



**Khalwale & Company Advocates v Devyani Food Industries Kenya  
Limited formerly Sameer Agriculture & Livestock Co Ltd (Miscellaneous  
Application 62 of 2021) [2023] KEHC 17593 (KLR) (16 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17593 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
MISCELLANEOUS APPLICATION 62 OF 2021  
RK LIMO, J  
MAY 16, 2023  
IN THE MATTER OF THE ADVOCATES CLIENT BILL OF COSTS  
IN THE MATTER OF THE ADVOCATES REMUNERATION (AMMENDMENT ORDER)  
IN THE MATTER OF TAXATION OF COSTS  
ADVOCATE/CLIENT BILL OF COSTS**

**BETWEEN**

**KHALWALE & COMPANY ADVOCATES ..... APPLICANT**

**AND**

**DEVYANI FOOD INDUSTRIES KENYA LIMITED FORMERLY SAMEER  
AGRICULTURE & LIVESTOCK CO LTD ..... RESPONDENT**

*(This Ruling shall also apply to a related matter Misc. Application No. E009 of 2021)*

**RULING**

1. This ruling is in respect to the Respondent's preliminary objection dated May 18, 2022 against the applicant's advocate client bill of costs dated September 8, 2021. The gist of the Respondent's Preliminary Objection is that the bill of costs is statute barred by the operation of Section 4(2) of the [Limitation of Actions Act](#) having been filed eight years after the finalization of the Primary Suit that engaged the applicants.
2. The primary suit that saw the Respondent engage the services of the applicant was Kitui PMCC No 282 of 2011 where the Respondent through Counsel sought to set aside an exparte judgement. The trial court however vide its ruling dated August 14, 2018 found no merit in the application to set aside the judgement upon which the applicant advised their client (the Respondent) to prefer an appeal.



3. There is no evidence on recording showing or indicating that the applicants were instructed to lodge an appeal. In an affidavit sworn on September 23, 2022 Counsel for the applicants avers that he was retained on a continuous basis by the Respondent in 2009 and that he represented it on numerous cases including the present matters. He avers that he worked for the Respondent until September 30, 2018 when his services were terminated and has exhibited an email to that effect.
4. The applicant contends that his bill of cost is not time barred because in their view, the cause of action arose on September 30, 2018 when they were sacked.
5. The Respondent on the other hand insist that the bill of costs herein, is in respect to Kitui PMCC No 282 of 2011 where it was sued as a 3<sup>rd</sup> party is time barred. It contends that the judgement was determined on April 17, 2013 as against the defendant in that case and their application to set aside was determined on August 14, 2013. The respondent faults the applicants for laches insisting that they should have filed their bill of costs in 2013 before expiry of 6 years.
6. The Respondent relies on the case of *Abincha & Co Advocates vs Trident Co Limited (2013) eKLR* where the court held that bills of costs filed by the Advocate more than six (6) years after completion of the work which he was retained by the Client to do, or after the lawful termination of the retainer in respect of such work, were statute-barred by virtue of Section 4(1) (a) of the *Limitation of Actions Act*.
7. He also relies on the case of *Akide & Company Advocates vs Kenindia Assuarncce Company Limited (2021) eKLR* where similarly, the court found that a claim for legal fees was based on contract and that a bill of costs which was filed over six (6) years after the completion of the work was time barred.
8. On the question of a continuous retainer, the Respondent had place reliance on the case of *Martin Mugambi Mitbega vs Invesco Assurance Company Ltd (2019) eKLR* where the court held as follows;
 

‘It is no answer for the Applicant to latch on to the fact of his alleged continued general retainer with the Respondent. The reference point in this instance is the bill of costs raised in connection with Kiambu Civil Case No 163 of 2005 and not any other cases in respect of which the Applicant may have been instructed. Therefore, the fact that the Applicant’s name is still in the panel of advocates retained by the Respondent is of no moment in this case. As stated in *Abincha and Co Advocates v Trident Insurance Co Ltd [2013] eKLR*, any bill of costs filed more than 6 years after completion of the work which an advocate was retained by the client to do, or after termination of retainer in respect of such work, is statute barred.’
9. This Court has considered the Preliminary Objection raised in respect to applicant’s bill of costs dated September 8, 2021. I have also considered the response made.
10. A look at the applicant’s bill of costs under item 1 or instructions fees) the item is in reference to Civil Appeal No HCA No 185 of 2013. The Respondent Sameer Agricultural & Livestock Co Ltd was appealing against the ruling of Hon AS Lessotia delivered on August 14, 2013.
11. It is the advocate’s contention that he was representing the Respondent in Civil Case No 282 of 2010; (*Jared Makombere Kutsua vs Simon Kamau Kagwe & Sameer Agricultural & Livestock Co LTD*). That a Ruling was rendered in the said matter on August 14, 2013 following which he lodged a Memorandum of Appeal dated September 9, 2013. Ideally then, time did not begin to run against the advocate until the appeal was decided. The Respondent however contends that the advocate’s instructions ceased upon delivery on the Court’s Ruling on August 14, 2013 where the Respondent was exonerated of any fault. The Advocate has attached the Memorandum of Appeal of Appeal September 9, 2013 as well as the said ruling in his Advocates List of Documents. This Court finds it a bit



curious that the decision which the advocate was apparently appealing on behalf of the Respondent, was actually entered in favour of the Respondent. Specifically, the court held as follows;

‘Further, it’s the court’s opinion that the 3<sup>rd</sup> party (the Respondent herein) was absolved of liability, the Defendant was found fully liable in this matter that shielded the 3<sup>rd</sup> party from any claim to necessitate this application or the 3<sup>rd</sup> Party allegation of having been condemned unheard. That is the ruling of the Court.’

12. It is therefore not clear to this court why the advocate was appealing a decision that was in favour of his client. It is also apparent from the documentation on record filed by the advocate that he was in constant communication with the Respondent. He wrote to the Respondent after the decision of the trial court vide a letter dated August 19, 2013 attached in his list of documents where he sought instructions on whether he should file an appeal against the decision. The advocate has not attached any communication/ instructions from his client thereafter on the approach the client wanted him to take. It is also not clear what transpired after the advocate cited the Memorandum of appeal. From the bill of costs, the advocate’s action took place on September 10, 2015 when he allegedly attended the judge for directions and despite his claim that he ceased acting for the Respondent on October 31, 2018, he has not provided a report on how the appeal progressed if at all from 2015.
13. In the absence of a letter giving him express instructions to pursue an appeal on behalf of his client, the applicant’s claim that he had general instructions cannot be sustained despite attaching documents in relation to CMCC No 3652 of 2015 Paul Muthama versus Sameer Agriculture & Livestock (K) Ltd. The applicant should have presented cogent evidence on retainer in respect to the case he has billed.
14. An advocate’s claim for costs is based on the contract for professional services between him and his client and an action to recover such costs is subject to the limitation period stipulated under Section 4 of the Limitation of Actions Act which 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’

15. In the case of Martin Mugambi Mitheka T/A Mitheka & Kariuki versus Invesco Assurance Co Ltd [2019] eKLR, the Court had this to say on a case by an advocate claiming to have been on a continuous retainer.

‘It is no answer for the Applicant to latch on to the fact of his alleged continued general retainer with the Respondent. The reference point in this instance is the bill of costs raised in connection with Githunguri Civil Case No 65 of 2005 and not any other cases in respect of which the Applicant may have been instructed. Therefore, the fact that the Applicant’s name is still in the panel of advocates retained by the Respondent is of no moment in this case. As stated in *Abincha and Co Advocates v Trident Insurance Co Ltd* [2013] eKLR, any bill of costs filed more than 6 years after completion of the work which an advocate was retained by the client to do, or after termination of retainer in respect of such work, is statute barred.’

16. A retainer is simply an agreement presenting the terms of engagement between an advocate and their client including fees payable. An advocate cannot purport in my view to pursue litigation on behalf of a client without express instructions to do so. An advocate must be accountable and must act with transparency. It is not safe or fair to assume that because an advocate has instructions in a specific matter



or matters, he also has instructions on another matter or matters unless the actions of the client can imply that the counsel has those instructions.

17. In this instance, as I have noted above, there is no evidence of any instructions from the Respondent to the advocate to pursue Civil Appeal No 185 of 2013 on its behalf. The Counsel wrote a letter seeking express instructions as seen on the record but there is no proof of any response from the Respondent herein who, as I have noted above, had really nothing at stake in the appeal. The only viable assumption therefore, is that the matter giving rise to the subject bill of costs herein was finalized on August 14, 2013 when the trial court rendered itself. This in effect means that the operation of Section 4 of Limitations of Actions Act kicked in 6 years after August 14, 2013. The applicant's bill of costs dated September 8, 2021 is therefore, statute barred and for that reason the Preliminary Objection dated May 18, 2022 is sustained with costs to the Respondent. This ruling shall also apply to a related matter Misc Application No E009 of 2021.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 16<sup>TH</sup> DAY OF MAY, 2023.**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

