



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLN. NO. 693 OF 2017

MBUGUA & MBUGUA COMPANY ADVOCATES.....APPLICANT

VERSUS

KENINDIA ASSURANCE COMPANY LIMITED.....RESPONDENT

RULING

1. In the Notice of Motion dated 10th July 2018, the respondent (hereinafter the applicant) prays that the Advocate/Client Bill of Costs filed by the respondent, *Mbugua & Mbugua Company Advocates* on 16th November 2017 be struck out with costs on grounds that it is time barred since it was based on a contract between the parties and it was filed more than ten years after the primary suit was determined.

2. The application is anchored on *Section 4 (1) (a)* of the *Limitation of Actions Act* and *Order 51* of the *Civil Procedure Rules*. It is supported by the supporting and further affidavit sworn by *Winnie A. Paul* on 10th July 2018 and 6th June 2019 respectively and annexures thereto.

3. Briefly, the applicant contends that the respondent was in its panel of advocates but their relationship ceased in the year 2007 when the respondent commenced taxations against the applicant; that the respondent has not explained why it took them more than twenty years to file a Bill of Costs without raising a fee note on fees; that the respondent's application to cease acting was meant to prevent the applicant from raising the issue of limitation on the payment of fees.

4. The application is contested by the respondent. *Ms Rebo Diana Rose Wambui*, an associate in the respondent's firm swore a replying affidavit on 6th November 2018 in which she admitted that the firm was retained by the applicant to represent it in RMCC No. 1930 of 1997. She averred that the retainer was terminated on 14th November 2017 when the respondent sought and obtained leave of the court to cease acting for the applicant; that at the time the application to cease acting for the applicant was filed, the matter had not been concluded as an appeal was filed which was pending together with an application to have the appeal dismissed for want of prosecution; that in the premises, the Bill of Costs is not time barred as time started running on 14th November 2017 when the respondent's application to cease acting for the applicant was heard and allowed. The applicant urged the court to find that the application lacked merit and ought to be dismissed.

5. The application was prosecuted by way of written submissions which both parties duly filed and which I have carefully considered together with the authorities cited.

6. It is common knowledge that an advocate's claim for costs is based on a contract for professional services between a firm of advocates and its client. Since a claim for costs is rooted on a contract, it is subject to the limitation period of six years prescribed in *Section 4 (1) (a)* of the *Limitation of Actions Act*. This section states as follows:

“(1) 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;

(b) actions to enforce a recognizance.”

7. In Halsbury's Laws of England 4th Edition, Volume 28 at page 452 paragraph 879 which was referred to by *Waweru J* in *Abincha & Co Advocates V Trident Insurance Company Limited, [2013] eKLR*, the learned authors when discussing when time starts running with regard to the recovery of legal costs stated 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.”

8. In this case, it is not disputed that the applicant retained the respondent to recover on its behalf KShs.79,165 and that those instructions were executed by institution of Milimani CMCC No. 1930 of 1996. What is disputed is when that retainer came to an end since this is what would determine when the respondent’s cause of action accrued for purposes of computation of time under *Section 4 (1) (a) of the Limitation of Actions Act*.

9. Since the applicant is the one asserting that the Bill of Costs herein was time barred, it has the onus of proving that the said Bill of Costs was filed more than six years after its contract with the respondent was terminated. This is in line with the cardinal principle of the law of evidence as set out in *Sections 107 to 109 of the Evidence Act* that he who alleges the existence of certain facts must prove that those facts actually exist.

10. In this case, the applicant has asserted that the respondent’s retainer was terminated after CMCC No. 1930 of 1997 was concluded on 4th March 2002 when the trial court dismissed an application filed by the defendant to set aside judgment entered therein. The respondent on the other hand claimed that there was an appeal which was filed against that decision and that the appeal was still pending on 14th November 2017 when its application seeking court’s leave to cease acting was allowed. The applicant in its further affidavit sworn on 6th June 2019 did not deny this claim nor did it deny that the respondent was granted leave to cease acting for the applicant on 14th November 2017.

11. In the alternative, the applicant had contended that the respondent’s retainer was terminated in the year 2007 when the respondent commenced taxation of advocate/client Bill of Costs filed against the applicant. I have perused the notices of taxation in Misc. Appln. Nos. 454 of 2007 and 265 of 2007 annexed to the applicant’s supporting affidavit and although they confirm that the taxation proceedings were instituted by the respondent against the applicant, they do not prove that the taxation was in respect of the retainer in CMCC No. 1930 of 1997 which is the basis of the Bill of Costs filed on 16th November 2017.

12. Given that the applicant has not disputed the respondent’s claim that there was an appeal filed against the trial court’s decision dated 4th March 2002 which was still pending when the respondent was granted leave to cease acting for the applicant, I find that the applicant has failed to prove on a balance of probabilities that the respondent’s retainer was terminated on either 4th March 2002 or in the year 2007 and that therefore the Bill of Costs herein was filed more than six years after the party’s contract for provision of legal services was terminated.

13. In the absence of such evidence, I am persuaded to accept the respondent’s contention that the retainer was terminated on 14th November 2017 which is the date on which time started running for purposes of limitation of the respondent’s cause of action. It then automatically follows that the impugned Bill of Costs was filed well within the time prescribed by the law.

14. For the reasons foregoing, I have come to the conclusion that the Notice of Motion dated 10th July 2019 lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 14th day of November, 2019.

C. W. GITHUA

JUDGE

In the presence of:

Mr. Salach: Court Assistant

No appearance for both the applicant and the respondent though duly served