



Wakini Kiarie & Company Advocates v Kenya Orient Insurance Co. Ltd (Miscellaneous Case 576 of 2019) [2023] KEHC 1770 (KLR) (Civ) (16 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1770 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CASE 576 OF 2019

AA VISRAM, J

MARCH 16, 2023

BETWEEN

WAKINI KIARIE & COMPANY ADVOCATES APPLICANT

AND

KENYA ORIENT INSURANCE CO. LTD RESPONDENT

RULING

1. This ruling relates to the respondent's preliminary objection dated March 2, 2021 against the applicant's Advocate-Client Bill of Costs dated August 15, 2019 ("the Bill of Costs") on the ground that the Bill of Cost is statute barred by virtue of section 4(1)(a) of the [Limitation of Actions Act](#), cap 22.
2. On February 15, 2023, this court gave directions that the preliminary objection be dispensed by way of written submissions. The applicant and the respondent both filed their submissions dated May 20, 2022 and May 17, 2022 respectively.
3. Counsel for the respondent submitted that the advocate received his initial instructions on January 31, 2006 in relation to a suit being CMCC No.13893 of 2005 ("the suit"), and that his last action was carried out on June 2, 2006. Nothing happened after that date for a period of 12 years.
4. The respondent submitted that in the bundle of documents that had been filed in support of the fees, there were only two letters, namely; a Notice of Taxation; and a second letter, dating back to 2008. These two letters could not revive the advocate's cause of action dating back to January 31, 2006.
5. The respondent submitted that the last action that the advocate had carried out was to peruse a letter dated May 31, 2006. No further action had been carried out after that. Counsel argued that the advocate accordingly had six years from May 31, 2006 to claim his fees. The present demand for fees



was 12 years after that date and hence, too late. He submitted that the Statute of Limitation had been enacted to protect a party who faced litigation after prolonged time had passed.

6. In support of the above argument, the respondent relied on the High Court case of *Kenya Orient Insurance Limited v Oraro & Company Advocates* (2017) eKLR where the court held inter alia as follows:

“It cannot be controversial that the relationship between the Advocates and the Client was contractual in nature. Again, there can be no dispute that the Advocates cannot bring a claim for fees against the Client after six years from the time to bring the Claim last accrued. What is critical for purposes of determining this dispute is the date when the clock started to tick ie. when time started running. On this, I am persuaded that the approach taken by Waweru J. in *Abincha & Company Advocates v Trident Insurance Co Ltd* [2013] eKLR is the correct one.”

7. In opposition to the preliminary objection, the applicant submitted that it received instruction from the respondent to defend its insured in the Suit, which was a work injury related claim, which instructions they duly executed.
8. With regard to the question of when time begins to run, counsel referred to the text in *Halsbury's Laws of England*, 4th Edition, Volume 28 at paragraph 879 on recovery of costs by a solicitor, which states as follows:

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

9. Counsel further relied on the High Court decision in *Abincha & Co. Advocates v Trident Insurance Co. Limited* (2013)eKLR, in support of his submission that time starts to run after the completion of work that the advocate was retained to carry out.
10. Further, that for section 4(1)(a) of the *Limitations of Actions Act* to apply in an Advocates-Client costs, the work must either be complete, or subject to lawful termination of the retainer. Counsel cited various examples of termination, which included: filing an application to cease acting by an advocate; the advocate being served with a notice of change of advocates; and by the client instructing the advocate that her services are no longer required.
11. The applicant submitted that none of the above had occurred. The law firm’s services had not been legitimately terminated; nor had judgment been recorded in the Suit.
12. Finally, counsel submitted that a retainer cannot be lawfully terminated by way of lack of communication for more than 12 years.



Analysis and Determination

13. The respondent has raised a Preliminary Objection opposing the applicant's Bill of Costs on the ground that it is time barred.

14. An objection on the ground that a matter is barred by the law of limitation of actions is ordinarily a pure point of law subject to the test in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* (1969) EA 696, where the court held as follows:

“so far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop.”

15. Additionally, the relationship between an advocate and his or her client is a contractual relationship which is subject to the Statute of Limitations.

16. The issue is, was the Bill of Costs time barred? The answer to this question lies in asking several further questions. Most importantly, when did the time start to run?

17. Justice Waweru in the case of *Abincha & CO Advocates v Trident Insurance Co. Ltd* [*supra*], considered this very question and quoted with approval, *Halsbury's Laws of England* 4th Edition Volume 28 page 452 at paragraph 879 where the learned authors state as follows:

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

18. Based on the above authority, it is clear to me that time begins to run only after the completion of work, or after the lawful termination of the advocate’s services. I ask myself, did either of these two events occur? Here, there are two different versions of events. The applicant submitted that to date, its instructions have never been validly terminated; nor has judgment been entered in the Suit. On the other hand, the respondent submitted that the last communication between the advocate and client was over 12 years ago, and time ought to run from the date of the last communication between the parties.
19. At this point, I go back to the test set out in the case of *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd (supra)*, and remind myself that a Preliminary Objection must first, raise a point of law based on ascertained facts and not on evidence.
20. Further, to the above, in Civil Suit No 85 of 1992, *Oraro v Mbaja* [2005] 1 KLR 141, Ojwang J, as he then was, stated as follows on the operation of preliminary objection: -

“... I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.”
21. In the present matter, several questions of fact have arisen. These questions include, inter alia: When was the advocate’s work completed? Was judgment ever entered in the Suit? Did the client ever lawfully terminate the advocate’s services? If so, how was this done?
22. It is not possible to answer the question of whether or not the Bill of Costs is time barred without first determining the factual issues presented above, which in turn may only be proved by way of evidence. Because facts need to be ascertained in order to make a decision, I am satisfied that the test *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd (supra)* cited above has not been met.
23. Based on the reasons above, I find that the respondent’s preliminary objection of 2nd March, 2021 is without merit and is dismissed with costs.
24. Consequently, I direct that taxation of the applicant’s Bill of Costs do proceed for taxation before the Deputy Registrar.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 16TH DAY OF MARCH 2023.

ALEEM VISRAM

JUDGE

