



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLN. NO. 692 OF 2017

MBUGUA & MBUGUA ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE & CO LTDRESPONDENT

RULING

1. In the Notice of Motion dated 10th July 2018, the respondent (hereinafter the applicant), seeks that the advocate-client bill of costs filed by the applicant (hereinafter the advocate) be struck out for being time barred.

2. The application is premised on grounds that the bill of costs stems from a suit which was determined more than ten years ago; that the bill was filed without due regard to the law and that the parties had a contract regarding fees. The application is supported by the supporting affidavit, supplementary and further supplementary affidavit sworn by *Winnie A. Paul* on 10th July 2018, 19th March 2019 and 12th July 2019 respectively.

3. It is the applicant's contention *inter alia* that the advocate was in its panel of advocates and he was instructed to defend the applicant's insured in a claim of KShs.136,253; that the advocate-client relationship ceased in the year 2007 when the advocate commenced taxation proceedings against the applicant; that in any event, the suit in which the advocate represented the applicant was concluded on 15th July 2011 and that therefore the bill of costs had been filed out of time.

4. The application is opposed through a replying affidavit sworn by *Rebo Diana Rose Wambui* and *Joseph Njoroge Mbugua* on 29th November 2011 and 24th March 2019 respectively as well as a supplementary affidavit sworn by *Joseph Njoroge Mbugua* on 23rd July 2019. In the replying and supplementary affidavits, the advocate denied the applicant's claim that he had commenced taxation proceedings against the applicant in the year 2007 as alleged and that the suit in which he was instructed to represent the applicant was concluded on 15th July 2016. The advocate claimed that he was still handling the suit when the bill of costs was filed and that for purposes of limitation of actions, time started running from 16th February 2018 when the applicant appointed another advocate to replace him in the suit.

5. By consent of the parties, the application was canvassed by way of written submissions. The applicant filed its submissions on 12th September 2019 while those of the advocate were filed on 4th July 2019.

I have carefully considered the parties' rival written submissions and the authorities cited.

Having done so, I find that the only issue that arises for my determination is whether the advocate-client bill of costs dated 28th August 2017 is incompetent for being time barred.

6. It is common knowledge that an advocate's claim for costs is based on a contract for provision of legal services. An advocate's claim for costs is therefore a claim founded on contract and is thus subject to the limitation period prescribed in *Section 4 (1) (a)* of the *Limitation of Actions Act* which states as follows:

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

7. Given the provisions of *Section 4 (1) (a)* of the *Limitation of Actions Act* and given that it is not disputed that the applicant instructed the advocate to defend its client's interests in Milimani CMCC No. 796 of 2004, I find that the resolution of this application hinges on a determination of when the parties' advocate-client relationship ended or was terminated since this would in turn determine when the advocate's cause of action accrued.

8. In *Abincha & Co Advocates V Trident Insurance Co Ltd, [2013] eKLR*, *Waweru J* when considering when time starts running in an action for recovery of legal fees quoted with approval *Halsbury's Laws of England 4th Edition Volume 28 page 452 at paragraph 879*

where the learned authors state as follows:

“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.”

9. In this case, the applicant has claimed that the advocate’s retainer was terminated on 15th July 2011 when CMCC No. 796 of 2004 was concluded. The advocate denied this claim asserting that the suit is still pending and that his retainer was only terminated on 16th February 2018 when another advocate was appointed to replace him; that time started running on 16th September 2018 with regard to his claim for recovery of legal fees.

10. In view of the conflicting positions taken by the parties with regard to the conclusion or otherwise of the primary suit and considering that the applicant had annexed to its further supplementary affidavit a brief handwritten copy of a judgment allegedly entered in the primary suit whose authenticity was highly doubted by the advocate, I took it upon myself to call for the original record of the trial court in the primary suit in order to peruse the same and satisfy myself about the actual status of the matter.

11. Having read the record of the trial court in Milimani CMCC No. 796 of 2004, I confirm that indeed the suit was determined on 15th July 2011 when judgment was delivered in the absence of both parties. As illustrated earlier, termination of the action in which an advocate was instructed to act on behalf of a client is one of the instances which signals the end of a retainer and sets in motion the computation of time for purposes of limitation of acts. The advocate’s claim that his retainer was terminated in February 2018 when another advocate was appointed to replace him is not substantiated by any evidence since none was availed by the advocate and the court record does not have any such indication.

12. It is trite that he who alleges must prove. This is the import of *Sections 107 to 109* of the *Evidence Act*. In the absence of evidence to prove the advocate’s claim that his retainer was terminated on 14th February 2018 and that therefore his bill of costs was filed within time, I find that the said retainer was terminated on 15th July 2011 when the primary suit was concluded.

13. The above finding means that time for the advocate’s recovery of costs started running on 16th July 2011. It then follows that the six year limitation period within which the advocate should have filed his bill of costs expired on or about 17th July 2017.

The court record shows that the advocate-client bill of costs herein was filed on 16th November 2017, about 3 months after the limitation period. In the premises, I find that the bill of costs dated 28th August 2017 was filed outside the statutory limitation period of six years and it was hence time barred.

14. For the foregoing reasons, I find merit in the Notice of Motion dated 10th July 2018 and it is hereby allowed in terms of prayer 1.

15. On costs of the application, the order that best commends itself to me is that each party shall bear its own costs.

It is so ordered.

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

C. W. GITHUA

JUDGE

In the presence of:

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

Ms Mathenge holding brief for Mr. Mbugua for the respondent

Mr. Salach: Court Assistant