



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPEAL NO. 110 OF 2016

BETWEEN

C.B. GOR & GOR.....APPELLANT

AND

ORIENTAL COMMERCIAL BANK LIMITED

(formerly known as Delphis Bank Limited).....RESPONDENT

*(An appeal from the Ruling of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 29<sup>th</sup> September, 2016*

*in*

*H.C. Misc. Applic No. 296 of 2015, as consolidated with H.C Misc. Applic. Nos. 297 of 2015, 298 of 2015, 299 of 2015, 300 of 2015, 301 of 2015 & 302 of 2015.)*

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**JUDGMENT OF THE COURT**

1. The appeal revolves around two major issues, *to wit*, whether the High Court has jurisdiction to strike out bills of costs before the taxing master and whether the bills of costs as filed by the appellant were time barred.

2. There was a long standing advocate/client relationship between the appellant and the respondent. The appellant represented the respondent in contentious as well as non-contentious matters. Somewhere down the line, this relationship took a sour turn culminating in its termination in October, 2005, at least as per the respondent. As a result, the respondent through its current advocates, Messrs Patel & Patel Advocates, wrote to the appellant requesting them to release all documents and monies belonging to it to the said advocates. As would be expected the appellant in response sent an itemized bill of what it deemed as costs due to it.

3. It seems that the respondent was not agreeable to the amount being claimed and negotiations on the same commenced between its advocate and the appellant. These negotiations did not yield any fruit since the respondent's advocates wrote to the appellant on two occasions that is, 28<sup>th</sup> June, 2006 and 3<sup>rd</sup> July, 2006 advising them to file their bills of costs. Be that as it may, there was still some communication between the appellant and the respondent's advocates regarding the fees due and release of crucial documents and files.

4. Subsequently, the appellant filed the first bill of costs on 21<sup>st</sup> April, 2007 which was taxed on 13<sup>th</sup> November, 2007. The rest of the bills of costs were filed on 15<sup>th</sup> October, 2015. These bills were set down for taxation before the taxing master. However, before taxation could take place, the respondent filed a Notice of Motion dated 8<sup>th</sup> April, 2016 before the High Court seeking *inter alia*:

***a) THAT the bills of cost dated 15<sup>th</sup> September, 2015 and filed on 15<sup>th</sup> October, 2015 be struck out and the proceedings therein be dismissed.***

5. The application was anchored on the grounds that the bills were statute barred by virtue of **Section 4(1) (a)** of the **Limitation of Actions Act**. The bills were premised on the contractual relationship of the parties hence, subject to the six years limitation period. The cause of action with respect to the appellant's professional fees accrued when the parties' relationship ended in October, 2005. Moreover, the respondent's advocates had advised the respondent to file the necessary bills of cost on 28<sup>th</sup> June, 2006 and 3<sup>rd</sup> July, 2006. The respondent filed the bills in question on 15<sup>th</sup> October, 2015, outside the requisite time frame. Therefore, the taxing master had no jurisdiction to consider

the bills which were otherwise an abuse of the court process.

6. In opposing the application, Chitranjan Bhanuprasad GOR, a partner in the appellant's firm, deposed that at all material time, the respondent's advocates led the appellant to believe that they were desirous of settling the issue of costs. A bill of costs so to speak was not an action as contemplated under **Section 4(1)** of the **Limitation of Actions Act**. Besides, limitation could only be raised as defence to an action claiming costs and not when the bills of cost are being taxed. In point of fact, the appellant had already applied towards its costs a sum of KShs.9,126,428.56 it had received on behalf of the respondent and over which it had a lien.

7. In a supplementary affidavit, Ashok Vaja, the Assistant Manager of the respondent, deposed that the attempts to negotiate could not stop the limitation period from running. Particularly, taking into consideration the letters advising the appellant to file its bills of cost. As for appropriation of the sums held on behalf of the respondent, it was submitted that the appellant could not apply the same toward its costs without an agreement to that effect.

8. Faced with the divergent positions taken, the learned Judge (**Njoki Mwangi, J.**) in a ruling dated 29<sup>th</sup> September, 2016 struck out the bills and in her own words expressed:

***“It is my finding that the relationship between a client and an Advocate is a contractual one and an advocate is required to take action in pursuit of his professional fees without undue delay after completion of an assignment to forestall the unfortunate position that the respondent finds himself in. The Bills of Costs for Mombasa High Court Misc. Civil Application Nos. 296, 297, 298, 299, 300, 301 and 302 of 2015 were all filed on 15<sup>th</sup> October, 2015.***

...

***A perusal of all the files that form the subject of the present application reveals that the work that the respondent was instructed to undertake by the applicant was finalized more than 6 years ago. An action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act. I am therefore in agreement with counsel for the applicant that the bills of costs filed on 15<sup>th</sup> October, 2015 are statutorily time barred. The application dated 8<sup>th</sup> April, 2016 is hereby allowed with costs.”***

9. It is this decision that is the subject of the appeal before us which is premised on 12 grounds of appeal. In a nutshell, the appellant takes issue with what it regards as misdirection on the part of the learned Judge that the bills of cost were time barred; and that she had jurisdiction to strike out the bills of cost

10. Mr. Amoko, learned counsel for the appellant, submitted that the **Advocates (Remuneration) Order** is a subsidiary legislation which empowers a taxing master to tax or assess costs as between an advocate and client at the request of either party. In carrying out his/her mandate the taxing master has powers analogous of a court conducting a hearing; the High Court cannot usurp the special and primary jurisdiction of the taxing master which is derived from **paragraph 11** of the **Advocates (Remuneration) Order**.

11. The High Court's jurisdiction in such a scenario could only arise once a bill of costs is taxed and a reference is filed under **paragraph 11**. The bills struck out by the learned Judge were not references under **paragraph 11**. Therefore, the learned Judge acted without jurisdiction. In buttressing that line of argument, reference was made to the High Court's decision in **Hezekiah W. Gichohi vs. Uhuru Highway Development & Others [2011] eKLR** wherein **Mwera, J.** (as he then was), stated:

***“To support that position the two High Court cases of Fulchand M. Shah vs. Panchand J. Shah & 6 Others [2010] eKLR, and Daly & Figgis & Co. Advocates Vs Karuturi Networks Ltd & Anr [2009] e KLR were cited in essence following the court of Appeal decision in Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 530. In those cases it was propounded that where a matter has not come before the High Court regarding taxation e.g. by way of plaint to recover costs or a reference under paragraph 11 (above), the court has no jurisdiction to entertain any proceeding coming by a course other than those two. Otherwise the proceeding is a nullity...”***

***After considering all the above this court concurs with the decisions in the two High Court cases and follows the principle laid down in the Court of Appeal case. The preliminary objection is upheld. The notice of motion dated 29.9.10 is struck out with costs to the defendants.”***

12. Laying further emphasis, counsel also cited **Stanley Mwandoe Righa vs. Braimoh Joseph Mburu [2014] eKLR** wherein the High Court held:

***“I would then turn to the taxation of bill of costs by the defendant. The advocate-client bills of cost against Occidental Insurance Company and Fidelity Insurance Company are before the taxing master of this Court. The taxing master exercises a special and primary jurisdiction. The High Court only gets seized of jurisdiction over taxation by an appeal or reference from the taxation. Sharma vs. Uhuru Highway Development Company [2001] 2 E.A 530, Donholm Rahisi Stores vs. East African Portland Cement Limited [2005] e KLR.”***

13. He also reiterated that the bills of costs in issue were not actions within the meaning of **Section 4(1)** of the **Limitation of Actions Act** thus could not be held to be time barred. Besides, the cause of action could only accrue when the costs claimed are ascertained; the costs were neither agreed between the parties nor were they taxed.

14. In light of the foregoing, the application before the learned Judge was a nullity since the bills in question had already been fixed for

taxation before the taxing master. As far as Mr. Amoko was concerned, the application for striking out the bills was an abuse of the court process.

15. He added that even in the event that the debt with respect to fees is statute barred, the appellant could recover such a debt through the lien it had over a sum of Kshs.9,126,428.56 it held on behalf of the respondent. In counsel's view, the object of taxation was to ascertain the amount of costs for which the appellant could enforce its lien. The taxing master was clothed with jurisdiction to tax the bills without regard to the statute of limitation.

16. On his part, Mr. Khagram, learned counsel for the respondent, submitted that the appellant had acknowledged that its claim for costs was statutorily time barred. In doing so, the appellant contended that statute barred debts are not extinguished rather it is the recovery of the same through an action is what is barred. The appellant appeared to suggest that it was merely seeking the taxation of the bills for purposes of exerting a lien over the respondent's funds in its custody. According to counsel, such conduct was barred by **Section 52** of the **Advocates Act**. In any event, lien could only be exercised on account of a debt which is due. In the case at hand, the appellant's costs had not been ascertained thus, the lien alluded to by the appellant was premature.

17. Countering the appellant's allegation that a bill is not an action, he urged that a bill of cost amounts to an action because after its taxation, a certificate of taxation is issued and thereafter judgment can be entered on the basis of such a certificate. It was therefore fallacious on the appellant's part to argue that the question of time limitation could only be raised and considered by the learned Judge in a reference filed against the taxing officer's decision. In Mr. Khagram's view, no proceedings could be commenced by the appellant even by way of filing bills of cost to ascertain costs when the claim for such costs was time barred.

18. Mr. Khagram argued that as it stood there were conflicting schools of thought on whether the taxing master has ancillary jurisdiction to stay and/or strike out bills. One school of thought takes the position that the jurisdiction of the High Court in taxation matters only arises on a reference for the taxing master's decision. He stated that the appellant in advocating for the first school of thought cited the decision of this Court in ***M. G. Sharma vs Uhuru Highway Development Limited [2001] eKLR***. In his opinion, this was not the correct position because this Court in the aforementioned decision recognized that the taxing master is only empowered to tax costs and nothing else. The limited scope of the taxing master's jurisdiction was also restated by this Court in ***Joreth Ltd. vs. Kigano & Associates [2002] 1 EA 92***. Moreover, **paragraphs 13 and 13A** of the **Advocates (Remuneration) Order** restrict the taxing officer's jurisdiction to taxing bills of cost

19. In light of the foregoing, the learned Judge had the jurisdiction to strike out the bills of costs. In support of that proposition, counsel relied on several decisions and to mention a few, ***Abincha & Co Advocates vs. Trident Insurance Company Ltd [2013] eKLR***, ***Kenya Orient Insurance Limited vs. Oraro & Company Limited [2014] eKLR*** & ***V. Chokaa & Company Advocates vs. County Government of Uasin Gishu [2016] eKLR***.

20. Referring the Court to High Court's decision in ***Musembi Ndolo & Co. Advocates vs. Cannon Assurance (K) Ltd [2015] eKLR***, Mr. Khagram urged that time with regard to filing bills of costs begins to run from the date the work which is subject to the bill was completed. Negotiations on a without prejudice basis between the parties could not stop the time from running. What is more, the respondent's advocates had advised the appellant to file its bills of costs. Therefore, it was without a doubt that the bills as filed were out of time.

21. In a brief rejoinder, Mr. Amoko stated that exerting lien over debtor's property is an equitable remedy and there was no requirement for the appellant's costs to be ascertained before it could exercise such a right. In that regard, he relied on ***Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 28 para 646***.

22. We have considered the record, submission by counsel and the law. Jurisdiction is what clothes a court with the authority to not only entertain a dispute before it but to also determine the same. Jurisdiction is conferred either by the **Constitution** or Statute. A court has no business giving the time of day to a matter which it lacks jurisdiction since any purported decision thereon would be a nullity. This is why **Nyarangi, JA.** in the celebrated case of ***Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR*** stated that:

***"Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***.

23. Did the learned Judge have jurisdiction to entertain the application seeking to strike out the bills of costs? It is common ground that the taxing master is clothed with jurisdiction to tax either a party/party or an advocate/client bills of costs. In such proceedings, the High Court's jurisdiction may be invoked by any party who is aggrieved with the decision of the taxing master on the taxation or any other matter therein by filing of a reference under **paragraph 11** of the **Advocates (Remuneration) Order**. The High Court's jurisdiction can also be invoked under the provisions of **paragraph 12** where the parties by consent have agreed that a matter arising from the taxation of a bill of costs be referred for the High Court's opinion.

24. Another avenue is where an advocate files a suit for recovery of costs due to him. See **Section 48** of the **Advocates Act**. Even so, save for where there is an agreement on fees in place, if the client in his/her defence to such a suit challenges the quantum of the costs sought, the High Court cannot enter judgment, unless with the parties consent, until the costs are taxed and certified by the taxing master. See **Section 49(a)** of the **Advocates Act**.

25. In light of the foregoing, we take the view that the High Court's jurisdiction with respect to taxation of bills of cost is limited to the scenarios set out above. To us, the contention that the taxing master's jurisdiction is limited to only taxing bills of costs hence he/she could not handle an application challenging the competency of the bills in question does not hold water. More so, paying regard to **paragraph 13A** of the **Advocates (Remuneration) Order** which stipulates:

***"For the purpose of any proceeding 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.” [Emphasis added]

26. The above provision surely must mean that a taxing master who is charged with the duty of taxing bills of costs must also have the power to determine an objection as to the competency of the bill. Our position is fortified by this Court’s observations in Otieno Ragot & Company Advocates vs. Kenya Airports Authority [2015] eKLR to the effect:

**“The High Court decision in the case of *The Board of Trustees National Hospital Insurance Fund vs. Kipkorir, Titoo & Kiara Advocates HCCC No. 154 of 2004* was premised on the view taken by the learned judge in that case that the allegations made there went beyond the scope of the mandate of the Deputy Registrar on a taxation. To the extent that it might be interpreted to support the view that the High Court may usurp the taxing function confronted (sic) a taxing officer in the first instance that decision is in our view not a correct representation of the legal position.”**

27. Accordingly, the learned Judge acted without jurisdiction in as far as she went on to consider the application challenging the bills of costs which had been by then scheduled for hearing before the taxing master. Such an application, in our view should have been dealt with by the taxing master in the first instance before escalating to the High Court. See Otieno Ragot & Company Advocates v Kenya Airports Authority (supra). Furthermore, this Court in the case of Sharma vs. Uhuru Highway Development Ltd [2001] 2 EA 531 held that where the advocate’s bills of costs had been scheduled for taxation before the taxing master, the High Court had no jurisdiction in such circumstances to entertain an application for stay of the said taxation. In entertaining the said application, the proceedings before the High Court were a nullity because there were no grounds conferring jurisdiction on the learned Judge to hear the matter and no steps had been taken to divest the taxing master of his jurisdiction.

28. We think we have said enough to demonstrate that the learned Judge acted without jurisdiction. Having expressed ourselves as herein above, we see no reason to delve into the issue of whether the bills of costs were time barred. Consequently, we allow the appeal and set aside the ruling dated 29<sup>th</sup> September, 2016 and substitute the same with an order striking out the respondent’s application dated 8<sup>th</sup> April, 2016 with costs. The appellant shall also have costs of this appeal.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of July, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**