



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MIGORI**  
**MISC. CAUSE NO. 29 OF 2015**

**KENINDIA ASSURANCE CO. LTD.....APPLICANT/CLIENT**

**-VERSUS-**

**OTIENO, RAGOT & CO. ADVOCATES.....RESPONDENT/ADVOCATE**

***(Arising from professional services rendered by the Applicant to the Respondent in the original Migori Resident Magistrates Court Civil Suit No. 169 of 2003).***

**-between-**

**JOSIAH OKWE OSODO.....PLAINTIFF**

**-versus-**

**1. SONY SUGAR COMPANY LIMITED**

**2. JOHN OMENDA OBONYO.....DEFENDANTS**

**RULING NO. 1**

1. Before this Court for determination is the reference from the decision of the Deputy Registrar as Taxing Officer dated 10/11/2015 in taxing the Respondent's Bill of Costs dated 12/08/2015.

2. The reference is by way of a Chamber Summons dated 23/02/2016 which sought the following orders:

***a) This application be certified urgent in terms of and or for a consideration of prayer (b) hereof.***

***b) The court be pleased to order that pending the determination of this reference, there be stay of any further costs recovery proceedings arising from the decision of the taxing officer dated 10th November, 2015 and the resultant certificate of costs arising there from.***

***c) The decision of the Deputy Registrar as Taxing Officer dated 10th November, 2015 taxing the Bill of Costs dated 12th /8/2015 in the sum of Kshs. 32,541/= and the resultant certificate of costs emanating there from be set aside, reversed reviewed and or otherwise varied.***

***d) The court be pleased to issue a declaratory order to the effect that so far as the bill of costs dated 12/8/2015 has sought to have taxed and eventually recovered, advocates fees for services, the of first of which, as shown in the bill of costs was rendered on 8th April 2003 and the last of which was rendered by the advocates on 12/11/2003, the same is statute barred and offends the***

*law of Limitations of Actions Act.*

*e) In any event it be declared that the advocates / respondent, having raised a fee note dated 25/11/2003 for services rendered which the client, pursuant to agreement with the Advocates, paid to them by 22/1/2004, are estopped from claiming further fees from the applicant / client a sought through the process of taxation.*

*f) The Court be pleased to find that the Taxing Officer erred in law in Taxing and allowing the bill of costs dated 12/8/2015 in the sums and amounts as shown in the ruling dated 10th November, 2015.*

3. The reference was opposed by the Respondent through the Grounds of Opposition dated 26/04/2016 on nine grounds being:

*1. The Advocate filed his bill of costs as provided under the Advocates Remuneration Order and served the Respondent and fixed the same for taxation and went ahead to serve the Respondent and there's an Affidavit of service to that effect on record. Thereafter the Advocate proceeded to tax its bill before the Deputy in the absence of the Respondent who had been served. (Rule 76 of the Advocates Remuneration order).*

*2. That the bills as filed are not statute barred because the Remuneration of Advocates is provided for in the Advocates Remuneration Order which provides for the amounts to be charged and further that it is a criminal offence not to charge and/or to undercharge a client. (Section 46 of the Advocates Act Cap 16 Laws of Kenya).*

*3. The Defendant in the initial suit were awarded costs of the suit the same has not been taxed to date and as such the Advocate is still properly on record for the Respondent.*

*4. That the relationship between the Advocate and Client is a special relationship created and guided by Statute Therefore the laws and principles of contract ca not apply to it.*

*5. The issues being raised in this application are new and were never presented before the Deputy Registrar who shall have power and authority to summon and examine witnesses, to 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. (Rule 13A of the Advocates Remuneration Order).*

*6. This being a reference on a taxation, its' basically an appeal from the decision of the taxing officer and the court should not look at documents that were never presented before the taxing officer.*

*7. The application is incompetent, most frivolous and misconceived and ought to be dismissed with costs.*

*8. The Advocates representing the defendant/Respondent have not received instructions from the instructing client that the Applicant should take over the matter.*

*9. The application has in any event failed to meet the criteria for grant of the orders sought.”*

4. Directions were taken that the reference be disposed by way of written submissions and that the decision of this Court on the reference to apply *mutatis mutandis* to 32 other similar references being Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92 of 2015.

5. Both parties duly filed their respective written submissions hence this ruling.

6. I have patiently and intently considered this matter and gone through all the parties' documents, written submissions and the various legal decisions tendered in support of the parties' rival positions. There is no doubt that the matter involves the relationship between an Advocate on one side and a Client on the other and whether or not the Advocate is entitled to the remuneration sought by way of the taxation.

7. The Applicant/Client took the position that no further legal fees were due and payable to the Advocate/Respondent on several grounds but mainly that the Bill of Costs subject of the taxation was statute-barred and that indeed the Advocate/Respondent was adequately remunerated on an agreement. Both parties made substantive submissions on the issue of limitation. Several decisions were as well referred to.

8. It is without any doubt that the issue of limitation was not raised before the taxing officer mainly because the Applicant/Client did not participate at that level. But even if the same would have been raised I take the position that the Taxing Officer would not have been seized of the jurisdiction to determine the issue but the High Court. (See the persuasive decisions of **Abincha & Co. Advocates vs. Trident Insurance Co. Ltd (2013)eKLR** and **Kenya Orient insurance Limited vs. Oraro & Company Advocates (2014)eKLR**).

9. To me the issue of limitation is so central and not just a technical one because it goes to the jurisdiction of a Court. It therefore means that if a matter is statute-barred then there is nothing to be placed before a Court for adjudication and as such that Court lacks and cannot assume any jurisdiction. Such a Court downs its legal tools and the matter ends there since jurisdiction is only conferred and not assumed. The Court of Appeal in the case of **Thuranira Karauri vs. Agnes Ncheche (1997) eKLR** reiterated the position that an issue of limitation goes to the jurisdiction and it must be determined first before a matter proceeds further.

10. Talking of jurisdiction, the Supreme Court of Kenya in the case of **Re: The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011 (unreported)** at paragraphs 29 and 30 had the following to say:

***“29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lilian S’ vs. Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14.):-***

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”***

***30. The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient –Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”***

11. The correct approach therefore in this matter would have been for the issue of limitation to be determined first but since, as said before, the same was not placed before the Taxing Officer, that issue has now surfaced before this Court. Looking at the rival parties' submissions on the issue, it is clear that the issue of limitation as it has been unfolded is a cocktail of facts and law. It is therefore not an express legal issue that can be summarily determined but has to be approached holistically.

12. As the issue of limitation was never canvassed before the Taxing officer and as such the decision of the Taxing officer did not touch on it, I will not at this point in time make a determination as to whether or not this Court should interfere with the taxation by the Taxing officer. I will however direct that parties

appear before Court, on a date to be agreed, to deal with the issue of limitation.

13. As earlier on indicated, this ruling shall apply *mutatis mutandis* to 32 other similar references being **Nos. 30, 31, 32, 33, 34, 35, 36, 37, 38, 41, 68, 69, 70, 71, 72, 73, 74, 76, 77, 78, 80, 81, 82, 83, 84, 86, 87, 88, 89, 90, 91, 92 of 2015.**

14. Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 17<sup>th</sup> day of February 2017.**

**A. C. MRIMA**

**JUDGE**