REPUBLIC OF KENYA

IN ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC SUIT NO. 263 OF 2006

SIFA INTERNATIONAL LIMITED.....PLAINTIFF

=VERSUS=

BOARD OF TRUSTEES NSS.....DEFENDANT

RULING

1. The defendant, Board of trustees NSSF has filed this motion dated 28th March 2017 under the provisions of section 1A, 1B and 3A of the Civil Procedure Act and order 51 rule 1 of the Civil Procedure Rules seeking to be granted the following orders:

1. That the Bill of costs dated7th December, 2016 be struck out for the following reasons;

i) It is statute barred by virtue of section 4 (1) (a) of Cap 22.

ii) It is fatally defective for being in contravention of paragraph 13 (3) of the Advocates (Remuneration) order 2009.

iii) It violates the principle of estoppel by deed in section 120 of the Evidence Act Cap 80.

2 The costs of this application be awarded to the Defendant

2. The motion is supported by the grounds inter alia that the defendant met with their advocate then, discussed the fee notes dated 11th June 2010 and mutually agreed that the advocates would accept legal fees of Kshs.2-5M inclusive of VAT for handling HCC 263 of 2009 and 2.5M plus VAT for handling HCC 102 of 2009. That this agreement was communicated vide the defendants letter dated 6th August 2010 and accepted by the advocate vide his letter of 17th August 2010. Further that the defendant made the payments on 28.9. 2010. Consequently the ill of costs dated 7th December 2016 and any subsequent Bill of costs is not only time barred but also violates the principal by dead. The application is further supported by the facts narrated in the affidavit sworn by Austin Ouko who is an employee of the defendant.

3. The application is opposed by the law firm of Lumatete Muchai & Company Advocates who is the Respondent in the application by the replying affidavit of Mr. Lumatete Muchai dated 4th April 2017. Mr. Muchai deposed that the defendant/applicant demanded for refund of Kshs.1,329,000 on allegations of overpayment. That this demand negated the mutual agreement reached by the parties as regard their

costs which agreement he stated was valid and binding upon both parties. He deposed that pursuant to this agreement, the defendant is estopped by deed from demanding or seeking the alleged refund. He also deposed that the defendant is estopped from denying the law firm's right to tax its bill having relied on the defendants' representation. He then proceeded to define estoppel by representation in paragraph 13 & 14 of his affidavit. Based on this definition, he urged the court to invoke the doctrine of equitable estopped and restrain the defendant from crying foul so that the ends of justice can be met.

4. Mr. Muchai deposed further that the letter of 26. 11. 16 waived the application of statute of limitation so the applicant cannot use the defence that the bill is time-barred. In response to the bill contravening the provisions of paragraph 13 (3) of the Advocates (Remuneration) order, Mr. Muchai pleaded the provisions of article 159 (2) (d) of the Constitution and urged the court to hear and determine the bill. In conclusion, the law firm urged the court to dismiss the present application for being misconceived, frivolous and an abuse of the court process. He annexed the letters of 29. 11. 2016, his response dated 2. 12. 2016 and the contentious bill dated 7th December 2016 in support of the facts put forth in the replying affidavit.

5. The parties advocates filed written submissions which addressed the three main issues for determination i.e:

(a) Whether the Bill of costs is statute barred

(b) Whether the Bill contravenes the provisions of paragraph 13 (3) of the advocates (Remuneration) order 2009.

(c) Whether either of the parties are estopped from disclaiming the costs or claiming the costs.

6. On the first item on whether the Bill of costs is statute barred, the advocate submitted that that the effect of the letter by the defendant dated 29th November 2016 re-opened the matter thus effectively vitiating the agreement entered on 16th August 2010.The defendant on its part submitted that the letter of 29. 11. 2016 was demanding for refund of monies paid as deposit for the appeal that was to be filed from the decision of **Sergon J** given on 27th February 2009. In analyzing both arguments, it's my understanding that the advocate conceeds that the cause of action was time barred by virtue of the provisions of section 4 (1) (a) of the limitation of Actions Act. However the defendant having demanded for refund in November 2016 it re-opened the matter and therefore the cause of action now began fresh.

7. There is no dispute that the services of the advocate were terminated by the defendant on 31st May 2010. The defendant/applicant cited the case of P**.M. Wamae & Company Advocates vs Ntoitha Mmithiaru (2016) eKLR** where the court stated thus and which I fully concur with, "**if a solicitor sues for costs in an action, the statute of limitation only begins to run from the date of termination of action or the lawful ending of a retainer of the solicitor."**

It follows then that time began running in this instance on 1st June 2010 and given that it was a contractual relationship, the time lapsed/expired on 31st May 2016. The advocate may as well adopt a defence that even the demand for the refund of the sum of Kshs.1392000 by the defendant is also statute barred. However the demand in my opinion did not change the date of 31st May 2010 when the cause of action accrued as the demand did not revise the date termination. For this reason it is my finding that the bill of costs dated 7th December 2016 is indeed time barred. Having been filed without first seeking extension of time if at all), it cannot stand.

8. I will skip the second item on violation of paragraph 13 (3) of the order which in my opinion is a question of form rather than substance and address myself to the issue whether the advocate is estopped by deed from filing his costs or alternatively whether the defendant is estopped from disputing the taxation of the advocate – client bill of costs. From the correspondences annexed between the two parties, the advocate sent his fee note to the defendants dated 11th June 2010. The letter forwarding the fee note in the concluding paragraph stated thus, **"we look forward to receiving your settlement cheque**

at your earliest convenience to enable us close our respective accounts herein and release the files to M/S Cootow Associates."

9. Subsequent to the sending of the fee note, the two parties met, discussed the fee payable and reached a settlement. The defendant asked their advocate to signify acceptance of the figures agreed during their meeting to enable them process payment. In response to this request, the advocates wrote the letter dated 17th August 2010 confirming that payment may be processed as per the contents of the defendants' letter of 16th August 2010 and they also provided account details in their letter of 28th September 2010. The payment was subsequently made. Given that the advocates already sent a fee note for services rendered which was then discussed and a figure agreed for costs of the services rendered. What then would form the basis for filing a new bill of costs and for which the advocate holds the view its taxation should not be refuted by the defendant/client?

10. The law firm has deposed in the replying affidavit that the agreement reached on 6. 8. 2010 was binding on both parties. It is my considered view again that it is not open for the advocate to do and a fresh bill of costs merely on account of the demand for the refund being demanded by the applicant. His fee note dated 11th June 2010 was construed to contain the entire costs for services rendered. Once the same was negotiated and agreed, the final figure reached then became the fees due and payable. The advocate seems to want to rely on this agreement and ran away from it at the same time.

11. The defendant is demanding for refund of Kshs.1, 392, 000, being deposit made towards filing of an appeal. The said letter stated that it enclosed a notice of appeal lodged in 2009 and asked for memorandum and records of appeal if any filed. It was not a demand for over - payment as stated in the replying affidavit. I do agree that the costs if any would be due for settlement in regards to the instructions on appeal which constitutes a separate set of instructions from the bill that was drawn and agreed vide the fee note of 11th June 2010. The demand letter does not in my view vitiate the agreement reached between the parties on 6th August 2010 in respect of that bill. The advocate's remedy and or defence in my view would be to justify explain why they cannot honour this demand which explanation cannot be by way of filing a fresh bill for the court to tax. The parties having compromised the fee note of 11th June 2010 are bound by the terms of that agreement thus calling the application of the provisions of section 120 of the Evidence Act into play. For this reason I am persuaded to find in favour of the applicant that the bill of costs dated 7th December 2016 violates the principle of estoppel by deed.

12. In light of my findings on the two issues, I am satisfied that there is merit in the present application and grant it in terms of prayer 1 (i) & (iii). The Bill of costs date 7. 12. 2016 be and is hereby ordered struck out. Each of the parties herein to meet their respective costs of this application

Dated and Delivered at Mombasa this 19th.Day of January, 2018

A.OMOLLO

JUDGE