



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. APPLICATION NO. 698 OF 2017

MBUGUA & MBUGUA CO. ADVOCATES.....ADVOCATE

VERSUS

KENINDIA ASSURANCE & CO. LIMITED.....CLIENT

RULING

1. Before me for determination is the Notice of Motion dated 10th July, 2018 brought by the client herein and supported by the grounds set out on the face thereof in addition to the affidavit of *Winnie A. Paul*. The orders being sought in the Motion are as follows:

i) THAT the advocate/client Bill of Costs filed herein be struck out with costs to the client.

ii) THAT the costs of the application be provided for.

2. The abovementioned deponent in her affidavit asserted that upon being served with the Advocate/Client Bill of Costs dated 16th November, 2017 on the 24th of November, 2017, the client embarked on establishing the status on payment of the fees only to realize that the client had in fact instructed the firm of V.R.D. Patel advocates to act for it in CMCC NO. 1000 OF 1997 (*“the original suit”*) as opposed to the advocate herein, adding that the advocate-client relationship between the parties herein terminated sometime in 2007.

3. The deponent stated that her current advocate on record wrote to the Executive Officer to confirm the status of the abovementioned suit but that the court file could not be traced.

4. The deponent further attested that the advocate herein filed an application to cease acting with the aim of attempting to hinder the client from raising the limitation on payment of fees, and that the said advocate ought to have raised a fee note at the earliest opportunity but inexplicably took over 20 years to do so.

5. In opposing the application, *Joseph Njoroge Mbugua* swore a replying affidavit on 27th August, 2018 essentially stating that the advocate was instructed to come on record for the client by its erstwhile advocate, namely V.R.D Patel, and that a notice of change of advocates dated 28th January, 1998 was filed in that regard. The deponent further stated that the client had in the past made payments to the advocate in other matters where instructions were given through the aforesaid V.R.D Patel.

6. It was the deponent’s assertion that the advocate’s application to cease acting for the client was heard and subsequently allowed and that the client has not appealed against the said decision or sought to have the same set aside. That in the circumstances, the time started to run on 13th November, 2017 being the date when the application was allowed.

7. *Winnie A. Paul* swore a further affidavit on behalf of the client and in response to the reply, refuting the averments made therein and averring that judgment was entered in the original suit on 18th February, 2000 and Civil Appeal No. 89 of 2000 filed against the said judgment vide the memorandum of appeal dated 2nd March, 2000. The deponent by and large maintained that the Bill of Costs is time barred.

8. On behalf of the advocate, *Joseph Njoroge Mbugua* filed a supplementary affidavit maintaining that his firm acted for the client in the original suit and that no copy of the purported judgment has been attached to either of the affidavits supporting the application, neither is there evidence to show that the original suit was concluded in 2001.

9. The Motion was disposed off through written submissions. On its part, the client submitted that a sum of Kshs.200,000/= was paid to the plaintiff in the original suit and a sum of Kshs.166,714.80/= was released to the advocate herein, as full settlement after the appeal and/or suit was compromised by the parties by way of an order made on or about the 20th of February, 2001. That since the relationship between the parties herein was contractual, time started to run when the High Court compromised the primary suit and hence, the Bill of Costs ought to have been filed on or before 29th February, 2006.

10. The client also submitted that the advocate has failed to explain the whereabouts of Kshs.166,714.80/= which was paid to it pursuant to the court order compromising the primary suit.

11. In its contesting submissions, the advocate took the position that the client has not proved that the Bill of Costs is time-barred; that the appeal before the High Court was never heard and determined and instead, the High Court only ordered that the sum of Kshs.200,000/= be deposited to the plaintiff in the primary suit and the remaining sum be left in the court account as security. That as a result, the time for filing a Bill of Costs would begin to run either when the action has come to a lawful conclusion or when the retainer has terminated. The case of *Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR* was cited in support thereof.

12. The advocate maintained that the sum of Kshs. 166,714.80/= was never paid to himself and that in any case, the client has not proved that this was done. That the Advocates (Remuneration) Order does not put a limit on when taxation can be undertaken.

13. I have taken into consideration the grounds presented in the Motion, the facts deponed to in the affidavits both in support of and in opposition to the same, and the rival submissions. In my view, the issues to be deliberated are two-fold: that is, whether there was an existing advocate-client relationship between the parties and whether or not the Bill of Costs is time barred.

14. As concerns the first issue, I have taken the time to peruse the court file and established that previously, V.R.D Patel was on record as the client's advocate. However, vide a letter dated 29th January, 1998, the said V.R.D Patel instructed the advocate herein to take over the matter; it is noteworthy that the letter was copied to the client. Further to this, it would appear a notice of change of advocates was filed to that effect.

15. In the same manner, I refer to annexures "JNM 3, 4 and 5" to the replying affidavit of *Joseph Njoroge Mbugua* all pointing to the fact that the advocate had received instructions from the client in regards to both the suit and appeal therefrom. If at all this is not enough, the record reveals that Honourable Lady Justice Aburili in her ruling delivered on 26th June, 2015 in Misc. Cause No. 446 of 2013 held that there existed a retainer and hence the advocate was entitled to his instruction fees and which ruling, remains unchallenged whether by way of an appeal or review. In view of the foregoing, I am satisfied that the advocate was at all material times retained to act for the client in the original suit.

16. This leads me to the subject of whether the Bill of Costs is statute-barred. It has already been established that there existed an advocate-client relationship between the parties and that the same was of a contractual nature. That being the case, the guiding provision on limitation would be **Section 4 (1) (a)** of the *Limitation of Actions Act* which grants a six (6)-year window period for bringing a cause of action in instances where a contract subsists. This was well recognized in *Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR* cited in the advocate's submissions in the following manner:

"An advocate's claim for costs would be based on the contract for professional services between him and his client. It would be a claim founded on contract. An action to recover such costs would be subject to the limitation period set out in section 4(1) (a) of the Limitation of Actions Act."

17. The above position was reinforced in the case of *P.M. Wamae & Company Advocates v Ntoitha M'mithiaru [2016] eKLR*.

18. Further on, the above-cited authorities drew guidance from *Halsbury's Laws of England 4th Edition, Volume 28 at paragraph 879 page (452)* in respect to the instances in which an advocate can claim his or her costs from a client as hereunder:

"If a solicitor sues for his costs in an action, the statute of limitation only begins to run-

a) from the date of termination of action or of the lawful ending of the retainer of the solicitor;

b) 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;

c) If judgment has been given and there is no appeal, time runs from the judgment, and subsequent items of costs incidental to the business of the action will not take the earlier items out of statute.

d) In respect of miscellaneous work done by a solicitor, time under statutory limitation begins to run from the completion of the whole of each piece of work."

19. Going by the record, it is apparent that the said Bill of Costs was filed on 16th November, 2017. On its part, the client submitted that the appeal and/or suit were compromised through an order made by the High Court on 20th February, 2001 to the effect that the sum of Kshs.200,000/= out of the deposited amount of Kshs.368,214.80/= be released to the plaintiff in the original suit and Kshs.166,714.80/= be paid to the advocate. The client further submitted that the aforesaid order was adopted by the trial court in the original suit. Going by the advocate's submissions, the above averments were vehemently disputed; in fact, the advocate contended that the appeal is yet to be concluded.

20. However, I noted that neither of the parties availed any documentary evidence to enable this court ascertain the truth of the above averments, whether a copy of the original judgment, the judgment on appeal or the order compromising the appeal and/or suit.

21. Be that as it may, the parties seem to concur that the suit was determined on 18th February, 2000. The advocate has also not refuted that it

continued to represent the client in the appeal though the status of the appeal remains unclear. Whereas it is apparent that the advocate filed an application to cease acting for the client, I noted that the same was; strangely enough; filed in the original suit, notwithstanding the argument that the same had been concluded way back in 2000. As it stands and given that there are contradictory positions being presented on the status of the appeal, I am unable to determine when; if ever; the appeal was concluded so as to determine when time would actually start to run. I must mention that it is unfortunate that the parties did not avail the relevant documentation to assist this court in arriving at an informed decision despite having been granted the opportunity of doing so.

22. In the premises, I am unable to grant the order being sought in the Motion. Consequently, the same is hereby struck out with no order as to costs.

Dated, signed and delivered at NAIROBI this 2ND day of OCTOBER, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Advocate

..... for the Client