



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 296 OF 2015 CONSOLIDATED WITH MISC. CIVIL APPLICATION NOS. 297, 298, 299, 300, 301 AND 302 OF 2015)

IN THE MATTER OF THE ADVOCATES REMUNERATION ORDER

AND

IN THE MATTER OF TAXATION OF THE BILL OF COSTS BETWEEN

ADVOCATE AND CLIENT C.B. GOR & GOR ADVOCATES INSTRUCTED BY THE DELPHIS BANK LIMITED NOW KNOWN AS ORIENTAL COMMERCIAL BANK LIMITED

BETWEEN

C.B. GOR & GOR ADVOCATESAPPLICANT

VERSUS

ORIENTAL COMMERCIAL BANK LIMITED

Formerly known as THE DELPHIS BANK LIMITEDRESPONDENT

RULING

1. This court has been moved by way of a Notice of Motion dated 8th April, 2016 that seeks the following orders:-

(i) Spent;

(ii) That the Bill of Costs dated 15th October, 2015 be struck out and these proceedings be dismissed; and

(iii) That the costs of the proceedings including this application be awarded to the respondent.

2. The application is supported by the affidavit of Ashok Vaja dated 8th April, 2016 and the grounds on the face of the application. The applicant/respondent (respondent) filed a replying affidavit on 21st April, 2016 to oppose the application. The respondent's/applicant's (applicant) deponent Ashok Vaja filed a supplementary affidavit on 27th June, 2016.

3. In arguing the application, Mr. Khagram for the applicant in submitting that the bills of costs are

statutorily time barred cited the case of **Abincha & Company Advocates vs Trident Insurance Co. Ltd.** [2013] eKLR where Judge Waweru held that an Advocate's claim for costs is based on contract for professional services between him and the client. Counsel also cited the case of **Mbugua & Mbugua vs Kenindia Assurance Co. Ltd.** [2016] eKLR where the same position was confirmed. It was submitted that in a letter dated 3rd July, 2006 attached to the applicant's supporting affidavit, the applicant's Advocate advised the respondent to proceed to tax his bills of costs. It was Mr. Khagram's view that time started to run from that date. On 2nd April, 2007, the applicant's counsel wrote to the respondent seeking release of their client's files.

4. Mr. Khagram further submitted that on 10th April, 2007 the respondent wrote to the applicant stating that the bills of cost were almost ready and would be filed for taxation. On 21st April, 2007, one bill of costs was filed. The other bills of costs were filed in the year 2015. He prayed for the application to be allowed.

5. Mr. Omollo Learned Counsel for the respondent filed his written submissions on 27th July, 2016. He did not attend court to highlight the same following a court order exempting him from attending court to highlight his submissions. His submissions were to the effect that the respondent believed that the counsel for the applicant genuinely intended to negotiate a settlement of the bills of costs but the said counsel delayed the settlement. In his view, it was apparent that attempts had been made to frustrate the respondent and their lawyers in the cases referred to in paragraph 8 of the respondent's replying affidavit.

6. It was submitted, for the respondent that the bill of costs filed herein are not actions within the meaning of section 4(1) (a) of the Limitation of Actions Act, Cap 22, hence the said provisions do not apply. He added that statute barred debts are not extinguished but only their recovery by an action is barred. He cited the case of **Curwen vs Milburn** [1989] 42 ChD 424, where Justice Cotton stated that statute barred debts are due though payment of them cannot be enforced by action. The court of appeal held that the solicitor had lien on the documents and that it was the duty of the taxing Master to tax all the items of the bill without regard to the statute of limitation. It was submitted that Judgment will not automatically be entered upon the bill having been taxed. A judgment can only be entered by a court upon a production of a certificate of taxation at which time the plea of limitation can be taken. Mr. Omollo argued that the respondent has a lien not only over monies received by it on behalf of the applicant and also his documents pending the settlement of costs. Counsel prayed that the application be dismissed.

DETERMINATION

The issue for consideration is if taxation of bills of costs is statutorily time barred.

7. There is no doubt that the respondent and the applicant entered into negotiations with regard to the respondent's professional fees being settled out of court. The said negotiations however stalled in the year 2006 and precisely on 3rd July, 2006 when the Counsel for the applicant wrote to the respondent advising him to tax his bills of costs. It is at this point in time that the respondent should have swung into action to tax the bills of costs. This was not done. At paragraph 7 of the supporting affidavit dated 8th April, 2016, the applicant's deponent states that the respondents' cause of action to claim the fees and disbursements allegedly outstanding accrued at least in October, 2005 by which time its contractual relationship with the applicant and the provision of its services to the applicant had been terminated.

8. The respondent in its replying affidavit dated 19th April, 2016 states that it is the Counsel for the applicant who frustrated the efforts to negotiate a settlement of his costs. He attached a bundle of correspondence to show his efforts to meet the counsel for the applicant with a view of finding an amicable settlement. The said Counsel was however non responsive.

9. It is my finding that the relationship between a client and an Advocate is a contractual one and an advocate is required to take action in pursuit of his professional fees without undue delay after completion of an assignment to forestall the unfortunate position that the respondent finds himself in. The Bills of Costs for Mombasa High Court Misc. Civil Application Nos. 296, 297, 298, 299, 300, 301 and 302 of

2015 were all filed on 15th October, 2015.

10. Section 4(1) of the limitation of Actions Act provides that:-

“The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-

(a) actions founded on contract;

(b) actions to enforce recognizance;

(c) actions to enforce an award;

(d) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law”.

11. In the case of **Kenya Orient Insurance Limited vs Oraro & Company Advocates** [2004] eKLR, the court cited Halsbury’s Laws of England 4th edition Vol. 28 at page 419 paragraph 820, which states that;

***“ once there has been a complete cause of action arising out of contract or tort, time begins to run*”.**

At page 452 paragraph 879 of the same treatise, it states that:-

“.....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 out of statute.

..... a solicitor cannot sue a client for costs until the expiration of one month after the 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 (emphasis added).

12. A perusal of all the files that form the subject of the present application reveals that the work that the respondent was instructed to undertake by the applicant was finalized more than 6 years ago. An action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act. I am therefore in agreement with counsel for the applicant that the bills of costs filed on 15th October, 2015 are statutorily time barred. The application dated 8th April, 2016 is hereby allowed with costs.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 29th day of September, 2016.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Ondego holding brief for Mr. Khagram for the applicant/respondent

Mr. Omollo for the respondent/applicant

Mr. Oliver Musundi Court Assistant