REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

MISCELLANEOUS CAUSE NO. 334 OF 2014

TRUST BANK LIMITED……..….CLIENT/APPLICANT

VERSUS

CHEPTUMO & COMPANY ADVOCATES....……ADVOCATE/RESPONDENT

RULING NO. 2

1. This Ruling is in relation to a Preliminary Objection which the client, **TRUST BANK LIMITED,** has lodged against the Bill of Costs filed by the Advocate, **CHEPTUMO & COMPANY ADVOCATES.**

2. In a nutshell, the client contends that the Bill of Costs was time-barred.

3. On the other hand, the advocate holds the view that the client's conduct had given rise to an estoppel, which would preclude the client from relying on the issue of limitation.

4. From the material placed before me, it is clear that the client gave instructions to the advocate on 19th September 2001. The advocate was instructed to demand from **REVACK LIMITED (IN RECEIVERSHIP),** the sum of Kshs. 609,002,082.00 plus intent at 15% per annum.

5. The client further instructed the advocate that if the sums claimed were not paid, the advocate should take steps to realize the security.

6. It is common ground that on 28th February, 2005 the client wrote to the advocate, saying that it had no further instructions. Accordingly, the client told the advocate to close his file.

7. On 3rd June 2005 the advocate submitted his final bill to the client. The said bill was for a sum of Kshs. 10,024,466/-.

8. Thereafter, the advocate and the client appear to have engaged in some negotiations.

9. According to the advocate, it was not until 3rd December 2013 that the client made it clear that it would not pay any more fees, apart from the sum of Kshs. 450,000/- which had been paid earlier. Therefore, the advocate submitted that the time within which he could lodge his Bill of Costs, started running from 3rd December 2013.

10. More fundamentally, the advocate reasoned that when the client had acceded to holding negotiations, that constituted a representation to the advocate that there was a possibility of a settlement.

11. The advocate further submitted that the representation by the client caused the advocate to forfeit his right to file a Bill of Costs.

12. The advocate relied on the following words of the Court of Appeal in **DAVID STEPHEN GATUNE Vs HEADMASTER TECHNICAL HIGH SCHOOL & ANOTHER [1986] e KLR;**

> **"Only a fool-hardy and vexatious litigant would want to prejudice the negotiations and thereby earn the displeasure of the Attorney-General, by filing an action on the very same cause of action which had given rise to the negotiations".**

13. According to the advocate, it would have been fool-hardy for him to pursue the route of taxation whilst negotiations were proceeding.

14. Meanwhile, the client emphasized that the relationship between the parties herein was contractual. Therefore, by dint of the provisions of Section 4 (1) (a) of the Limitation of Actions Act, the advocate was obliged bring his action against the client within six (6) years from the date when the cause of action accrued.

15. The advocate has not challenged that pronouncement, and he was right to refrain from challenging it because it is an express stipulation of statute.

16. That leads to the question about when the cause of action accrued in this case.

17. In **KENYA ORIENT INSURANCE LIMITED Vs ORARO & COMPANY ADVOCATES, Misc. CAUSE No. 701 of 2012** the court noted that the following words from the learned authors of **HALSBURY'S LAWS of ENGLAND, 4th Edition, Vol. 28 paragraph 879,** would enable the court to apply the prescriptions of the limitation period set out in Section 4 (1) (a) of the Limitation of Actions Act;

> **"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 determination 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 judgement has been given and there is no appeal, time runs from the judgement, and subsequent items of costs incidental to the business of 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 the solicitor from the completion of the work and not from the delivery of the bill. If some only of items in the bill are statute-barred, the solicitor may recover in respect of the balance".**

18. In this case the work came to an end on 28th February 2005, when the client told the advocate to close his file. Therefore, the time under the statute of limitation begun to run from that date.

19. However, because the parties got involved in negotiations, the advocate submitted that the client's conduct gave rise to an estoppel against the client, barring it from relying on the Limitation of Actions Act.

20. In **WASHINGTON NYAKONGO ODONGO T/A NYAKONGO ODONGO Vs. TASHA ENTERPRISES (K) LIMITED, Hccc No. 31 of 2013,** *(at Kisii),* Muriithi J. expressed himself thus;

> **"Accordingly, I find that the limitation period with regard to the cause of action herein did not run as the respondent was estopped, by his own conduct, in requesting the advocate to consent to the change of advocates and subsequently promising to pay and requesting time to settle the Bill of Costs".**

21. On the basis of that authority, the advocate herein submitted that;

> **"…with the proposal of meetings to discuss the fee payable, a reasonable person would have faith and belief that the fees would be negotiated in good faith".**

22. I understand the advocate to be saying that the client's conduct, which he deems as giving rise to an estoppel, is the proposal for meetings to discuss the fee payable.

23. Before reverting to the issue of estoppel, I think it is important to make it clear that the claim by an advocate, for his fees ought, ordinarily to be brought against his client within 6 years from the date when the particular task assigned to him was competed or within 6 years from the date when the Advocate/Client relationship came to an end.

24. The Advocate/Client relationship can come to an end at the instance of either party or by mutual understanding.

25. In **ABINCHA & Co. ADVOCATES Vs. TRIDENT INSURANCE Co. LTD Misc. APPLICATION No. 527 of 2011,** Waweru J, said;

> **"An advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim in contract. An action to recover such costs would be subject to the limitation period set out in Section 4 (1) (a) of the Limitation of Actions Act".**

26. It is thus clear that the Bill of Costs ought to have been filed for taxation within 6 years from the date when the client informed the advocate to close his file.

27. However, pursuant to Section 39 (1) of the Limitation of Actions Act;

> **"A period of limitation does not run if –**
>
> **a) there is a contract not to plead limitation; or**
>
> **b) the person attempting to plead limitation is estopped from so doing".**

28. Upto this stage, the parties are reading from the same script. In effect, unless the advocate can demonstrate that the client is estopped from invoking the provisions of the statute of limitation, the Bill of Costs, which was filed in court on 17th July 2014, would be struck out.

29. I now revert to the issue of estoppel.

30. In the case of **Washington Nyakongo Odongo t/a Nyakongo Odongo Vs Tasha Enterprises (K) Ltd, Hccc No. 31 of 2013,** the respondent had done the following things;

> **i) the advocate to consent to the change of advocate; and**
>
> **ii) Promise to pay; and**

iii) Request time to settle the costs.

31. It is in those circumstances that the court held that the client was estopped.

32. In contrast, the advocate in this case has only made reference to the client's conduct of making a proposal for a meetings to discuss the fee payable. There was no promise made by the client, that it would settle the advocate's fees.

33. The first letter which made substantive reference to the advocate's fee-note is dated 8th October 2008. By that letter, the client asked the advocate to consider the sum of Kshs. 450,000/-, which it had already paid, as constituting the final settlement of the fees.

34. The advocate thereafter wrote four letters, but the client did not respond to them. That prompted the advocate to write on 9th October 2009, complaining about the client's failure to answer the advocate's letters.

35. By the letter of 9th October 2009, the advocate asked for a joint meeting, to enable the parties to discuss the way forward, regarding the fee-note dated 3rd June 2005. It is noteable that the advocate said the following to the client;

> **"In the event you do not agree with our proposed way forward, let us know to enable us determine our next cause of action".**

36. By a letter dated 13th October 2009, the client asked the advocate to get in touch with Mr. Z.K. Rono, so that a mutually convenient date for the meeting could be agreed upon.

37. In other words, it was the advocate who made the request for a meeting. That request was made more than 4 years after the Advocate/Client relationship had ended.

38. Of course, I am alive to the fact that by a letter dated 15th December 2005, the client had asked the advocate to schedule a meeting. However, I consider the discussions between the parties to have ended in October 2008, when the client said that it would not make payment of any money other than the Kshs. 450,000/- which it had already paid.

39. That is why I consider the advocate's letter of 9th October 2009 to constitute a new request for meetings; and that request was made by the advocate.

40. After due consideration of the conduct of the client, I have found neither a promise nor a representation that the client would settle the fee-note.

41. Accordingly, there was no estoppel which could bar the client from putting forward the provisions of the Limitation of Actions Act as a shield against the advocate's Bill of Costs.

42. In the result, I uphold the Preliminary Objection, and find that the Bill of Costs was brought to court later than is legally permissible. It cannot therefore be sustained.

43. I hereby order that the Advocate/Client Bill of Costs dated 15th July 2014 be and is hereby struck-off.

44. The advocate will pay to the client the costs of the Preliminary Objection.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **8th day** of **March** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Miss Weru for the Client/Applicant

Kibet for Odhiambo for the Advocate/Respondent

Collins Odhiambo – Court clerk.