



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 1 OF 2016

IN THE MATTER OF THE APPELLATE JURISDICTION ACT

AND

IN THE MATTER OF THE COURT OF APPEAL RULES, 2010

AND

**IN THE MATTER OF TAXATION IF ADVOCATE –CLIENT BILL OF COSTS IN CIVIL
APPEAL NO. 272 OF 2003 AT NAIROBI**

BETWEEN

P.M. WAMAE & COMPANY ADVOCATESAPPLICANT

VERSUS

NTOITHA M'MITHIARURESPONDENT

RULING

1. On 12th January 2016, the advocate/applicant filed an advocate/client bill of costs dated 7th January 2016, seeking for taxation of the said bill consisting of 92 items all totaling shs 10,876,012.68 inclusive of VAT. Pursuant to the said bill, the Deputy Registrar issued notice of taxation to the respondent Honourable Ntoitha M'Mithiaru. It is dated 14th January 2016.
2. In response to the Bill of Costs, the respondent through his advocates Gitonga Kamiti, Kairaria and Company Advocates filed grounds of opposition dated 1st February 2016 on 3rd February 2016, a replying affidavit sworn by the Respondent on 2nd February 2016 and filed on 4th February and a notice of preliminary objection dated 18th February 2016 filed on 22nd February 2016.
3. In all the response documents, the common thread is that the bill of costs is statute barred as it contravenes the clear provisions of Section 4(1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya; and that the bill of costs is incompetent and constitutes a gross abuse of the court process.
4. The applicant/advocate filed an affidavit in response to the respondent's replying affidavit dated

2nd February 2016 on 20th May 2016 as well as the grounds of opposition to the preliminary objection notice dated 18th February 2016.

5. In the grounds of objection, the applicant/advocate contends that the bill of costs dated 7th January 2016 is not premised on contract as stipulated in Section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya but that it is premised on an action upon a judgment under Section 4(4) of the Limitation of Actions Act Cap 22 Laws of Kenya. Further, that the judgment the subject of the bill of costs was delivered on 19th October 2007 and that the bill of costs was filed on 12th January 2016, 9 years after the delivery of the said judgment and three years prior to expiry of the limitation period which is 12 years.

6. In addition, it is contended that the preliminary objection is in bad faith since the issue of fees payable for the Election Petition in the High Court and the fees payable for the appeal, CA 272/2003 at Nairobi, which appeal was against the dismissal of the election petition, were matters in issue in the respondent's appeal being CA 17/2013 in which payments for the election petition and the appeal against the dismissal of the petition, were included in the grounds of appeal and also in the record of appeal. That the said inclusion of fees is necessary implication an acknowledgment of the fees sought to be taxed in the bill of costs hereof as provided in Section 23(3) of the Limitation of Actions Act. That by offering to settle the fees of the Election Petition by installment followed by entering into an agreement with the applicant upon acceptance of the said offer, it was implicitly mutually understood that upon full payment of the fees in terms of the said agreement, the advocates had the option of pursuing or not pursuing the recovery of the balance of the fees of the appeal, which is the subject of this bill.

7. It was further contended that by renegeing on the said agreement through the filing of the appeal at Nyeri, the applicant had opted to pursue recovery of the balance of his fees for the appeal case CA 272/2003 at Nairobi.

8. It was therefore contended that the preliminary objection is misconceived, incompetent, fatally and incurably defective, bad in law and an abuse of the court process and should be dismissed with costs to the applicant.

9. The preliminary objection was urged orally on 27th July 2016 with Mr Kairaria advocate appearing for the client/respondent whereas Mr Wawire advocate appeared for the advocate/applicant. In his submissions, Mr Kairaria asserted that the bill of costs as filed by the advocate/applicant is based on legal services rendered in CA 272 of 2003 which was dismissed on 19th October 2007. That the applicant/advocate ceased to act for the client/respondent herein in 2008 pursuant to a letter dated 7th April 2008 advising the client/respondent to seek services of another advocate and indicating that the advocate would be filing a bill of costs on that matter.

10. Mr Kairaria submitted that a client/advocate relationship is a contractual one and has a limitation period of 6 years from the date when the cause of action arises/accrues. In this matter, it was submitted that time started running from the date when the matter was determined or when the advocate/client relationship ceased, which is 19th October 2007 when the appeal was dismissed, or on 7th April 2008 when the advocate/applicant wrote to the client/respondent informing him seek services of another advocate. Counsel relied on **Abincha & Company Advocates Vs Trident Insurance Company Ltd [2013]eKLR** wherein the court held that an advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. Further, that on action to recover such costs would be subject to the limitation period stipulated in Section 4(1) (a) of the Limitation of Actions Act Cap 22 of Laws of Kenya.

11. Mr Kairaria further submitted that the advocate/applicant does not deny that the services he offered to the client ceased in 2008. In addition, it was submitted that there is no factual or legal basis that the bill of costs as filed is based on a judgment since item No.1 in the said bill of costs is clear that it was the instructions to file CA 272/2003 hence the bill as filed was an abuse of the court process.

12. Counsel further denied that there was any acknowledgment of the fees due or payment which would be a defence to a time barred claim by the advocate from his client.

13. Further, counsel submitted that the advocate's argument that had the appeal gone their way then they would not have filed a bill of costs in an abuse of the court process and therefore this court should strike out the bill of costs. It was further submitted that the Nyeri CA 17/2013 was different from the matter subject of the impugned bill.

14. In response, Mr Wawire opposed the preliminary objection submitting that the bill of costs is not based on the contract under Section 4(1) (a) of the Limitation of Actions Act but that it is premised on an action upon a judgment under Section 4(4) of the Limitation of Actions Act. That the dispute occurred after judgment in 2008 hence the limitation period is 12 years. Further, that the bill as filed on 7th January 2016 was 3 years before expiry of the said 12 years limitation period.

15. In addition, it was submitted by the applicant that even if the bill was based on a contract, Section 23(3) of the Limitation of Actions Act comes to their aid and that before CA 17/2013 at Nyeri was filed, the respondent had agreed to pay the amount of shs 3,236,348.60 by a letter dated 18th March 2013 out of which one million was paid. Further, that the parties negotiated and agreed that if the respondent paid the whole of costs as taxed in HC Election Petition No 1/2003 then the applicant/advocate would not file this bill of costs. That this bill was only filed after the respondent reneged and that therefore if the bill is based on contract then the time started running in 2013 when there was part payment made. The applicant urged this court to dismiss the preliminary objection.

16. In a rejoinder, Mr Kairaria submitted that there was no agreement on the payment of costs in CA 272/2003 and that the letter of 18th March 2013 related to costs in Petition 1/2003. Further, that the issue of part payment being raised by the applicant is Resjudicata since the Court of Appeal ordered the applicant to re tax their costs.

17. In addition, it was submitted that the letter annexed as PMW2 dated 20th March 2013 does not mention any costs of appeal and that costs on the appeal were never agreed upon and that there was no part payment. Mr Kairaira also submitted that Section 4(4) of Cap 22 does not fit the circumstances of this case as it envisages a case where two parties have been litigating and a party does not act on a judgment until 12 years lapse, and not a case where an advocate seeks to recover costs from a client that he acted for. He urged the court to allow the preliminary objection with costs.

Determination

18. I have considered the respondent's preliminary objection, the responses by the applicant and the parties' advocates oral submissions and authorities relied on.

19. In my view, the only issue for determination in this preliminary objection is whether the bill of costs dated 7th January 2016 filed on 12th January 2016 is statute barred under Section 4(1) of the Limitations of Actions Act. There are also ancillary questions which the court will endeavour to answer in resolving the above single issue.

20. The first question is whether the advocate/client relationship is a contractual relationship. But first, some background information is critical. On 12th January 2016, the applicant/advocate herein PM. Wamae & Company Advocates filed an advocate client bill of costs for taxation. The bill, from item No. 1, is clear on the face of it that it was in respect of instructions to file Civil Appeal No. 272 of 2003 on behalf of the appellant, Hon Ntoitha M' Mithiaru against the judgment in the High Court at Meru. Before that bill of costs could be taxed but after the Deputy Registrar has issued a notice of taxation dated 14th January 2016 to the client/respondent, the respondent/ client through Gitonga Kamiti Kairaria and Company Advocates filed grounds of opposition dated 1st February 2016 simultaneous with notice of appointment of Advocates, followed by a replying affidavit and notice of preliminary objection dated 18th February 2016 seeking to have the bill of costs as filed to be struck

out for being statute barred as it founded on a contract for provision of legal services hence it falls within the purview of Section 4 of the Limitation of Actions Act hence time barred.

21. As to whether the advocate's bill of costs is time barred under section 4 of the Limitation of Actions Act, it is important to note and it is trite law that an advocate's claim for costs would be based on the contract for professional services between him and his client. It is therefore a claim founded on a contract for legal services. An action to recover such costs would therefore be subject to the limitation period stipulated under Section 4(1) of the Limitation of Actions Act, Cap 22 Laws of Kenya which provides that:

“4 Actions of contract and tort and certain other actions.

(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrues-

(a) actions founded on contract.....”

22. Halsbury's Laws of England 4th Edition, Volume 28 at paragraph 879 page (452) is also instructive and provides the following guide:

“879 Solicitor's costs: In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action;

a. If a solicitor sues for his costs in an action, the statute of limitation only begins to run from the date of termination of action or of the lawful ending of the retainer of the solicitor;

b. 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;

c. 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.

d. In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.

e. A solicitor cannot sue a client for costs until the expiration of one month after delivery if a signed bill, but nevertheless time runs against a solicitor from the completion of the work and not from the delivery of the bill.

f. If some only of items included in the bill are statute barred, the solicitor may recover in respect of the balance.”

23. The respondent /clients case herein with regard to the issue of limitation is that time started running from 7th April 2008 when the advocate wrote a letter to the client advising the latter to engage services of another advocate to represent him in the subject appeal HCCA 272 of 2003 at Meru which was between the client and Richard Maoka Maore & 2 Others. This court notes from the record that the advocate represented the client in Election Petition No. 20 of 2003 which petition was dismissed. The terms of engagement between the client and the advocate are contained in the letter dated 20th March 2003 written by the advocate to the client and which the Court of Appeal 17/2013 at Nyeri did confirm vide a judgment dated 25th November 2014. Being dissatisfied with the decision of the Court of Appeal on his entitlement as to advocate/client costs, the advocate approached the Supreme Court vide SC CAPP 48/2014 which latter court rejected an attempt by the advocate to advance his claim to the Supreme Court on a matter of taxation of advocate/client bill of costs.

24. The said terms of engagement between client and advocate were that the advocate had offered as a volunteer to support the client's political party and he agreed to take a necessary fee for conducting the hearing of the Election Petition for shs 400,000 on condition that in the event of the petition succeeding, then the advocate would be entitled to recover the balance of their fees from the costs to be recovered and that in addition the client would pay the disbursements. The election petition was lost and the advocate sought to tax his bills of costs against the client beyond the terms of the letter of 20th March 2003 which the Court of Appeal halted. The client was dissatisfied with the dismissal of his election petition so he instructed the advocate/applicant herein to file Meru HCCA 272 of 2003. However, their relationship soured and on 7th April 2008 the advocate threw in the towel by advising the client to get another advocate to act for him which the client obliged by instructing his present advocates Gitonga Kamiti Kairaria & Company to represent him in the said appeal.

25. And while that was happening, the advocate sought to have his bill of costs taxed in the High Court as ordered by the Court of Appeal, after losing his bid in the Supreme Court to have his application certified on a question of general public importance. It is of importance to note that the Court of Appeal awarded costs to the client following an unsuccessful bid by the advocate to challenge the High court decision vide CA 17/2003- Nyeri delivered on 25th November 2014.

26. with the above background, the question, therefore, is, whether the bill of costs dated 7th January 2016 and filed on 12th January 2016 is statute barred.

27. From the letter of 7th April 2008 written by the applicant, which fact is not denied, the applicant relinquished instructions to act for the client /respondent in CA 272/2003 at Meru , after which the client/respondent, vide letter of 13th May 2008 acknowledged the decision of the advocate and acting on that decision, identified Ms Gitonga Kamiti Kairaria advocates to represent him in the appeal. The client also dispatched to the advocate a cheque for shs 80,000 being balance of advocate's fees. The advocate acknowledged the client's letter dated 13th May 2008 vide letter dated 29th July 2008 by writing to Gitonga Kamiti Kairaria advocates to among others that, ".....Kindly to take over the matter and do the needful." The letter was copied to the client.

28. According to the advocate, the bill of costs is not statute barred because it is premised on a judgment of appeal which was CA 17/2013 at Nyeri, in which payments for the election petition and the appeal against dismissal of the petition were included in the grounds of appeal and also in the record of appeal; and that the said inclusion of fees is by necessary implication an acknowledgement of the fees sought to be taxed in the bill of costs hereof as provided for in Section 23(3) of the Limitation of Actions Act. The advocate also talks of a mutual agreement and part payment.

29. I have examined all the annexures to the advocate's replying affidavit to this preliminary objection. I do not find any single document wherein there was mention of part payment or even mutual agreement for settlement of the advocate's legal fees in CA 272/2003, subject matter of this preliminary objection.

30. In addition, I have examined the advocate/client bill of costs dated 7th January 2016 and filed in court on 12th January 2016. What I find in item I is instructions fees to file CA 272/2003 and no other case. From the said itemized bill, the last date when the advocate took some active role in the matter was on 20th February 2009 at item 62 that of writing the letter dated 20th February 2009 to client's new advocates.

31. In my humble view, the bill of costs being founded on a contractual relationship between the advocate and client, which relationship ended in 2008 with the advocate ceasing to act for the client in the CA 272/2008 and passing on the responsibility to a different advocate without seeking and obtaining any undertaking for his costs in the matter to be paid after the appeal is determined, the advocate could only claim for his fees before expiry of 6 years, thus, by 2014. The advocate, regrettably, did not lodge his bill within the said 6 years. Consequently, the bill is undoubtedly

statute barred as stipulated in Section 4(1) (a) of the Limitation of Actions Act , Cap 22 Laws of Kenya.

32. Although the work which the advocate was retained to do was not completed by him, nonetheless, the advocate on his own accord terminated the retainer in respect of such work by asking the client to engage another advocate which the client did. Accordingly, any claim filed by advocate more than 6 years after termination of the retainer is by virtue of Section 4(1) (b) of the Limitation of Actions Act statute barred. (see also **HC Misc App 527/2011 Nairobi ABINCHA & COMPANY ADVOCATE V TRIDENT INSURANCE COMPANY LTD.**

33. In my view, Section 23(3) of the Limitation of Actions Act is inapplicable in this case. It provides:

“ where a right of action accrued to recover a debt or other liquidated pecuniary claim (sums owed to the advocate) and the person liable or accountable acknowledges the claim or makes payment in respect of it, the right accrues on and not before the date of acknowledgement or the last payment.

34. In addition, Section 4(4) of the Limitation of Actions Act cannot come to the aid of the advocate/applicant. The said Section provides:

“4(4) An action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

35. Although the advocate/applicant claims that his bill of costs dated 7th January 2016 is premised on the outcome of the appeal and that therefore the period of limitation is 12 years and further, that the bill was filed 3 years before elapse of that 12 years period, as already stated, the advocate did not represent the client in the CA 17/2003 at Nyeri to the end. Further, it is the advocate who terminated the client's retainer before the appeal could be heard and determined. And since the advocate did not get any undertaking from the client that the advocates fees would be paid after the determination of the appeal or that the client would not plead the statute of limitation, it was incumbent upon the advocate to lodge his bill of costs against the client before the expiry of 6 years from the date when the advocate ceased acting for the client which, in this case, was by letter dated 7th April 2008 and followed by the letter of 29th July 2008 to Gitonga, Kamiti Kairaria advocates urging the latter advocates to ***“ take over the matter and do the needful.”***

36. In this case, there is also no evidence that the client acknowledged owing the advocate any fees in respect of Nyeri CA 272/2003 for which the bill of costs relates. Further, there is absolutely no evidence that the client made any part payment of the said legal fees in CA 272/2003 Nyeri on demand by the advocate.

37. There is also no evidence of any mutual understanding or agreement for costs in CA 272/2003 as alleged by the advocate/applicant, for the services rendered in the said appeal.

38. Accordingly, I find that the respondent/client's preliminary objection was well taken and hold that the bill of costs between advocate and client dated 7th January 2016 and filed in court on 12th January 2016 respecting services rendered in CA 272/2003 was based on a contract between client and advocate and was filed after expiry of 6 years from the date when the advocate lawfully terminated his retainer with the client/respondent in 2008. It is therefore statute barred by virtue of Section 4(1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya. Accordingly, the same is truck out costs to the client /respondent.

39. Dated, signed and delivered at Nairobi this 21st day of September 2016.

R.E. ABURILI

JUDGE

In the presence of:

Mr Kairaria for the Respondent/client

Mr Senteyo h/b for Mr Wawire for the applicant/advocate

CA: Adline