



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISC APPLICATION NO 4 OF 2015**

**MBUGUA & MBUGUA ADVOCATES.....APPLICANT**

**VERSUS**

**KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. On 8<sup>th</sup> January 2015, the Applicant herein filed an Advocate- Client Bill of Costs dated 7<sup>th</sup> January 2015. When the matter came up for taxation on 22<sup>nd</sup> June 2016, the Respondent raised an objection in its Written Submissions that the said Bill of Costs was time barred under the Limitations of Actions Act Cap 22 (Laws of Kenya). The matter was therefore referred to the High Court for hearing and determination as the Taxing Master took the view that she did not have jurisdiction to hear and determine the said objection.

2. When the matter was placed before this court on 20<sup>th</sup> May 2019, it directed the Respondent to file a Notice of Preliminary Objection which it did on 28<sup>th</sup> May 2019. The same was dated 28<sup>th</sup> May 2019. The ground of objection was that the said Bill of Costs was time barred by virtue of Section 4(1)(a) of the Limitations of Actions Act. Only the Applicant herein filed Written Submissions in respect of the said Preliminary Objection as per the court's directions. The Respondent relied on the submissions it had made before the Taxing Master. The same were filed on 23<sup>rd</sup> May 2016.

3. The Respondent submitted that the Applicant herein ought to have filed its Bill of Costs within a period of six (6) years from the date of judgment in **HCCC No 2924 of 1996**. It relied on the case of **Abincha & Co Advocates vs Trident Insurance Co Ltd [2013] eKLR** where Waweru J held that any bills of costs filed more than six (6) years after completion of the work which an advocate had been retained or after the lawful termination of the retainer in respect of such work was time barred by virtue of Section 4(1)(a) of the Limitation of Actions Act and that even if the statute did not apply to bills of costs, the advocate was estopped in law and equity from raising final bills eight (8) or ten (10) years later.

4. It was categorical that time started running from the date of termination of retainer, which in this case it contended was on 17<sup>th</sup> March 2005 as per the Bill of Costs.

5. On the other hand, the Applicant pointed out that the Respondent had argued that the said Bill of Costs was in respect of a matter that was concluded between 6<sup>th</sup> June 2013 and 17<sup>th</sup> March 2005 thus estopping it from claiming the said costs. However, it pointed out that item No 67 referred to a letter dated 28<sup>th</sup> August 2012 and hence, time could only have started running from this date.

6. It referred this court to the case of **HC Misc No 667 of 2013 Mbugua & Mbugua Advocates vs Kenindia Assurance Company Limited** where Mbogholi Msagha J observed that it was not clear how the retainer therein was terminated. It was categorical that the Respondent had a duty to prove the allegations of time bar.

7. While the Respondent submitted that the last letter in the Applicant's Advocate- Client Bill of Costs was on 17<sup>th</sup> March 2005, the Applicant equally stated that the last letter was on 28<sup>th</sup> August 2012 as indicated in Item 67 of the said Advocate-Client Bill of Costs. It was not clear to this court what this letter entailed. None was placed before this court. It was therefore difficult for this court to determine whether the retainer was terminated on 17<sup>th</sup> March 2005 as had been contended by the Respondent or on 28<sup>th</sup> August 2012 as had been averred by the Applicant herein. There was also no indication when the judgment in the primary suit was delivered.

8. The question of limitation of the said Applicant's Advocate- Client Bill of Costs was therefore not as straight forward as the Respondent had made it seem. This could only be ascertained during taxation of the said Bill of Costs. To strike out the said Bill of Costs without all the

facts would be to drive out the Applicant from the seat of justice and deny it an opportunity to present its case. This would be contrary to Article 50(1) of the Constitution of Kenya, 2010 that gives every party a right to have its dispute determined fairly and in a court of law.

9. A preliminary objection cannot be sustained if the issues raised therein are factual and have to be ascertained. In the case of **Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd [1969] EA 696**, the Court of Appeal rendered itself as follows:-

**“...a preliminary objection cannot be raised if any fact has to be ascertained...”**

10. Evidently, the Applicant and the Respondent were in a contractual relationship in which Section 4 of the Limitation of Actions Act applies. The said Section 4(1)(a) of the Limitations of Actions Act provides that:-

**“The following actions may not be brought after the end of six years from the date on which the cause of action accrued—**

**a. actions founded on contract...”**

11. In the absence of when the contractual relationship between the Applicant and the Respondent was terminated, so as to give some direction in this matter, this court determined that in the event the Taxing Master establishes that the retainer was terminated on 17<sup>th</sup> March 2005 as had been asserted by the Respondent herein, then he or she must immediately down his or her tools as he or she will have no jurisdiction to tax the said Advocate- Client Bill of Costs, the said Bill of Costs having been barred by the Limitations of Actions Act.

12. Indeed, as was held in the case of **Joseph Mungai Wanene vs Housing Finance Company of Kenya Limited [2019] eKLR**, limitation is to protect defendants against unreasonable delays in bringing suits against them.

13. However, in the event the said taxing master determines that the retainer was terminated on 28<sup>th</sup> August 2012 as had been averred by the Applicant herein, then he or she must proceed to tax the Advocate- Client Bill of Costs dated 7<sup>th</sup> January 2013.

14. Notably, the burden of proof will lie on both the Applicant and the Respondent to prove what they will each be asserting in accordance with Section 107 of the Evidence Act Cap 80 (Laws of Kenya) which stipulates that:-

**1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.**

**2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.**

15. Further, Section 109 of the Evidence Act provides that:-

**“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”**

## **DISPOSITION**

16. For the foregoing reasons, the upshot of this court’s decision was that the Respondent’s Preliminary Objection dated 27<sup>th</sup> May 2019 and filed on 28<sup>th</sup> May 2019 was not merited and the same is hereby dismissed. Costs of the same will be in the cause.

17. It is so ordered.

**DATED and DELIVERED at NAIROBI this 13<sup>th</sup> day of May 2020**

**J. KAMAU**

**JUDGE**