Otieno, Ragot & Company Advocates v National Bank of Kenya Limited (Civil Appeal 19 of 2018) [2023] KECA 685 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 685 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 19 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

JUNE 9, 2023

BETWEEN

OTIENO, RAGOT & COMPANY ADVOCATES ..... APPELLANT

AND

NATIONAL BANK OF KENYA LIMITED ..... RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Busia (Kiarie Waweru Kiarie, J.) dated 18th October, 2017 in Misc. Civil Application. No. 64 of 2015)

JUDGMENT

Judgment Of Tuiyott,JA

1. Pursuant to the provisions of paragraph 11(3) of the *Advocates (Remuneration) Order, 1962* (the Remuneration Order, a person aggrieved by the decision of a judge to a reference, may, upon obtaining leave of the judge, appeal to this Court. This is one such appeal.

2. Otieno, Ragot & Company Advocates (the appellant or the Advocates) were retained by National Bank of Kenya Limited (Respondent or Bank) to represent it in Busia High Court Civil Case No 34 of 2005 (the primary suit). As sometimes happens, there was a fallout between advocate and client, and the Advocates initiated Busia High Court Misc. Application No 64 of 2015 against the Bank, being proceedings for a claim of fees for services rendered in the primary suit. The taxing officer determined the Bill by taxing item 1 of the Advocates bill of costs at Kshs 887,938.95 with VAT of 142,070.23. The taxing officer did not address the other 7 items of that short Bill.

3. Both the Advocates and the Bank were dissatisfied with the decision of the taxing officer and filed two separate references which were heard together and determined in a composite ruling whose headlines were:

    i. There existed a retainer agreement between the Advocates and the Bank which bound the parties.

    ii. The taxation proceedings were time barred under the provisions of the *Limitation of Actions Act*.

4. Through a ruling delivered on October 18, 2017, the High court granted leave to the Advocates to bring this appeal. In it the Advocates have raised grounds and made submissions which revolve around the following issues:

    i. Whether there was evidence of a retainer agreement before the taxing officer and if not, whether such evidence could be placed before the learned Judge at the reference.

    ii. Depending on the answer to (i) above, whether the parties intended to be bound by the retainer agreement.

    iii. Was the Advocates' claim time barred.

5. In an advocate-client taxation of costs, such as the one which is the subject of this appeal, statute empowers a taxing officer to summon and examine witnesses, direct production of books, papers and documents. In this regard are paragraphs 13 and 13A of the *Remuneration Order* which read:

    1. The taxing officer may tax costs as between advocate and client without any order for the purpose upon the application of the advocate or upon the application of the client, but where a client applies for taxation of a bill which has been rendered in summarized or block form the taxing officer shall give the advocates an opportunity to submit an itemized bill of costs before proceeding with such taxation, and in such event the advocate shall not be bound by or limited to the amount of the bill rendered in summarized or block form.

    2. Due notice of the date fixed for such taxation shall be given to both parties and both shall be entitled to attend and be heard.

    3. The bill of costs shall be filed in a miscellaneous cause in which notice of taxation may issue, but no advocate shall be entitled to an instruction fee in respect thereof.

    13. Powers of taxing officer

    A. 'For the purpose of any proceedings before him, the taxing officer shall have power and authority to summon and examine witnesses, to administer oaths, to direct the production of books, paper and documents and to direct and adopt all such other proceedings as may be necessary for the determination of any matter in dispute before him.'

6. Before the determination of a bill, a party to taxation proceedings may, even without the prompting of the taxing officer, offer the evidence, be it by way of witnesses or documents that could assist the party

prosecute or resist the bill. In this case, it was the client who sought to rely on the retainer agreement and the onus was on the Bank to produce it before the taxing officer. On this I readily agree with the submission of Mr Otieno David, counsel who appeared for the Advocates in this appeal.

7. In the written arguments filed before us, there is convergence that a reference to a judge is akin to an appeal and this really is the position. Paragraph 11 of the *Remuneration Order* encapsulates the reference process to the superior court below and any subsequent appeal to the Court of Appeal. It provides;

> ' 11. Objection to decision on taxation and appeal to Court of Appeal.
>
> 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
>
> 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all parties concerned, setting out the grounds of his objection.
>
> 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
>
> 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.'

8. While the proceedings to the superior court below is christened a reference as opposed to appeal as the one to this Court, a reference is a test of the taxing officer's reasons on objected items. As to whether the parties to a reference can seek to rely on evidence that was not presented to the taxing officer, the parties to this appeal hold conflicting positions. The appellants cite the decision of this Court in *Otieno, Ragot & Company Advocates V National Bank of Kenya Limited* [2020] eKLR for the argument that, on a reference, a judge can only deal with what had been produced before the taxing officer.

9. The Bank, on the other hand, argues that as proceedings in taxation are a special type of proceedings, they are not strictly bound by the rules of appeal in civil matters. In respect to this particular matter, the Bank contends that having raised the issue of the retainer agreement in its submission before the taxing officer, the issue of the retainer agreement was a live issue before the officer who had power under the rules to call for any documents that, in her opinion, would assist her decide the bill of costs. A further argument is made that nothing in law prevented the Bank from availing the retainer agreement after the decision of the taxing officer it being asserted that if the costs arrived at by the taxing officer was less than the amount agreed in the retainer agreement then there would be no need to produce the retainer agreement but if, as here, the amount exceeded that in the retainer agreement then the Bank was at liberty to avail it before the learned Judge.

10. In Otieno Ragot & Company Advocates (*supra*) cited by the Advocates, Asike-Makhandia JA observed:

> ' It is common ground that a reference is an appeal from the decision of the taxing officer. Therefore, for a party to adduce additional evidence on appeal, leave ought to be granted by the said court.
>
> In the present appeal, the respondent did not seek leave to adduce additional evidence. It filed an application for review on which it purported to introduce new evidence. No additional evidence could be produced before the learned Judge unless they formed part of the record before the taxing officer as correctly submitted by the appellant. Admission of documents in taxation proceedings is a preserve of the taxing officer under Rule 13A of the Advocates Remuneration Order ad on reference, the Judge only deals with what was on record before the taxing officer. In the case of Wanga & Co. Advocates (supra), the court stated that allowing a party to introduce new evidence at the appellate level was not only prejudicial to the opposing party but also against public policy and the law. The two courts below were not given an opportunity through the proper channels to strike a fair balance. By allowing the new evidence on account of inadvertent mistake, the learned Judged opened a door to litigants to introduce all sorts of material which should have been properly placed and considered by the taxing officer and not before the first appellate court. Having discussed elsewhere in this judgment and concluded that the application for review was not merited, I find that the learned Judge erred in allowing the said evidence.'

11. Undoubtedly this is the law because once it is accepted that a reference is an appeal from the decision of the taxing officer, then it has to be accepted that the taxing officer's decision ought to be reviewed only on the material placed before the taxing officer unless there is good reason to allow additional evidence for which leave must be granted by the superior court below. To decide a reference on evidence not before the taxing officer would be to determine the bill on different parameters and would not amount to an appeal.

12. This court in *Wanga & Company Advocate v APA Insurance Company Limited* [2014] eKLR discusses an additional rationale for the principle that an appeal should only be determined on the evidence presented to the court from which the appeal emanates. This Court approved following passage from the speech of Lord Birkenhead in *North Staffordshire Railways Co v Edge* (1920) AC 254 cited in *Alwi A Saggaf v Abed Algeredi* (1961) EA. 767:

> ' The appellate system in this Country is conducted in relation to certain well known principles and by familiar methods. The issues of fact and law are orally presented by counsel. In the course of the arguments it is the invariable practice of appellate tribunals to require the judgments of the judges in the courts below shall be read. The efficiency and authority of a Court of Appeal, and especially on a final Court of Appeal are increased and strengthened by the opinions of learned judges who have considered these matters below. To acquiesce in such an attempt as the appellants have made in this case, is in effect to undertake decisions which may be of the highest importance without having received any assistance at all, from the judges in the courts below.'

13. The contention by the Bank that it was for the taxing officer to call for the retainer agreement is unhelpful because nothing barred it from placing that agreement at the taxation stage as it attempted to do at the reference. The further argument that it only became necessary to present the retainer agreement once the taxing officer taxed the bill for more than the fees agreed in the retainer agreement

is as flawed as it is disingenuous. The bill of costs filed by the Advocates was for a sum of Kshs 1, 521,793.88 which was fivefold what the Bank contended to be fees agreed in the retainer agreement and it would have been obvious to Bank that the costs could have possibly have been taxed way beyond the supposedly agreed sum unless the agreement was brought to the attention of the taxing officer. Indeed, in their submissions before the taxing officer the Bank's lawyers make reference to the retainer agreement but without producing it as follows:

> ' That having been the law your honour, we do submit that the respondent and the applicant herein had an agreement dated April 1, 2005. Which agreement was duly executed by the applicant herein to vide letter dated May 3, 2005'

14. Inexorably, none of the parties to the reference could rely on evidence that was not before the taxing officer unless the High Court granted leave for adduction of further or additional evidence, neither sought nor granted in this matter.

15. This is now a good place to consider whether, on the material before the taxing officer, the Bank proved the existence of a retainer agreement. When confronted with the submission that there existed such an agreement, the Advocates filed a further list of documents before the taxing officer which it was used to address the question of the retainer agreement. Notably none of these documents is the retainer agreement nor do they make reference to a retainer agreement. On the basis of these documents, the Advocates answered the issue as follows; the Bank had not availed the retainer agreement; if the agreement ever existed then it could not apply to instructions given two years earlier; as one of the documents, in particular, a letter dated April 1, 2005 makes reference to a fee policy dated July 8, 1999 which was not exhibited, the law envisages an agreement and not a fee policy; there was no evidence that the respondent had signed any such agreement; even if such agreement had been signed it would be unlawful for agreeing on fees that was less than that prescribed under the *Remuneration Order*; the evidence was that the relationship between the parties and their conduct was inconsistent with any claim of such agreement.

16. The emphatic position taken by the Advocates at that stage was that no retainer agreement existed and that stance was, in my view, insurmountable as the Bank had not produced evidence of that agreement.

17. In clearly a repair exercise, the Bank produced a copy of the said retainer agreement for the first time before the High Court. This would amount to adducting further evidence but without leave of court. And in a further affidavit sworn by counsel David Otieno, the Advocates protested the production of this new evidence. This protest persists when the Advocates made their submissions before the Judge:

> ' For some strange reason, the client has now come up with documents which it wants this court to look at in dealing with this reference. what the client is doing is to adduce evidence at an appeal stage without providing a single reason for the move.'

18. To be fair to the Advocates, the learned Judge did not address this protest at all and proceeded as though the documents evidencing the retainer contract were properly before the court. To keep fidelity to the law on adduction of additional evidence at an appeal and the laudable objectives and reasons that undergird that principle, it is inevitable to hold that the learned Judge fell into error in deciding the reference on additional evidence that was not properly before the court. The net result of that holding is that the Bank could not prove that there existed a retainer agreement which complied with section 45 of the *Advocates Act*:

> ' (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.'

19. On the question whether the proceedings were barred by limitation of time, the learned Judge held:

> ' In the instant case when did the time start to run? The client has contended that the primary suit was dismissed in the year 2007. This therefore means that the advocate had until 2013 to demand the payment for his services. Records show that the advocate raised an issue with his bill with the client by a letter dated May 5, 2015. The same record shows that the client had sent the final fees of Kshs 31,544/= to the advocate account on June 29, 2007. Even if we assume that the advocate had not been paid his dues fully, the claim is time barred for it was raised 8 years after the completion of the work which he was retained to do.'

20. The Advocates fault this finding and submit that learned Judge misunderstood the facts of the case before him and misinterpreted the law.

21. Although the Advocates, in their last portion of their written submissions, suggest that an advocate/client relationship is a special contract and the law of limitation as we ordinarily understand it does not apply to an action for recovery of an advocates' fees, there was a convergence between them and the Bank that the High Court decision in *Abincha & Co Advocate V Trident Insurance Co Ltd*[2013] eKLR provides an answer as to when time should begin to run for the purposes of computation of time. But before commenting on the position in Abincha, it is imperative that the Court interrogates the Advocates' bold proposition.

22. Mr Otieno argues that our courts should not apply the English position because the relationship between a solicitor and his client in England is a simple straightforward contract in which parties are at liberty to agree on the terms they desire. Counsel submits that in Kenya an advocate/client relationship is not an ordinary contract because it is guided by statute which sets out amounts payable for services rendered by an advocate. For instance, it criminalizes the offering of services for free if not done within the pauper brief arrangement or at rates lower than that prescribed by statute. In building on this argument, counsel contends that,as there is no limitation of time for bringing criminal proceedings, the application of the statute of limitation to an advocate's claim for fees would mean that while the client would at some stage cease to be under an obligation to pay, the advocate will forever be open to criminal liability for failing to charge fees in accordance with the Remuneration Order.

23. The Bank makes no response to this argument.

24. There can be no doubt that an advocate –client relationship is a contract in which the client hires the advocate to offer professional services, at a fee. The contractual nature of the relationship is evident in the meaning assigned to the word 'client' under the *Advocates Act*;

> ' Client' includes any person who, as a principal or on behalf of another, or as a trustee or personal representative, or in any other capacity, has power, express or implied, to retain or employ, and retains or employs, or is about to retain or employ an advocate and any person who is or may be liable to pay to an advocate any costs'

25. The statute regulates the conduct and discipline of advocates; remuneration of advocates; an advocates fiduciary responsibility to clients; and provides for some aspects of principal –agency nature of the advocate-client relationship. But so are other professionals regulated. The *Architects and Quantity Surveyors Act* has similar rules for architects and quantity surveyors. The Medical Practitioners and Dentist Act establishes a council which regulates the conduct of registered medical and dentists' practitioners and discipline any form of professional misconduct.

26. I see nothing in the *Advocates Act* that suggests that because the professional is regulated, actions based on the contractual relationship between advocates and their clients are exempted from the provisions of the *Limitation of Actions Act*. The preamble to this latter Act is indicative of its stature as the primary statute in respect to limitation of time for actions and arbitrations. The Act in section 42 excludes its application to certain proceedings:

i. Exclusion of certain proceedings

1. This Act does not apply to-

a. Criminal proceedings; or

b. Matrimonial proceedings; or

c. An action to recover possession of Trust land; or

d. Proceedings by the Government to recover possession of Government land, or to recover any tax or duty, or the interest on any tax or duty, or any penalty for non-payment or late payment of any tax or duty, or any costs or expense in connection with any such recovery; or

e. Proceedings to which the *Public Authorities Limitation Act* (Cap 39) applies; or

f. Forfeiture proceedings under the *East African Customs Management Act*, 1952 (No 12 of 1952), or the East African Excise Management Act, 1952 (No 13 of 1952), of the High Commission; or

g. Proceedings in respect of the forfeiture of a ship or an aircraft; or

h. Civil proceedings brought under the *National Social Security Fund Act* (Cap 258.), for the recovery of any contributions or any other sum and any penalty or interest thereon; or

i. Civil proceedings brought under the *Higher Education Loans Board Act* 1995, (No 3 of 1995), for the recovery of any loans owed to the Board including any penalty or interest thereon; or

j. A proceeding to recover an amount for which a person is liable under section 51 or 52 of the *Anti-Corruption and Economic Crimes Act*, 2003 (No 3 of 2003) or a proceeding under section 55 or 56 of that Act;

k. Actions, including actions claiming equitable relief, in which recovery or compensation in respect of the loss of or damage to any public property is sought.'

27. It is to this exempting provision that one should look to see whether an action is excused from the rigors of the Act. An action for recovery of an advocates fees is not one such action and does enjoy such privilege.

28. The argument that to provide a limit of time for recovery of an advocates fees would expose the advocate to possible criminal liability of failing to charge fees, liability which it is argued is not limited by time, is weak and unconvincing. An advocate ought to know that his relationship with his client is contractual in nature and governed by the *Limitation of Actions Act* and would be to blame for any consequences that may arise from his/her failure to take out proceedings to recover fees within the time set by statute.

29. With that settled, I turn to the Abincha case where Waweru, J famously held:

> ' As already seen, any claim or action for an advocate's costs is subject to the statute of limitation. As already seen also, time begins to run from the date of completion of the work or lawful cessation of the retainer. Time does not begin to run from the date of delivery of the bill! Section 48 (1) of the *Advocates Act* therefore cannot offer any defence against limitation.
>
> As to whether an advocate/client bill of costs is an action to recover costs, it clearly is. It will be remembered that upon a certificate of taxation being issued, all an advocate need do is apply for judgment under section 51(2) of the *Advocates Act*. In any case, why should parties go through taxation of a bill of costs if the costs thereby taxed cannot be recovered on account of the statute of limitation?'

30. I am happy to endorse this holding as a correct statement of the law and both sides agree. What is not agreed is how that formula should apply to the facts here.

31. The Advocates argue that because costs in the primary suit had not been recovered, the assignment it had been retained to undertake was not complete and it was for that reason the Bank appointed M/s Otieno Yogo, Ojuro and Co Advocates to take over the conduct of the primary suit. Applying the alternative formula in Abincha, the appellants contend that they were the advocates for the Bank until the Notice of Change of Advocates was filed on September 22, 2015 and the clock, for purposes of limitation, could only begin to tick from that date. In support of this position the Advocates point to the Bank's letter of May 11, 2015 as a concession and recognition by the Bank that they were their advocates and even appears to issue fresh instructions for recovery of taxed costs in the primary suit.

32. The Bank supports the holding of High court and submits that the Advocates completed their work under the retainer on July 9, 2008 when costs in the primary suit were taxed and any action for recovery of the Advocates cost ought to have been filed before 2014.

33. From the certificate of costs placed before the taxing master, party and party costs in the primary suit was taxed on July 9, 2008. While the Advocates now state that they understood their assignment to the Bank as only ending after recovery of the party and party costs in the primary suit, the manner in which

they conducted the brief is not consistent with that position. The advocate/ client bill of costs filed by the Advocates reveals that, after travelling to Busia on 2October 4, 2017 for taxation of the party/party Bill of costs, there was a period of extensive lull until February 25, 2015 when the Advocates drew and formally extracted the certificate of costs. This inaction betrays the Advocates current posturing that they understood their brief to have ended only upon successful recovery of costs because it is clear, at least from their bill of costs, that they did take any action towards recovery of their client's costs. And it is easy to read the motivation behind the Advocates obtaining the certificate of costs seven (7) years after inaction. It was useful for mounting and supporting their bill of costs filed just a few months later on May 19, 2015! It was not inspired by a desire to recover fees on behalf of the client or to carry out a remaining assignment.

34. Further, the contents of the Bank's letter of May 11, 2015 does not change the fact that the Advocates, through their own conduct, understood that they had successfully completed their assignment on July 9, 2008 after taxing the party and party costs in the primary suit. In that letter the Bank complains that the Advocates purported to send a 'Final Bill' through a letter of May 5, 2015 when they had much earlier sent a 'Final fee note' dated June 18, 2007 for a sum of Kshs 373,949.00 and which was settled through payment of Kshs 371, 544 on June 29, 2007. The Bank further complains:

> ' Finally, we have separately noted that there are several party and party costs certified in these cases (and in other Bank cases known to yourself) in which you are yet to advise status or account to the Bank in terms of recovery thereof. We feel it behoves you as the professional handling these Banks matters to render to it an account of the position or whatever steps you have taken towards execution.'

35. This Court is unable to construe the letter as instructions to the Advocates to recover the taxed costs in the primary suit. The client is simply complaining about the advocates' failure to render anaccount of any party and party costs recovered or steps taken towards execution for the costs. A duty to account by the advocate remains even after the contract between advocate and client has come to any end or after completion of the assignment. It is a duly imposed on an advocate by common law and statute.

36. In the end the learned Judge cannot be faulted for holding that the taxation proceedings were time barred.

37. I would propose that the appeal be dismissed with costs to the Respondents.

JUDGMENT OF KIAGE, JA

38. I have had the benefit of reading in draft the judgment of Tuiyott,JA and I am in full agreement with his reasoning, the conclusion he reaches, and the order he proposes.

39. As Joel Ngugi, JA is in agreement, the appeal is dismissed with costs to the respondents.

JUDGMENT OF JOEL NGUGI, JA

40. I concur with the Judgment of my learned brother Tuiyott, JA which I considered in draft, and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 9TH DAY OF JUNE, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.