



**Musembi Ndolo & Co. Advocates v Cannon Assurance (K) Ltd (Civil Appeal 24 of 2017) [2022] KECA 887 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KECA 887 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 24 OF 2017  
DK MUSINGA, AK MURGOR & S OLE KANTAI, JJA  
APRIL 28, 2022**

**BETWEEN**

**MUSEMBI NDOLO & CO. ADVOCATES ..... APPELLANT**

**AND**

**CANNON ASSURANCE (K) LTD ..... RESPONDENT**

*(An appeal from the Ruling of the High Court of Kenya at Kisumu (E. N. Maina, J.) dated 26th February, 2015 in HCC Misc. No. 161 of 2012)*

**JUDGMENT**

1. This appeal arises from the ruling of E. N. Maina, J. delivered at Kisumu on 26th February 2015 in Misc. Civil Application No. 161 of 2012. The background to the appeal is that by a letter dated 30th April 2004 the respondent instructed the appellant (a firm of advocates) to represent it in the taxation of 157 bills of costs filed against the respondent by Mr. Rajni K. Somaia Advocate, (Somaia). The said bills were grouped into several clusters and taxed by the Deputy Registrar and a ruling thereon delivered on 16th February 2006.
2. Shortly after the taxation of the bills, Somaia filed an application to convert the certificates of taxed costs into decrees under section 51 of the *Advocates Act*. The respondent, represented by the appellant, opposed the application. A ruling thereon was delivered on 30th September 2005. Upon delivery of that ruling the respondent instructed the appellant to file an application under certificate of urgency for stay of execution and for leave to appeal. The application was filed and interim orders were granted as prayed. Subsequently, the respondent instructed the appellant to file an application to set aside warrants of attachment that had been obtained by Somaia against its assets. The appellant filed an application dated 19th October 2005 on 21st October 2005 and served it upon Somaia. It was Misc. Civil Application No. 82 of 2005. The application was scheduled to be heard on 25th October 2005 but it would appear that it was not heard then. Somaia did not file grounds of opposition against the application until 24th June 2011. The grounds of opposition were however dated 24th June 2010.



3. The respondent's application dated 19th October 2005 that was filed on its behalf by the appellant was eventually heard by Ali-Aroni, J. who, in a ruling dated 4th November 2011 struck out the grounds of opposition as having been filed after a period of five years from the date of service and without leave of the court, and granted the orders sought by the respondent. Consequently, the warrants of attachment and sale issued to Keysian Auctioneers on the application of Somaia were declared null and void and Somaia was ordered to pay the court broker's charges.
4. It would appear that following delivery of the said ruling by Aroni, J. the advocate-client relationship between the appellant and the respondent turned sour and the appellant filed an advocate-client bill of costs for representing the respondent in the various matters of taxation of costs between Somaia and the respondent. Upon service of the appellant's bills of costs the respondent instructed A. Thuo Kanai to represent it.
5. On 19th September 2012 the respondent filed a preliminary objection to the taxation of the bills of costs, arguing that they were filed after the lapse of six years from the time when instructions were given and were therefore statute barred under section 4 (i) (a) of the Law of Limitation of Actions Act.
6. The Taxing Officer upheld the preliminary objection but the appellant, being dissatisfied with that decision filed a reference to the High Court.
7. In the impugned ruling, E. N. Maina, J. agreed with the Deputy Registrar (Taxing Officer) that the bills of costs lodged by the appellant from 20th July, 2012 were statute barred. The learned judge delivered herself as hereunder:

“The work here was in my view completed on 16/2/2005 when the bills in which the applicant was instructed were taxed. That was the date on which the ruling in respect of all the bills was delivered. With due respect the ruling of Ali-Aroni, J delivered on 4/11/2011 did not relate to the taxations directly. It was made pursuant to an application by Rajni Somaia for judgment on the taxed costs. As can be seen from the body of that application the same was secured (sic) on Cannon

Assurance K. Limited and there is nothing to demonstrate that the applicant's advocate in this matter was instructed in the matter as well. The work having been completed on 16/2/2005 it is evident that by the time the bills were filed on 20/7/2012 seven (7) years had lapsed. They had been caught by section 64

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(a) (sic) and even (d) of the Limitations of Actions Act.

The taxing officer correctly reached his findings”.

8. Being dissatisfied by that Ruling, the appellant preferred an appeal to this Court on grounds that the learned judge erred and misdirected herself in law: in finding that the appellant's work was completed on 16th February 2005 whereas the ruling of Ali-Aroni, J. in respect of Kisumu HCC Misc. Application No. 82 of 2005 was completed on 4th November 2011; that the application dated 19th October 2005 that was determined by Ali-Aroni, J. was not filed by the appellant; and that there was nothing on record to show that the appellant was instructed by the respondent in the said application.
9. This appeal was canvassed by way of written submissions with minimal oral highlights by the parties' advocates, Mr. Ndolo and Mr. Ojuro respectively. Mr. Ndolo reiterated his written submissions and urged us to find that time began to run upon determination of Misc. Civil Application No. 82 of



2005 which he filed on behalf of the respondent. On the other hand, Mr. Ojuro urged us to affirm the impugned ruling.

10. We shall start by determining the 2nd and 3rd grounds of appeal which, in our view, are straight forward as they question whether the learned judge erred in finding that the appellant was not instructed by the respondent to file the application dated 19th October, 2005.
11. The record is clear that the said application was filed by Musembi Ndolo & Company Advocates, the appellant herein, and it was supported by an affidavit sworn by Julius Maina Mukoma, the Managing Director/Chief Executive Officer of Cannon Assurance (K.) Ltd, the respondent herein. We therefore agree with the appellant that the learned judge misdirected herself in law in holding that

“there is nothing to demonstrate that the applicant’s advocate in this matter was instructed in that matter as well”. There can be no dispute that the appellant was instructed by the respondent to apply for the cancellation of warrants of attachment and sale that had been obtained by Somaia against the respondent’s assets. The appellant successfully argued the said application and was granted the orders as sought. We therefore allow grounds 2 and 3 of the appeal.”

12. We now turn to the main ground of the appeal, which is whether the learned judge erred in law in holding that the appellant’s bills of costs against the respondent were statute barred. It is not in dispute that the initial instructions by the respondent to the applicant were given on 30th April 2004. The ruling in respect of the 157 bills of costs filed by Somaia against the respondent was delivered on 16th February 2006. However, that was not the end of the matter. Subsequently Somaia sought to attach the respondent’s assets in an effort to recover his fees. As earlier stated, the respondent instructed the appellant to challenge that move and the appellant, on behalf of the respondent, filed Misc. Civil Application No. 82 of 2005. For whatever reasons, that application lingered before the High Court until 4th November 2011 when it was determined by Ali-Aroni, J. It follows therefore that the brief that was given by the respondent to the applicant on 30th April 2004 was finalized on 4th November 2011.

The appellant then filed its bill of costs about eight (8) months thereafter, that is, on 20th July 2012.

13. In our view, therefore, the bill of costs was not statute barred. Until 4th November 2011 the appellant was still acting for the respondent in the matters relating to payments of advocate’s fees by the respondent to Somaia. This was a claim founded on contract and the limitation period of such a claim is six (6) years from the date on which the cause of action accrued, see section 4(1)(a) of the *Limitation of Actions Act*. *Halsbury’s Laws of England*, 3rd Edition Volume 36 at page 233 states as follows:

“for the purposes of an action on the bill, time begins to run against a solicitor from the date when the work to which it relates was completed and not from the expiration of one month from the delivery of the bill...”.

14. Further, *Halbury’s Laws of England*, 4th Edition Volume 28 paragraph 879 states as follows:

“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.”



15. We respectfully adopt the finding of *T. W. Cherere, J. in Cannon Assurance K. Limited vs Musembi Ndolo & Company Advocates* 2018 eKLR that was cited before this Court by the appellant to the effect that for purposes of claiming fees, time began to run on 4th November, 2011.
16. In view of the foregoing, we find and hold that the learned judge erred in law in finding that the appellant's bills of costs filed on 20th July 2012 was statute barred. Consequently, we allow this appeal, set aside the ruling by E. N. Maina, J dated 26th February 2015 and substitute therefor an order directing that the appellant's bills of costs in Kisumu HCC Misc. Applications Nos. 161, 162, 163, 164, 165 and 166 all of 2012 be remitted to the Taxing Officer in the High Court of Kenya at Kisumu for taxation. The respondent shall bear the costs of this appeal as well as the costs of the Reference in the High Court. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.**

**D. K. MUSINGA, (P)**

**JUDGE OF APPEAL**

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**A. K. MURGOR**

**JUDGE OF APPEAL**

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**S. ole KANTAI**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

