IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Miscellaneous Application No. 0029 of 2021

In the matter between

MATOVU & MATOVU ADVOCATES **APPLICANT**

And

1. **DAMANI JYOTIBALA**
2. **HEMA DAMANI**
3. **ALEX TUHIMBISE** **RESPONDENTS**

Heard: 27January, 2023.
Delivered: 10 January, 2024.

Civil Procedure *— Consultative Case Stated — At common law a consultative case stated is a procedure by which a court can ask another court for its opinion on a point of law can be made at any time during proceedings before a final determination has been made — A registrar may refer a matter to the High Court when he deems it proper to do so and a Judge may either dispose of the matter or refer it back to the Registrar with such directions as he or she may think fit — The Higher Court cannot receive additional evidence on the stated case — The decision of the higher Court is transmitted to the Registrar who can then resume the hearing of the case, with the benefit of the legal advice of the higher Court — Where a case is stated after aspects of the decision have been made, the Court may reverse, affirm or amend the determination in respect of which the case has been stated — It is essential that the Registrar has made the necessary findings of fact on which the question(s) of law to be stated will be based — In the meantime, the final decision in the case is suspended until the case stated has been determined.*

Advocate-Client Bill of Costs *— Limitation — Taxation of an Advocate-Client Bill of Costs — The procedure of assessment of costs is premised on the underlying advocate-client contractual relationship — Being a claim in contract, recovery of advocates' fees is subject to the law on Limitation — Without a retainer, an advocate has no contractual claim to costs and disbursements from a client — The absence of a written retainer immediately puts the advocate at a disadvantage — Where there is a conflict as to the authority between the solicitor and the client, without further evidence, weight must be given to the affidavit against, rather than the affidavit of, the solicitor — An Implied retainer exists where one party expresses an offer to contract to the other party who subsequently accepts through his acts of acquiescence — Where there is no agreement on the quantum of fees payable, still Court proceedings must be commenced within the limitation period — The commencement of a costs assessment too is an "action on a cause of action" within the context of the law of limitation — Although there cannot be a recoverable sum of money through court proceedings until the costs have been assessed, the advocate's right to initiate the process of doing so is recognised as a right of action — It is not a mere procedural mechanism for resolution of the quantum and subsequent enforcement of the right to recover legal fees, even when there are no other issues in dispute — That process does not confer a right independent of contract to the recovery of legal fees by a law practice from its client, and neither does it immunise the recovery of legal fees and costs from the operation of The Limitation Act — It simply provides for the assessment of costs payable under contract — It is the underlying right and title to the debt, and not the cost assessment process, which is subject to The Limitation Act.*

RULING

STEPHEN MUBIRU, J.

Background:

[1] The respondents are the administrators of the estate of the late Mr. Harshad Damani. Before his death, the late Mr. Harshad Damani was the registered proprietor of land comprised in LRV 2310 Folio 12, Singo Block 548 Plot 12 at Lwentanga and LRV 1567 Folio 9, Singo Block 551 Plot 5 at Kigwanya. Sometime during the month of December, 2012, the deceased instructed the applicant law firm to negotiate and finalise the sale of that land. Pursuant to those instructions, the applicant prepared and caused the execution of a land sale agreement dated 12th November, 2012. The 677 hectares of land were sold at

the price of shs. 1,672,860,000/= to M/s Trinity Transporters and Distributors Limited.

[2] Later on or about 18th April, 2013 the applicant received further instructions from the deceased to prepare a "novation agreement" over the same subject matter, which in fact is a replacement agreement of the former. Whereas in the earlier agreement the balance of the purchase price was to be paid in a lump sum within a period of one year, in the latter agreement the parties modified the payment to be in instalments within a period of ninety days following delivery of the judgment in High Court Civil Suit No. 75 of 2013. It is the applicant's case that the deceased did not pay the legal fees involved in both transactions. It is on account of that the applicants prepared and served upon the estate of the deceased, an itemised advocate-client bill of costs on 21st December, 2020, on account of those legal services.

The Application:

[3] The application by Notice of Motion is made under the provisions of sections 57 (1), (2), (3), (4), (6) and (7) of *The Advocates Act*, and Order 51 rules 1 and 2 of *The Civil Procedure Rules*. The applicant seeks leave to have the advocate-client bill of costs taxed. It is the applicant's case that although the law firm provided legal services to the deceased, they were never remunerated yet the estate of the deceased has refused to comply with the demand for payment of their fees.

The affidavit in reply:

[4] By the affidavit in reply sworn by the 1st respondent's, the respondents contend that the applicants' claim is barred by limitation. In the alternative, they dispute the claim that the applicant carried out all activities enumerated in the itemised bill of costs. The claim presents a demand for double remuneration.

Affidavit in Rejoinder:

[5] By the affidavit in rejoinder, the applicant contends that the law of limitation does not apply to the recovery of legal fees. The respondent cannot raise as a preliminary objection, an issue that requires evidence for its determination.

Submissions of Counsel for the applicant:

[6] Counsel for the applicant submitted that the affidavit in reply is argumentative and prolix; it therefore ought to be struck out. There is no limitation as to the time within which an advocate my serve a client with an advocate-client bill of costs. The applicant having complied with the legal requirements relating to the recovery of legal fees, the application ought to be allowed.

Submissions of Counsel for the respondent:

[7] Counsel for the respondent submitted that the applicants billed the estate a sum of shs. 50,785,800/= for drafting two agreements in respect if the same land; hence a double payment for the same work. The instructions were executed latest 18th April, 2013 when the novation agreement was signed. The applicants did not demand for the payment of their fees until 11th December, 2020 by which time the claim was stale. This is because the advocate-client relationship is contractual and claims based in contract have a limitation period of six years. The cause of action arose on the date the applicants completed the work assigned to them; which was 18th April, 2013 since that is the day the fee became recoverable. In the alternative, the applicants have not provided any evidence of having ben instructed by the deceased. The transactional documents indicate three law firms, including the applicants, represented the deceased in the transaction. The role of each of the three firms is unexplained. The passage of time between the date of the transaction and the date of the claim raises suspicion of a fictitious claim. The application ought to be dismissed.

The Decision:

[8] When the matter came up before the Deputy Registrar for consideration, she decided to refer it to this court for its opinion in light of the unusual complexity of the facts in whose context it arose. Under Order 50 rule 7 of *The Civil Procedure Rules*, if any matter appears to the registrar to be proper for the decision of the High Court the registrar may refer the matter to the Court and a Judge may either dispose of the matter or refer it back to the Registrar with such directions as he or she may think fit. At common law a consultative case stated is a procedure by which a court can ask another court for its opinion on a point of law. A consultative case stated is made at the discretion of a presiding judicial officer before he or she determines the case before the court. The higher court to which the case is stated will refer the case back to the referring court with directions to correct its decision. The decision of the Court is transmitted to the Registrar which can then resume its hearing of the case, with the benefit of the legal advice of the Court. Where a case is stated after aspects of the decision have been made, the Court may reverse, affirm or amend the determination in respect of which the case has been stated.

[9] The Registrar may reserve a question of law if satisfied that it is in the interests of justice to do so. A consultative case stated can be made at any time during proceedings before a final determination has been made. Before stating a case, the Registrar must consider: the extent of any disruption or delay to the trial process that may arise if the question of law is reserved; whether the determination of the question of law may; - (i) render the trial or hearing unnecessary; (ii) substantially reduce the time required for the trial or hearing; (iii) resolve a novel question of law that is necessary for the proper conduct of the trial or hearing; or (iv) in the case of questions reserved in relation to a trial, reduce the likelihood of a successful appeal. It is essential that the Registrar has made the necessary findings of fact on which the question(s) of law to be stated

will be based (see *DPP (Travers) v. Brennan [1998] 4 IR 67 at 70*). In the meantime, the final decision in the case is suspended until the case stated has been determined.

[10] The factors which should weigh in the Registrar's decision to require a case stated to the court are: (a) there has to be a real and substantial point of law open to serious argument and appropriate for decision by the court, (b) the point should be clear cut and capable of being accurately stated as a point of law and not a matter of fact dressed up, (c) the point should be of such importance that the resolution of it is necessary for the proper determination of the case. If those factors are satisfied the Registrar should state a case (see *Halfdan Greig & Co. A/S v. Sterling Coal and Navigation Corporation and A. C. Neleman's Handel-En Transportonderneming (The "Lysland") [1973] 1 Lloyd's Rep. 296*). On a stated case, this Court cannot receive additional evidence. It can only examine the record from which it may make additional findings of fact or draw inferences. It must determine the matter based on the facts included in the stated case. In the instant case, three issues arise; whether the applicants furnished proof of instructions; whether the demand for recovery of the legal fee sis time barred and whether the applicants have complied with the legal requirements for the grant of leave.

i. Whether the applicants furnished proof of instructions;

[11] It is a rule of thumb that no advocate can act for a client without receiving instructions from that client. This is expressly stated in Regulation 2 (1) of *The Advocates (Professional Conduct) Regulations* which is to the effect that; "No advocate shall act for any person unless he/she has received instructions from that person or his/her authorized agent." A lawyer has no authority to act for anybody without instructions (see *Lakhman Bhimji v. Manor Developments Ltd, H. C. Misc. Application No. 105 of 2010*). If an advocate proceeds without requisite authority, the client may opt to have the case set aside and the

advocate may be liable for costs/disciplinary proceedings. However, a client may ratify and adopt proceedings that were started without his authority (see *Danish Mercantile Co. Ltd v. Beaumont Co. Ltd [1951] All ER 925; [1951] Ch 680*). Receipt and acceptance of instructions by counsel constitutes a binding contract between the client and counsel. Counsel may receive instructions orally as long as it can be proved that he was duly given instructions.

[12] As a general principle, the relationship of advocate and client is a relationship between two contracting parties. Being contractual, its general contours are governed by the same rules that govern the creation of a contract and so it must be proved like any other contract. The easiest method of proving an advocate-client relationship is a written retainer agreement or engagement letter describing the existence and scope of the advocate's representation of the client. However, neither a written contract nor an express appointment and acceptance is essential to the formation of the relationship. The relationship may be established by mutual agreement manifested in express words or conduct. Courts can and do use other evidence to establish the existence of the advocate-client relationship, including the parties' behaviour, correspondence between the advocate and the client, invoices for services rendered, proof of payment made to the advocate, and other relevant facts or information. There has to be some form of agreement: whether oral or in writing, or inferred by the conduct of the parties.

[13] Retainer is a term used to describe a contract between an advocate and a client for the provision of legal services. Without a retainer, an advocate has no contractual claim to costs and disbursements from a client. This means that a retainer does not exist unless the elements of a contract are present. The relationship of advocate and client may be created when the following three things occur: (i) a person seeks advice or assistance from an advocate, (ii) the advice or assistance sought pertains to matters within the advocate's professional competence, and (iii) the advocate expressly or impliedly agrees to give or actually gives the desired advice or assistance. The third element may be

proved by evidence of detrimental reliance, particularly where either party, aware of the reliance, does nothing to negate it. The establishment of the advocate-client relationship involves two elements: a person seeks advice or assistance from an advocate; and the advocate appears to give, agrees to give or gives the advice or assistance.

[14] The party alleging the existence of a contract bears the onus of proof; the client bears the onus of proof if he or she wishes to render the advocate liable for a breach of legal or equitable duties (but there must be a causal link between that breach and loss that the client has suffered). If the advocate is seeking to recover fees from a client, the onus is on him or her to prove the retainer (see *Coshott v Barry [2009] NSWCA 34*). An advocate alleging the existence of a retainer that is not in writing can adduce evidence in the form of words and conduct (subsequent conduct is allowed) of the parties. In determining the existence of an implied retainer, the court will adopt the perspective of the alleged client, objectively. Its existence is determined by inference from objective facts, and not from the parties' respective belief (because this is subjective and harder to prove). The client's perspective must be considered in an objective context: he cannot simply say that he believed that a relationship of advocate and client had not arisen between him and the advocate concerned if such a belief is unreasonable. An implied retainer could only arise where on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties.

[15] Where the evidence consists of the advocate's word against the client, the court ordinarily sides with the client (when all else is equal). "The word of the client is to be preferred to the word of the solicitor because the client is ignorant and the solicitor is or should be learned" (see *Griffiths v. Evans [1953] 1 W.L.R. 1424; [1953] 2 All E.R. 1364* and *Murray and another v. Richard Slade and Company Ltd [2021] EWHC B3 (Costs*). Where there is a conflict as to the authority between the solicitor and the client, without further evidence, weight must be

given to the affidavit against, rather than the affidavit of, the solicitor, (see *Re Paine (1912), 28 T.L.R. 201*). If the advocate's authority is disputed it is for him to prove it, and if he has no written authority, and there is nothing but assertion against assertion, the court will treat him as unauthorised (see *Allen v. Bone (1841) 4 Beav 493; 49 E.R. 429*). Clearly, the absence of a written retainer immediately puts the advocate at a disadvantage. In the absence of persuasive evidence, the Court should prefer the client's version. An advocate who does not take the precaution of getting a written retainer has only himself to thank for being at variance with his client over it and must take the consequences. It is acknowledged though that a retainer, just like any other contract, may also be oral and could be implied through the conduct of the parties.

[16] On the other hand, a retainer can be implied (see *Blyth v. Fladgate [1891] 1 Ch 337; 60 LJ Ch 66*). Although no express retainer may have been given, the relation may subsist, and its existence may be inferred from the acts of the parties. The court will readily imply a retainer if, viewed objectively, the parties' conduct is consistent only with the advocate being retained to act for the respondent. Mere silence though will not be enough. In *Empirnall Holdings Pty Ltd v. Machon Paull Partners Pty Ltd (1988) 14 NSWLR 523*, it was held that;

> A Silence is usually insufficient to create any contract - the objective theory requires some external manifestation of consent. Convenience requires communication, and silence is usually seen as rejection. But the offeror can be bound if communication is dispensed with. Where an offeree, with a reasonable opportunity to reject the offer of goods or services, takes the benefit of them under circumstances which indicate they were to be paid for, the tribunal of fact may hold that the offer was accepted according to its terms. A useful analogy is found with the ticket cases. The case is not so much one of acceptance by silence, as of taking the benefit of an offer with knowledge of its terms and knowledge of the offeror's reliance on payment being made in return for the work being done.

[17] Similarly, in *Pegrum v. Fatharly (1996) 14 WAR 92*, it was held that; "a contractual relationship of solicitor and client will therefore be presumed if it is

proved that the relationship of solicitor and client existed *de facto* between a solicitor and another person. Upon proof of that kind it would not be necessary to prove when, where, by whom or in what particular words the agreement of retainer was made." Proof of an implied retainer rests on proof of facts and circumstances sufficient to establish a retainer. It is a multi-factorial consideration and is largely fact specific. The court should ask: "Was there conduct by the parties which was consistent only with the firm being retained as solicitors for the claimants?" (See C*aliendo v. Mischon de Reya [2016] EWHC 150 (Ch*). The court may be prepared to find that there existed an implied retainer if, viewed objectively, the parties acted as if such a relationship existed. A person may become a client of an advocate if the manner in which the advocate conducts himself towards that person gives rise to such a relationship. This is so even if there was originally no express intention to create a retainer. An "implied retainer" is said to arise in such circumstances.

[18] The key ingredient is agreement to enter into a contractual relationship. An implied retainer exists where one party expresses an offer to contract to the other party who subsequently accepts through his acts of acquiescence (see P*arrott v. Echells (1839), 3 J.P. (Eng.) 771* and *Pinley v. Bagnall (1782), 3 Doug. K.B. 155*). It has been inferred in a number of situations, for example; *Gray v. Wainman (1823), 7 Moore C.P. 467* (receipt of payment out of court); *Cameron v. Baker (1824), 1 C. & P. 268* (failure to repudiate employment by third party); *Hall v. Laver (1842), 1 Hare, 571*; *Reynolds v. Howell (1873), L.R. 8 Q.B. 398* (action commenced without authority); *Parrott v. Echells (1839), 3 J.P. (Eng.) 771* (leaving papers with solicitor); *Anderson v. Boynton (1849), 13 Q.B. 308* (consent to consolidation order); *Southall v. Keddy (1858), 1 F. & F. 177* (authorising solicitor to conduct suit though not a party); *Blyth v. Fladgate, [1891] 1 Ch. 337* (investment of funds by solicitor trustee). An implied retainer "[can] only arise where on an objective consideration of all the circumstances, an intention to enter into such a contractual relationship ought fairly and properly to be imputed to the parties" (see *Dean v. Allin & Watts [2001] 2 Lloyd's Rep 249*). The word

"impute," as used in this context, signifies the attribution of an intention to enter into a contractual relationship, rather than the fact of the existence of such an intention. Imputation involves concluding what the parties would have intended, whereas inferences involve concluding what they did intend.

[19] For agreed intention, the ascertainment of such intention can be by way of express or implied reading of the contractual terms. In contrast, for an imputation of intention, the concern is with the imputation of what the court believes to be reasonable in the circumstances, as an approximation to what the parties ought to have intended (see *Chan Yuen Lan v. See Fong Mun [2014] 3 SLR 1048 at [111]* and *Stack v. Dowden [2007] 2 AC 432 at [126]*). The fundamental question is thus whether, on an objective analysis of the circumstances from the perspectives of both the putative advocate and the putative client, an intention to enter into an advocate-client relationship should be attributed to the parties. In this regard, it is important to note that the putative client's subjective understanding of his relationship with the putative advocate is not determinative of whether an advocate-client relationship should be imputed in the circumstances.

[20] The objective facts in the instant case are that the applicant never presented any fee agreement, invoice, receipt or other documentary evidence to corroborate its claim of having been retained by the deceased. Reliance is instead placed only on the fact that the two agreements name the applicant together with M/s Lubega, Mwebaza and Company Advocates as the two law firms which jointly prepared the two agreements for the signature of the parties. None of the two agreements indicates on whose instructions each of the two law firms was acting. However, Clause 16 of the agreement dated 12th December, 2012 and Clause 14 of the agreement dated 18th April, 2013 both indicate that "each party shall bear its own cost for the preparation of this agreement."

[21] The implication is that each of the parties retained its own counsel to handle the preparation of the agreement. Since there are only two law firms involved in drafting the agreement, it is fair to conclude that while the applicant represented the seller (the deceased), M/s Lubega, Mwebaza and Company Advocates represented the buyer (M/s Trinity Transporters and Distributors Limited). Therefore, on a balance of profanities, the applicants discharged the onus placed upon them to prove the retainer; there existed an advocate-client relationship between the applicants and the late Mr. Harshad Damani on the basis of which the applicants rendered him legal services.

ii. Whether the demand for recovery of the legal fees is time barred;

[22] The instant claim lies in contract, because there must have been a contract of retainer during the time that the applicant acted for the respondent as his advocate and incurred the costs and disbursements sought to be recovered. An advocate's cause of action to recover fees arises either in contract or quasi-contract (see *Coshott v. Lenin [2007] NSWCA 153*). Being a claim in contract, the limitation period for recovery of advocates' fees is governed by section 3 (1) (a) *The Limitation Act* which specifies that there is a general limitation period of six years from the date on which the cause of action accrued. In the case of such claims founded on contract, time for limitation purposes runs from the date of breach (see *Gould v. Johnson (1702) 2 Salk 422; 91 ER 367* and *Midland Bank Trust Co., Ltd. v. Hett, Stubbs and Kemp (a firm) [1978] 3 All E. R. 571*). Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract, i.e. breach of the contractual duty imposed by the retainer.

[23] It has always been open to advocates to agree upon the terms of payment under their retainer. Where they have a written retainership agreement, most advocates include a term as to when payment is due. Terms such as "Payment is due within 30 days of invoice" are common. Where there is no such written agreement, it

will be more difficult to tell when the cause of action arises. In such cases, where the retainer is an entire one, the obligation will arise when the work is completed. Where the obligation is not entire, then time runs from when the client received the benefit that gave rise to the obligation to pay. For example, it is recognised that litigation may take years, proceeding through stages and be the subject of natural breaks allowing the delivery of a bill at any point (see *In re Romer & Haslam [1893] 2 QB 286 per Lord Esher MR at 293*). Therefore, in principle advocates are entitled to bill their fees and costs when a natural break occurs in the course of protracted proceedings.

[24] In the instant case, the applicants' bill of costs as served upon the estate of the late Mr. Harshad Damani indicates that the fees sought to be recovered involved instructions to undertake a search at the Land Office, making applications for the necessary permissions / licenses, undertaking a valuation of the land, meetings with the deceased and preparation of the respective agreements. I deduce this to have been a retainer of the entire type, wherein the deceased's obligation to pay arise when the work is completed; i.e. 12th November, 2012 and 18th April, 2013 respectively. Had there been evidence of a specified sum agreed upon as the fees payable, time begins to run after expiry of a reasonable period from each of those dates. In principle though, the cause of action accrues when the work is completed or upon termination of the retainer (see *Edwards v. Bray [2011] 2 Qd R 310 at [20]; - [2011] QCA 72*).

[25] Where there is no agreement on the quantum of fees payable, still Court proceedings must be commenced within the limitation period. The commencement of a costs assessment too is an "action on a cause of action" within the context of the law of limitation. Although there cannot be a recoverable sum of money through court proceedings until the costs have been assessed, the advocate's right to initiate the process of doing so is recognised as a right of action (see *Allen v. Ruddy Tomlins & Baxter [2019] QCA 103*). It is not a mere procedural mechanism for resolution of the quantum and subsequent

enforcement of the right to recover legal fees, even when there are no other issues in dispute. The procedure advocate-client costs assessment procedure is premised on the underlying contractual relationship resulting from the retainer, part of which is the fee agreement; the underlying cause of action is contractual. That process does not confer a right independent of contract to the recovery of legal fees by a law practice from its client, and neither does it immunise the recovery of legal fees and costs from the operation of *The Limitation Act*. It simply provides for the assessment of costs payable under contract. It is the underlying right and title to the debt, and not the cost assessment process, which is subject to *The Limitation Act*. Thus, fee agreements may be enforced in the same way as any other contract.

[26] A cause of action being, every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court, the period of limitation runs from the date on which the ingredients of the cause of action are complete. Consequently, the advocate's right and cause of action in respect of outstanding legal fees arises on completion of the last legal service (see *Coburn v. College [1897] QB 62; [1897] 1 QB 702*). The last legal service to the estate of the deceased Mr. Harshad Damani having been rendered on 18th April, 2013 the period of limitation for any action for recovery of legal fees elapsed on 18th April, 2019. This application having been filed on 17th June, 2021 was therefore more than two years out of time. To benefit from an exemption from any statute of limitation, one ought to have pleaded disability (see Order 7 rule 6 of *The Civil Procedure Rules*). Any pleading that rests on an action barred by limitation that does not contain averments invoking such an exemption, must be rejected and struck out or dismissed (see *Mulindwa Yekoyasi v. Attorney General [1985] HCB 70 and Katuramu K. Moses v. Attorney General and another [1986] HCB 39*). That being the case, it is not necessary to consider the third issue.

In conclusion, the claim being time barred, this application is dismissed with costs to the respondents.

Delivered electronically this 10th day of January, 2024……...Stephen Mubiru……

Stephen Mubiru
Judge,
10th January, 2024.

Appearances

For the applicant : M/s Matovu & Matovu Advocates,

For the respondent : M/s Nile Law Chambers, Advocates and Solicitors.