



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLN. NO. 695 OF 2017

MBUGUA & MBUGUA ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE & CO LTD.....RESPONDENT

RULING

1. The respondent, *Kenindia Assurance & Co Ltd* (hereinafter the applicant) approached this court vide a Notice of Motion dated 10th July 2018 seeking that the bill of costs filed by *Mbugua & Mbugua Advocates* (hereinafter the respondent) be struck out with costs for being time barred.
2. The application is supported by the grounds stated on its face and the depositions made in the supporting and supplementary affidavits sworn on 10th July 2018 and 19th March 2019 respectively by *Winnie A. Paul*, Head of the applicant's Legal Department.
3. The applicant contends that the respondent was in its panel of advocates and that the parties had a contract regarding legal fees; that the respondent was instructed to recover KShs.259,388 on behalf of the applicant; that the primary suit was determined more than ten years ago; that the applicant was served with an advocate-client bill of costs on 24th November 2017 though their advocate-client relationship had been determined in the year 2007 when the respondent commenced taxations against the applicant.
4. The application is opposed through a replying affidavit sworn by *Rebo Diana Rose Wambui*, an associate in the respondent's firm of advocates. The deponent denied the applicant's claim that the advocate-client bill of costs dated 16th November 2017 was time barred noting that time for purposes of limitation of actions started running from 13th November 2017 when the applicant's application to cease acting for the respondent was allowed by the court. The application to cease acting was annexed to the replying affidavit sworn by *Mr. Joseph Njoroge Mbugua* in response to the applicant's supplementary affidavit dated 19th March 2019. *Mr. Mbugua* also exhibited a memorandum of appeal to substantiate his claim that the ruling delivered in the primary suit on 4th December 2012 was appealed against by the defendant and that to the best of his knowledge, that appeal was still pending.
5. By consent of the parties, the application was prosecuted by way of written submissions. Those of the applicant were filed on 12th September 2019 while those of the respondent were filed on 4th July 2019.
6. I have carefully considered the application, the affidavits on record together with their annexures as well as the rival written submissions filed on behalf of the parties. Having done so, I find that the only issue for my determination is whether the advocates-client bill of costs dated 16th November 2017 should be struck out for being time barred.
7. An advocate's claim for costs is based on a contract for provision of legal services and it is thus subject to the limitation period of six years prescribed in *Section 4 (1) (a)* of the *Limitation of Actions Act* which states that:

“Actions founded on contract cannot be instituted after the end of six years from the date on which the cause of action accrued.”

8. In this case, it is not disputed that there was an advocate-client relationship between the parties which led to the institution of RMCC No. EJ 651 of 1996. What is disputed is when that relationship came to an end or when the respondent's retainer in that suit was terminated which is what would determine when the applicant's cause of action accrued for purposes of computation of time under *Section 4 (1)* of the *Limitation of Actions Act* – See: ***Abincha & Co Advocates V Trident Insurance Co Ltd, [2013] eKLR.***
9. The applicant has claimed that the bill of costs is statute barred since the primary suit in respect of which it was filed was determined over ten years ago. In the alternative, the applicant asserted that the advocate-client relationship between the parties was terminated in the year

2007 when the respondent commenced taxation proceedings against it.

10. It is a cardinal principle of the law of evidence that he who alleges must prove. This is the import of *Sections 107 to 109* of the *Evidence Act*. The applicant having alleged that the advocate's retainer ended over 10 years ago or that he commenced taxation proceedings against it about 12 years ago in the year 2007 had the burden of proving those allegations.

11. In a bid to prove those allegations, the applicant annexed to the supplementary affidavit the proceedings in CMCC No. EJ 651 of 1996. I have looked at those proceedings. They show that the last time the matter was in court was on 4th December 2002 when an application dated 29th October 2002 was allowed. That application was not exhibited by either of the parties and it is not clear what orders were sought in that application. What is clear from the proceedings is that as of 4th December 2002, the primary suit had not been concluded as it was still pending hearing. The applicant has not annexed a copy of a judgment entered in the said suit or a decree to prove its claim that the suit was determined over 10 years ago.

12. I have also perused the notices of taxation in Misc. Application Nos. 258 and 261 of 2007 annexed to the applicant's supporting affidavit. Although the notices confirm that taxation proceedings were instituted by the respondent against the applicant in the year 2007, they do not prove that the taxation was in respect of CMCC No. EJ 651 of 1996 on which the impugned bill of costs is premised.

13. In the absence of such evidence, I am persuaded to accept the respondent's contention that its retainer was terminated on 13th November 2017 when the advocate's application for leave to cease acting for the applicant was allowed pursuant to the advocate's application dated 14th September 2017 which was annexed to *Mr. Joseph Njoroge Mbugua's* replying affidavit dated 27th March 2019.

14. Given my foregoing finding, it follows that I have come to the conclusion that the respondent's cause of action accrued on 13th November 2017 which is the date on which time started running for purposes of limitation of actions. Considering that the impugned bill of costs was filed on 16th November 2017, there is no doubt that it was filed well within the time prescribed by the law.

15. For all the foregoing reasons, it is my finding that the Notice of Motion dated 10th July 2019 lacks merit and it is hereby dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 28th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Ms Mathenge holding brief for Mr. Mbugua for the respondent

Mr. Momanyi holding brief for Mr. Omwenga for the applicant

Mr. Salach: Court Assistant