



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**CIVIL DIVISION**  
**HIGH COURT MISC. APPLICATION NOS. 421, 428, 429 AND 430 OF 2016**  
**(CONSOLIDATED)**  
**WETANG'ULA ADAN & MAKOKHA ADVOCATES ....PLAINTIFF**  
**VERSUS**  
**MUMIAS SUGAR CO. LTD.....DEFENDANT**  
**R U L I N G**

**Introduction**

1. This ruling relates to the contest between the parties on the Bills of Costs arising from various matters decided by the Principal Magistrate's Court at Mumias in the following Civil Suits;-

- a. CC. NO. 950 of 2007 - Henry Josephat W. Keya – vs - Mumias Sugar Co. & 2 others
- b. CC. No. 140 of 2009 – Francis Wesonga Manguya –vs – Mumias Sugar Co. Ltd
- c. *CC No. 262 of 2004 – Mary A. Otieno – vs. Kalasto M. Machio & 2 others.*
- d. CC. No. 39 of 2007 – Wanangwe Makokha – vs – Mumias Sugar Co. Ltd & 2 others.

**Submissions**

2. It is to be noted that none of these matters has a substitute application on the file, and when the parties appeared before me on 11.07.2017, they agreed to canvass the issues in controversy by way of written submissions. The submissions were filed and exchanged.

3. The applicant's main contention in these matters is that the Bills of costs are time barred; secondly that the respondent is bound to tender evidence to prove that the retainer was terminated and that in the absence of such evidence, the bills of costs must be struck out.

**Authorities relied upon by the applicant**

4. In urging this court to make a finding that the Bills of Costs are time barred, counsel for the applicant cited the following authorities.

- a. *HC Misc. Application No. 527 of 2011 – Abincha & Co – vs – Trident Insurance CO. Ltd* in

which it was held that an advocate's claim for costs is a claim based on contract for professional services and further that in a case where an advocate has presented what appears to be a final fee note upon completion of each brief, and the same having been paid by the client and the relevant file archived or destroyed, then it would be unacceptable and unfair for the advocate to turn around after more than 6 years and present a final fee note.

**b. High Court of Kenya at Kisumu Misc. Application No. 123 of 2016 – Wetangula Adan & Makokha Advocates – Vs- Mumias Sugar Co. Ltd** where the court held after referring to the Abincha case (above), that the respondent having not tendered evidence to prove that the retainer was terminated could not turn around and say the Bill of costs was time barred.

**c. High court of Kenya at Kisumu – Misc Application No. 124 of 2016 – Wetangula Adan & Makokha Advocates – vs – Mumias Sugar Co. Ltd** in which the court reached a similar decision as that reached in Misc. Application No. 123 of 2016.

**d. High Court of Kenya at Machakos – Misc. Civil Application No. 59 of 2015 – Mercy Nduta Mwangi t/a Mwangi Kengara & CO. Advocates – vs – Invesco Assurance Co. Ltd** in which the court also held that the respondent having failed to bring any evidence of the end of the respondent's retainer or evidence of when judgment was entered in the primary cause, and there having been a moratorium from which the respondent benefitted, then the applicant could not claim that the respondent Bill of Costs was time barred.

5. The Respondent's submissions dated 25.04.2011 and filed in court on 27.04.2017 are to the effect that the Bills of Costs presented in court are not time barred and that the respondent has no option but to pay them. Counsel relied on a number of authorities which I have carefully read through;-

a. *Jeremiah Maku – vs Methodist Church in Kenya Trustees Registered and another – HCCC No. 80 of 2005 (at Meru [2015] e KLR*

b. *Jareth Limited –vs – Kigano & Associates – Civil Appeal No. 65 of 1999 [2002] EA 92.*

c. *Kanyi J & Company – vs – Trade Bank Limited (In liquidation) High Court of Kenya at Mombasa Misc. Civil Application No. 784 of 2004 in which the court held that there was a distinction between party and party Bill of Costs and Advocate – client Bill of Costs, with the latter being between an advocate or firm of advocates and a client and further that the applicable scales in taxation are different.*

d. *The Abincha & Co Advocates case (above)*

e. *Kenindia Assurance Co. Ltd – Vs- Akide & Co. Advocates being Nairobi HCCC Misc Civil Application No. 1037 of 2013 [2015]eKLR.*

6. On the issue of application of Limitation of Actions Act the respondent cited the case of *Otieno Ragot & Co. Advocates – vs – National Bank of Kenya – Kisumu Hct Misc. Application No. 61 of 2015[2016]eKLR* where Majanja J expressed himself thus on the issue:-

“On the issue of application of Limitation of Actions Act, I cannot fault the Deputy Registrar. The Advocates continued to represent the client until such time as the retainer was terminated either by themselves or by the client. It is in these circumstances that the claim of fees would start to accrue and the time would begin to run for purposes of limitation. In light of this finding, it is not necessary to decide whether the limitation of Actions Act is applicable to a contract between advocate and client.”

7. I have perused the Bill of costs in this case and note that the last service delivered by the respondent before the filing of the Bill of Costs was on 08.02.2008, which is roughly ten years later. The record before me is however quite incomplete. There is no application on the file from which this court can

deduce other important dates/information to guide it on exactly when, if at all, the retainer ended, nor is there evidence to show when judgment in the primary suit was entered. In the circumstances of this case therefore, I find that the Bill of costs herein is not time barred. The application is accordingly dismissed. Though this court is being asked to tax the Bill of Costs, I rather that the Bill of Costs be taxed by the taxing master.

8. I accordingly order that the Bill of costs herein do revert to the taxing master for taxation. Each party shall bear its own costs. This ruling shall apply mutatis mutandis to Misc. Application Nos. 428, 429 and 430 of 2016

It is so ordered

**Ruling delivered, dated and signed in open court this 30<sup>th</sup> day of November, 2017**

**RUTH N. SITATI**

**JUDGE**

In the presence of ;-

Mr. Obilo (present).....for Applicant

Miss Atieno (present).....for Respondent

Polycap.....Court Assistant