REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANOUS CIVIL APPLICATION NO 69 OF 2015

MWANGI KENGARA & COMPANY ADVOCATES....ADVOCATE /RESPONDENT

VERSUS

INVESCO ASSURANCE COMPANY LIMITED.....CLIENT/APPLICANT

RULING

The Application

The Applicant herein is Invesco Assurance Company (hereinafter referred to as the "Client"), and it engaged the firm of Mwangi Kengara & Company Advocates (hereinafter referred to as the "Advocate") to defend various suits filed against it in Court. The Client has now filed a Notice of Motion dated 29th June 2015 seeking orders that the Bill of Costs filed herein by the Advocate be struck out and dismissed with costs.

The grounds for the application are firstly, that the said Bill of Costs and supporting documents and subsequent affidavits and submissions were drawn and executed by a person who is not duly qualified to act as an Advocate under the provisions of sections 9 and 31 of the Advocates Act, for the reason that Mwangi Mercy Nduta otherwise practicing as Mwangi Kengara & Company Advocates did not hold a current practicing certificate and was not qualified to practice as an advocate for the year 2015.

Secondly, and there exists a fee agreement between the Advocate and the Client which renders the Bill of Costs otiose, and that the Advocate has been paid a sum of over Kshs. 20 million in honour of the said agreement which remains unaccounted for, and which has not been acknowledged.

Lastly, that the Bill of Costs herein is null and void within the provision of section 4 of the Limitation of Actions Act, having been filed more than 7 years after the finalization of the primary suit, and since the relationship between the advocate and client is contractual and within the provisions of Law of Contract Act.

The application is supported by a supporting affidavit sworn on 30th June 2015 by Carolyn Shavulimo, the acting Legal Manager of the Client, and she attached the said agreement entered into with the Advocate dated 19th October 2006 and a letter dated 4th June 2015 by the Deputy Secretary of the Law Society of Kenya indicating that the advocate had not yet taken out a practicing certificate for the year 2015. She deponed that the agreement was in relation to a schedule of 370 cases where the Advocate was on record for the Client, and the primary suit herein, being Yatta RMCC No. 11 of 2005, was one of the cases in the said agreement. Further, that the amounts agreed upon were fully paid as admitted by the Advocate in an affidavit dated 10th December 2013 in HCCC 504 of 2013, a copy of which was annexed.

The Advocate filed a supporting and further affidavit in response sworn on 9thJune 2015 and 4th August 2015 respectively by Mercy Nduta Mwangi, its registered proprietor, wherein she confirmed being retained by the Client on 25th February 2005 to defend its insured in **Yatta RMCC No. 11 of 2005- Hellen Njeri vs Daniel Kimeu Muia**, and attached a copy of the instruction letter. The deponent gave a history of her representation in the matter and stated that on 17th April 2015 she filed a bill of costs for the unpaid legal fees for services rendered between 25th February 2005 and 23rd January 2008.

According to the Respondent, at all material times when she rendered services to the Client she had taken out a valid practicing certificate and the services for which taxation was sought were lawfully rendered and the fees rights earned, and she attached copies of her various practicing certificates. Further, that her appearance in this cause is as a party and not in any representative capacity or as an agent, and it was not necessary to have a practicing certificate to realize previously earned legal fees due to her firm.

The Advocate denied that any payment had been paid in **Yatta RMCC No. 11 of 2005- Hellen Njeri vs Daniel Kimeu Muia**,, and that she had expressly denied receiving any payment of Kshs 20 million in the affidavit she swore 10th December 2013 in HCCC 504 of 2013. She also denied receiving Kshs 85, 465/= as interim fees in the subject matter.

The Advocate contended that the annexures and payment schedules attached to the supporting affidavit did not constitute any proof of payment and are falsified and fabricated, and consist of duplicated alleged payments. She gave detailed examples of the allege fabrications and duplications in the said schedules and also in various other court proceedings filed by the Client on payments of fees to the Advocate, as well as of correspondence between the Advocate and Client on the fees due.

She stated in her further affidavit that the Carolyn Shavulimo, the Client's Legal Officer had perjured herself in the supporting affidavit, and made reference to affidavits filed in other cases in which the Client had stated that the documents annexed to the Advocate's affidavit sworn on 10th December 2013 in HCCC 504 of 2013 were inadvertently included and did not form part of the affidavit.

It was further contended that the agreement entered into with the Client expressly provided that the Advocate would raise a final fee on conclusion of matters where additional fees would accrue, and nothing in the agreement barring the Advocate from presenting A Bill of Costs for for taxation if the accrued fees exceeded the basic legal fees, and that the Bill of Costs herein being for Kshs 82,608/= outstrips the fees provided for in the agreement , which fees was never paid.

Lastly, the Advocate denied that the Bill of Costs was time barred, and stated that even though the last service rendered by the Advocate to the Client in the subject matter was on 14th February 2008, the Client obtained two orders and a moratorium in the High Court in HCC No. 318 of 2008 barring any taxations against it for the period running from 1st March 2008 and 15th November 2012, and placing the Client under statutory management. Copies of the said orders were attached.

The Issues and Determination

The Client's application was canvassed by way of written submissions. The Client's learned counsel, Gichuki King'ara & Co Advocates filed three sets of submissions dated 22nd July 2015, 11th November 2015 and 25th January 2016. The Advocate also filed three sets of submissions dated 3rd August 2015, 20th November 2015 and 10th February 2016. The issues before the Court for determination are three: firstly whether the Advocate's Bill of Costs is incompetent for reason of having been filed by a person not qualified to act as an Advocate; secondly, if the Bill of Costs is found to be competent, whether there was an agreement as to fees as between the Client and Advocate, and if so, its effect on the Advocate's Bill of Costs; and lastly, whether the Advocate's Bill of Costs is time barred.

On the first issue, the Client submitted that taxation is between an advocate and a client as defined in the Advocates and a person who is not qualified as an Advocate cannot bill a client pursuant to the

provisions of section 9 and 31 of the Advocates Act. Reliance was placed on various judicial decisions in this regard where documents filed in Court by persons not qualified to act as advocates including Bills of Costs were struck out, including **B.N. Mucira & Co. Advocates vs Mbo-I- Kamiti Co. Ltd, (2010) e KLR; Njau Kayai & 10 Advocates vs James Nyira (2006) e KLR**; **Geoffrey Orao Obura vs Martha Karambu Koome, (2001) e KLR;** and **National Bank of Kenya vs Wilson Ndolo Ayah (2009) e KLR**.

The Advocate on her part submitted that section 34 of the Advocates Act make it clear that for breach of the provisions of the Act to have occurred, the Advocate has to take instructions to act on behalf of a client, and in the present application there was no client being represented and the Advocate was acting on her own behalf as a party in the suit. The decisions cited by the Client were distinguished on this ground, and the Advocate relied on the decisions in **Mbugua & Mbugua Advocates vs Kenindia Assurance Company Ltd**, **(2006) e KLR** and **Upward Scale Investment Co. Ltd and 8 Others vs Mwangi Kengara & Co. Advocates CA Appl. No 8 of 2015.** It was further submitted that the decisions cited and relied upon by the Client were held to be bad in law by the Supreme Court in its decision in **National Bank of Kenya vs Anaj Warehousing Limited (2015) e KLR.**

Section 9 of the Advocates Act provides as follows:

> **"Subject to this Act, no person shall be qualified to act as an advocate unless–**
>
> **(*a*) he has been admitted as an advocate;**
>
> **(*b*) his name is for the time being on the Roll; and**
>
> **(*c*) he has in force a practising certificate**;

Sections 31 and 34 of the Act provides for the following prohibitions of actions by a person not qualified to act as an Advocate:

> **"31. (1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.**
>
> **(2) Any person who contravenes subsection (1) shall–**
>
> **(*a*) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and**
>
> **(*b*) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting; and**
>
> **(*c*) in addition be guilty of an offence."**
>
> **34" (1) No unqualified person shall, either directly or indirectly, take instructions or draw or prepare any document or instrument–**
>
> **(*a*) relating to the conveyancing of property; or**
>
> **(*b*) for, or in relation to, the formation of any limited liability company, whether private or public; or**
>
> **(*c*) for, or in relation to, an agreement of partnership or the dissolution thereof; or**
>
> **(*d*) for the purpose of filing or opposing a grant of probate or letters of administration; or**
>
> **(*e*) for which a fee is prescribed by any order made by the Chief Justice under section 44; or**

(*f*) relating to any other legal proceedings;

nor shall any such person accept or receive, directly or indirectly, any fee, gain or reward for the taking of any such instruction or for the drawing or preparation of any such document or instrument:

Provided that this subsection shall not apply to–

(i) any public officer drawing or preparing documents or instruments in the course of his duty; or

(ii) any person employed by an advocate and acting within the scope of that employment; or

(iii) any person employed merely to engross any document or instrument."

The Supreme Court of Kenya in **National Bank of Kenya Limited vs Anaj Warehousing Limited, (2015) e KLR** after looking at various judicial precedents that upheld the invalidity of documents drafted by an advocate not holding a practicing certificate, including **National Bank of Kenya Ltd vs Wilson Ndolo Ayah (2009) e KLR**, **Kajwang' vs Law Society of Kenya (2002) 1 KLR 846** and **Obura vs Koome (2001) KLR 109,** held in that the proper direction in law is as follows:

"no instrument or document of conveyance becomes invalid under section 34(1)(a) of the Advocates Act, only by dint of its having been prepared by an advocate who at the time was not holding a current practicing certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates shall be void for all purposes."

The said Supreme Court decision is binding on this Court, and also equally applies to any document or instrument listed in section 34 of the Advocates Act prepared by an Advocate who does not have a practicing certificate including for purposes of filing a Bill of Costs. The Bill of Costs herein is thus properly and competently before this Court even though filed by a person who did not have a valid practicing certificate at the time of its filing.

On the second issue on the existence of an agreement on fees, the Client submitted that there was an agreement dated 19th October 2006 between the Applicant and Respondent which was a valid Agreement, legally recognized and binding upon the two parties. Reliance was placed on section 45(6) of the Advocates Act that the costs of an advocate in any case where an agreement has been made fixing the amount of the advocate's remuneration shall not be subject to taxation nor to section 48 of the Act.

Reliance was also placed on the decision in **Omulele & Co. Advocates vs Synresins Limited [2013] e KLR,** in this respect**.** It was also submitted that at the time of lodging the Bill of costs, no such notice was issued, and therefore the Bill of Costs is prematurely filed before complying with the mandatory provisions of Section 48 of the Advocates Act.

The Advocate on the other hand submitted that the agreement dated 19th October 2006 did not fall within the ambit of Section 45 (a) of the Advocates Act and that the agreement merely fixed the basic fees. Reliance was placed on clause 4 (a), (d) and (h) of the said agreement for the position that the said agreement expressly gave the advocate the right to tax his bill where the accrued fees exceeded the basic fees. The decision in **Omulele & Co. Advocates vs Synresins Limited, [2013] e KLR** was distinguished on the ground that the agreements therein provided for maximum legal fees .

It was further submitted that the procedure for taking of accounts of monies allegedly paid pursuant to an agreement is laid down under Order 52 rule 4 (1), and that section 48 of the Advocates Act was inapplicable for reasons that the bill of costs herein was instituted pursuant to the provisions of paragraphs 13 and 69 of the Advocates Remuneration Order, and that section 48 applies to filing of suits

and does not apply to matters filed under paragraph 13. Reliance was placed on the decision in **M.G Sharma vs Uhuru Highway Development Company Limited, Nairobi Court of Appeal No 133 of 2000** in this regard.

In order to determine the issue as to whether the agreement entered into between the Applicant and the Respondent falls within Section 45 (6) of the Advocates Act, this Court will first examine the application of section 45 before undertaking an examination of the relevant clauses of the said agreement.

Section 45 of the Advocates Act in this regard provides as follows:

> "**1) Subject to section 46 and whether or not an order is in force under section 44, an advocate and his client may–**
>
> > **(a) before, after or in the course of any contentious business, make an agreement fixing the amount of the advocate's remuneration in respect thereof;**
> >
> > **(b) before, after or in the course of any contentious business in a civil court, make an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both**
> >
> > **(c) before, after or in the course of any proceedings in a criminal court or a court martial, make an agreement fixing the amount of the advocate's fee for the conduct thereof; and such agreement shall be valid and binding on the parties provided it is in writing and signed by the client or his agent duly authorized in that behalf.**
>
> **(2) A client may, apply by chamber summons to the Court to have the agreement set aside or varied on the grounds that it is harsh and unconscionable, exorbitant or unreasonable, and every such application shall heard before a judge sitting with two assessors, who shall be advocates of not less than five years' standing appointed by the Registrar after consultation with the chairman of the Society for each application and on any such application the Court, whose decision shall be final, shall have power to order–**
>
> > **(a) that the agreement be upheld; or**
> >
> > **(b) that the agreement be varied by substituting for the amount of the remuneration fixed by the agreement such amount as the Court may deem just; or**
> >
> > **(c) that the agreement be set aside; or**
> >
> > **(d) that the costs in question be taxed by the Registrar; and that the costs of the application be paid by such party as it thinks fit.**
>
> **(2A) An application under subsection (2) may be made within one year after the making of the agreement, or within three months after a demand in writing by the advocate for payment under the agreement by way of rendering a fee note or otherwise, whichever is the later.**
>
> **(3) An agreement made by virtue of this section, if made in respect of contentious business, shall not affect the amount of, or any rights or remedies for the recovery of, any costs payable by the client to, or to the client by, any person other than the advocate, and that person may, unless he has otherwise agreed, require any such costs to be taxed according to the rules for the time being in force for the taxation thereof:**
>
> **Provided that any such agreement shall be produced on demand to a taxing officer and the client shall not be entitled to recover from any other person, under any order for the payment of any costs to which the agreement relates, more than the amount payable by him to his advocate in respect thereof under the agreement.**

4) Where any agreement made by virtue of this section is made by the client as the guardian or committee of, or trustee under deed or will for, any person whose property will be chargeable with the whole or any part of the amount payable under the agreement, the advocate shall, before payment thereunder is accepted or demanded and in any event within six months after its due date, apply by chamber summons to the Court for approval of such agreement, and every such application shall be dealt with in accordance with subsection (2).

(5) If, after an advocate has performed part only of the business to which any agreement made by virtue of this section relates, such advocate dies or becomes incapable of acting, or the client changes his advocate as, notwithstanding the agreement, he shall be entitled to do, any party, or the legal personal representatives of any party, to such agreement may apply by chamber summons to the Court to have the agreement set aside or varied, and every such application shall be dealt with in accordance with subsection (2):

Provided that, in the case of a client changing his advocate, the Court shall have regard to the circumstances in which the change has taken place and, unless of opinion that there has been default, negligence, improper delay or other conduct on the part of the advocate affording to the client reasonable ground for changing his advocate, shall allow the advocate the full amount of the remuneration agreed to be paid to him.

(6) 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 subject to taxation nor to section 48."

In this respect it is notable that section 45 (3) of the Advocates Act allows for taxation of costs in contentious business but with respect to other persons other than an Advocate, and it is evident that where an agreement fixing remuneration is in place, the costs of an Advocate shall not be subject to taxation except upon application under section 45(2) which is when the Court can order that the costs be taxed.

In the present application, clause 4 (a) of the agreement entered into between the Applicant and Respondent on 19th October 2006, fixed the remuneration payable to the Respondent by the Applicant as follows:

"THAT save for matters where the bills of costs are already pending in court and/or taxed, which are excluded herefrom, the basic legal fees in the Three Hundred cases /claims (300) filed in various courts contained in the schedule of claims attached hereto currently in the conduct of the Advocate shall be as follows:-

Instruction Fees Kshs 27,000/=

VAT at 16% Kshs 4,320/=

Disbursements Kshs 8,000/="

The argument that the term basic in the clause meant the minimum fees is accepted by the Court as the ordinary meaning of basic is that it is the simplest or lowest in level. Therefore the intention of the parties was that the Respondent could charge for higher fees for a case, and which was expressly provided for in the said agreement at Clause (h) which provided as follows:

"**THAT the ADVOCATE shall further to (g) above be entitled to go to taxation where accrued fees exceeds what is provided in 4 (a)".**

It is therefore my view that Clause 4(h) of the agreement allowed the Applicant to file Bills of Costs in applicable cases, and the present case is one such case as the amount billed for was Kshs 122,438/96 which exceeded the basic fees provided for in clause (a). It is also my view that the parties had the freedom to contract out of the provisions of section 45(6) of the Advocates Act as regards taxation in the context of their agreement, and that upon the Applicant bringing this application to Court, the powers

granted to the Court under section 45(2) are available and can be exercised to allow for the taxation of the Respondent's Bill of Costs .

On the alleged contravention of section 48 of the Advocates Act, the said section provides as follows:-

> **'(1) 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 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 verified 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 event action may be commenced before expiry of the period of one month.**
>
> **(2) Subject to subsection (1), a suit may be brought for the recovery of costs due to an advocate in any court of competent jurisdiction.**
>
> **(3) Notwithstanding any other provisions of this Act, a bill of costs between an advocate and a client may be taxed notwithstanding that no suit for recovery of costs has been filed."**

It is evident that the said section refers to actions for recovery of costs and not to taxation of bill of costs, which is the subject matter of the current application, and for which the applicable procedure is set out in the Advocates Remuneration Order.

On the last issue, the Client relied on section 4(1) of the Limitation of Actions Act and the decision in **Gichuki King'ara and Company Advocates vs Mugoya Construction and Engineering Limited, Misc. Application No.625 of 2009** for the position that the relationship between an advocate and a client is contractual and subject to the Law of Contracts Act section 2(1) and that the same creates a contract for service which is enforceable within six (6) years under Section 4 of the Limitation of Actions Act. Further, that the Advocate's Bill of costs was filed after a period of more than seven (7) years had lapsed upon conclusion of the matter. Reliance was placed on **Harlsbury's Laws of England (4thEdition), V 44(1) pgs 114-119** for the various ways in which a retainer can be terminated including by completion of business, change of advocates, withdrawal, incapacitation of either party, lapse of time and frustration of the contract.

The Applicant also cited the decision in **Abincha & Co. Advocates Vs Trident Insurance Co. Ltd, (2013) eKLR,** that a retainer is essentially a contract for professional service between an Advocate and Client which is subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act, and that time begins to run from the date of completion of the work or lawful cessation of the retainer.

The Advocate's submissions on the issue of limitation were that item 66 in the Bill of Costs shows that the last service she rendered to the Client was on 18th February 2008, and since then there has been no letter terminating the retainer in the primary cause, nor a notice of change of advocate duly filed in court and served upon the Advocate's law firm. Further, that the Client sought and was granted orders staying the running of time for the purposes of Limitation of Actions Act from 1st March 2008 until 15th November 2012 in HCCC No. 318 of 2008 when it was placed under statutory management.

Section 4(1) of the limitation of Actions Act in this regard provides that:-

> **"The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-**
>
> **(a) actions founded on contract;**
>
> **(b) actions to enforce recognizance;**

(c) actions to enforce an award;

(d) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law".

In **Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879** it is stated as follows as regards of recovery of costs by a solicitor: –

" In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action; 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;

if there is an appeal from the judgment in the action, time does not begin to run against the solicitor, if he continues to act as such, until the appeal is decided;

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.

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 a solicitor from the completion of the work and not from the delivery of the bill. If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance."

A perusal of the Bill of Costs shows that the last service delivered by the Respondent before the filing of the Bill of Costs was on 18th February 2008 when the Advocate perused a letter and documents received from the plaintiff in the primary cause. The Advocate also provided evidence of orders made in **Nairobi HCCC Civil Case No 318 of 2008 – In The Matter Of Invesco Assurance Company Ltd**, upholding a moratorium of proceedings, decrees, warrants and taxations declared by the Clients statutory manager from 1st March 2008 and which was still in force on 1st December 2011. The Bill of Costs was subsequently filed on 17th April 2015.

I am of the view that the effect of the said orders was to stay the running of time for purposes of the Limitation of Action Act, as a moratorium is in effect an authorized postponement of performing a legal obligations for the affected parties, including the obligations set out in the Limitation of Actions Act. The Client in this respect cannot have his cake and eat it by benefiting from the moratorium and at the same time seeking that the Advocate does not benefit from the same. For these reasons I do not find that that the Bill of Costs filed by the Advocate was time barred.

The Applicant's Notice of Motion dated 29th June 2015 is accordingly found not to have merit and is dismissed for the foregoing reasons.

Dated, signed and delivered in open court at Machakos this 12th June 2017.

P. NYAMWEYA

JUDGE