



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

MISCELLANEOUS CIVIL APPLICATION NO. 64 OF 2015

BETWEEN

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

AND

NATIONAL BANK OF KENYA LTD.....RESPONDENT/CLIENT

ARISING FROM BUSIA HIGH COURT CIVIL SUIT NO. 34 OF 2005

BETWEEN

DEBORA OWUORI.....PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD.....DEFENDANT

RULING

There are two applications herein. One is by the advocate and the other is by the client. I will address both applications together for they substantially raise issues that will have the same effect.

The advocate's application is brought by way of chamber summons dated 14th June 2016 pursuant to order 11 of the advocates Remuneration Order. The applicant is seeking orders as follows:

1. That the taxation by the Deputy Registrar dated 23rd May 2016 be set aside.
2. That the Deputy Registrar's order of 23rd May 2016 be substituted with an order allowing the applicant's bill of costs dated 18th May 2016.

The application was premised on grounds that it was not open to the Deputy Registrar to award any figure below what was in the certificate issued in the primary suit and that the reasons given by the Deputy Registrar do not support the award.

The client's application is dated 18th June 2016 and is brought by way of Chamber Summons under Rule 11(2) of the advocates Remuneration Rules, section 45 of the Advocates Act and Order 22 Rule 22 of the Civil Procedure Rules Cap 21 Laws of Kenya. The application is seeking the following substantive orders:

1. That the ruling on taxation delivered on 23/5/2016 be set aside for it was time barred under the Limitation of Actions Act.

2. That the court makes a finding that there was a retainer agreement between the parties herein.

Rule 11(2) the Advocates Remuneration Order provides as follows:

The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

On 1st April 2005 the National Bank Limited (hereinafter referred to as the client) wrote a letter to the firm of Otieno Ragot & Co. Advocates (hereinafter referred to as the client). The gist of the letter was to limit the fees payable to the advocate at KSHS. 300,000/=. The advocate was to confirm acceptance by signing and returning the letter to the client. On 28th April 2005 the advocate signed the same and returned it to the client. There was another letter dated 1st April 2005 which the client advised the advocate that the firm had been retained by the client. There is therefore no doubt that there was a retainer contract between the client and the advocate. Section 45 (1) of the advocates act provides as follows:

(1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may—

(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;

(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both;

(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof, and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.

The retainer agreement in this case was in compliance with the said section 45 of the Advocates Act. Kasango J, had arrived at a similar conclusion in the case of **OMULELE & COMPANY ADVOCATES vs. SYNRESINS LIMITED [2013] eKLR**.

The Court of Appeal in the case of **NJOGU & COMPANY ADVOCATES vs. NATIONAL BANK OF KENYA LIMITED [2016] eKLR** observed as follows:

In our view an advocate who willingly and knowingly enters into an agreement in regard to the payment of his fees that is contrary to the Advocates Remuneration Order, cannot maintain proceedings whose purport is to avoid the illegal agreement by reverting to the Court to tax his advocate/client bill of costs in accordance with the Advocate's Remuneration Order. We concur with the learned Judge that the appellant having made his bed he must lie on it.

Although I do not find the retainer agreement herein illegal, the advocate is bound by his agreement with the client.

When does time begin to run in respect of an advocates claim for costs? It is settled law that it is from the date of the completion of the work which he was retained to do or after lawful termination in respect of such work. This was held in the case of **ABINCHA & CO. ADVOCATES vs. TRIDENT INSURANCE CO.LTD (2013) eKLR** and in the case of **KENYA ORIENT INSURANCE LIMITED vs. ORARO & COMPANY ADVOCATES [2017] eKLR**. In the latter case the court quoted from

Halsbury's Laws of England 4th Edition Volume 28 at paragraph 879 which provides as follows:

1. If a solicitor sues for this cost in an auction, 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.

In the instant case when did the time start to run? The client has contended that the primary suit was dismissed in the year 2007. This therefore means that the advocate had until 2013 to demand the payment for his services. Records show that the advocate raised an issue with his bill with the client by a letter dated 5th May 2015. The same record show that the client had sent the final fees of Kshs. 371,544/= to the advocate account on 29th June 2007. Even if we assume that the advocate had not been paid his dues fully, the claim is time barred for it was raised 8 years after the completion of the work which he was retained to do.

The upshot of the foregoing is that the application by the advocate is dismissed with costs whereas that of the client succeed with costs.

DELIVERED and SIGNED at BUSIA this 18th day of October, 2017

KIARIE WAWERU KIARIE

JUDGE.