Kibuchi & Company Advocates v Kenindia Assurance Company Limited (Miscellaneous Application 703 of 2018) [2023] KEHC 3469 (KLR) (Civ) (20 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3469 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS APPLICATION 703 OF 2018

CW MEOLI, J

APRIL 20, 2023

BETWEEN

KIBUCHI & COMPANY ADVOCATES ..... APPLICANT

AND

KENINDIA ASSURANCE COMPANY LIMITED ..... RESPONDENT

RULING

1. Kibuchi & Co. Advocates (the Applicant) filed a Bill of Costs dated 14th December 2018 against Kenindia Assurance Company Limited (the Respondent). When the bill of costs came up for taxation, the Respondent raised a preliminary objection on grounds that the bill was statute-barred, the same having been filed outside the limitation period stipulated in Section 4(1) of the *Limitation of Actions Act*; that the Advocate's claim for costs being one based on a contract for professional services rendered in Nairobi CMCC No 5879 of 2004 (hereafter the primary suit), is time-barred as the said suit was finalized on 23.06.2009; and that the claim for costs lodged more than six (6) years after termination of the suit amounts to an abuse of the process of the court.

2. The preliminary objection was canvassed by way of written submissions. The Respondent asserted that the relationship between an advocate and client created through a retainer agreement was a contract for services which is enforceable within six (6) years after completion of the work as provided under section 4(1) the *Limitations of Actions Act*. While citing a host of decisions including *Abincha & Company Advocates v Trident Insurance Company Limited* [2013] eKLR, *Akide & Company Advocates v Kenindia Assurance Co. Ltd* [2017] eKLR, *Migos Ogamba & Co. Advocates v Kenindia Assurance Co. Ltd* [2021] eKLR and *Martin Mugambi Mithega t/a Mithega & Kariuki v Invesco Assurance Company Ltd* [2019] eKLR the Respondent emphasized that the primary suit was concluded on 23.06.2009, and that the Applicant filed the bill of costs on 20.12.2018, some nine years later. And

hence the claim was caught up by the six (6) year limitation period under statute. Consequently, it was counsel's submission that the bill of costs is statute barred and ought to be dismissed with costs.

3. Counsel for the Applicant in opposing the preliminary objection cited the decision in *Galaxy Paints Company Limited v Falcon Guards Limited* Court of Appeal Case No 2019 of 2018 and *Thermopack Limited v Joshua Bernard Awino* [2019] eKLR in contending that the objection raised by the Respondent was a mere technicality intended to help them escape making payment on costs due to the Applicant.

4. Counsel argued that the bill of costs was not time barred, while asserting that since the completion of the primary suit, the Applicant had sent countless demand letters to the Respondent for settlement of the fees. He took the position that the cause of action accrued from 18.10.2013, the date of the final demand to the Respondent, which demand letter was acknowledged. Thus, the filing of the bill of costs in 14.12.2018 was within the time prescribed by statute. In support of the submission, counsel called to his aid the decisions in *Shah & Parekh v Kenindia Assurance Company* [2019] eKLR and *Kibuchi & Company Advocates v Kenindia Assurance & Co. Limited* (Miscellaneous Civil Application 709 & 711 of 2018 (Consolidated)) [2022] KEHC 3051 (KLR) (Civ) to contend that pursuant to Section 24 (1) & (2) of the *Limitation of Actions Act* the final reminder/demand tentatively adjusted the accrual of rights which would have tentatively lapsed on 18.10.2019.

5. On the question whether the Bill of costs is an abuse of the court process, counsel argued that the same was filed in good faith pursuant to the legitimate expectation of entitlement of fees for work done. He concluded by stating that it would not be in the interest of justice for the Applicant to be denied the fruits of their labour having duly executed their professional responsibilities by representing the Respondent in the primary suit.

6. The court has considered the material canvassed in respect of the preliminary objection. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* (1969) EA 696, Law J. A. stated that:

> " 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 pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter 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, or occasion, confuse the issues, and this improper practice should stop."

7. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J (as he then was) reiterated the foregoing by stating that;

> " A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, 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.

> Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence."

8. The Court of Appeal in *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR cited with approval the decision of the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR where the latter court emphasized that: -

> "(16) It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law. (See *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, Civil Application No 14 of 2014, [2014] eKLR)."

9. The Respondent's preliminary objection is premised on Section 4(1) of the *Limitation of Actions Act*, which states as follows: -

> "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;
>
> (c) actions to enforce an award;
>
> (d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
>
> (e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law."

10. First, it is pertinent to observe that a preliminary objection based on limitation is not a technicality but a matter that goes to the root of the Court's jurisdiction; no court has jurisdiction to hear a matter that is time barred. The Court of Appeal in *Thuranira Karauri v Agnes Ncheche* [1997] eKLR held that:

> "We do not understand how the Judge could proceed with the trial without finally determining such an important point of jurisdiction and it is pointed out that as a general rule, a point or issue of limitation of time goes to the root of jurisdiction which this Court should determine at the first instance. Subsequently, that where a suit is time barred, the same is incompetent and consequently a court has no jurisdiction to entertain such suit".

11. In determining whether the bill of costs was filed out of time the court must contemporaneously determine when the cause of action arose. There is no dispute that the advocate's claim for costs is based on the contract for professional services between him and the client and that primary suit was concluded on 23.06.2009 when the same was dismissed for want of prosecution. That is when the work was completed and the enforcement of the contract by way of an action was subject to the limitation period as set out in section 4(1) (a) of the *Limitation of Actions Act*. Thus, the Applicant's claim being one based on a contract for professional services rendered, ought to have been filed by way of a bill of costs or otherwise, within a period of six years upon the accrual of the cause of action, namely the date of completion of the work on 23.06.2009.

12. This court concurs with Waweru J. in *Abincha & Co Advocates v Trident Insurance Co Ltd* [2013] eKLR where he stated inter alia that:

> "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...I therefore hold that any of the various bills of costs filed by the Advocate more than six 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*."
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> "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"

13. The foregoing accords with *Halsbury's Laws of England*, 4th Edition , Volume 28 at Paragraph 879 where it is stated concerning when time starts to run that:

> "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;
>
> 1. 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;
>
> 1. 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 of items included in the bill are statute-barred, the solicitor may recover in respect of the balance."

14. The Applicant only filed the bill of costs on 19.12.2018, some nine (9) years after the primary suit was concluded. Sections 23 and 24 (1) & (2) of the *Limitations Act* which the Applicant has called to his aid are of no avail in this case. An acknowledgement of debt as envisaged in the sections and pursuant to the provisions of 25(5) is the equivalent of an admission of debt. According to *Black's Law Dictionary*, Tenth Edition an acknowledgement of debt is:

> " Recognition by a debtor of the existence of a debt. An acknowledgement of debt interrupts the running of prescription".

15. The Applicant's submission in this regard was that by the fact of the Respondent "acknowledging the receipt of the letter dated above (i.e. letter dated 18.10.2013, there was a fresh accrual of the right of action against the Respondent...". This proposition is contrary to the clear provisions of sections 23, 24 and 25 of the *Limitation of Actions Act* which do not contemplate an act of acknowledgement of receipt of a demand letter as an acknowledgement of the debt claimed by such letter. In my view, the proposition conjures absurd outcomes where a mere acknowledgement of receipt of a demand letter would be construed as synonymous with an acknowledgment of the debt claimed by such letter, and to provide a defence against the plea of limitation.

16. The facts in the case of *Shah & Parekh v Kenindia Assurance Company Limited* cited by the Applicant are distinguishable from those in the instant matter, in that in the former case, an acknowledgement of debt in keeping with section 23(3) and 24(1) and (2) of the *Limitation of Actions Act* had been communicated in writing by the client to the Advocate and payment made on the acknowledged debt. The Applicant cannot rely on that decision in this instance and the argument that a fresh cause of action had accrued in 2013 therefore falls flat on its face.

17. In the result, the court finds that the preliminary objection raised by the Respondent has merit and it is hereby upheld. The Applicant's bill of costs is time barred and incompetent by dint of the provisions of section 4(1)(a) of the *Limitation of Actions Act*. A taxing master would have no jurisdiction to entertain it. The bill of costs dated 14.12.2018 is therefore struck out with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF APRIL 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms.Nambirige h/b for Mr. Kibicho

For the Respondent: Ms. Odhiambo

C/A: Carol