



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC. CIVIL APPLICATION NO. 706 OF 2018**

**KIBUCHI & COMPANY ADVOCATES.....APPLICANT/ADVOCATE**

**-VERSUS-**

**KENINDIA ASSURANCE CO. LTD.....RESPONDENT**

**RULING**

- 1) The subject matter of this ruling is the respondent's notice preliminary objection dated 13<sup>th</sup> August 2021 whereof the respondent sought for the applicant's Bill of costs dated 14<sup>th</sup> December 2018 to be struck on the basis that the same is time-barred under Section 4(1) of the Limitation of Actions Act.
- 2) The applicant opposed the preliminary objection arguing that the same lacks merit. Learned counsels filed and exchanged written submissions.
- 3) I have considered the grounds stated on the face of the notice of preliminary objection. I have also considered the rival written submissions. It is the submission of the respondent that the relationship between the parties herein is that of advocate client formed by a retainer agreement which is contractual and enforceable within six (6) years after completion of services rendered under Section 4(1) (a) of the Limitation of Actions Act.
- 4) The respondent argued that the primary sit i.e Nairobi C.M.C.C. no. 2211 of 2006 was concluded on 28<sup>th</sup> July 2009 when judgment was delivered. It is pointed out that the Bill of Costs was filed on 20<sup>th</sup> December 2018 some nine years after the primary suit was concluded and outside the limitation period.
- 5) The applicant on its part confirmed that the Bill of Costs arose out of Nairobi C.M.C.C. no. 2211 of 2006 in which the applicant represented the defendant as the insured of the respondent herein.
- 6) The applicant argued that the preliminary objection has been raised as a mere technicality to frustrate the applicant's efforts to recover fees. It is pointed out that the same was filed too late in the proceedings. The applicant has stated that the applicant made the final demand on 6<sup>th</sup> December 2013 which the respondent acknowledged receipt therefore there was a fresh accrual of the right of action against the respondent.
- 7) It is aid that the period 2013 and 2018 when the Bill of Costs was filed is within the time prescribed by the statute of limitation.
- 8) It is not in dispute that the respondent's preliminary objection is to the effect that the applicant's Advocate's Client Bill of Costs is statute barred. It is said that the same is based on a retainer agreement. It is also said that the cause of action arose on 28.7.2009 when judgment in the primary suit was delivered. In response the applicant stated that the client had acknowledged on 6<sup>th</sup> December 2013 hence time begun to run on the aforesaid date hence the bill of costs is not time-barred.
- 9) In **Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd**, the Court of Appeal for East Africa defined a preliminary objection as follows:

**“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which if argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

- 10) The instant notice of preliminary objection is based on facts which are disputed. The respondent is of the submission that the cause of

action arose on 28<sup>th</sup> July 2009 while the applicant avers that the cause of action arose on 6<sup>th</sup> December 2013 when the client acknowledged the applicant's outstanding fees.

11) It is clear in my mind that the correctness of facts must be ascertained by the presentation of oral or affidavit evidence. The respondent's objection cannot therefore be regarded as a preliminary objection founded on pure points of law and on correct or admitted facts.

12) The respondent's objection can only be established by the filing of a substantive application supported by affidavit evidence and not by a preliminary objection.

13) I find the respondent's preliminary objection to have been improperly raised. The notice is found to be incompetent and improper.

14) The same is hereby ordered struck out with costs abiding the outcome of the Bill of Costs.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Applicant/Advocate

..... for the Respondent