



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

MISC. CIVIL APPL. 175 OF 2007

GACHIRI KARIUKI & CO. ADVOCATESAPPLICANTS

Versus

INVESCO ASSURANCE CO. LTD.....RESPONDENTS

RULING

1. By a notice of motion under section 51(2) of the Advocates Act section 3 of the Civil Procedure Act Order 51 Rule 1 of CPR the applicant MS GACHIRI KARIUKI & CO. ADVOCATES applied for order

That judgment be and is hereby entered in favour of the applicant against the respondent for the sum of Ksh. 101044 plus interest thereon at Ksh. 14% per annum for 30 days of November 2007 until payment in full together with cost of this application.

2. It was supported by the affidavit of JOHN GACHIRI KARIUKI sworn on 14th November 2013 in which he deponed that the respondent on 30th July 2004 instructed his firm to defend its interest and that of its insured in Nyeri CM No. 698 of 2005 and on 21st February 2007 the applicant issued the respondent with a fee note that was not settled.
3. On 23rd November 2007 the applicants bill of cost was taxed at Ksh. 101,044 and the certificate of cost has not been challenged.
4. In response to the said application the respondent filed a notice of preliminary objection on the following grounds:

1. The application is incompetent and an abuse of the court process.

2. The honourable court has no jurisdiction to hear and determine an application for summary judgment in a miscellaneous case.

3. The application has no substance upon which to be grounded.

4. The application is time barred under the advocates Act and limitations of Actions Act.

5. In response to the said preliminary objection the applicant filed written submissions on 10th February 2014 in which it was submitted that the application is filed under the proper provisions of Law being section 51(2) of Advocates Act seeking to enforce certificate of cost. It was further submitted that under Article 165(3)(a) of the Constitution the honourable court has jurisdiction in

- all civil and criminal matters.
6. It was further submitted that under section 4 of Limitation of Actions Act an action may not be brought upon judgment after the end of twelve years and that since the application is premised on the certificate of cost by the Deputy Registrar which has not been set aside the true state to run from the date of the certificate in support of the application the applicant relied upon EVANS THIGA GATURU ADVOCATE vs KENYA COMMERCIAL BANK LTD HCC NO. 343 OF 2011 NAIROBI where justice G.V. ODUNGA held that where the client and advocates cost have been taxed and a certificate issued the only bar to the entry of judgment is if there is a dispute as to the retainer and that judgment would be entered by way of notice of motion.
 7. Reliance was also made upon the case of NYAMOGO & NYAMOGO ADVOCATE v JOSEPH MWANGI (2008)eKLR NYERI HC. MISC. 200 OF 2006 where justice Mary Kasango stated that the advocate remuneration order has set elaborate procedure for objection to taxed cost.
 8. On behalf of the respondent Miss Kimere made oral submissions and submitted that on the authority of Misc. No. 62 of 2009 where the court stated that the relationship between an advocate and a client is contractual and therefore six years limitation period under section 4 of Limitation of Actions Act applies, it was submitted.
 9. It was further submitted that the applicant should have filed a fresh suit for enforcement of the certificate of cost in support thereof case of CYRUS MINDA t/a MINDA & CO ADVOCATES v YUNES KERUBO ORUTA KISII HIGH COURT E &L MISC. APPL. NO. 247 OF 2012 was used.

ISSUES.

10. From the submissions herein the court has identified the following issues for determination.

a) Whether the court has jurisdiction to determine an application for summary judgment in a miscellaneous cause.

b) Whether the application is time barred under the advocates Act and Limitation of Actions Act.

11. Advocates Act provides for two ways under which the bill of cost may be enforced. Section 48 (1) of the Advocates Act provides as follows:

48(1) subject to the Act no suit shall be brought from the recovery of any cost due to an Advocates or his firm unless the expiry of one (1) month after a bill for such cost which 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 there with is about to leave Kenya or abscond from the local limits of the court jurisdiction.

12. Section 51(1) provides that every application for an order for the taxation of an advocate bill or for delivery of such bill..... shall be made in the matters of Advocates while sub article (2) provides that the certificate of the taxing officer by whom any bill has been taxed shall unless it is set aside or altered by the court be final as to the amount of cost covered thereby and the court may make such order in relation thereto as it thinks fit, including in a case where the retainer is not disputed an order that a judgment be entered for the sum certified to be due with cost.

13. From a reading of the two sections of the Advocates Act it is clear that where there is no dispute as to a retainer and the certificate of cost has not been set aside or altered by court, then court has jurisdiction to make any orders including summary judgment in a miscellaneous application. In this I find support in the ruling by Ringera J as he then was in the case of HEZEKIA OGAO ABUYA t/a ABUYA & CO ADVOCATES vs KIGURU FOOD COMPLEX LTD HCCC APPL. NO. 400 OF 2001 NAIROBI MILIMANI where the judge had this to say.

“An Advocate duly instructed is retained and where there is no dispute that the advocate was duly instructed by the client in any matter, the retainer cannot be disputed... it matters not that the instructions were given on behalf of some one else..... As the

certificate of taxation has not been set aside or altered by court and as there is no dispute with regards to the retainer, it is not necessary for the Advocate to file suit by plaint for recovery of his duly taxed cost” emphasis added.

14.The above position also finds support in the decision by justice Odunga relied upon by the applicant in the case of EVANS THIGA GATURU ADVOCATE v KENYA COMMERCIAL BANK LTD HCCC NO. 343 OF 2011 NAIROBI when the judge at page 17 had this to say

“In my view where an advocates cost have been taxed and a certificate issued, the only bar to the entry of judgment is if there is a dispute as to the retainer”.

The learned judge therefore proceeded and entered judgment in a misc. application.

15.I therefore find no merit on the preliminary objection that this court has no jurisdiction to enter summary judgment and therefore dismiss the same.

16.On the issue of Limitation, whereas it is true that the relationship between an advocate and a client is contractual and that the limitation period of six years is applicable, this may be raised at the taxation level. Once the bill of cost has been taxed it becomes a judgment of the court and therefore section 4 of Limitation of Actions Act which provides for 12 years is applicable.

17.I therefore find no merit on the preliminary objection herein and will therefore dismiss and enter judgment in favour of the applicant herein for the taxed amount together with cost and interest at the rate of 14 % p.a.

18.This ruling shall apply to Misc. Application Nos. 174 of 2007, 169 of 2007, 168 of 2007, 156 of 2007 and 159 of 2007.

Dated, signed and delivered at Nyeri this 13th day of June 2014.

J. WAKIAGA

JUDGE

13/6/2014

Coram: Before Justice J. Wakiaga

court clerk - Ndungu

Miss Kimere for the respondent.

Mr. Warutere for the applicant.

Court: The ruling is read in open court in the presence of the above named. This ruling applies to Misc. Nos. 174 of 2007, 169 of 2007, 168 of 2007, 156 of 2007 and 159 of 2007.

J. WAKIAGA

JUDGE