



**Otiende v Munyao & another (Miscellaneous Application E215 of 2021)
[2022] KEELRC 13499 (KLR) (13 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13499 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E215 OF 2021**

BOM MANANI, J

DECEMBER 13, 2022

**IN THE MATTER OF THE ADVOCATES ACT CAP 16 LAWS OF KENYA
AND
IN THE MATTER OF ADVOCATE-CLIENT BILL OF COSTS ARISING OUT
OF LEGAL SERVICE IN INDUSTRIAL CAUSE NO 1650 OF 2011 NAIROBI**

BETWEEN

ALOISE A OTIENDE CLAIMANT

AND

BONIFACE M MUNYAO 1ST RESPONDENT

KENYA LOCAL GOVERNMENT WORKERS UNION 2ND RESPONDENT

RULING

Introduction

1. The respondent (hereafter called “the Advocate”) is a lawyer practicing in Kenya with his offices in Nairobi. He commenced legal action to recover legal fees for services rendered to the Applicant (hereafter called “the Client”).
2. The Client is a Trade Union registered in the Republic of Kenya. Its membership covers workers of the defunct Local Government and now the County Governments.

The Dispute

3. It is common ground that the parties to this action had a Client-Advocate relationship, the Client having instructed the Advocate to render legal services in Industrial Cause No 1650 of 2011 alongside other matters. It does appear that the relationship ran into headwinds following what the Advocate



has described as the Client's reluctance to pay legal fees. Consequently, the Advocate filed the present case seeking that the court's Taxing Master ascertains the fees that is due to him.

4. From the record, the Advocate-Client Bill of Costs (hereafter called "the Bill") was eventually taxed and a ruling delivered on May 31, 2022. It is this ruling that triggered the application dated June 10, 2022 by the Client which is in the nature of a reference. In the application, the Client seeks for several orders some of which are alternative prayers. These are:-
 - a. Spent.
 - b. The decision of the Taxing Master be overturned and or vacated and the Bill dated November 23, 2021 be struck out as the Deputy Registrar lacked jurisdiction to entertain it.
 - c. The decision of the Taxing Master dated May 31, 2022 be set aside and or reviewed.
 - d. The further affidavit by Leonard Katungi Mbuvi sworn on April 1, 2022 and relied on by the Taxing Master be struck out for having been fraudulently and unprocedurally sneaked into the court record without having been duly filed, paid for or served upon the Client to enable a response.
 - e. In the alternative the court be pleased to remit the Bill to another Taxing Master for re-taxation.
 - f. The court does assess the costs due to the Advocate.
 - g. The court be pleased to grant any other order it deems fit.
 - h. The court gives orders on costs of the application.

Analysis

5. The court considering a reference from the decision of a Taxing Master is not to interfere with the award of costs by the Taxing Master unless it is demonstrated that there was an error of principle committed by the Taxing Master in the process of taxation. This principle has been re-stated in a number of decisions including *First American Bank of Kenya v Shah and others* [2002] eKLR where the court observed as follows:

"The Court cannot interfere with the taxing officer's decision on taxation unless it is shown that either the decision was based on an error of principle, or the fee awarded was manifestly excessive as to justify an inference that it was based on an error of principle."

6. I will have this principle in mind in determining the current reference. The issues that I need to consider are:-
 - a. Whether the Deputy Registrar had jurisdiction to entertain the Bill of costs.
 - b. Whether the further affidavit by Leonard Katungi Mbuvi sworn on April 4, 2022 (not April 1, 2022 as suggested by the Client) is improperly on the court's record.
 - c. Whether the Taxing Master committed an error of principle in the taxation process.
 - d. Whether the Bill should be remitted to a different Taxing Master for re-taxation.
7. In the Client's submissions on the issue of jurisdiction, the question of limitation of actions is raised. It is contended that the learned Taxing Master was not entitled to assume jurisdiction over the taxation as it was already barred by section 4 (1) (a) of the *Limitation of Actions Act*.



8. The Client contends that the Advocate's application to recover fees was filed over seven (7) years after the contract for provision of legal services in Industrial Cause No 1650 of 2011 had come to a close. It is the Client's contention that the last activity in the aforesaid cause was on June 7, 2013 when the judgment was delivered. The Client contends that indeed, the Bill as filed corroborates the position that the last time the Advocate acted on the matter was on June 7, 2013.
9. I have looked at the Bill and indeed item 45 thereof suggests that the last action in Industrial Cause No 1650 of 2013 was on June 7, 2013. A physical scrutiny of the parent file demonstrates that the last action in the cause was on June 7, 2013 when the Deputy Registrar of the court signed an order for stay of execution.
10. The court record in the taxation file shows that on April 14, 2022, the Taxing Master fixed the matter for ruling on May 31, 2022. Meanwhile, there is an observation by her that the parent file had not been found. The court ordered the Advocate to avail some documents by April 19, 2022.
11. It is noteworthy that by April 14, 2022, the parties had filed their respective submissions on the Bill and preliminary objection; the Advocates on February 9, 2022 and March 18, 2022 or thereabouts and the Client on March 10, 2022.
12. On April 4, 2022 or thereabouts the Advocate filed a further affidavit in the cause introducing a receipt showing payment of legal fees by the Client to the Advocate on November 24, 2020. The record does not show that the said affidavit was filed with leave of the court especially now that the cause was pending for ruling on the preliminary objection and the Bill, the parties having filed their written submissions on the two aspects.
13. By the time the Taxing Master was making a request to the Advocate on April 14, 2022 to avail some documents, the Advocate's affidavit dated April 4, 2022 was already on record. It cannot therefore be said that the court's directive on April 14, 2022 was intended to validate the impugned affidavit.
14. The Client submits that the decision by the Advocate to place the further affidavit on the court file was, in the circumstances, irregular. I agree with this observation. A further affidavit can only find its way onto the court's record with leave of the court. That this is the generally accepted legal position is not even contested by the Advocate. In *Treadsetters Tyres Ltd v Hussein Dairy Ltd* (2002) eKLR, the court observed that a further affidavit filed without leave remains inadmissible however long it takes to point out the violation of the rules.
15. The Client has asked me to strike out the offending affidavit. However, I reckon that the affidavit is not in proceedings before me. It was filed in the proceedings before the Taxing Master. Therefore, I will only observe that it was improperly filed and it is, in my view, invalid.
16. The Taxing Master relied on the receipt placed on the court's record through the invalid affidavit to arrive at her conclusion that the Bill was not time barred. The receipt having been introduced through an affidavit that was invalidly on record could not have been relied on to reach the conclusion that the Taxing Master did. The said receipt was improperly on the court's record. As was observed by Justice Wa Makau in a related cause (ELRC Miscellaneous Application No E245 of 2021, *Katunga Mbuvi & Co Advocates v Kenya County Government Workers Union*, unreported), the receipt was not admissible in evidence having been filed through an inadmissible affidavit.
17. Under section 4(1) of the *Limitation of Actions Act*, action to enforce a legal right under a contract must be instituted within six (6) years of conclusion of the contract. The services of a lawyer to a client being contractual in nature are subject to this legal edict.



18. Quoting *Halsbury's Laws of England*, 4th Edition, Vol 28 at paragraph 879, the learned Judge in *Akide & Company Advocates v Kenindia Assurance Company Limited* [2021] eKLR indicated that an action by an advocate to recover legal fees must be instituted within six years of conclusion of the case or termination of the retainer. The court stated as follows:-

“In relation to continuous work by a solicitor, such as the bringing and prosecuting or defending an action; 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;

...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.”

19. Although an Advocate is entitled to claim a retainer, this is only valid where there is evidence of some work going on in the parent file or where there has been an appeal from the decision in the parent file and the Client has not debriefed the Advocate in the file. In the case before me, the record shows that after the order of stay signed in June 2013, the matter has not been active. There is no evidence that there was an appeal arising from the decision and that the Advocate was retained in such appeal. In the premises, the Advocate's brief terminated in June 2013.

20. The Advocate's brief having terminated in June 2013, he was required to recover outstanding fees within six years of this date. The Bill presented on November 24, 2021 coming close to eight years down the line was clearly time barred.

21. The Taxing Master could not rely on a receipt placed on record through an inadmissible affidavit to extent the time for recovery of fees in the cause. In this context, the Taxing Master committed an error of principle.

Determination

22. The orders of the taxing master dated May 31, 2022 are set aside, the bill of costs having been barred by the *Limitation of Actions Act*.

23. Costs of the reference are granted to the client.

DATED, SIGNED AND DELIVERED ON THE 13TH DAY OF DECEMBER, 2022

BOM MANANI

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

BOM MANANI

