



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 31 OF 2013

WASHINGTON NYAKONGO ODONGO

T/A NYAKONGO ODONGO

 PLAINTIFF

-VERSUS-

TASHA ENTERPRISES (K) LTD

 DEFENDANT

RULING

1. By an ex parte Notice of Motion expressed to be brought under sections 4(1) and 31 of the Limitation of Actions Act and section 51 (1) of the Advocates Act, the applicant seeks the leave of court *“to bring suit in a court of law to recover his taxed costs of Ks. 126,800/- taxed on 20th December 2012 in Kisii HC. Misc. Cause no. 274 of 2012 as between Advocate/client”*.
2. The applicant’s case is that he had acted for the client respondent in objection proceedings before the Nairobi HCCC NO. 1755 of 1997 but *“that without reasonable cause the respondent withdrew instructions from me on 21st December 2006 as per agreed note dated the same and gave the same matter to another advocate...”*
3. The applicant contended at paragraph 7 of the supporting affidavit *“that I am not badly out of time or the same claim is not presented with excessive delay as the cause of action arose on 21st December 2006 and the delay to prosecute claim has been occasioned by the respondent request for indulgence in the matter to settle the Bill.”*
4. The advocate/applicant is obviously referring to the 6-year limitation of actions in relation to contract under section 4(1) of the Limitation of Actions Act, which period would have expired on the 20th December 2012 and hence the submission that he was ‘not badly out of time’.
5. However, there is no power to extend time with respect to claims in contract under section 28 of the Limitation of Actions Act, which provides for extension for reasons set out in section 27 of the

Act. As held by Githinji, J. (as he then was) with whom I agree, in *Nzoia Sugar Company Ltd. v. Kenya Ports Authority (1990) KLR 319* –

“Part III of the Limitation of Actions Act provides for extension of the limitation period in three instances:

- a. **As provided in section 22, in the case of disability**
 - b. **As provided in section 26, in the case of fraud or mistake**
 - c. **As provided in section 27, in the case of ignorance of material facts in an action for negligence.”**
6. As provided for in section 39 of the Limitation of Actions Act –

“39.(1) A period of limitation does not run if –

- a. **There is a contract not to plead limitation; or**
- b. **That the person attempting to plead limitation is estopped from so doing.**

(2) For the purposes of subsection (1), ‘estopped’ includes estopped by equitable or promissory estoppel.”

7. I consider that where a client retains an advocate to represent him in court proceedings and who later withdraws instructions and request the advocate to sign consent form for the transfer of instructions to another advocate with a promise to pay and subsequent plea for time to enable him settle the advocate’s Bill of Costs is liable to pay the reasonable costs either agreed between the parties or as taxed by the taxing officer of the court for the services rendered and he is estopped from relying on limitation on the principle of unjust enrichment.
8. That this should be so is reinforced by the provisions of section 48(3) of the Advocates Act which permit the taxing of Bill of Costs notwithstanding lack of a suit for recovery of such costs. Additionally, under section 51 (2) of the Advocates Act, the court is at liberty to enter judgment for the sum certified to be due upon a certificate of the taxing officer by whom a bill of costs has been taxed.
9. Accordingly, I find that the limitation period with regard to the cause of action herein did not run as the respondent was estopped by his own conduct in requesting the advocate to consent to the change of advocates and subsequently promising to pay and requesting for time to settle the Bill of Costs.
10. For this reason the applicant’s application for leave filed *ex abundanti cautela* is unnecessary.
11. For avoidance of doubt, I make an order that the plaintiff is at liberty to file suit to recover the taxed advocate/client Bill of Costs herein.

Dated and delivered this 26th day of APRIL 2013.

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EDWARD M. MURIITHI

JUDGE

In the presence of: -

..... **for the Plaintiff**

..... **for the Defendant**

Mr. Karlbean Mobisa - Court Clerk