



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**MILIMANI LAW COURTS**  
**MISC. CAUSE NO. 701 OF 2012**

**IN THE MATTER OF ADVOCATES ACT CAP 16(LAWS OF KENYA)**

**AND**

**IN THE MATTER OF A REFERENCE UNDER RULE 11 OF THE ADVOCATES  
(REMUNERATION) ORDER**

**BETWEEN**

**KENYA ORIENT INSURANCE LIMITED .....CLIENT/APPLICANT**

**VERSUS**

**ORARO & COMPANY ADVOCATES .....ADVOCATE/RESPONDENT**

**RULING**

**Reference on taxation**

**[1]** I have a Reference in my hand to determine. It has been preferred through the Chamber Summons dated 18<sup>th</sup> October, 2013. The Reference seeks the Ruling delivered by Hon. D.W. Nyambu, Deputy Registrar on 11<sup>th</sup> September, 2013 to be set aside, and more specifically:

***a. That this Honourable court do find that the taxing officer, erred in law in taxing and allowing the bill of costs dated 20<sup>th</sup> November 2012 and in failing to consider the Applicant's submissions.***

***b. That this Honourable court do [sic] find that the bill of costs dated 20<sup>th</sup> November 2012 is statute barred.***

***c. That this court do [sic] issue such further orders as it may deem fit and just in the interest of justice.***

***d. That the costs of this application be provided for.***

[2] Parties filed written submissions and took a robust position as to why the taxation ruling should or should not be interfered with. The arguments on both divide are rationally eminent as it will be borne out below.

**The Applicant submitted that:**

[3] The application is premised on the grounds stated on the face of the application as well as an affidavit sworn by Karen Njagi. It is seeking that the Ruling delivered by Hon. D.W. Nyambu, Deputy Registrar on 11<sup>th</sup> September, 2013 be set aside.

[4] The taxing officer erred in law in taxing and allowing the bill of costs dated 20<sup>th</sup> November 2012 and ignored the Applicant's submissions. Second, the bill of costs dated 20<sup>th</sup> November 2012 was statute barred. The Respondent's bill of costs dated 20<sup>th</sup> November, 2012 was claiming a sum of Kshs.220,535/- in relation to suits that had been filed between 1987 and 1989 to wit; **NAIROBI H.C.C.C. NO. 2747 OF 1987 GEORGE CHEGE KIARIE v WYCLIFF WAKILI & ANOTHER CONSOLIDATED WITH H.C.C.C. 4789 OF 1989 ERICK OTIENO SIKA & ANOTHER v LOCHAB BROS & ANOTHER**. See annexure marked **KN2**. The Applicant in its submissions raised the issue of the Respondent's bill of costs being time barred. The taxing officer, however, delivered a ruling dated on 11<sup>th</sup> September 2013 and made an award of the sum of Kshs. 100,298/- as taxed costs. That was in total disregard of the submissions by the Applicant, hence the Applicant's advocates requested to be supplied with the reasons for the decision on taxation. See annexure marked **KN 4**.

[5] The taxing officer responded vide a letter dated 3<sup>rd</sup> October, 2013 in which she informed the Applicant's advocates that the reasons for taxation were contained in the ruling delivered on 11<sup>th</sup> September 2013. See annexure marked **KN 5**. The taxation ruling did not address the issue of limitation of actions, hence this Reference.

[6] The Applicant was categorical in his replies to paragraphs 7, 10, 11, 15 to 18 of the Respondent's Replying Affidavit that limitation was an issue for determination by the taxing officer as it had been properly raised in the submissions of the parties. The Respondent also submitted on the issue in their written submissions. The Respondent argued that the issue of imitation ought to have been raised in the Applicant's replying affidavit or objections in the form of a preliminary objection. But the Applicant took a different view of the matter, that a bill of cost having been filed is open to opposition by the Applicant either orally or through written submissions. A bill of cost is not a pleading and as such, it was not possible and or procedural for the Applicant to file a replying affidavit as noted by the Respondent herein. In any event, the Applicant having raised an issue of fact of the bill of cost being statute barred, the burden of proving that the bill of cost was brought within the stipulated time frame was incumbent upon the Respondent and not the Respondent merely stating that the Applicant ought to have filed a pleading. Furthermore, the issue of limitation is one of fact which ought to be adjudicated upon as such and not as a preliminary objection.

[7] The taxing officer did not only fail to consider the submissions of both parties on the issues raised but also failed to even mention the issue of limitation in the entire ruling, or that issues of limitation must be specifically pleaded or that the issue ought not to have been raised in submissions. The submission by Respondent insinuating that those aspects were considered is, therefore, misleading. According to the Applicant, before taxation could have been undertaken, the issues of the bill of cost being statute barred ought to have been referred to the High Court by the taxing officer for determination. The High court is the court with jurisdiction to hear and determine such issues. The Applicant reiterates the issue of limitation was raised in the Applicant's submissions before the Bill of costs was taxed and as such was not a new issue.

[8] The Applicant holds the view that the Respondent never disputed; that the bill of costs herein was based on an advocate –client relationship; or that the instructions were completed way back in 2004 and the bill of cost was filed nine (9) years after the demand for fees was made; or that the issue of limitation of time is applicable. Therefore, this being a contractual relationship, the Limitation of Actions Act and specifically Section 4 (1) (a) is applicable to the bill of costs herein. The time started running when the Respondents made their last demand for payment which was on 22<sup>nd</sup> January 2004. According to Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 28 at page 419 paragraph 820, inter alia that “ **... once there has been a complete cause of action arising out of contract or tort, time begins to run...**”. Further relevant texts from Halsbury’s Laws of England 4<sup>th</sup> Edition Vol. 28 are at page 452 paragraph 879 that:

**“... in relation to continuous work by solicitor, such as the bringing and prosecuting or defending of 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 the termination of the action or the lawful ending of the retainer of the solicitor.**

**2. 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 decide,**

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

**... 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...”**

[9] The Applicant relied on the case of **H.C. MISC APPLICATION NO. 527 OF 2011 AT NAIROBI. (Delivered in 2013) ABINCHA & CO. ADVOCATES V TRIDENT INSURANCE CO. LIMITED** where the court in allowing the client’s application, stated inter alia that:

**“... any of the various bills of costs filed by the Advocate more than six (6) years after completion of the work which he was retained by the Client to do or after the lawful termination of the retainer in respect of such work, is statute barred by virtue of section 4 (1) (a) of the Limitation of Actions Act.”**

Accordingly, the taxing officer erred in law and in fact in falling to consider and/or address her mind to the Applicant’s submissions on the issue that the bill costs as presented was statute barred. On that basis, the Applicant submitted that the court should grant the orders sought in the application herein.

**The Respondent submitted that:**

[10] They relied on the replying affidavit of Gorgina Ogola Omondi dated 20<sup>th</sup> December 2013 in opposition to the application herein. The Respondent gave a synopsis of the facts to be; that the Applicant instructed the Respondent Advocate to act for it in the following consolidated matters namely **HCCC NO. 2747 OF 1987 GEORGE CHEGE KIARIE v WYCLIFF WAKOLI & ANOTHER AND HCCC NO 4789 OF 1989 ERICK OTIENO SIKA & ANOTHER v LOCHAB BROS & ANOTHER**. The Respondent Advocate faithfully rendered legal services to the Applicant for about twenty (20) years. The Respondent Advocate filed a reasonable Advocate Client Bill of Costs dated the 20<sup>th</sup> of November, 2012 (hereinafter referred to as the “Bill of

Costs”) claiming a sum of Kshs. 220,535/- in relation to the two consolidated suits (**Annexure G001A**)

[10] Except that the Applicant filed submissions, it did not file any or other further pleadings in the form of a replying affidavit or objections on points of law. The Respondent Advocate, however, filed submissions in response to those legal issues raised in the Applicant’s submissions. The Applicant opposed the Bill of on the primary ground that costs were excessive and attacked specific items thereof. It also raised a secondary ground that the bill of costs was brought after undue delay and is statute barred. The Respondent Advocate in its response submitted that the Applicant was not entitled to raise the issue of limitation in final submissions as the right to challenge a suit or an action on the basis of limitation needed the party raising the issue to first plead the issue in its reply. The Respondent Advocate in submissions sought the Honourable court to disregard the issue of limitation.

[11] The Respondent addressed the following issues:

#### **Whether the taxing officer failed to consider the Applicant’s submissions**

[12] To this first issue, the Respondent submitted that the Hon. D.W. Nyambu Deputy Registrar exercised the power vested in the Deputy Registrar to tax bill of costs Paragraph 13A of the Advocates (Remuneration) Order. The Applicant opposed the bill of costs on the primary ground of excessiveness and submitted on specific items namely item 1 to 82. These submissions were considered by the taxing officer and taxed the bill in accordance with the relevant Advocates Remuneration Orders for the years 1983, 1989, 1993 and 1997 as submitted by the Applicant. See her ruling (**Annexure G003**).

#### **Whether limitation can be raised in final submissions**

[13] To this second issue, the Respondent posits that limitation was not available to the Applicant at that stage as no pleading was filed raising limitation. The taxing officer rightly disregarded the Applicant’s submissions on limitation in her ruling and gave no determination as the same was only raised in submissions. There was no mention of limitation in the ruling as the same was rightly disregarded by the taxing officer as prayed by the Respondent. In **JOHN NJENGA V. BATA SHOE COMPANY LIMITED, HCCC 2332 OF 1993**, Visram J held that is not pleaded even if canvassed at the hearing cannot be a basis of a determination. Limitation should have been raised in a replying affidavit, objections or any other pleading in order for the same to be properly heard and determined by the honourable court. Order 2 Rule 5 of the Civil Procedure Rules, 2010 provides that a matter may be pleaded whenever arising in any pleading in order for the same to be properly heard and determined by the honourable court. Similarly Section 2 of the Civil Procedure Act, Cap 21 of the Laws of Kenya defines pleadings to include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant. Therefore, the Applicant should have placed its objection on limitation in the pleadings. The Respondent also cited the case of **GALAXY PAINTS COMPANY LIMITED V. FALCON GUARDS LIMITED COURT OF APPEAL CASE NUMBER 219 OF 1998**, where the Court of Appeal stated that issues for determination in a suit generally flow from the pleadings and unless the pleadings are amended in accordance with the Civil Procedure Rules, the trial court by dint of the aforesaid rules may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court’s determination. Limitation having been raised only in the final submissions and having not been specifically pleaded by the Applicant ought not to have been referred to the High Court or any court for determination as it was just an afterthought in submissions by the Applicant. See also the case of **ACHOLA & ANOTHER V HONGO & ANOTHER, COURT OF APPEAL CIVIL APPEAL NO 209 OF 2001**. The Respondent distinguished the authority relied on by the Applicant i.e. **HC. MISC APPLICATION NO 527 OF 2011 AT NAIROBI ABINCHA & CO. ADVOCATE V TRIDENT INSURANCE CO. LIMITED** as the Applicant therein raised the

issue of limitation through a notice of motion.

### **Was the bill of costs dated 20<sup>th</sup> November, 2012 statute – barred?**

[14] Without prejudice to the submissions hereinabove, the Respondent submitted that it is Section 23 (3) of the Limitation of Actions Act and not Section 4 of the said Act which is applicable. Under Section 23 where a right of action accrued to recover a debt or other liquidated pecuniary claim (sums owed to the advocate) and the person liable or accountable acknowledges the claim or makes payment in respect of it, the right accrues on and not before the date of acknowledgment or the last payment. The Applicant acknowledged the debt by dint of the content of its submissions and implied by its conduct. It is the Respondent's submission therefore that the period of limitation for purposes of recovery is still subsisting. The Respondent concluded that legal services were faithfully rendered for a period of close to twenty years and for which the Respondent rendered a reasonable bill of costs, and subsequently taxed off from Kshs.220,535/- to Kshs.100,298/-. The Reference should, therefore, be dismissed with costs. The court should uphold the taxing officer and ignore objections on procedural technicality by the Applicant.

### **COURT'S RENDITION**

[15] The issues for determination are fairly straight forward; as drawn from the pleadings and submissions of the parties. I frame them as follows:

- a. Whether limitation was properly placed before the taxing officer;
- b. If so, whether the taxing officer had jurisdiction to determine the issue or she ought to have referred it to the High court for hearing and determination;
- c. Whether the bill of costs is time barred; and
- d. What is the most appropriate relief in the circumstances of this Reference?

### **Whether limitation was an issue before the taxing officer**

[16] Under this issue, I will be answering the question whether limitation of action as an issue was placed before the taxing officer. In settling the question, I seek guidance of the holding of the Court of Appeal in the case of **GALAXY PAINTS COMPANY LIMITED V. FALCON GUARDS LIMITED COURT OF APPEAL CASE NUMBER 219 OF 1998**, where it held that:

*The issues for determination in a suit generally flowed from the pleadings and the trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination.*

[17] The parties herein agreed to file and filed written submissions on the matters they needed the court to determine. No further or other pleadings were agreed to be filed. The Applicant raised the issue of limitation of actions for determination by the court. The Respondent then addressed that issue in the written submissions but their argument took a different flight; that the issue ought to have been raised by way of affidavit or preliminary objection. On my part, I do not think that is entirely correct especially given that no other pleadings were filed by or agreed to be filed between the parties. The submissions by each party constituted the issues for determination by the court; framed the issues for the court's determination. That aside; even in a case where parties have adduced evidence or submitted on an un-pleaded issue, the law says that the issue has been left for the decision of the court. I find support in the case of **HERMAN P. STEYN CHARLES THYS CIVIL APPEAL NO 86 OF 1996**, where the Court of Appeal quoted with approval a statement in the case of **ODD JOBS v MUBIA [1979] E.A 476** that:-

***A court may base its decision on an un-pleaded issue if it appears from the course followed at the trial the issue has been left to the court for decision. On the facts the issue had been left for decision by the court as the advocate for the appellant led evidence and addressed the court on it.***

[18] By the above judicial authorities, and the fact that the parties placed the issues for determination by the court through written submissions, I am sanctified to hold that the issue of limitation of action was properly placed before the taxing officer. I am not persuaded by the argument by the Respondent that the issue was not properly raised before the taxing officer because there was no replying affidavit or a preliminary objection that had been filed by the Applicant. I should even state that, I belong to the school of thought, which takes the view, and I believe is the position of the law, that the question of limitation of actions is both a matter of law and fact and cannot be determined in limine or as a preliminary objection. Parties must be heard; evidence must be adduced; the court has to evaluate the entire circumstances of the case and make a decision. It is a matter for the trial. That rendition catapults the court to the second issue below.

***Does the taxing officer have jurisdiction to determine the issue or ought to have referred it to the High court?***

[19] I do not wish to re-invent the wheel. Waweru J dealt with the issue so well in the case of **ABINCHA & CO ADVOCATES V. TRIDENT INSURANCE CO LTD [2013] EKLR** where he held:

***16. What if the Deputy Registrar heard the application as Taxing Officer of the Court? The jurisdiction of a taxing officer is to tax the bill of costs before him. His powers set out in paragraph 13A of the Advocates (Remuneration) Order are in connection with taxation of the bill of costs before him. That paragraph states –***

***“13A. For the purpose of any proceeding before him, the taxing officer shall have power and authority to summon and examine witnesses, administer oaths, to direct the production of books, papers 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.”***

***“Any matter in dispute before him” must mean any matter connected with or concerning the taxation of any item in the bill of costs. It cannot mean any issue that challenges the taxing officer’s jurisdiction to tax the bill of costs.***

***17. The main issues raised in the notice of motion dated 20<sup>th</sup> February 2012 were challenging the Taxing Officer’s jurisdiction to tax the bill of costs before him. Those issues were whether the Advocate’s bill of costs was statute-barred under the Limitation of Actions Act and whether the Advocate was estopped from claiming any further costs? Did the Taxing Officer have jurisdiction to deal with those issues?***

***18. Those issues were raising one fundamental issue, to wit, whether there were any costs due to the Advocate that the Taxing Officer could tax? I hold that it was an issue that could only be determined by a Judge. It is the kind of issue that the Taxing Officer, with the consent of both parties, should have referred to the opinion of the High Court.***

***19. Only after determination of that fundamental issue by the High Court, that is, whether or not there were any costs due to the Advocate that could be taxed, would the bill of costs be referred back to the Taxing Officer for taxation, if it is found that there were costs that were due to the Advocate.***

***20. I therefore hold that even the Taxing Officer of the Court did not have jurisdiction to hear and determine the main prayers of the notice of motion dated 20<sup>th</sup> February 2012.***

[20] The *ratio decidendi* in and the thinking by Waweru J, in the above case is quite subtle and I am persuaded to adopt it. Consequently, I hold that a taxing officer in such matter as a taxing officer does not have jurisdiction to determine the issue of limitation of the bill of costs. I am delighted she did not determine it. However, the taxing officer committed two fatal judicial errors: 1) proceeding with the taxation; and 2) failing to refer the issue of whether or not the bill of costs was time barred, to the High court for determination. And although, as a general rule, the court should not interfere with taxing officer's decision, it would, however, disturb the taxation on the basis of the error in principle committed by the taxing officer. Due to the error in principle committed herein, I set aside the taxation. That penultimate order leaves me with the ultimate question below:

### **Is the bill time-barred?**

[21] Much have been submitted on this item, but they relate more to what the law provides about client-advocate relationship being contractual and, therefore, subject to the Limitation of Actions Act; and when time starts to run in various instances where an advocate seeks to recover his costs. But little information or evidence was provided as to exactly what the circumstances of this case are in relation to when the relationship was terminated or the engagement ended or cases on which the brief emanated ended and so on. These are matters which will enable the court to apply the prescriptions of the limitation period set out in section 4(1) (a) of the Limitation of Actions Act and also in **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 28 at paragraph 879(page 452)** which states –

***“879. Solicitor's Costs. 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;***

***2.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;***

***3.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.”***

[22] Accordingly, to enable the court to resolve the issue of limitation of this action, effectually and completely, I will ask the parties to appear before me on a convenient date agreed or appointed by the court, to address the court on the question of whether the bill is time-barred. The manner in which the evidence or information should be tendered will be agreed or as directed by the court. It is so ordered.

**Dated, signed and delivered at Nairobi this 24<sup>th</sup> March, 2014**

**F. GIKONYO**

**JUDGE**