



**Miller & Company Advocates v China Road & Bridge Corporation (Commercial
Miscellaneous Application 168 of 2019) [2024] KEHC 1773 (KLR)
(Commercial & Admiralty) (27 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1773 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND ADMIRALTY
COMMERCIAL MISCELLANEOUS APPLICATION 168 OF 2019**

**JWW MONG'ARE, J
FEBRUARY 27, 2024**

BETWEEN

MILLER & COMPANY ADVOCATES ADVOCATE

AND

CHINA ROAD & BRIDGE CORPORATION CLIENT

RULING

1. The Client/Applicant filed a Notice of Motion application dated 25th January 2021 pursuant to the provisions of Sections 1A, 1B, 3A & 63E of the Civil Procedure Act, Order 2 Rule 15 (b), (c), & (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 45(6) of the Advocates Act, Section 4 of the Limitation of Actions Act and all enabling provisions, seeking the following orders: -
 - i. This Honourable Court be pleased to strike out and/or dismiss the Advocate-Client bill of costs dated 20th February 2019; and
 - ii. Costs be awarded to the Applicant.
2. The application is predicated on the grounds set on its face and is supported by an affidavit sworn on the same day by Cui Jay, the Applicant's head of legal service. In opposition thereto, the Respondent filed a replying affidavit sworn by Eric Mugo, learned Counsel for the Respondent on 15th March 2022.
3. The Applicant's case is that it retained the Respondent on 7th June 2001 to defend its interest in HCCC No. 622 of 2001, which suit was dismissed by a judgment delivered on 19th January 2009 by M.A. Warsame. J (as he then was) with costs to the Applicant. Subsequently, on 6th February 2009 the Respondent sent the Applicant its final fee note with respect to the aforementioned matter for Kshs.110,000/=, which was settled by the Applicant on 23rd February 2009 and a receipt issued



acknowledging full payment of the said fees. The Applicant averred that on 20th February 2019, the Respondent filed an Advocate-Client Bill of Costs for Kshs.2,112,420/= seeking to recover fees in respect of proceedings in HCCC No. 622 of 2001.

4. It asserted that the final fee note issued on 6th February, 2009, settlement of the same and receipt duly issued to the Applicant, constitute an agreement with respect to remuneration as provided for under Section 45(6) of the *Advocates Act*. For this reason, the Respondent's Bill of Costs is an abuse of the Court process. In addition, since the Respondent's claim for costs is founded on a contract for provision of legal services, any dispute arising therefrom ought to have been pursued within 6 years from 23rd February 2009 when the cause of action accrued pursuant to the provisions of Section 4 of the *Limitation of Actions Act*.
5. The Respondent in response thereto averred the purported final fee note claimed by the Applicant cannot be a final fee note since the Respondent continued to act, represent and defend the Applicant's interests until sometime in the year 2018. It further averred that the receipt issued to the Applicant was as a result of the interim fee note thus cannot qualify as full settlement of the legal fees charged. It was stated by the Respondent that the fee note sent to the Applicant on 6th February 2009 was an interim fee note thus the provisions of Section 45(6) of the *Advocates Act* are not applicable herein. The Respondent denied that the Bill of Costs in this suit was filed outside the statutory allowed time.
6. In rejoinder the Applicant stated that pursuant to the provisions of Section 120 of the *Evidence Act* and guided by the principles of estoppel by conduct and record, the Respondent is prohibited from pursuing any form of recovery for these fees from the Applicant.
7. The instant application was canvassed by way of written submissions which were highlighted on 9th October 2023. Mr. Kimathi, learned Counsel for the Applicant referred to the provisions of Section 45(6) of the *advocates Act* and the case of *Corporate Insurance Company Limited v Kang'ethe and Mola Advocates* [2021] eKLR and submitted that the issuance of the final fee note by the Respondent on 6th February, 2009 can be construed as an unequivocal offer to the Client.
8. This offer was unambiguously accepted by the Applicant by settlement of the fees contained therein thereby creating a legally binding agreement between the parties herein. Learned Counsel contended that from the foregoing, it is clear that the Deputy Registrar does not have jurisdiction to tax the Respondent's Advocate-Client Bill of Costs since the settlement of the Respondent's fee note constitutes a binding agreement.
9. Mr. Kimathi relied on the case of *Abincha & Co. Advocates v Trident Insurance Co Ltd* [2013] eKLR and stated that the parties herein were in a contractual relationship created when the Respondent accepted instructions from the Respondent and terminates when judgment is entered and no appeal is preferred against the said judgment. Therefore, the provisions of Section 4(1) (a) are applicable in this case. He further stated that in this case, judgment was delivered on 19th January 2009 thus time within which the Respondent could institute a suit to recover costs from the Applicant, if any, started running on 19th January 2009. Consequently, the Bill of Costs in this suit having been filed 9 years 11 months after delivery of judgment is time barred and ought to be dismissed with costs.
10. Mr. Mugo, learned Counsel for the Respondent submitted that from the date of Judgment in the substantive suit, the Respondent under the Applicant's instructions pursued Party and Party Costs *Vide* Party and Party Bill of cost dated 25th April, 2013. However, the said bill of costs had to await a ruling on the plaintiffs Bill of Costs against the 1st Defendant in HCCC No. 622 of 2001 which was yet to be delivered as at 12th August 2016. He further submitted that it is only after this that the Respondent raised the instant Advocate-Client Bill of Costs thus it is not time barred.



11. It was stated by Counsel that the fee note dated 6th February 2009 was not subject to any agreement between the parties herein. In addition, the Respondent proceeded to represent the Applicant long after delivery of judgment in HCCC No. 622 of 2001 thus taking into account the time factor and the subject value of the case which was US\$ 62,500, the Respondent is justified in the taxed award issued by this Court.

Analysis And Determination

12. Upon consideration of the application herein, the grounds on its face and the affidavit filed in support thereof, the replying affidavit by the Respondent and the written as well as oral submissions by Counsel for parties, the issues that arise for determination are: -
 - i. Whether the Respondent's Advocate-Client Bill of costs should be dismissed; and
 - ii. Whether the Respondent's Advocate-Client Bill of Costs is time barred.

Whether the Respondent's Advocate-Client Bill of costs should be dismissed.

13. The Respondent averred that the fee note dated 6th February 2009 for Kshs.110,000/= in respect to HCCC No. 622 of 2001 was an interim fee note since it continued to represent the Applicant's interest till sometime in the year 2018 as such the Advocate-Client Bill of Costs dated 29th February 2019 is properly on record. The Applicant on the other hand submitted that the issuance of the final fee note by the Respondent on 6th February, 2009 can be construed as an unequivocal offer to the Applicant which was accepted by settlement of the fees contained therein thereby creating a legally binding agreement between the parties herein. The Applicant relied on the provision of Section 45(6) of the Advocates Act provides that: -

“Subject to this section, the costs of an advocate in any case where an agreement has been made by virtue of this section shall not be subject to taxation nor to section 48.”

14. It is trite law that where there is a valid agreement between an Advocate and a client with regards to legal fees, an Advocate is not at liberty to tax his/her costs. The Court in the case of Sifa International v Board of Trustees NSSF [2018] eKLR, when dealing with a similar issue held that:-

“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...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 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...”

15. The facts in the aforementioned case are almost similar to the facts in this case. Upon perusal of the Respondent's Advocate-Client Bill of Costs dated 29th February 2019, it is evident that it contains costs for the entire period the Respondent rendered its professional services to the Applicant. However,



the letter dated 6th February 2009 forwarding the fee note for Kshs.110,000/= with respect to HCCC No. 622 of 2001 to the Applicant, stated that it was the Respondent's final fee note. Upon receipt of the said fee note, the Applicant settled it on 23rd February 2009 and was issued with a receipt by the Respondent.

16. The Court in the case off *Corporate Insurance Company Limited v Kang'ethe and Mola Advocates (supra)* in allowing a similar application held that: -

“...settlement of the Advocates Fee Note constituted an agreement on the terms proposed in the fee and based on the first principles of the law of contract, the offer by the Advocates contained in fee was accepted by the Applicant who paid the consideration by way of settling it.”

17. In view of the foregoing, I am inclined to agree with Counsel for the Applicant that settlement of the fee note dated 6th February 2009 created a legally binding agreement between the parties herein, consequently the Respondent was not at liberty to pursue it costs by filing an Advocate- Client Bill of Costs except for services rendered after issuance and settlement of the fee note date 6th February 2009.

Whether the Respondent's Advocate-Client Bill of Costs is time barred.

18. It is not disputed that an Advocate-Client relationship is contractual thus any dispute arising therefrom would be subject to the provisions of Section 4(1) (a) of the *Limitation of Actions Act* which states that, actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. The question now that arises is when does time start running for purposes of Section 4(1) (a) of the *Limitation of Actions Act*. I concur with the Court's holding in the case of *Abincha & Co. Advocates v Trident Insurance Co Ltd (supra)* where when dealing with a similar issue it held that: -

“ 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 the lawful cessation of the retainer.”

19. In HCCC No. 622 of 2001 judgement was delivered on 19th January 2009. However, the Respondent contended it thereafter represented the Applicant's interest by filing a party and party Bill of Costs which was yet to be heard and determined as at 12th August 2016. Upon perusal of the Respondent's Advocate-Client Bill of Costs dated 29th February 2019, it is clear that the Respondent is pursuing costs for services rendered from 7th June 2001 when it received instructions to 12th April 2016 when it drew a Notice of Taxation in respect to the party and party Bill of Costs in HCCC No. 622 of 2001.

20. In the case of *Abincha & Co. Advocates v Trident Insurance Co Ltd (supra)* the Court referred to the Halsbury's Laws of England, 4th Edition, Volume 28 at paragraph 879 (page 452) which states that: -

“...if judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of the statute.

In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work.

A solicitor cannot sue a client for costs until the expiration of one month after delivery of a signed bill, but nevertheless time runs against a solicitor from the completion of the work



and not from the delivery of the bill. If some only of items included in the bill are statute-barred, the solicitor may recover in respect of the balance.”

21. For this reason, I opine that time within which the Applicant could file a Bill of Costs in relation to costs for representing the Respondent’s interest in HCCC No. 622 of 2001 started running on 19th January 2009 when judgment therein was delivered. For this reason, the Respondent ought to have filed its Bill of Costs on or before 19th January 2015. This means that the Respondent’s Advocate-Client Bill of Costs dated 29th February 2019 is time barred in this regard.
22. When it comes to costs for services rendered to the Respondent with regards to the party and party Bill of costs allegedly filed by the Applicant on behalf of the Respondent, time starts running from 12th April, 2016 which is the last day the Respondent offered its services to the Applicant by drawing a Notice of Taxation as can be seen from the Respondent’s Advocate-Client Bill of Costs dated 29th February 2019. This means that the aforementioned costs ought to have been pursued on or before 12th April 2022.
23. The upshot is that the instant application is merited. As a result, I make the following orders:-
 - i. Item Nos. 1-25 of the Respondent’s Advocate-Client Bill of Costs dated 20th February 2019 are hereby dismissed;
 - ii. The Respondent is at liberty to pursue its fees for any services rendered after settlement of the fee note dated 6th February 2009; and
 - iii. Cost of this application to be borne by the Respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2024.

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J.W.W. MONG’ARE

JUDGE

In the Presence of:-

1. Mr. Mugo for the Advocate /Applicant.
2. N/A for the Client.
3. Amos - Court Assistant

