



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 542 OF 2015

AKIDE & CO. ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LTDRESPONDENT

RULING

1. The application dated 19th September, 2016 seeks orders that:

“1. THAT the Honourable court be pleased to set aside in its entirety the Order/Ruling of the taxing Master on 7th September 2016 and delivered on the same day.

2. THAT the Honourable Court be pleased to review the Order of the taxing master made 7th September 2016 disallowing the entire bill of costs herein.

3. THAT this Honourable court be pleased to reinstate the Applicant’s Bill of Costs dated 26th May, 2015.

4. THAT costs of this application be provided for.”

2. The application is based on the grounds that:

(a) THAT the taxing master disallowed the entire bill of costs herein under section 4(1) (a) of the Limitations of Actions Act in excess of her powers under the Remuneration order.

(b) THAT the taxing master has no jurisdiction to determine whether a bill of costs is time barred or not.

(c) THAT the taxing master erred in law and in fact in failing to tax the bill of costs dated 26th may 2015.

(d) THAT the Applicant stands to suffer great loss if the orders sought are not granted.

(e) THAT it is in the interest of justice that the orders sought be granted.”

3. It is stated in the supporting affidavit and further affidavit that in the ruling by the Deputy Registrar given on 7th September, 2016 striking out the Bill of Costs as being time barred, there was failure to appreciate that the parties entered into negotiations in the primary suit but that the consent judgment was not adopted as an order of the court and therefore the matter is actively pending before the court.

4. The application is opposed. It is stated in the replying affidavit that the application is unprocedural and muddled up and ought to be dismissed.

5. While submitting on the issue of the jurisdiction of the Taxing officer, the Applicant’s counsel relied on Order 49 rule 7 Civil Procedure Rules and Rule 13 of the Advocates Remuneration Order. It was submitted that the Taxing Officer had no jurisdiction to determine whether the bill of costs was time barred or not. The court was referred to the following cases:

(a) **Abincha & Co. Advocates v Trident Insurance Co. Ltd [2013] eKLR**

(b) **Mbugua & Mbugua Advocates v Kenindia Assurance Co Ltd [2016] eKLR**

7. On the powers of the Taxing Officer, the Respondent's counsel referred the court to Section 13A of the Advocates Remuneration Order and submitted that the Taxing Officer had the requisite jurisdiction to determine all the issues raised pertaining to the Bill of Costs. It was further submitted that if the court holds that the Taxing Officer had no jurisdiction then this court can determine the issue as to whether the Bill of Costs was time barred. The Respondent's counsel relied on the **Abincha Case (Supra)**; Article 159 (2) of the Constitution; Order 45 Civil Procedure Rules; Section 80 Civil Procedure Act and **Communications Commission of Kenya v Royal Media Services Ltd [2006] eKLR**.

8. Order 49 of the Civil Procedure Rules provides for the special powers of Registrar.

Rule 13 A of the Advocates Remuneration order which is applicable herein provides as follows:

"13A for the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers 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".

9. I am in complete agreement with the decision in the **Abincha Case (Supra)** where it was held as follows:

"The jurisdiction of a taxing officer is to tax the bill of costs before him. His powers set out in paragraph 13A of the Advocates (Remuneration) Order are in connection with taxation of the bill of costs before him."

10. The Taxing Officer had no jurisdiction to determine whether the Bill of Costs was time barred. The matter could only be determined by a judge. As stated in the **Mbugua & Mbugua Case (Supra)**:

"Before taxation could have been undertaken by the taxing officer, the issues of the bill of costs being statute barred having been raised by the parties ought to have been referred to the High Court by the taxing officer for determination. In this case, the High Court is the court with jurisdiction to hear and determine such issues."

11. On whether the Advocate's Bill of Costs was time barred, Section 4 (1)(a) of the Limitation of Actions Act comes into play. For actions founded on contract like the advocates claim for professional services, there is a time limit of six years. This position is expounded in Halsbury's Laws of England 4th Edition Vol 28 paragraph 879 (Page 452) which reads 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 judgement 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."

12. In the case at hand, the Advocate/Client Bill of Costs herein dated 26th May, 2015 and filed on 4th December, 2016 reflects the date the instructions were received as 20th December, 2001 and the date of attending court for judgment as 28th January, 2003 and 26th February, 2003. The date 5th March, 2003 is reflected as the date of drafting a consent to mark the suit as settled. The rest of the entries in the Bill of Costs relate to the taxation of the Bill and events that took place thereafter plus disbursements.

13. The Bill of Costs clearly shows that the last step taken in respect of the suit was on 5th March, 2003 which is over twelve years to the date the Bill of Costs was filed. It is absurd for the Applicant to argue that the consent judgment was never adopted more than twelve years down the line. It cannot be logically argued that the consent is still awaiting to be adopted as an order of the court. In any event, the filing of the Bill of Costs herein signals that the suit came to an end or that the retainer came to an end. As stated in the **Abincha case (supra)**.

"...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."

14. With the foregoing, this court sets aside the orders/ruling of the Taxing Master delivered on 7th September, 2016 and substitutes the same with the orders of this court striking out the Bill of Costs dated 26th May, 2015 and filed on 4th December, 2015 as being time barred. Consequently, prayer No. 3 of the application is dismissed. Costs of the Application to the Respondent.

Dated, signed and delivered at Nairobi this 2nd day of Feb, 2018

B. THURANIRA JADEN

JUDGE