



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISC. APPL NO. 186 OF 2015

TOM MUTEI T/A

TOM MUTEI ADVOCATES APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED RESPONDENT

RULING

1. The applicant in the Notice of Motion dated 1st March 2017 is the *National Bank of Kenya* which is named as the respondent in the Advocate- Client bill of costs dated 24th July 2015 and filed on 28th July 2015 by the respondent *Tom Mutei T/A Tom Mutei Advocates*.

2. In the Notice of Motion, the applicant seeks the following orders against the respondent;

i) That the Advocates- Client bill of costs be struck out since the same is statute barred under the *Limitation of Actions Act*.

ii) In the alternative, that the respondent be estopped from claiming any further costs.

iii) That costs of the cause and the application be provided for.

iv) That the orders sought if granted should apply to the following related matters involving the same parties namely:-

(a) ELDORET HCCA NO. 182 OF 2015

(b) ELDORET HMSCA NO. 160 OF 2015

(c) ELDORET HMSCA NO. 161 OF 2015

(d) ELDORET HMSCA NO. 162 OF 2015

(e) ELDORET HMSCA NO.163 OF 2015

(f) ELDORET HMSCA NO. 164 OF 2015

(g) ELDORET HMSCA NO. 165 OF 2015

- (h) ELDORET HMSCA NO. 176 OF 2015
- (i) ELDORET HMSCA NO. 179 OF 2015
- (j) ELDORET HMSCA NO. 180 OF 2015
- (k) ELDORET HMSCA NO. 181 OF 2015
- (l) ELDORET HMSCA NO. 182 OF 2015
- (m) ELDORET HMSCA NO. 183 OF 2015
- (n) ELDORET HMSCA NO. 184 OF 2015
- (o) ELDORET HMSCA NO. 185 OF 2015
- (p) ELDORET HMSCA NO. 187 OF 2015
- (q) ELDORET HMSCA NO. 188 OF 2015
- (r) ELDORET HMSCA NO. 189 OF 2015
- (s) ELDORET HMSCA NO. 190 OF 2015
- (t) ELDORET HMSCA NO. 191 OF 2015
- (u) ELDORET HMSCA NO. 192 OF 2015
- (v) ELDORET HMSCA NO. 193 OF 2015
- (w) ELDORET HMSCA NO. 194 OF 2015
- (x) ELDORET HMSCA NO. 195 OF 2015
- (y) ELDORET HMSCA NO. 196 OF 2015
- (z) ELDORET HMSCA NO.197 OF 2015
- (aa) ELDORET HMSCA NO.262 OF 2015
- (bb) ELDORET HMSCA NO. 263 OF 2015
- (cc) ELDORET HMSCA NO. 264 OF 2015
- (dd) ELDORET HMSCA NO. 265 OF 2015
- (ee) ELDORET HMSCA NO. 266 OF 2015
- (ff) ELDORET HMSCA NO. 267 OF 2016
- (gg) ELDORET HMSCA NO. 268 OF 2015
- (hh) ELDORET HMSCA NO. 269 OF 2015

3. In support of the application, the applicant contends that the respondent's claim is founded on a contract for provision of legal services and that all the matters in which the claim was made were

concluded over six years ago; that the claims were therefore statute barred in view of the provisions of *Section 4 of the Limitation of Actions Act*; that the respondent raised a fee note upon conclusion of each of the matters in question and is estopped from claiming additional fees; that the Advocate-client bill of costs amounts to an abuse of the court process. These contentions are stated on the grounds anchoring the motion and in the depositions made on 1st March 2016 and 2nd May, 2017 by *Mr. David Biwott Kibor*, the applicant's operations manager, Eldoret Branch.

4. The application is contested by the respondent. There is a replying and a supplementary affidavit sworn by *Mr. Tom Mutei* on 24th May, 2016 and 8th May, 2017 respectively. It is the respondent's case that though his relationship with the applicant was indeed contractual, his letter of appointment dated 11th September, 2000 provided interalia that his legal fees would be paid on execution and completion of matters handled; that in contentious matters, he was entitled to raise further fees over and above the agreed fees when full recovery was made; that the cases in respect of which the Advocates-client bill of costs were filed are still pending in court and the respondent was still on record for the applicant; that the applicant has admitted in HCC 27 of 2015 that only part of his fees have been paid; that an omnibus order sought in prayer 4

should not issue as instructions in the suit giving rise to the bill of costs filed herein were issued independently of instructions in the suits giving rise to the other bill of costs sought to be consolidated in the orders sought and that each matter should be considered on its own merit. It is the respondent's prayer that the application be dismissed for lack of merit.

5. The application was canvassed before me on 9th May, 2017. Learned counsel *Mr. Oribo* argued the application for the applicant while learned counsel *Mr. Omondi* appeared for the respondent. They both made elaborate oral submissions buttressing their client's respective positions.

6. In support of its submissions, the applicant relied on two persuasive authorities namely; *Abincha & Co. Advocates V Trident Insurance Co. Ltd Nairobi Misc Appn No. 527 of 2011 (2013) eKLR ;Kenya Orient Insurance Limited V Oraro and Co. Advocates Nairobi Misc Appn No. 701 of 2012 (2014) eKLR.*

7. The respondent on his part also relied on two other persuasive authorities namely; *Washington Nyakongo Ondongo T/A Nyakongo Ondongo & Company Advocates V Tasha Enterprises (K) Limited Kisii HCCC No. 31 of 2013; Kenindia Assurance Co. Limited V. Akide & Co. advocates Nairobi High Court MISC APPN NO. 1037 of 2013.*

8. I have carefully considered the application, the affidavits filed by the parties, the rival submissions and all the authorities cited.

9. It is common ground that the parties had a contract for provision of legal services by the respondent to the applicant. The contract was governed by terms stipulated in the respondent's letter of appointment to the applicant's panel of advocates dated 11th September, 2000 and fee policies issued in the form of circulars by the applicant from time to time under *Rule 3 of the Advocates Remuneration Order of 2005*. The letter of appointment and legal fees circulars dated 1st April, 2005 and 1st July 2008 were annexed to the respondent's replying affidavit and marked *TM1; TM2 and TM3* respectively.

10. Under clause 2 of the letter of appointment (*TMI*), payment of the respondent's legal fees was pegged on the execution and completion of matters assigned to the firm. For the avoidance of doubt, clause two reads as follows;

“Subject to the provisions herein, your legal fees and any other commitment on behalf of the Bank will be settled on execution and completion of the matters handled in the course of your work”.

11. The applicant claims that the bill of costs filed in this case is time barred and ought to be struck out

given that over six years have passed since the matter in respect of which it was filed was concluded; that the loan facility granted to the customer was repayed and a discharge of charge was executed on 13th February, 2007; that the applicant issued his final fee note which was paid on 9th July, 2002. All these claims were denied by the respondent.

12. Whilst I wholly agree with the parties' submissions that an advocate's claim for costs would be based on a contract for professional services between him and his client and would therefore be subject to the limitation period set out in *Section 4(1) (a)* of the *Limitation of Actions Act*, the burden of proving that a claim for costs by an advocate was over six years old and was therefore statute barred falls squarely on the party disputing the legal validity of the claim. This follows the legal maxim that he who alleges must prove- see *Section 107* and *108* of the *Evidence Act*. In this case, that burden fell on the applicant.

13. In a contract for the provision of legal services, for purposes of computation of time, time begins to run from the date of termination of the advocate's retainer or on execution of the assigned tasks or on completion or conclusion of the cases forming the basis of the claim for costs. This legal position is expounded in *Halsbury's Laws of England, 4th Edition, Volume 28 at Paragraph 879 (page 452)* wherein it is stated as follows;

"879. 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 termination of the action or of the lawful ending of the retainer of the solicitor;

2. 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;

3. 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."

14. Applying the above principles to the current application, it is noteworthy that the bill of costs herein was filed in respect of

services rendered to the applicant in Kapsabet PMCC No. 173 of 2001. Contrary to insinuations made by the applicant in paragraph 4 of the supplementary affidavit, the bill of costs herein is not in respect of a loan facility granted to the bank's customer which was discharged on 13th February, 2007.

15. Though the applicant has claimed that the aforesaid case was concluded vide a ruling on a preliminary objection delivered on 5th October, 2001, it has not adduced any evidence to substantiate that claim. This is so since the said ruling has not been annexed to any of the affidavits sworn on behalf of the applicant. There is therefore no evidence to rebut the applicant's claim that the suit is still pending in court.

16. The applicant has also failed to adduce any evidence to verify its claim in paragraph 6 of the supplementary affidavit that the respondent is no longer on the panel of its advocates or when his retainer was terminated if at all. In the circumstances, there is no material before the court upon which it can determine when time with respect to the instant bill of costs started running. There is thus no basis for a

finding that the bill of costs dated 24th July 2015 is statute barred as alleged.

17. Regarding the claim that the respondent is estopped from demanding payment of further fees, it is my finding that the applicant has failed to support with evidence its claim that the respondent issued his final fee note on 9th July, 2002 which was settled. The copies of receipts and letters confirming payments of legal fees to the respondent annexed to the applicant's supplementary affidavit marked B1 to B7 are irrelevant and lack any evidential value. None of those receipts or letters discloses any payment in respect of Kapsabet PMCC No. 173 of 2001. They do not in fact show the matters in respect of which the legal fees were paid save for the document marked 'B6' which depicts payment in connection with ELD CMCC No. 375 of 2013 which needless to say is not the basis of the impugned bill of costs dated 24th July 2015.

18. It is also pertinent to note that the applicant has admitted that it has not paid the respondent his full legal fees and that there are still some outstanding fees for which parties were pursuing settlement. Having admitted its indebtedness to the respondent with respect to undisclosed matters and having failed to discharge its burden of proving its claim that the applicant had received his final dues on 9th February, 2002, I am persuaded to find that the applicant has failed to prove that the respondent has been fully paid for his services and is therefore estopped from demanding payment of the sums claimed in the bill of costs.

19. Turning now to prayer 4 of the application, I find that the order sought is not available to the applicant for the following reasons; First, the pleadings in the matters listed in the prayer have not been annexed to the application. Secondly, there is no evidence to prove the claim that the matters in respect of which the bills of costs were filed were concluded six years ago; that the applicant has already closed its files in the said matters and terminated its Advocate - Client relationship with the respondent.

20. Besides, there is evidence availed by the respondent demonstrating that some of the matters listed in the aforesaid prayer emanated from cases which were determined as recently as in year 2014 and 2015 and some are the subject of appeals which may be pending in court. In the circumstances, it is my finding that the defence of limitation of action ought to be raised separately and considered on its own merit in each of the matters in question.

21. For the foregoing reasons, I find that the Notice of Motion dated 1st March, 2016 is devoid of any merit. It is accordingly dismissed with costs to the respondent.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 14th day of June, 2017.

In the presence of:-

Mr. Omondi for the Respondent

Mr. Oribo for the Applicant

Mr. lobolia court clerk