



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISCELLANEOUS CIVIL APPLICATION NO.51 OF 2015**

**MWANGI KENGARA & CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**INVESCO ASSURANCE CO. LIMITED.....CLIENT/APPLICANT**

**RULING OF THE COURT**

1. The Client/Applicant herein has filed a Notice of Motion dated 10/11/15 pursuant to Section 45(6) of the Advocate Act Cap 16 paragraph 12 and 13 A of the Advocate Remuneration Order Section 4 of the Limitation of Action Act and all other enabling Provisions of the law. It seeks for the following reliefs namely:

- (1) That the Bill of Cost herein be struck out and the same be dismissed with costs.***
- (2) That the Bill of Costs herein be struck out and or dismissed for being time barred under Section 4 of the Limitation Act Cap 22 laws of Kenya.***
- (3) That the Respondent be condemned to pay the costs.***

2. The Application is supported by an annexed affidavit of its former legal officer sworn on even date and further upon the following grounds namely:-

- (1) THAT there existed a fee agreement between the Advocate and Client which renders the Bill of Costs Otiose.***
  - (a) That the Advocate has further been paid a sum of over Khs.20 million in honour of the Agreement above which remains unaccounted for to date.***
  - (b) That the Advocate has never acknowledged either the amounts above but has indicated Nil amounts has been paid.***
- (2) THAT the primary suit herein the subject of this taxation was included on the 300 matters in the Agreement and appears in the list attached to the Agreement.***
- (3) THAT the bill of costs herein is null and void within the Provisions of Section 4 of the Limitation of Actions Act having been filed more than seven (7) years after the finalization of the primary suit herein since the relationship between the Advocate and Client is contractual and within the Provisions of the law of Contract Act.***
- (4) THAT the Advocate/Respondent will suffer no prejudice if the Application is allowed as she***

*can always reply to the issues raised thereon.*

***(5) THAT it is in the interest of Justice that this Application be allowed and the orders being sought be granted.***

3. The Application is opposed. The Respondent filed a Replying Affidavit sworn on 2/12/2015 which raised the following grounds of oppositions:-

***(1) The Application is grossly misconceived and is an abuse of the due process of the court.***

***(2) That the last service rendered by the Respondent to the Applicant was on 30/07/2007 in relation to the primary suit to which the Bill of Costs herein relate.***

***(3) That on 1/3/2008 the Applicant was placed under Statutory Management and obtained 2 High Court orders in HCCC No. 318 of 2008 where proceedings of whatever nature or form were barred from being instituted in any court or tribunal against the Applicant that had been placed under Statutory Management and a Moratorium took effect on the said date and further the running of time for purposes of any law of limitation was suspended.***

***(4) That the moratorium was later extended upto 15/11/2012.***

***(5) That as a result of the above two High Court orders time for purposes of Limitation of Actions Act did not run from 1/3/2008 to 15/11/2012 and the Bill of Costs herein was filed three (3) years after that which is still within the period of Limitation of Actions Act.***

***(6) That the Application is sub-judice on light of rulings in 4 other cases between Applicant and Respondent.***

***(7) That the Originating Summons in HCCC 504 of 2013 between the Applicant and Respondent is still pending and which deals with the issue of accounting for the Kshs.20 million and same is sub-judice and entertaining the same in this court shall subject the Respondent to double jeopardy which is against the law, public policy and natural justice.***

***(8) That no payment has been made in respect of CMCC NO.492 OF 2005.***

***(9) That Applicant should participate in the taxation before the taxing master and it can seek credit for any payments made against respective files in the taxation.***

***(10) That the agreement provided for taxation if the accrued fees exceeded the basic legal fee and the Bill of Costs herein being the Kshs.67,324/= far outstrips the fees provided for in the agreement which fees were never paid.***

4. With the leave of the Court, parties filed submissions. I have carefully considered the said submissions and authorities cited. I find the following issues necessary for determination namely:-

***(1) Whether there was a fee agreement between the Advocate and client.***

***(2) Whether the Bill of Costs should be dismissed for being time barred.***

***(3) Whether the Bill of Costs is properly filed.***

***(4) Whether the Client's Application is Res judicata***

5. As regards the first issue, it is not in dispute that indeed there was a fee agreement between the parties herein. The agreement is dated 19/10/2006. Section 45(6) of the Advocates Act (Cap 16 L.O.K) provides:-

***“Subject to this Section, the costs of an Advocate in any case where an agreement has been made by virtue of this Section shall not be subjected to taxation nor to Section 48.”***

48(1) provides:-

***“Subject to this Act no suit shall be brought for the recovery of any***

***costs due to an Advocate or his firm until the expiry of one (1) month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be certified by affidavit filed with the plaint, for believing that the party chargeable therewith is about to quit Kenya or abscond from the local limits of the court’s jurisdiction, in which even action may be commenced before expiry of the period of one month.”***

A perusal of the fee agreement dated 19/10/2006 reveals that vide clause 4 thereof the basic legal fee in each file was Kshs.39,320.00 which comprised of instruction fees, V.A.T and disbursements. The agreement also provided that the Advocate would raise a final fee note on conclusion of the matter where additional fees will have accrued and the client shall pay the difference. The Bill of Costs herein dated 30/03/2015 is in the sum of Kshs.67,324.00 which is in excess of what had been agreed and since the Agreement provided that the Advocate could demand for the same from the client and in view of the fact that the Advocate is no longer acting for the client, the only recourse is by way of taxation of the Bill of costs. Counsel for the Client sought reliance in the case of **SOUTHERN CREDIT BANKING CORPORATION LTD =VS= KIPKORIR TITOO & KIARA ADVOCATES – MILIMANI COMMERCIAL COURTS CIVIL CASE NO. 332 OF 2003** where Justice O. K. Mutungi ruled that no taxation could take place where there is an agreement within the meaning of Section 45(1) of the Advocates Act. However, the circumstances obtaining herein appear to me to be different in that the fee agreement entered between the Advocate and client provided exit clause whereby the Advocate could bill for more fees if the same is accrued. As noted, the bill of costs is in excess of the initial Kshs.39,320/= and thus the Advocate is entitled to file for taxation. Even though the client has claimed that the fees had been paid yet the Advocate disputes, the issues could be canvassed in the taxation or in the pending **Originating Summons Suit No. 504 of 2013** where accounts are sought to be taken.

6. As regards the second issue, the Client has maintained that the Bill of costs herein has been filed after a period of seven (7) years and therefore since the basis of the bill is tied to an agreement (contract), the same is subject to Section 4 of the Limitation of Actions Act which puts timelines for cause of action regarding such transactions at six (6) years. The fee agreement was entered on the 19/10/2006 and therefore six (6) years would have elapsed on the 19/10/2012. The Advocate has countered this by claiming that the Client had been placed under Statutory Management where a moratorium was issued vide two High Court decisions. I have perused the orders issued by the High Court in **HCCC No. 318 of 2008** which suspended time for purposes of the Limitation of Actions Act from 1/3/2008 to 15/11/2012. Hence the Bill of costs herein was filed within time and consequently, I find the same not to be time barred as claimed by the client. The moratorium had been obtained by the client when it went to court to protect its interest and its request to suspend the operation of the Limitation of Action Act was acceded to by the High Court. It is therefore quite surprising for the same client to deny the existence of such a moratorium just because this time it is not in its favour but the erstwhile Advocate. The Client cannot run away from the stark reality that the moratorium which it had sought has now come to benefit it’s Advocate in this matter.

7. As regards the third issue, the Client has objected to the Bill of costs by claiming that the Advocate is connivingly by mischievous as she wants to unjustly enrich herself yet she had been paid. Indeed the said Bill of costs is yet to be taxed and during the process of taxation any credits in favour of the Client would be factored. Furthermore there is a pending suit namely **Originating Summons No. 504 of 2013** whose sole aim is to establish accounts and thus the issue of whether or not the Advocate had been paid would be canvassed. Hence I do not find anything wrong in the filing of the Bill of costs by the Advocate. I find it has been properly filed.

8. As regards the fourth issue, I note that there had been several matters in which the Client and Advocate herein had litigated over the sole issue being legal fees. The Client had maintained and still maintains that an amount to the tune of twenty (20) million shillings had been paid to the Advocate as fees in respect of several cases running to over three hundred (300) in number. Copies of the cases in which the two had tussled were availed. One such case is **INVESCO ASSURANCE COMPANY LIMITED =VS= MWANGI KENGARA** where Justice Alfred Mabeya rejected the Client's Application to stay execution of decrees obtained in favour of the Advocate and directed the Client to proceed and commence the requisite suits in which accounts would be taken. At that time there had been in existence the **Originating Summons No. 504 of 2013** filed by the Client against the Advocate for the purpose of taking accounts. The said case is still in existence yet the client still seeks to raise the issue of having paid the Advocate over Kshs.20 million. In fact the issue of payment of Kshs. 20 million now raised by the Client had already been dealt with vide several cases namely **504/2013 (Nairobi)** and **49/13, 93/13, 94/13, 103/13, 90/13 (all consolidated at Muranga High Court)**. Since the main thread running in all these cases is the Client's claim that the Advocate had been paid Kshs.20 million which the Advocates disputes and that the same issue is now being raised again in these proceedings, I find that the doctrine of *Res judicata* has to apply herein. The issue of *Res judicata* was aptly captured in the case of **NICHOLAS NJERU =VS- ATTORNEY GENERAL & 8 OTHERS [2013] eKLR** where the Court of Appeal ruled as follows:-

***“The doctrine of Res judicata is founded on public policy and is aimed at achieving two (2) objectives namely:- that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation.”***

9. Again under the Provisions of Section 7 of the civil Procedure Act the issue of *Res judicata* is also raised as follows:-

***“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”***

10. As noted in all the cases involving the Client and Advocate herein, the issue had been about the Client's claim that a sum of Kshs.20 million had been paid to the Advocate which is denied by the Advocate. The Client had been using the issue of the Kshs.20 million to seek orders of stay but which were rejected by the courts and the Client directed to file suit for the taking of accounts. The issue of the payment of Kshs. 20 million by the Client to the Advocate as a ground for stay appears to have been substantially determined by the various courts. Hence the Client now raising the same is barred and or estopped by the doctrine of *Res judicata*. It is my finding that the Client's Application herein is *Res judicata*. The Bill of Costs herein should proceed for taxation.

11. In the result it is the finding of this court that the Client/Applicant's Application dated 10/11/2015 lacks merit. The same is dismissed with costs to the Advocate/Respondent.

Dated, signed and delivered in court at **MACHAKOS** this **11<sup>TH</sup>** day of **MAY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

.Mrs Mwangi for Advocate/Respondent.

C/A: Kituva.