



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 587 OF 2019

WAKINI KIARIE & COMPANY ADVOCATES.....APPLICANT

VERSUS

KENYA ORIENT INSURANCE CO. LTD.....RESPONDENT

RULING

This ruling relates to the respondent's preliminary objection dated 2nd March 2021 against the applicants Advocate-Client Bill of Costs dated 15th August, 2019 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.

On 5th May, 2021, this court gave directions that the Preliminary Objection be dispensed with by way of written submissions. The applicant and the respondent both filed their submissions dated 13th July, 2021 and 4th June 2021 respectively.

Respondent's Submissions:

The respondent's case is that the relationship between an advocate and a client is contractual and is therefore governed by the Law of Contract thus the provisions of Section 4 (1)(a) of the Limitations of Actions Act is applicable. According to the respondent, the contractual relationship is created once the advocate accepts instructions from the client and terminates when the advocate fulfills the instructions. Section 4(1) (a) of the Limitation of Actions Act provides that;

“(1) 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;...”

In litigious proceedings, the respondent submits that time runs from when the judgement is delivered in the suit handle by the advocate on behalf of the client. To this end, the respondent has relied on Halsbury's Laws of England 4th Edition Vol. 28 at page 452 paragraph 879 where it is stated that;

“Solicitors costs. In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending of an action;

1. ...

2. ...

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 statute.

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.”

The respondent further makes reference to the case of **GATHIGA MWANGI & CO. ADVOCATES VS JANE MUMBI KIANO [2016] eKLR** where the Court while making reference to the above cited text held that;

“This citation must have been making reference to the Solicitor's Act, 1974 which applies in England but, in the absence of any local statutory provision on this issue, it remains the closest indication of when time begins to run against the filing of an advocate/client bill of costs. It is instructive that time started running from the date the judgment was delivered assuming that counsel was then still on record and not from the date counsel ceased acting, after the delivery of the judgment.”

Although the respondent acknowledges that the Bill of Costs relates to instructions given to the applicant on 31st January, 2006 to defend a suit instituted against it at the Chief Magistrates' Court Case No. 13893 of 2005, Counsel submits that there has been no communication between the parties herein since 31st May, 2006. Consequently, the respondent contends that the applicant ought not to have waited for almost 11 years so as to demand its fee and/or file a bill of costs. Counsel for the respondent submits that the instructions given to the applicant were extinguished when the judgment was delivered and has pointed out that the last communication as between them was on 2nd June 2006. The applicant has sought to rely on the case of **ABINCHA & CO ADVOCATES VS TRIDENT INSURANCE CO LTD [2013] eKLR** where Waweru J. held that;

“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.”

The respondent urged the court to consider the mischief that the Limitations of actions Act seeks to cure and has referred to the case of **MONARCH INSURANCE CO. LTD VS PARBAT SIYANI CONSTRUCTION CO. LTD [2016]eKLR** where the court adopted with approval the decision of Lord Denning in the case of **Letang vs Cooper [1994]2 All ER 929 (CA) (at page 936)** stated;

“The Act is a Limitation Act; it relates only to procedure. It does not divest any person of rights recognized by law; it limits the period within which a person can obtain a remedy from the courts for infringement of them. The mischief, against which all Limitation Acts are directed is delay in commencing legal proceedings; for delay may lead to injustice, particularly where the ascertainment of the relevant facts depend on oral testimony. This mischief, the only mischief against which the section is directed is the same in all actions in which damages are claimed in respect of personal injuries.”

Applicant's Submissions;

The applicant submits that it received instruction from the respondent to defend its insured in Milimani Cmcc No. 1024 of 2006; Robert Muthoka Kioko vs David Engineering Limited in a work injury related claim, which instructions they did execute. Counsel for the applicant has referred the to Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879 on recovery of costs by a solicitor;

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

While making reference to the case of **Abincha & Co. Advocates (Supra)**, the applicant submits that for Section 4(1)(a) of the Limitations of Actions Act to apply in advocates-clients costs, there must be completion of work or the lawful termination of the retainer. According to the applicant, lawful termination of a retainer by a client can either be by way of filing an application to cease acting by an advocate, an advocate being served with a notice of change of advocates or by the client instructing the advocate that her services are no longer required.

The applicant confirms that neither has judgment been entered in Cmcc No. 1014 of 2006 nor has the respondent lawfully terminated their services. Counsel for the applicant contends that lack of communication for over 12 years does not amount to lawful termination of a retainer.

Analysis and Determination;

The respondent has raised a preliminary objection opposing the applicant's bill of costs on the ground that it is statute barred. An objection on the ground that a matter is caught up by the law of limitation of actions is a pure point of law as was held by Law JA in the case of **MUKISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD (1969) EA 696:**

“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 perusal of the parties' pleadings before this court reveals that the only issue that arises for my determination is whether the advocate-client bill of costs dated 15th August, 2015 is incompetent for being time barred. A relationship between an advocate and his or her client is a contractual relationship for professional services. The Court of Appeal in the case of **OMULELE & TOLLO ADVOCATES V MOUNT HOLDINGS LIMITED [2016] eKLR** while discussing the difference between a retainer and retainer agreement defined retainer in the following terms;

“It encompasses the instructions given to an advocate as well as the fees payable thereunder. A retainer need not be written, it can be oral and can even be inferred from the conduct of the parties.”

Such a relationship is therefore subject to the Limitation of Actions Act, specifically **Section 4 (1)** of the **Limitation of Actions Act** which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued.

Justice Waweru in the case of **ABINCHA & CO ADVOCATES V TRIDENT INSURANCE CO LTD [2013] eKLR**, considered the question of when does time start to run in an action for recovery of legal fees 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 some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

In the present case, the respondent does not dispute having instructed the applicant to defend its interests. Its case is that the applicant’s bill of costs is time barred having being brought almost twelve (12) years after their last correspondence. The respondent contends that in litigious proceedings, the limitation period starts to run when judgment is delivered in a suit that an advocate is handling. On its part, the applicant submits that for the provision of Section 4 (1) (a) to apply in a retainer, the question of completion of work and/or lawful termination of the retainer must be considered. According to the applicant, the instructions by the respondent have not been lawfully terminated and that judgment is yet to be entered in the matter consequently the bill of costs as filed cannot be said to be time barred.

This court takes note that the bill of costs presented for taxation on 15th August, 2019 is in relation to **Milimani Cmcc No. 1014 of 2006; Robert Muthoka Kioko versus David Engineering** and not **Milimani Cmcc No. 13893 of 2005**. There is no evidence before this court that judgment has been entered or the retainer has been terminated and in the absence of such information this court cannot proceed on the assumption that the bill was filed outside the limitation period. For the foregoing reasons, I find that the respondent’s preliminary objection of 2nd March, 2021 is not merited and the same is dismissed with costs. Consequently, I direct that the taxation of the applicant’s bill of costs do proceed for taxation before the deputy registrar.

DATED DELIVERED AND SIGNED AT NAIROBI THIS 13TH DAY OF OCTOBER 2021

.....

S. CHITEMBWE

JUDGE