



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC APPLICATION CIVIL NO 67 OF 2017

MARTIN MUGAMBI MITHEGA T/A

MITHEGA & KARIUKI.....APPLICANT

VERSUS

INVESCO ASSURANCE COMPANY LTD..... RESPONDENT

R U L I N G

1. Before the court is the Respondent's preliminary objection to the Applicant's Bill of Costs filed on 20th April, 2017 to recover legal fees and other expenses for work done in connection with **Limuru CMCC No. 399 of 2004**.

2. The key ground is that the Bill of Costs is time barred pursuant to the provisions of the Limitation of Actions Act and cannot be maintained against the Respondents.

3. In response to the preliminary objection, the Applicant filed grounds of opposition. To the effect that the preliminary objection lacks merit, is misconceived, bad in law and an abuse of the court process. Further that the Applicant failed to sue earlier due to a consent entered between the parties which the Respondents have breached. Finally, that the preliminary objection is based on a technicality and that under Article 159(2) (d) of the Constitution courts should eschew undue regard for on technicalities.

3. The court directed that the preliminary objection be canvassed by way of written submissions. The Applicant submitted that it joined the Respondent's panel of advocates in the year 2002 and therefore the relationship with the Respondents is based on a contract. It was contended that following a financial crisis in the Respondent's company, it was mutually agreed between the Respondent and its creditors including the Applicant that payment of legal fees be stayed until the company got back on its feet. The Applicant asserts that the Respondents have not acted in good faith in suppressing this information from the Court.

4. Regarding the effect of consent by parties, counsel relied on several authorities including **Livingstone Kunini Ntutu vs County Council of Narok & 2 others (2015) eKLR** where the Court of Appeal overturned a decision of the High Court which had set aside a consent judgment.

5. Counsel conceded the *ratio* in **High Court Misc. Application No. 527 of 2011 Abincha & Co. Advocates vs Trident Insurance Company Ltd (2011) eKLR** that a bill of costs filed more than six years after completion of work or after lawful termination of the retainer is statute barred, but proceeded to argue that every matter ought to be determined on its own unique facts. It was also submitted that since the Applicant firm remains in the Respondent's panel of advocates, termination of retainer has not occurred and therefore the claim for costs is not time barred. Citing the decision in **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A 696**, the Applicant argued that the preliminary objection did not raise pure points of law.

6. The Respondents for their part submitted that the preliminary objection raises the point of law that the Applicant's Bill of Costs is time barred. To the effect that under Section 4 (1) (a) of the Limitation of Actions Act actions founded on contract may not be brought after the end of six years from the date when the cause of action arose. The case of **Abincha & Co. Advocates vs Trident Insurance Co. Ltd** was relied on. It was contended that judgment in **Limuru Civil Case No. 399 of 2004** was delivered in 2005 and that the Bill of Costs filed eleven years later could not stand. The Respondents submitted that an action in a suit terminates upon entry of judgment and hence the Bill of Costs was time-barred.

7. The court has considered the matters canvassed in respect of the Preliminary Objection. There is no dispute that the Applicant was instructed by the Respondent in May 2005 to defend **Limuru Civil Case No 399 of 2004** and that judgment was delivered in the year 2005. The Applicant's answer to the preliminary objection is two pronged:

a) hat due to a consent between the parties in 2010 the Applicant did not file his bill of costs

b) that the Applicant's retainer with the Respondents is ongoing, hence there has been no termination.

8. Under Section 4(1)(a) of the Limitation of Actions Act, actions founded on contract may not be brought after the end of six years from the date of the accrual of the cause of action. In **Halsbury's Laws of England 4th Edition, Volume 28** at paragraph 879 it is stated that:

"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."

9. Time begins to run after entry of judgment where no appeal is preferred. Thus, by the date of the alleged consent between the parties vide the latest communication by the Respondents (dated 17th May 2010) about four years had already lapsed since judgment. Besides, the alleged consent was to the effect inter alia that **"all outstanding legal fees be frozen/suspended for one year."** Whereas it is debatable whether parties can by consent suspend or stay the effluxion of statutory time lines, even excluding the period of one year stated in the alleged consent, the bill of costs filed on 20th April 2017 still falls outside the limitation provided in Section 4(1)(a) of the Limitation of Actions Act.

10. It is no answer for the Applicant to latch on to the fact of his alleged continued general retainer with the Respondent. The reference point in this instance is the bill of costs raised in connection with **Limuru Civil Case No 399 of 2004** and not any other cases in respect of which the Applicant may have been instructed. Therefore the fact that the Applicant's name is still in the panel of advocates retained by the Respondent is of no moment in this case. As stated in **Abincha and Co. Advocates v Trident Insurance Co. Ltd [2013] eKLR**, any bill of costs filed more than 6 years after completion of the work which an advocate was retained by the client to do, or after termination of retainer in respect of such work, is statute barred.

11. In view of the foregoing, I must find that the bill of costs filed herein is time barred, having been filed after the effluxion of a cumulative period of 10 years since the cause of action accrued. The court therefore upholds the preliminary objection with costs to the Respondents.

DELIVERED AND SIGNED AT KIAMBU THIS 7TH DAY OF NOVEMBER, 2019

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C. MEOLI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondents

Court Assistant - Kevin