REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 59 OF 2015

IN THE MATTER OF ADVOCATES ACT CHAPTER 16 OF THE LAWS OF KENYA AND THE ADVOCATES (REMUNERATION) (AMENDMENT) ORDER 1997

MERCY NDUTA MWANGI T/A

MWANGI KENGARA & COMPANY

ADVOCATES.....ADVOCATE /RESPONDENT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/APPLICANT

RULING

The Application

The Applicant herein who is the Advocate's Client, has filed a Notice of Motion dated 27th April 2017 seeking orders that the Bill of Costs herein be struck out and dismissed for being in contravention of section 48 and section 45(6) of the Advocates Act, and for being time barred under section 4 of the Limitation of Actions Act. The grounds for the application are that there exists a fee agreement between the Advocate and the Client which renders the Bill of Costs otiose, and that the Advocate has been paid a sum of Kshs. 17,013,237 million in honour of the said agreement which remains unaccounted for, and which has not been acknowledged. Further, that the Bill of Costs herein is null and void within the provision of section 4 of the Limitation of Actions Act, having been filed more than 7 years after the finalization of the primary suit, and since the relationship between the advocate and client is contractual and within the provisions of Law of Contract Act.

Paul Gichuhi, a former Claims and Legal Manager of the Applicant swore a supporting and further affidavit on 27th April 2016 and attached the said agreement entered into with the Respondent dated 19th October 2006. He deponed that in the month of October 2006, the Respondent rendered a comprehensive schedule of 300 cases where she was on record for the Applicant, and reduced the fee demand into an agreement wherein she duly acknowledged receipt of Ks.h 3,572.821/- on account, and also confirmed the total fees due to her at Ksh 8,223,179/-, which she demanded be settled at Ksh 800,000/ = per month as a condition for her continued conduct in the said three hundred matters .

Further, that between the months of October 2006 and December 2007, the Applicant in performance of its contractual obligation under the aforesaid agreement paid to the Respondent a further Ksh 8,551,661/-, bringing the total payment on account of the same agreement at Ksh 12,124,482/-. In addition, that the

Applicant within the same period, further paid the Advocate / Respondent a total of kshs 4,480,801/= without reference to any particular case, which the Respondent contends constitutes payments on account and without any consideration. Therefore, that the Respondent has received a total of Ksh 17,013,237/- from the Applicant during the period under reference, and which amount is Ksh 4,809,283/- in excess of the total fees acknowledged as owed to the Respondent in the aforesaid Agreement. The Applicant annexed a schedule of the payments made to the Respondent.

The Respondent who is the Applicant's Advocate, filed a replying affidavit thereto that she swore on 10th May 2016, wherein she deponed that the Applicant's application is *sub judice* and in abuse of the process of Court. She referred to the rulings made in **Muranga H.C Misc Application No. 49 of 2013- Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited, H.C.C.A NO. 65 OF 2015 - Invesco Assurance Company Limited Versus Mwangi Keng'ara & Co. Advocates, H.C.C.C NO 504 of 2013 (OS)- Invesco Assurance Company Limited Versus Mwangi Keng'ara & Co. Advocates** and **Milimani H.C Misc. No 245 of 2015- Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited**, and gave detailed summaries thereof, and further stated that the issue of the fee agreement and the accounting of over Kshs 20,000,000/= allegedly paid to the Respondent were decided on.

According to the Respondent, the subject of the taxation are instructions and work done in **Machakos PMCC No. 400 of 2004,** and he has not been paid the alleged sum of Kshs 17,013,237/= on the basis of the agreement of 19th October 2006, whose terms were explicit, together with the matters that it related to. It was also averred that the Bill of Costs was timeously filed, in light of the fact that the last services to be rendered by the Advocate to the client was on 15/3/2007. Further, that in a n y event the client was placed under statutory management on 1/3/2008, when it obtained orders in High Court of Kenya in H.C.C.C No. 318 of 2008, staying running of time for purposes of limitation of action act and the said orders remained in force until 15/ 11/201 2, and also obtained orders in H.C.C.C NO 1178 of 2007, wherein all proceedings that had taken place during the moratorium were declared null and void. The Respondent attached copies of the said orders.

The Issues and Determination

The Applicant's application was canvassed by way of written submissions. The Applicant's learned counsel, Gichuki King'ara & Co Advocates filed submissions dated 30th November 2016, while the Respondent filed submissions dated 7th December 2016. The issue before the Court for determination are three, firstly whether the Applicant's application is *sub judice* or *res judicata* and in abuse of the process of court, secondly whether there was an agreement as to fees as between the Applicant and Respondent, and if so, its effect on the Respondent's Bill of Costs, and lastly, whether the Respondent's Bill of Costs is time barred.

On the first issue, the Respondent submitted that the Applicant has raised matters similar as those raised in the cases stated in the Respondent's pleadings between the same parties and the same subject matter, and relied on sections 6 and 7 of the Civil Procedure Act and the decision in the case of **Kiama Wangai vs John N. Mugambi & Another , [2012) eKLR**, and other judicial decisions for the position that the Applicant's application was in abuse of the process of court, and that this Court lacks jurisdiction to hear the application on account to entertain litigation on the issue of the agreement of 19th October 2006 or the scope of the fees payable thereunder.

Sections 6 and 7 of the Civil Procedure Act prohibits a court from hearing a matter that is *sub judice* or *res judiciata* as follows:

> "**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed…..**

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.;"

I have perused the pleadings and ruling in **Muranga H.C Misc Application No. 49 of 2013- Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited** and **H.C.C.C NO 504 of 2013 (OS)- Invesco Assurance Company Limited Versus Mwangi Keng'ara & Co. Advocates** and note that although the issue of the agreements was raised therein, there was no definitive findings made therein on the issues raised in the in the present case.

The issues were raised in a preliminary objection and not substantively dealt with in the former case , and the Court in the latter case did not make a definitive finding other than affirm the existence of the agreement between the parties, and ordered that the parties proceed to taxation. Likewise in **Milimani H.C Misc. No 245 of 2015, Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited**, J. Ochieng only ruled on the existence of the agreement and declined to rule on other issues raised therein including the issue of whether the Bill of Costs were time barred on account that the same were pending in another case. Further, in **H.C.C.A NO. 65 OF 2015 - Invesco Assurance Company Limited Versus Mwangi Keng'ara & Co. Advocates** the issue was different as it concerned stay of execution proceedings. I cannot therefore in the circumstances find this application to be *sub-judice* or *res judicata*

On the second issue on the effect of the agreement on fees, the Applicant submitted that there was an agreement dated 19th October 2006 between the Applicant and Respondent which was a valid Agreement, legally recognized and binding upon the two parties. Reliance was placed on section 45(6) of the Advocates Act that the costs of an advocate in any case where an agreement has been made fixing the amount of the advocate's remuneration shall not be subject to taxation nor to section 48 of the Act.

Various judicial decisions were also cited in support of the position that that the Respondent has filed the Bill of costs herein in contravention of the provisions of Section 45(6) of the Advocates Act, including **Omulele & Co. Advocates vs Synresins Limited [2013] e KLR,** and **D. N. Njogu & Co. Advocates v National Bank Of Kenya Limited [2007] eKLR.** It was also submitted that at the time of lodging the Bill of costs, no such notice was issued, and therefore the Bill of Costs is prematurely filed before complying with the mandatory provisions of Section 48 of the Advocates Act.

The Respondent on the other hand submitted that Applicant has not pointed out to the Court clauses in the agreement dated 19th October 2006 that bars the bill of costs herein from being taxed, or a clause which conforms to Section 45 (a) of the Advocates Act and which fixed the maximum amount of the Advocates Remuneration for services rendered in the current matter. Reliance was placed on clause 4 (a) , (d) and (h) of the said agreement for the position that the fees of Kshs 39,320/= provided in the said agreement was basic or the lowest legal fees and not final, and that the agreement expressly gave the advocate the right to tax his bill where the accrued fees exceeded the basic fees.

The decisions in **Omulele & Co. Advocates vs Synresins Limited, [2013] e KLR**, and **D. N. Njogu & Co. Advocates v National Bank Of Kenya Limited, [2007] eKLR** were distinguished on the ground that the agreements therein provided for maximum legal fees . Reliance was placed on the decision in **Ahmednasir Abdikadir & Company Advocates vs National Bank Kenya Limited, (2006] eKLR** that the Applicant ought to have filed a suit for a declaration that there were no more fees due from it.

It was further submitted that the procedure for taking of accounts of monies allegedly paid pursuant to an agreement is laid down under Order 52 rule 4 (1), and that section 48 of the Advocates Act was inapplicable for reasons that the bill of costs herein was instituted pursuant to the provisions of paragraphs 13 and 69 of the Advocates Remuneration Order, and that section 48 applies to filing of suits and does not apply to matters filed under paragraph 13. Reliance was placed on the decision in **M.G**

<u>Sharma vs Uhuru Highway Development Company Limited,</u> Nairobi Court of Appeal No 133 of 2000 in this regard.

In order to determine the issue as to whether the agreement entered into between the Applicant and the Respondent falls within Section 45 (6) of the Advocates Act, this Court will first examine the application of section 45 before undertaking an examination of the relevant clauses of the said agreement.

Section 45 of the Advocates Act in this regard 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.**
>
> **(2) A client may, apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order–**
>
> **(a) that the agreement be upheld; or**
>
> **(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or**
>
> **(c) that the agreement be set aside; or**
>
> **(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.**
>
> **(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.**
>
> **(3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof:**
>
> **Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.**

4) Where any agreement made by virtue of this section is made by the client as the guardian or committee of, or trustee under deed or will for, any person whose property will be chargeable with the whole or any part of the amount payable under the agreement, the advocate shall, before payment thereunder is accepted or demanded and in any event within six months after its due date, apply by chamber summons to the Court for approval of such agreement, and every such application shall be dealt with in accordance with subsection (2).

(5) If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.

(6) Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48."

In this respect it is notable that section 45 (3) of the Advocates Act allows for taxation of costs in contentious business but with respect to other persons other than an Advocate, and it is evident that where an agreement fixing remuneration is in place, the costs of an Advocate shall not be subject to taxation except upon application under section 45(2) which is when the Court can order that the costs be taxed.

In the present application, clause 4 (a) of the agreement entered into between the Applicant and Respondent on 19th October 2006, fixed the remuneration payable to the Respondent by the Applicant as follows:

"THAT save for matters where the bills of costs are already pending in court and/or taxed, which are excluded herefrom, the basic legal fees in the Three Hundred cases /claims (300) filed in various courts contained in the schedule of claims attached hereto currently in the conduct of the Advocate shall be as follows:-

Instruction Fees Kshs 27,000/=

VAT at 16% Kshs 4,320/=

Disbursements Kshs 8,000/="

The argument that the term basic in the clause meant the minimum fees is accepted by the Court as the ordinary meaning of basic is that it is the simplest or lowest in level. Therefore the intention of the parties was that the Respondent could charge for higher fees for a case, and which was expressly provided for in the said agreement at Clause (h) which provided as follows:

"**THAT the ADVOCATE shall further to (g) above be entitled to go to taxation where accrued fees exceeds what is provided in 4 (a)".**

It is therefore my view that Clause 4(h) of the agreement allowed the Applicant to file Bills of Costs in applicable cases, and the present case is one such case as the amount billed exceeded the basic fees provided for in clause (a). It is also my view that the parties had the freedom to contract out of the provisions of section 45(6) of the Advocates Act as regards taxation in the context of their agreement, and that upon the Applicant bringing this application to Court, the powers granted to the Court under section

45(2) are available and can be exercised to allow for the taxation of the Respondent's Bill of Costs .

On the alleged contravention of section 48 of the Advocates Act, the said section provides as follows:-

> '**(1) Subject to this Act no suit shall be brought for the recovery of any costs due to an advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the Court's jurisdiction, in which event action may be commenced before expiry of the period of one month.**
>
> **(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.**
>
> **(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."**

It is evident that the said section refers to actions for recovery of costs and not to taxation of bill of costs, which is the subject matter of the current application, and for which the applicable procedure is set out in the Advocates Remuneration Order.

On the last issue, the Applicant relied on section 4(1) of the Limitation of Actions Act and the decision in **Gichuki King'ara and Company Advocates vs Mugoya Construction and E ngineering L imited, Misc. Application No.625 of 2009** for the position that the relationship between an advocate and a client is contractual and subject to the Law of Contracts Act section 2(1) and that the same creates a contract for service which is enforceable within six (6) years under Section 4 of the Limitation of Actions Act.

Further, that the Advocate's Bill of costs was filed after a period of more than seven (7) years had lapsed upon conclusion of the matter. Reliance was placed on **Harlsbury's Laws of England (4thEdition), V 44(1) pgs 114-119** for the various ways in which a retainer can be terminated including by completion of business, change of advocates, withdrawal, incapacitation of either party, lapse of time and frustration of the contract.

The Applicant also cited the decision in **Abincha & Co. Advocates Vs Trindent Insurance Co. Ltd, (2013) eKLR,** that a retainer is essentially a contract for professional service between an Advocate and Client which is subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act, and that time begins to run from the date of completion of the work or lawful cessation of the retainer.

The Respondent's submissions on the issue of limitation was that the Applicant is stopped from pleading the defence of limitation of time over the time it enjoyed the protection of the court orders of moratorium it obtained in H.C.C.C No 318 of 2008 and 1178 of 2008.

Section 4(1) of the limitation of Actions Act in this regard 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".

In **Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879** it is stated as follows as regards of recovery of costs by a solicitor: –

" In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action; if a solicitor sues for his costs in an action, 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;

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;

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 the statute.

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.

A solicitor cannot sue a client for costs until the expiration of one month after 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. If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance."

A perusal of the Bill of Costs shows that the last service delivered by the Respondent before the filing of the Bill of Costs was on 15th March 2007 when the Respondent sought instruction fees for defending the Applicant in CMCC No. 135 of 2004. The Bill of Costs was filed on 14th April 2015, eight years later. It would therefore appear that the work that the Respondent was instructed to undertake by the applicant was finalized more than 6 years ago, and 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.

However, the Applicant did not bring any evidence of the end of the Respondent's retainer in this respect, or evidence of when judgment was entered in the primary cause. The Respondent in my view also benefits from the evidence he produced of the moratorium imposed on the Applicant's cases after the Applicant was placed under statutory management on 1/3/2008, when it obtained orders in the High Court of Kenya in H .C.C.C NO 318 of 2008 until 15/ 11/201 2, and of the orders in H.C.C NO 1178 OF 2007, wherein all proceedings that h ad taken place during the moratorium were declared null and void.

I am of the view that the effect of the said orders was to also stay the running of time for purposes of the Limitation of Action Act, as a moratorium is in effect an authorized postponement of performing a legal obligations for the affected parties, including the obligations set out in the Limitation of Actions Act. The Applicant in this respect cannot have his cake and eat it by benefiting from the moratorium and at the same time seeking that the Respondent does not benefit from the same. For these reasons I do not find that that the Bill of Costs filed by the Respondent was time barred.

The Applicant Notice of Motion dated 27th April 2016 is accordingly found not to have merit and is dismissed for the above reasons.

Dated, signed and delivered in open court at Machakos this 21st day of December 2016.

P. NYAMWEYA

JUDGE