



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
MISCELLANEOUS APPLICATION NO 110 OF 2018
IN THE MATTER OF TAXATION OF
ADVOCATES AND CLIENT'S BILL OF COSTS

SHAH & PAREKH.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

INTRODUCTION

1. On 7th February 2018, the Applicant filed a Bill of Costs of even date against the Respondent herein. It was for advocates' services it rendered to the Respondent between 23rd June 1986 and 15th July 2013 in several court matters.
2. On 4th July 2018, the Respondent filed a Notice of Preliminary Objection dated 2nd July 2018 on the ground that the said Bill of Costs was statute barred and offended the Law of Limitation as they arose out of a contract which had a prescribed limitation period.
3. In turn, the Applicant filed Grounds of Opposition dated 18th July 2018 on 19th July 2018. It also filed an affidavit that was sworn by its remaining partner, Hasmukhrai Manilal Parekh on 18th July 2018. The same was also filed on 19th July 2018.
4. When the matter came before the Taxing Master on 23rd July 2018, the Applicant raised an objection that she did not have jurisdiction to hear and determine the Preliminary Objection that had been filed by the Respondent. The matter was then referred to High Court for hearing and determination of the aforesaid Preliminary Objection.
5. The Applicant's Written Submissions were dated 18th July 2018 and filed on 19th July 2018 while those of the Respondent were dated 2nd July and filed on 4th July 2018.

LEGAL ANALYSIS

6. Both the Applicant and the Respondent agreed in principle that an advocate could not file a bill of costs

six (6) years after termination of retainer or after a Certificate of Costs had been issued. This was demonstrated by the reliance by both the Applicant and the Respondent on the cases of Abincha & Co Advocates vs Trident Insurance Co Ltd [2013] eKLR, Akide & Co Advocates vs Kenindia Assurance Co Ltd [2018] and Halsbury Law of England 4th Edition, Volumes 28 at paragraph 879 (page 452).

7. In addition, the Respondent relied on P.M Wamae & Co Advocates vs Ntoitha M'mithiaru [2016] eKLR, Debora Owuori vs National Bank of Kenya Ltd [2017] eKLR and Mbugua & Mbugua Advocates vs Kenindia Assurance Co [2017] eKLR where the common thread was also that an advocate could only demand for payment for services rendered within six (6) years of the determination of the case so as to gain protection from the Limitation of Actions Act Cap 22 Laws of Kenya.

8. Their point of departure was whether or not the Applicant's Bill of costs was time barred. On the one hand, the Respondent argued that the said Bill of costs was time barred because it was filed some 32 years after instructions were given and long after the conduct of the matters was concluded and decisions rendered.

9. On the other hand, the Applicant submitted that the matters it acted for the Respondent were not distinct and separate as they all arose out of a single cause of action namely a motor accident that was a matter still pending determination and consequently, the Advocate-Client in relationship between them still existed.

10. The Applicant was emphatic that its claim for costs was of "action" as stipulated in the Halsbury's Laws of England (Supra) and was not for separate and distinct cases arising out of an "action."

11. It added that the Respondent acknowledged the action when it sent it a cheque in the sum of Kshs 294,234/= on 24th April 2018 and that the only way the Respondent could have challenged the Bill of costs was only by reference under Rule 11 of Advocates Remuneration Order.

12. Perusal of the Applicant's Bill of costs shows that it was in respect of work it rendered to the Respondent in the following cases:-

1. HC Criminal Application Misc Case No 321 of 1986 and HC Criminal Appeal Case No 1131 of 1986 from 23rd June 1986 to 22nd May 1987 when judgment therein was delivered.

2. HCCC No 2643 of 1986 from 20th June 2018 to 11th April 2001. Judgment was delivered on 27th June 2000. However, there was no indication whether the matter was finally concluded as the last item under this head was "Perusing Notice of Motion together with Affidavit and exhibits 136 folios."

3. CA Civil Appeal No 212 of 2003 from 1st September 2003 to 21st March 2007 judgment was delivered on 13th March 2007. There was also no indication if the matter was concluded as the last item under this head was "Attending Court of Appeal Registry and filing the letter."

4. CA Civil Application No 71 of 2007 from 4th April 2007 to 27th July 2007 where the last item under the head was "Instruction fee to prepare application to extend time for filing Appeal. It was also not clear from the said Bill of costs whether this matter was concluded. However, in the Applicant's Written Submissions, it was indicated that the application for extending time to file an appeal was dismissed on technical grounds.

5. CA Civil Appeal No 168 of 2007 from 13th August 2007 to 10th July 2012. Judgment was delivered on 9th November 2011 when the Court of Appeal dismissed the therein.

6. Milimani CMCC No 9307 of 2002 Peter Kabibi Kinyanjui vs Kenindia Assurance Co Ltd

from 11th December 2002 to 15th July 2013 when Written Submissions were filed. Judgment therein was being awaited.

13. What this court understood to have been the Applicant's case was that since all the court matters emanated from one (1) motor accident and **CMCC No 9307 of 2002** was still awaiting determination, the action had not been terminated and consequently, the statute of limitation could not begin to run.

14. This court was clear in its mind that an advocate-client relationship is contractual in nature and as such, any action by each of them against each other must be brought within six (6) years of the termination of their relationship or from the date on which the cause of action accrued.

15. Section 4(1) (a) of the Limitations of Actions Act stipulates as follows:-

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.

16. Action is terminated upon delivery of a final determination in a matter. This court took the view that each case the Applicant represented the Respondent was a distinct action and time started running in each case once judgment was delivered.

17. The Applicant ought to have lodged its Bill of costs for the separate cases before the expiry of six (6) years from the date of the determination. For all purposes and intent, since the Bills of costs were not filed within the said period, they were therefore technically statute barred.

18. Having said so, this court took cognisance of the fact that on 24th April 2018, the Respondent sent to the Applicant a cheque in the sum of Kshs 294,234/= in settlement of fees of all in the aforementioned cases. In acknowledging the debts it owed the Applicant, there was a fresh accrual of right of action against the Respondent herein.

19. Indeed, Section 23 (3) of the Limitations of Actions Act stipulates as follows:-

“Where a right of action has accrued to recover a debt or other liquidated pecuniary claim, or a claim to movable property of a deceased person, and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right accrues on and not before the date of the acknowledgement or the last payment:

Provided that a payment of a part of the rent or interest due at any time does not extend the period for claiming the remainder then due, but a payment of interest is treated as a payment in respect of the principal debt.”

20. Section 24 (1) and (2) of the Limitation of Actions Act further provides that:-

1. Every acknowledgement of the kind mentioned in section 23 of this Act must be in writing and signed by the person making it.

2. The acknowledgement or payment mentioned in section 23 of this Act is one made to the person, or to an agent of the person, whose title or claim is being acknowledged, or in respect of whose claim the payment is being made, as the case may be, and it may be made by the agent of the person by whom it is required by that section to be made.

21. The communication to the Applicant forwarding the aforementioned cheque was in writing and duly signed by Winnie A Paul (Ms), the Respondent's Head of Legal Department in line with Section 24 (1) of the Limitations of Actions Act. It was made to the Applicant whose claim was being acknowledged as contemplated in Section 24 (1) of the Limitations of Actions Act. This court was therefore not persuaded

by the Respondent's submissions that the Applicant's Bill of Costs was time barred.

22. Going further, this court acknowledged that the proper manner of challenging the Applicant's Bill of costs was by way of a reference under Rule 11 of the Advocates (Remuneration) Order. That is the only procedure for a party seeking intervention of the High Court can approach it.

23. Rule 11 (1) and (2) of the Advocates (Remuneration) Order provides as follows:-

1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.

2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

24. However, what happens if a party before a taxing master challenges her jurisdiction before he has made a determination on the bill of costs before him? The correct procedure as was aptly set out by Gikonyo J in the case of Kenya Orient Insurance Ltd vs Oraro & Co Advocates [2014] e KLR and by Hatari Waweru J in Abincha & Co Advocates vs Trident Insurance Co Ltd (Supra) is for the taxing master to refer such challenge for hearing and determination by the High Court as her jurisdiction is well stipulated in Rule 13A of the Advocates (Remuneration) Act. The same provides that:-

“For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper 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.”

25. Accordingly, having considered the parties' respective Written Submissions and cases they relied upon, this court was not persuaded that the Respondent had demonstrated or proven that the Applicant's Bill of costs was statute barred, the fresh cause of action having accrued following the acknowledgment of its claim by the Respondent in the Respondent's letter dated 24th April 2019.

DISPOSITION

26. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Preliminary Objection dated 2nd July 2018 and filed on 4th July 2018 and was not merited and the same is hereby dismissed with costs to the Applicant.

27. It is hereby directed that parties appear before the Taxing master on 7th May 2019 for further orders and/or directions on the hearing and determination of the Applicant's Bill of costs dated and filed on 7th February 2018.

28. It is so ordered.

DATED and DELIVERED at NAIROBI this 8th day of April 2019

J. KAMAU

JUDGE