



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC APPLICATION NO 527 OF 2011

ABINCHA & CO., ADVOCATES.....ADVOCATE

VERSUS

TRIDENT INSURANCE CO LTD.....CLIENT

RULING

1. The Advocate filed herein his **advocate/client bills of costs dated 8th December 2011**. Before the bill could be taxed the Client challenged it by **notice of motion dated 20th February 2012** which in essence sought an order to strike out the bill of costs upon the ground that the Advocate's claim for costs, "being a claim founded on a contract for provision of legal services, falls within the purview of section 4 of the Limitation of Actions Act, and is therefore time-barred". In the alternative and without prejudice the Client claimed estoppel, in essence to the effect that the Advocate had raised a fee note upon conclusion of each matter in which he acted for the Client, and the Client paid the same; and that the Advocate was therefore estopped from claiming additional fees.

2. The application also contained a prayer for **consolidation** of this matter with 29 other miscellaneous applications (apparently where the Advocate had filed similar advocate/client bills of costs) "for hearing and determination as the points of law raised in this application apply to all of them".

3. The application was stated to be brought under **section 48(1) of the Advocates Act, Cap 16, section 4 of the Limitation of Actions Act, Cap 22** and "all other enabling provisions of the law". It was supported by an affidavit sworn by one **Martin Bett**, a legal officer of the Client.

4. The Advocate opposed the application by his replying affidavit sworn on 5th March and filed on 24th April 2012. He deponed, *inter alia* –

(i) That his fees for work done are governed by the Advocates Act and are not subject to the Limitation of Actions Act.

(ii) That the fee notes that he had submitted to the Client, and which had been paid, were interim, not final.

6. The application was canvassed by way of written submissions before a Deputy Registrar of the Court: it is not indicated whether in the capacity of Taxing Officer or merely as Deputy Registrar of the Court. The Client's submissions were filed on 15th March 2012 while those of Advocate were filed on 24th April 2012.

7. In a ruling dated and delivered on 10th August 2012 the Deputy Registrar dismissed the Client's application. He held, *inter alia* –

(i) That the Limitation of Actions Act is not applicable to taxation of bills of costs. Further, the issue of limitation is irrelevant as there was no suit for recovery of costs after taxation; what was before the court was an application for assessment of costs.

(ii) That the issue, whether the Advocate had already been paid his full fees for work done, is an issue to be determined at taxation through evidence.

8. It was also stated in the ruling that the prayer for consolidation had been compromised to the effect that the ruling would apply to all the other matters mentioned in the application.

9. The Client then filed **chamber summons dated 19th September 2012** which is the subject of this ruling. The application seeks an order to set aside the aforesaid ruling and orders of the Deputy Registrar of 10th August 2012. It is expressed to be brought under **paragraph 11(2) of the Advocates (Remuneration) Order**. There is a supporting affidavit annexed to the application which in essence argues the application.

10. The Advocate opposed the application by his **replying affidavit sworn on 14th and filed on 18th January 2013**. Grounds of opposition emerging therefrom include-

(i) That the application is defective and bad in law as there was no taxation.

(ii) That the Deputy Registrar's findings were good and within the law.

(iii) That in any event the Client ought to have appealed, not file a reference against a taxation that never was.

11. The application was canvassed orally. I have considered the submissions of the learned counsels appearing. They also relied upon their respective written submissions filed before the Deputy Registrar, which I have also considered.

12. There are two important jurisdictional and procedural issues that must be determined first. They are -

(i) Whether the Deputy Registrar had the necessary jurisdiction to hear and determine the main prayers in the notice of motion dated 20th February 2012 (whether the Advocate's bill of costs was statute-barred and whether the Advocate was estopped from seeking more costs from the Client)?

(ii) Whether the present application (chamber summons dated 19th September 2012) is the proper way to challenge the Deputy Registrar's ruling and orders of 10th August 2012?

Only if the matter goes beyond these two issues will the application at hand be decided upon its own merits.

Did the Deputy Registrar have jurisdiction to hear and determine the main prayers of the notice of motion dated 20th February 2012?

13. As already noted, the notice of motion dated 20th February 2012 was stated to be brought under section 48(1) of the Advocates Act and section 4 of the Limitation of Actions Act.

14. Section 48(1) of the Advocates Act provides for actions for recovery of advocates' costs while section 4 of the Limitation of Actions Act prescribes limitation periods in actions founded on contract, tort and certain other actions.

15. If the Deputy Registrar heard the matter as such, not as a Taxing Officer, the application was clearly outside the ambit of **Order 49, rule 7(1)** of the **Civil Procedure Rules** that sets out applications that a Deputy Registrar of the Court may hear and determine.

16. What if the Deputy Registrar heard the application as Taxing Officer of the Court? The jurisdiction of a taxing officer is to tax the bill of costs before him. His powers set out in **paragraph 13A** of the Advocates (Remuneration) Order are in connection with taxation of the bill of costs before him. That paragraph states –

“13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.”

“Any matter in dispute before him” must mean any matter connected with or concerning the taxation of any item in the bill of costs. It cannot mean any issue that challenges the taxing officer's jurisdiction to tax the bill of costs.

17. The main issues raised in the notice of motion dated 20th February 2012 were challenging the Taxing Officer's jurisdiction to tax the bill of costs before him. Those issues were whether the Advocate's bill of costs was statute-barred under the Limitation of Actions Act and whether the Advocate was estopped from claiming any further costs? Did the Taxing Officer have jurisdiction to deal with those issues?

18. Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax? I hold that it was an issue that could only be determined by a Judge. It is the kind of issue that the Taxing Officer, with the consent of both parties, should have referred to the opinion of the High Court.

19. Only after determination of that fundamental issue by the High Court, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate.

20. I therefore hold that even the Taxing Officer of the Court did not have jurisdiction to hear and determine the main prayers of the notice of motion dated 20th February 2012.

Is the present applications (chamber summons dated 19th September 2012) the proper way of challenging the decision of the Deputy Registrar/Taxing Officer of 10th August 2012?

21. As there was no taxation, there was nothing to challenge under paragraph 11 of the Advocates (Remuneration) Order. The decision challenged in the present application was not a decision on taxation. The present application is thus incompetent.

22. The decision could also not be challenged by an appeal under **Order 49, rule 7(2)** of the Rules as the Deputy Registrar's decision was not a decision under the Orders referred to in **subrule (1)** of rule 7. Perhaps the proper way to challenge the decision ought to have been by way of an application for review under **Order 45** of the Rules.

23. What is to be done now? Having held that the Deputy Registrar/Taxing Officer had no jurisdiction to hear and determine the main issues raised in the notice of motion dated 20th February 2012,

his decision of 10th August 2012 must be set aside. It is hereby set aside. And then what?

24. I hold the review that the proper thing to do, in the interests of justice and expediency, is to deal with the two issues raised in the notice of motion dated 20th February 2012, as if the issues had been referred to the High Court to deal with, as they should have been.

Was the Advocate's bill of costs time-barred under the Limitation of Actions Act?

25. 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. 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. In this connection see also **Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879 (page 452)** which states –

“879. Solicitor's Costs. In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending 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 termination of the action or of 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 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.”

26. The Client's case, with regard to the issue of limitation, is that apart from the deposit paid up-front by the Client as demanded by the Advocate on taking instruction in each matter, upon completion of the work in any such matter the Advocate presented to the Client a fee note that was settled; that it was not until eight (8) to eleven (11) years later that the Advocate presented the bills of costs in question; and that therefore the bills are caught by limitation.

27. The Advocate's answer has been that the various fee notes were never presented as final fee notes, and further, that the Limitation of Actions Act does not apply to advocates' costs.

28. As already seen, any claim or action for an advocate's costs is subject to the statute of limitation. As already seen also, time begins to run from the date of completion of the work or lawful cessation of the retainer. Time does not begin to run from the date of delivery of the bill! Section 48(1) of the Advocates Act therefore cannot offer any defence against limitation.

29. As to whether an advocate/client bill of costs is an action to recover costs, it clearly is. It will be remembered that upon a certificate of taxation being issued, all an advocate need do is apply for judgment under **section 51(2)** of the Advocates Act. In any case, why should parties go through taxation of a bill of costs if the costs thereby taxed cannot be recovered on account of the statute of limitation?

30. I therefore hold that any of the various bills of costs filed by the Advocate more than six (6)

years after completion of the work which he was retained by the Client to do, or after the lawful termination of the retainer in respect of such work, is statute-barred by virtue of section 4(1) (a) of the Limitation of Actions Act.

Would the Advocate in any event be estopped from now raising the bills of costs?

31. In respect to estoppel, the Client's case is that at the beginning of each matter in which the Client instructed the Advocate, the Advocate raised an interim fee note of KShs 5,000/00 which the Client paid; that upon conclusion of each matter the Advocate raised another fee note which the Client paid; that the Advocate never indicated that this second fee note was another interim fee note, and the same could only have been a final fee note; that the Client, believing that the issue of the Advocate's costs had been concluded, proceeded to close each concluded file and either sent it to the archives elsewhere or destroyed it altogether; and that it would thus be unacceptable and unfair for the Advocate to "turn around" after 8 to 11 years to present "final" fee notes.

32. Even if the statute of limitation did not apply to the Advocate's bills of costs (and clearly it does!) the Advocate having presented what appeared to be a final fee note upon completion of each brief, and the same having been paid by the Client who then proceeded to archive or destroy its related files, the Advocate is estopped in law and in equity from turning around, between 8 and 11 years later as the case may be, to raise "final" bills of costs.

33. The notice of motion dated 20th February 2012 is thus determined in favour of the Client. I will award costs in this Court and before the Deputy Registrar to the Client. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 26th DAY OF NOVEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 29TH DAY OF NOVEMBER 2013