



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION NO. 694 OF 2017**

**MBUGUA & MBUGUA CO. ADVOCATES.....ADVOCATE/RESPONDENT**

**VERSUS**

**KENINDIA ASSURANCE & CO. LIMITED.....CLIENT/APPLICANT**

**RULING**

1. This ruling is precipitated by the Notice of Motion dated 10<sup>th</sup> July, 2018 brought by the client and supported by the grounds set out on its face and the affidavit sworn by its Head of Legal Department, *Winnie A. Paul*. The client is seeking the following orders from this court:

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. In her affidavit, *Winnie A. Paul* deponed that after having been served with the bill of costs by the advocate, the client sought to establish the status on payment of the fees as well as the status of the suit but the court file could not be traced so as to ascertain when the suit was concluded, if at all.

3. The deponent further deponed that while it is true that the client had instructed the Advocate to recover the sum of Kshs.216,390/ on its behalf in CMCC NO. 8753 OF 1997 (“*the suit*”), the advocate-client relationship between the parties herein terminated sometime in 2007, hence the advocate ought to have raised a fee note or filed the bill of costs at the earliest opportunity.

4. In response, *Rebo Dianarose Wambui* swore the replying affidavit on behalf of the advocate on 6<sup>th</sup> November, 2018 asserting that the advocate filed an application to cease acting in the suit on 14<sup>th</sup> September, 2017 which was subsequently allowed by the court on 13<sup>th</sup> November, 2017.

5. According to the deponent, the client has not contested the order permitting the advocate to withdraw from acting for the client in the suit, hence the time within which to lodge the bill of costs started to run from 13<sup>th</sup> November, 2017 when the order was made.

6. The deponent went a step further in stating that the suit had not been concluded at the time the application to cease acting was allowed, hence the client has not proved that the bill of costs is time barred.

7. *Winnie A. Paul* rejoined with the supplementary affidavit sworn on 15<sup>th</sup> May, 2019 wherein she averred that the suit was concluded and a decree issued, and there is no indication that there exists an appeal against the same; which is to say that the time started to run from the date of entry of the judgment since it is at that point that the advocate’s services terminated.

8. The Motion was canvassed by way of written submissions filed and exchanged between the parties. The client through its submissions maintained that the suit was concluded on 1<sup>st</sup> December, 1999 upon entry of judgment in its favour and that the retainer between the parties terminated in 2007 when the advocate commenced taxation proceedings against the client.

9. It was the client’s position that given that the relationship between an advocate and client is of a contractual nature, it then follows that the applicable limitation period would be that prescribed under Section 4(1) of the Limitation of Actions Act. The client further relied on the case of *Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR* where the court acknowledged the above.

10. The client maintained that no appeal has been lodged against the judgment entered in the suit, hence the time started to run when the judgment was entered. Further to this, the client faulted the advocate for filing a bill of costs without having raised a fee note for the services rendered. For that reason, the client advanced the argument that the advocate ought to have filed the bill of costs within six (6) years from the date of entry of judgment or at the point of collapse of the contractual relationship between the parties.

11. In response, the advocate contended that the client has utterly failed to prove that the suit was determined in 1999, adding that the decree annexed to the supplementary affidavit cannot be relied upon to ascertain when judgment was entered, if ever.

12. The advocate further submitted that the client has not adduced any evidence to show that the parties had previously entered into a contract regarding payment of legal fees, while simultaneously maintaining that time would start to run from the date on which the application to cease acting was allowed. The advocate urged this court to consider the holding made in a similar case involving the parties, being *Misc. Application No.667 of 2013* where the court determined that it was not clear when the retainer terminated or when the matter came to an end, and that the duty fell upon the client to prove its case. On that basis, the advocate urged this court to dismiss the Motion with costs.

13. I have considered the grounds laid out on the face of the Motion; the facts deponed in the affidavits supporting and opposing the same; as well as the contending submissions plus authorities relied upon.

14. The issue for determination concerns whether the bill of costs is time-barred. To begin with, it is not disputed that an advocate-client relationship subsisted between the parties. It is equally not contested that such relationship was at all material times contractual in nature, thereby causing it to fall within the purview of **Section 4 (1) (a)** of the **Limitation of Actions Act, Cap.22** which provides that a cause of action arising out of a contract shall be brought within a period of six (6) years. As earlier stated, the above was noted in the case of ***Abincha & Co Advocates v Trident Insurance Co Ltd [2013] eKLR*** cited by the client in this way:

***“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.”***

15. To add on, the abovementioned authority made reference to ***Halsbury’s Laws of England 4<sup>th</sup> Edition, Volume 28 at paragraph 879 page (452)*** which carefully set out the instances in which an advocate can claim his or her costs from a client as follows:

***“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.”***

16. In addressing the termination of the retainer between the parties, on the one hand the advocate did not avail any evidence to indicate that its application to cease acting dated 14<sup>th</sup> September, 2017 was allowed; neither does the record shed any light on this issue. On the other hand, I noted the client’s position that the retainer relationship terminated in 2007 upon filing of the bill of costs and the notice of taxation dated 5<sup>th</sup> April, 2007 and annexed as “WP 2” to the supporting affidavit of Winnie A. Paul. I have perused the same and seen that it relates to an entirely different cause (Misc. Application No. 457 of 2007) hence cannot support the client’s argument. In that case, it remains unclear when the retainer terminated.

17. Be that as it may, the client availed a copy of the decree annexed to the supplementary affidavit equally deponed by Winnie A. Paul as “WP 1”. I have perused the copy and established that it relates to the suit. The decree discloses that judgment was entered in the suit on 1<sup>st</sup> December, 1999. There is nothing to point out that the judgment was challenged by way of an appeal or in any other manner.

18. Going by the above information, it is apparent that the advocate then ought to have filed its bill of costs within six (6) years from the date of judgment. According to the record, the said advocate-client bill of costs was filed on 16<sup>th</sup> November, 2017 which clearly falls outside of the statutory timelines. It is therefore evident that the statutory timelines have since lapsed and the bill of costs is indeed statute-barred.

19. Consequently, the Motion is allowed and the advocate-client bill of costs is hereby struck out with costs to the client.

Dated, signed and delivered at **NAIROBI** this 21<sup>st</sup> day of November, 2019.

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**L. NJUGUNA**

**JUDGE**

In the presence of:

..... for the Advocate/Respondent

..... for the Client/Applicant