 when the Respondent sought instruction fees for defending the Applicant in CMCC No. 135 of 2004. The Bill of Costs was filed on 26/10/2015, ten years later. However, the Applicant did not bring any evidence of the end of the Respondent's retainer in this respect, or evidence of when judgment was entered in the primary cause. For this reasons, I do not find that the Bills of Costs filed by the Respondent was time barred.

10. The Respondent argues by analogy that the Learned Judge is clear that a suit terminates upon entry of judgment and that she would have ruled that the Bill of Costs was time barred if there was evidence that judgment had been entered in the suit more than six years prior to the filing of the suit.

11. According to the Respondent, the termination of the action occurred with entry of judgment. Any fees accrued from services rendered in procuring the judgment ought to have been demanded within six years of entry of the judgment. As for fees accrued in execution of the judgment, the Respondent is categorical that those would be fees for entirely new set of instructions: to execute the judgment.Indeed, the Respondent says that the Bill of Costs bears him out: the Applicant has listed as one of his services under item number 57 a service he describes as "Instructions to Institute execution proceedings." The Respondent says that this is a clear indication that these were separate instructions from the earlier instructions to file suit to recover the monies. As such, the Respondent argues that the only fees that are not time barred are those charged for services rendered in furtherance of the instructions to execute.

12. The Applicant sees it entirely differently. According to him, the instructions to file suit to recover the monies owed to the Respondent extended to instructions to execute after entry of judgment. According to the Applicant, the firm remained on record and with instructions to act for the Respondent until the instructions were formally withdrawn on 30/08/2016. The Applicant states that the last action in the matter was on 14/05/2014 when the matter came up for a Notice to Show Cause why the Judgment-Debtor should not be committed to civil jail.

13. In other words, the Applicant sees the instructions it received to file suit on behalf of the Respondent as continuing past the entry of judgment into the execution proceedings. According to the Applicant, the instructions remained until they were formally withdrawn on 30/08/2016.

14. The Applicant cited two cases. ***P.M. Wamae & Co. Advocates v Ntoitha M'Mithiaru [2016] eKLR*** where Aburili J. held that a retainer is terminated when the advocate informs his client to seek services of another advocate. Similarly, in ***Kenya Orient Insurance Limited v Oraro & Co. Advocates [2015] eKLR*** the Court held that the Advocate-client relationship is terminated when the engagement ended or when

the brief is concluded.

15. The three cases cited by the parties are not entirely on point. As I stated at the outset, the specific question presented here is whether instructions by a client to execute a judgment entered into constitutes a fresh set of instructions or a continuing brief from the earlier instructions to bring the suit. The answer to the question is consequential: if the former is correct, then the clock, for purposes of the Statute of Limitations, starts running on the date judgment is entered but if the latter is correct, then time does not start running until execution is complete and successful or until the instructions are withdrawn.

16. After due consideration, I have come to the conclusion that the Respondent is correct: entry of a judgment brings to a close instructions by a client to an advocate to bring that suit. Execution proceedings constitute a new set of instructions for purposes of the Statute of Limitations. I have come to this conclusion for two reasons.

17. First, it is the position envisaged in our law. As the Respondent pointed out to me, ***Halsbury's Laws of England 4th Edition Vol. 28*** are at page 452 paragraph 879 contains the following authoritative statement:

> *"… in relation to continuous work by solicitor, such as the bringing and prosecuting or defending of 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 the termination of the action or the lawful ending of the retainer of the solicitor.*
> >
> > *2. 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.*
> >
> > *3. 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 of costs incidental to the business of the action will not take the earlier items out of statute*

18. It is my view, that when the author speaks of "subsequent items of costs incidental to the business of the action" the author is referring to items such as execution proceedings. The author is quite categorical that such items, coming as they do after entry of judgment, will not take the earlier items out of statute. In other words, the Statute of Limitations will begin to run upon entry of judgment and any instructions given thereafter incidental to the action will not amount to "continuous" work related to the bringing of the suit.

19. Secondly, I find that there is a sound policy reason for this. One of the policy objectives for the Statute of Limitations to ensure that parties litigate their disputes when it is still efficient to do so – both from an operational perspective (for example, because of the diminishing value of evidence: when the parties can collect their evidence and memories have not faded) as well as an efficiency perspective. The efficiency perspective counsels that a party might wish to get closure and go on with their life without having to worry about a potential suit or claim hanging over their head. Such closure has economic value because it brings certainty and facilitates planning on the part of the would-be litigant. From an economic perspective, such certainly encourages or at least enables the party, as an economic actor, to proceed to invest in other economic activities with certainty.

20. It is therefore useful that doctrines on how the Statute of Limitations is applied in practice should be as predictable as possible. This case provides a useful portrait of the utility of drawing a sharp bright line on when instructions to bring a suit by an advocate come to an end: with the entry of judgment. This is because, often, as happened here, execution proceedings can go on for years. Indeed, at times, they are never fully completed. It would, therefore, be inefficient and inoperably diffuse to have a rule that states that the advocate-client transaction for purposes of bringing a particular suit spills over to execution

proceedings. It is a far superior rule both from a predictability perspective as well as an operational efficiency perspective that entry of judgment marks the bright line point when the clock begins to run for purposes of the Statute of Limitations.

21. Consequently, the result is that the Preliminary Objection here will succeed to the extent that all the items in the Bill of Costs associated with instructions to bring a suit against Jipsy Civil & Building Contractors are adjudged time-barred. All the other items shall proceed for taxation before the Deputy Registrar. For clarity, only the items in the Bill of Costs related to execution proceedings shall be taxed.

22. Orders accordingly.

Dated and delivered at Kiambu this 21stday of September, 2017.

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JOEL NGUGI

JUDGE