



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

MISC. CIVIL CASE NO.49 OF 2017

FORMERLY KISII HIGH COURT MISC. NO.129 OF 2014

MIGOS OGAMBA & COMPANY

ADVOCATES APPLICANT/ADVOCATE

VERSUS

KENINDIA ASSURANCE LIMITED RESPONDENT/CLIENT

RULING

[1] This is a ruling on the preliminary objection filed herein on the 24th October 2017 by the respondent **KENINDIA ASSURANCE COMPANY LIMITED**, through the firm of **OKONGO, WANDAGO & COMPANY ADVOCATES**.

It arises from the Advocate/Client Bill of costs filed in court on 24th June 2014, by the applicant, **MIGOS-OGAMBA & COMPANY ADVOCATES**, against the respondent and is based on four points Viz:-

[1] That, the bill of costs herein is statute barred and has been filed outside the period set out under the law of limitation of Actions Act.

[2] That, the filing of the Bill of Costs and the proceedings in 2014 to recover costs for services which were rendered between 1st December 2003 and 8th November 2005, constitutes an abuse of the process of the court.

[3] That, upon conclusion of the matter, the advocates submitted a fee note as is prescribed under the Advocates Remuneration Order which fee note the client processed and paid to the advocates and the fact of such payment is admitted so far in the pleadings filed by the advocate.

[4] That, the advocates are thus estopped from demanding through the court process any further fees in respect of the proceedings in the primary suit and outside the period of limitation set out by the law.

[2] Apparently, written submissions in support of the objection were filed by the respondent on the same 24th October 2017, and without leave from the court. In response thereto, the applicant also filed its written submission on 29th June 2018.

From the rival submissions it is clear that the applicant's bill of costs is challenged by the respondent on the basis of time as provided by the Limitation of Actions act. Therefore, for the purposes of this objection, ground one of the appropriate notice of preliminary objection is the most crucial of all the grounds and is essentially the determinant factor.

So, the issue arising for determination is whether the applicant's bill of costs dated 23rd May 2014 and filed herein on 24th June 2014, is time barred by dint of the Limitation of Actions Act.

[3] It was submitted by the respondent that the relationship between an advocate and his client is contractual in nature. In that regard, the applicant's firm was retained by the respondent to attend to the matter in the primary suit. After this trial, the applicant submitted a fee note which was duly processed and paid to them in the year 2005. The last service rendered by the applicant was on 8th November 2005 and therefore any claim for fees through the taxation process ought to have commenced within six (6) years from the said 8th November 2005 i.e. in or before the month of November 2011.

The respondent submitted that the impugned bill of costs was filed on 24th June 2014 to claim fees earned by the applicant in the year 2005

i.e. nine (9) years after the cause of action accrued.

The respondent therefore contends that the claim by the applicant is statute barred and ought to be struck out.

In support of the contention, the respondent relies on **Section 4 (1)** of the **Limitation of actions act, Halsbury's Laws of England – 4th Edition Vol.28 paragraph 879** and the decisions of the High Court in **OTIENO, RAGOT & CO. ADVOCATES –VS- KENINDIA ASSURANCE CO. LTD. [2017] e KLR, ABINCHA & CO. ADVOCATES –VS- TRIDENT INSURANCE CO. LTD. [2013] e KLR** and **DEBORA OWUORI –VS- NATIONAL BANK OF KENYA LTD [2017] e KLR**.

[4] On its part, the applicant submitted that its services were retained by the respondent in the year 2003 vide a letter dated 14th July 2003 and to date, the retainer is still ongoing and valid as the applicant is still on the respondent's panel of Advocates. Therefore, the allegation by the respondent that the retainer has been terminated is misleading.

The applicant contends that the statute of limitation begins to run after the cessation of the lawful retainer yet the respondent has not provided any proof to demonstrate the termination or cessation of the retainer.

In fortifying its objection to the respondent's preliminary objection, the applicant relied on the decisions of the High Court in **TOM MUTEI ADVOCATES –VS- NATIONAL BANK OF KENYA LTD [2017] e KLR** and **MWANGI KENGARA & CO. ADVOCATES –VS- INVESCO ASSURANCE CO. LTD. [2017] e KLR** as well as **ABINCHA & CO. ADVOCATES –VS- TRIDENT INSURANCE CO. LTD.** (supra).

The applicant also relied on **Section 4 (1) (a)** of the **Limitation of actions Act** and **Halsbury's Laws of England** (supra).

[5] The applicant's other reason for opposing the preliminary objection is that it does not conform with the law and precedent and should therefore be dismissed at first instance.

The applicant contends that the preliminary objection raises both matters of law and fact which are disputed. Therefore, the factual basis has to be proved through evidence. In that regard, reliance was placed on the decisions in **MUKISA BISCUITS MANUFACTURERES LTD. –VS- WEST END DISTRIBUTION LTD [1969] EA 696, KENYA ORIENT INSURANCE LTD –VS- ORARO & CO. ADVOCATES MISC CAUSE NO.701 OF 2012, KENYA UNION OF EMPLOYERS OF VOLUNTARY & CHARITABLE ORGANIZATION (KUEVCO) –VS- BOARD OF GOVERNORS PUMWANI SECONDARY SCHOOL [2014] e KLR** and **NZELE DAVID NZOMO – VS- MOSES NAMAYI ANYANGU & ANOTHER [2009] e KLR**.

The applicant thus prays for the dismissal of the preliminary objection with costs.

[6] After due consideration of the preliminary objection together with its supporting grounds and the submissions for and against, it is apparent that the bill of costs dated 23rd May 2014, would fall for striking out and/or dismissal for being time barred if it was indeed presented for taxation outside the time stipulated for bringing an action founded on contract.

It is common ground that the relationship between an advocate and his client is contractual in nature. In that regard, **Section 4 (1) (a)** of the **Limitation of Actions Act (Cap.22 Laws of Kenya)** would apply on a dispute such as the present one.

The said provision provides that actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued.

[7] In the instant case, the cause of action accrued on 14th July 2003, as contended by the applicant on the basis of the letter dated the same day from the respondent to the applicant. The letter is annexed to the applicant's replying affidavit and marked as **Exhibit "DOM1"**. It is apparently not disputed by the respondent and may safely be treated as the beacon to determine the actual time when the cause of action accrued. It was on that 14th July 2003, that the applicant was formally retained by the respondent by being empaneled to the respondent's panel of external lawyers in Nairobi.

Accordingly, the applicant acted for the respondent in several court cases including the primary suit herein i.e. **Oyugis SRMCC No.325 of 2003** which was allegedly finalized on 8th November 2005 and a fee note to that effect was raised by the applicant which fee note was according to the respondent discharged in the same year thereby culminating in the relationship between the applicant and the respondent.

[8] It is however, the applicant's contention that its relationship with the respondent remains intact as it is yet to be terminated. That to date, the applicant's name is still on the respondent's list of its external lawyers in Nairobi.

The applicant thus, implies that its contract with the respondent based on the retainer expressed in the respondent's letter dated 14th July 2003, is still valid and was valid as at the time the applicant's bill of costs was filed herein on 24th June 2014. Therefore, the present preliminary objection is without merit as the statute of limitation would not apply in the circumstances.

[9] In this court's opinion, the statute of limitation would only apply if the applicant's bill of costs was filed six years after the termination of the retainer or agreement between the applicant and the respondent. However, there is nothing cogent from the respondent establishing that the retainer was indeed terminated. It did not matter that the applicant discharged its duty with regard to the primary suit and was paid for the services rendered. This is because the letter creating the retainer (i.e. **Exhibit marked "DOM 1"**) was not specific with regard to which matters or matter were to be handled by the applicant. There was no other letter showing that the applicant was specifically retained to handle a particular matter. The retainer made in favour of the applicant vide that letter of 14th July 2003, was therefore a general retainer

which gave the applicant the leeway to handle any matter at any time as long as necessary instructions were forthcoming.

And, just as the retainer was made in writing, its termination was also expected to be in writing. Herein, the respondent has not exhibited any written notice of termination of the retainer made in favour of the applicant.

[10] It is for all the foregoing reasons that this court must find that the present preliminary objection by the respondent is without merit and is clearly an abuse of the court process intended to buy time or avoid the payment of taxed costs to the applicant for services lawfully rendered.

In sum, the applicant's objection to the respondent's preliminary objection is hereby sustained with costs to the applicant.

[11] Ordered accordingly not only in this matter (i.e. **Misc. Civil case No.49 of 2017**) but also in **Misc. Civil cases No.48 of 2017** and **No.50 of 2017**.

J.R. KARANJAH

JUDGE

10.07.2018

[Read and signed this 10th day of July 2018]