



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC. CIVIL APPLICATION NO. 12 OF 2016

AKIDE & COMPANY ADVOCATES.....APPLICANT/ADVOCATE

VERSUS

KENINDIA ASSUARANCE CO. LIMITED.....RESPONDENT/CLIENT

(Arising out of Nairobi SPMCC No. 5293 of 2003 Orbit Chemicals Industries Limited Vs Braeburn Limited and Another)

RULING

This ruling relates to the Chamber Summons dated 1st November 2016 instituted by the applicant seeking orders;

1. THAT this Honourable court be pleased to set aside in its entirety the Order/Ruling of the taxing master made on 27th October 2016 and delivered on the same day.
2. THAT this honorable court be pleased to review the Order of the taxing master made on 27th October, 2016 disallowing the entire bill of costs.
3. THAT this Honourable court be pleased to reinstate the applicants Bill of costs dated 3rd April, 2015.
4. THAT cost of this application be provided for.

The application is premised on the grounds set out in its body and in the annexed affidavit of **Patriciah Wangari Gikunju** dated 1st November, 2016.

The applicant averred that they filed a bill of costs dated 3rd April 2015 on the 14th January 2016 for an amount of ksh. 57,346. The matter was disposed of by way of written submissions and the taxing master delivered a ruling on 27th October 2016 striking out the applicant's bill of cost for being time barred. The applicants contended that the taxing master disallowed the entire bill of costs herein under Section 4(1) (a) of the Limitation of Actions Act in excess of her powers under the Remuneration Order. They further averred that the taxing master has no jurisdiction to determine whether a bill of costs is time barred or not. The applicants further averred that the taxing master erred in law and in fact in failing to tax the bill of costs dated 3rd April, 2015.

The applicant stated that the taxing master noted in her ruling that the last activity to be carried out by the applicant was on 14th May, 2004 which was 12 years ago. They argued that the taxing master failed to

appreciate that the applicant drafted a consent marking the matter as settled which was never filed nor adopted as an order of the court. The matter is therefore pending actively before court and the applicant is still on record with the Respondent's instructions.

It was contended that the taxing master relied on the decision of Waweru J in the case of **Abincha & Co. Advocates Vs Trident Insurance Co. Ltd, Miscellaneous Application Number 527 of 2011** in striking out the Bill of costs citing the Bill as being time barred but failing to appreciate that the learned judge in the said authority pointed out that the issue of whether a Bill of costs is time barred or not ought to be placed before a judge for determination.

The applicant stated that they stood to suffer great loss if the orders sought are not granted and that, it is in the interest of justice that the orders are granted.

The Respondent, by way of a replying affidavit sworn by Don Otury and dated 28th February 2017 opposed the application. They sought to have it dismissed with costs as it lacked form and merits.

The respondent averred that the applicant's prayer to set aside the ruling dated 27th October, 2016 is tantamount to an appeal on the face of the record. That on the face of it, the applicant has failed to follow procedure as relates to appeal as stipulated by law. The respondent further averred that the applicant sought to review the same decision without following proper procedure that appertains to review. In addition, the respondent stated that the applicant had not annexed the ruling dated 27th, October 2016 and that the applicant could not seek for review and appeal simultaneously as this is not the proper procedure.

The respondent contended that it was in the interest of justice that the application dated 1st November, 2016 be dismissed as it is vexatious, malicious, and an abuse of the process.

The application was canvassed by way of written submissions.

The Respondent submitted that the Deputy registrar as the taxing master had the jurisdiction to hear and determine the matter as it was a Bill of costs that fell under the purview of Section 13A of the Advocates Remuneration Order which states:

“For purposes of any proceeding before him/her, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him/her”

The respondent further submitted that should the court find that the taxing master had no jurisdiction, then it had the power to adjudicate on the issue and especially on the contention that the bill of cost drawn by the applicant is statute barred. The respondent cited the case of **Abincha & Company Advocates Vs Trident Insurance Company Ltd** where Waweru J held that the taxing master could not preside over the main prayers in a Notice of Motion Application. However, he went ahead and considered the issue of limitation and found that the bill of costs was statute barred.

On whether the bill of costs was statute barred, the respondent submitted that the bill was in respect of a matter in which the contractual relationship between the applicant and respondent ended on the 5th April, 2004. The Bill was filed on 14th January, 2016, hence the applicant is estopped from claiming such costs due to the doctrine of limitation of actions.

Having considered the application and arguments set forth by both parties, the issue for determination is;

1) Whether the taxing master had the jurisdiction to dismiss the Bill of costs for being time barred.

On the issue of jurisdiction, the court is guided by the **case of Abincha & Company Advocates Vs Trident Insurance Company Ltd** where Waweru J considered whether the taxing officer had

jurisdiction to determine the question whether the advocate's bill of costs was statute barred. The court in that instance held that that was an issue that could only be determined by a Judge and that it was the kind of issue that the taxing officer, with the consent of both parties, should have referred to the High court. The learned Judge further held;

“Only after determination of that fundamental issue by the High Court, that is whether or not there were any costs due to the advocate that could be taxed, would the bill of costs be referred back to the taxing officer for taxation. I therefore hold that the taxing officer of the court did not have jurisdiction to hear and determine the main prayers of the Notice of Motion dated 20th February 2012.”

It is therefore my view and I hold that the taxing master did not have the jurisdiction to adjudicate on the issue of statutory limitation of the Bill of costs.

On the issue of whether this court can make a determination on the issue of limitations, I find in the affirmative, as it would not serve any useful purpose to refer the matter back to the taxing officer for purposes only of referring it back to this court for determination of that issue.

It is the applicant's contention that the matter is pending actively before the court and the applicant is still on record with the Respondent's instructions, since the consent marking the matter as settled was never filed or adopted as an order of the court. The respondent on the other hand submits that the contractual relationship between the applicant and the respondent ended on the 5th of April 2004 as per item 7 when the applicant attended court for judgment.

Section 4 (1) (a) of the limitation of Actions Act sets a 6 year limitation period for actions founded on contract. In the case herein, the applicants claim is based on the contract for professional services between the advocate and his client. Given that the bill of costs was filed on the 14th January 2016, it is clear that it was time barred by a period of 6 years. In the case of Abincha referred to above, Waweru J held that:

“.....any claim or action for an advocate's costs is subjected to the statute of limitation. As already seen also, time begins to run from the dates of completion of the work or lawful cessation of the retainer. 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..... 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.”

It is clear from the above and I therefore find that the bill of costs is time barred.

In the premises foregoing, the court makes the following orders:

1. That the ruling dated 27th October, 2016 is set aside.
2. That the Bill of costs dated 3rd April, 2015 is struck out.
3. That each party shall bear their own costs of this application.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 13th Day of **October, 2017.**

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L. NJUGUNA

JUDGE

In the Presence of

..... for the Applicant

..... for the Respondent