



REPUBLIC OF KENYA



Khalwale & Company Advocates v Devyani Food Industries Kenya Ltd (Miscellaneous Civil Application E206 of 2021) [2025] KEHC 13563 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13563 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MISCELLANEOUS CIVIL APPLICATION E206 OF 2021
HI ONG'UDI, J
SEPTEMBER 30, 2025**

BETWEEN

KHALWALE & COMPANY ADVOCATES APPLICANT

AND

DEVYANI FOOD INDUSTRIES KENYA LTD RESPONDENT

RULING

1. This ruling is in respect of two applications. The first one is dated 6th October, 2023 while the second one is dated 21st February, 2025.
2. In the chamber summons dated 6th October 2023 the applicant prays for the following orders;
 - i. The ruling on taxation by Hon, Nancy Makau on 06.10.2023 be and is hereby adopted as a judgment of this Honourable court.
 - ii. A decree be drawn and issued in the sum of Kshs 384,211/= pursuant to the said ruling.
 - iii. Costs of the application together with interest be provided for.
3. The said application is premised on the grounds on its face and the affidavit of an advocate practising with the applicant firm sworn on the even date. He deponed that his firm acted and represented the respondent in the subordinate court case CMCC NO. 3 of 2018 Mega Pack K Limited vs Devyan Food Industries Limited formerly Sameer Agriculture & Livestock Company Limited. However, the respondent failed to pay his legal fees which prompted the filing of an Advocate/Client bill of costs for taxation which was finally taxed at kshs. 384,211/=. Thus, it was necessary to adopt the ruling on taxation as a Judgment of the court to enable the applicant execute for recovery of the taxed sum.
4. In the notice of motion dated 21st February 2025 the respondent prays for orders that it be granted leave to file an appeal against the ruling delivered by this court on 20th February 2025.



5. The said application is premised on the grounds on its face and the affidavit of applicant's legal officer. She deponed that this court in its ruling dated 20th February 2025 upheld the decision of the Hon. Nancy Makau (DR) allowing the advocate's bill of costs dated 24th August 2021 and taxed at kshs 384,211/=. She stated that the respondent was aggrieved by the said ruling and required leave of this court pursuant to Rule11(3) of the Advocates (Remuneration) Order, 1962 to file its Appeal to the Court of Appeal.
6. She further stated that the respondent had an arguable appeal with high chances of success as it raised weighty grounds of objections. Thus, unless leave is granted the respondent would suffer substantial injustice. She added that the application had been brought without unreasonable delay.
7. In response to the application the respondent filed a replying affidavit dated 8th May, 2025 sworn by Wilberforce L. Khalwale an advocate of the high court. He opposed the application and averred that the said application was baseless, scandalous, frivolous and vexatious. He stated that litigation must come to an end and that the application was meant to deny him the fruits of this court's judgment on legal fees payable. He further stated that the subject bill of costs had been taxed and assessed twice by two different taxing masters. He added that the intended appeal had not raised any substantial issue to be determined by the Court of Appeal.
8. Both applications were canvassed by way of written submissions.

Applicant's submissions

9. The said submissions were filed by Khalwale & company advocates on 8th May 2025. Counsel gave a brief background of the case and submitted that the respondent filed a reference which annulled the taxation and the court ordered a fresh taxation. He stated that the new taxing master taxed the bill of costs afresh and allowed it in the sum of Kshs.384,211/=. He further stated that the respondent filed a reference which was disallowed by the court and had now sought to appeal against that decision. He added that there was no stay on the taxation and it was only fair and just that the application be allowed to allow for execution.
10. Counsel further submitted that the application dated 21st February 2025 seeking for leave to appeal was scandalous, frivolous and vexatious. He placed reliance on the decision in the case of Joseph Okumu Simiyu -V Standard Chartered Bank (Hayanga J) HCCC No. 899 of 1994, where Justice Hayanga. J held that scandalous, frivolous, vexatious pleadings are pleadings that tend to embarrass or delay a fair trial. He held as follows;

“The Court emphasized that appeals should not be entertained unless they present substantial legal issues.”

11. He urged the court to adopt the taxing master's decision dated 6th October 2023 and dismiss the respondent's application with costs.

Respondent's submissions

12. The said submissions were filed by Eliud Maina Karanja Advocates on 15th May, 2025. Counsel gave a brief introduction of the case and identified three issues for determination by this court.
13. On the first issue on whether the applicant has met the legal threshold for grant of leave to appeal under rule 11(3) of the Advocates Remuneration Order, counsel submitted that the right to appeal is



not merely procedural but was a fundamental tenet of justice. He placed reliance on Rule 113 of the Advocates Remuneration Order 1962 which provides as follows:

“ Any person aggrieved by the decision of a judge upon any such reference may, with the leave of the judge but not otherwise appeal to the Court of Appeal.”

14. He further cited articles 48 and 50(1) of *the Constitution* and submitted that an appeal is a constitutional right and an integral part of the justice system which ensures fairness and accountability in judicial decision-making. Thus, denying a party the opportunity to appeal, particularly where there are arguable legal grounds would amount to denying them access to justice.
15. The second issue is whether the intended appeal raises cogent, arguable and substantial questions of law. On this, counsel submitted that the respondent had demonstrated through the draft Memorandum of Appeal (Annexure “PM-2”) that the intended appeal raised substantial legal questions. Further, that the question whether an advocate who lacked a valid practising certificate was entitled to remuneration for legal services was not only central to the integrity of legal practice, but also a substantial question of law that has far-reaching implications on public policy, professional ethics, and the administration of justice.
16. He placed reliance on section 9 of the *Advocates Act* and the decision in *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR, where the Court of Appeal observed that acting without a practising certificate contravenes public policy and renders the contract for legal services unenforceable. See also; *George M. Maengwe t/a G.M Maengwe & Co. Advocates v Josea Kipkurui Mutai* [2019] eKLR.
17. On whether the chamber summons dated 17th October 2023 (sic) would prejudice the respondent’s applicant’s right of appeal, counsel submitted that the application dated 6th October was not properly before this court since there was no verifiable evidence of its filing or service, no court receipt, e-filing record, or entry in the physical court file. Thus, in the absence of such proof the court lacked jurisdiction to entertain the said application and the same ought to be dismissed outright.
18. He urged the court to allow the application dated 21st February 2025 as prayed.

Analysis and Determination

19. I have considered the two applications together with the affidavits sworn in support, the replying affidavit, and the submissions by the respective parties. I opine that the issue for determination by this court is whether the applications dated 6th October, 2023 and 21st February 2025 are merited.
20. I will first deal with the application dated 21st February 2025 which seeks for leave to appeal to file an appeal against the ruling delivered by this court on 20th February 2025.
21. When deciding whether to grant leave to appeal to the Court of Appeal in Kenya, this court will consider whether the application is frivolous, vexatious, or an abuse of the court process. The court will also consider whether the application shows a grave error in the decision that would cause substantial prejudice to the applicant or is detrimental to the interests of justice.
22. The respondent’s application dated 17th October 2023 for setting aside of the ruling by Hon. Nancy Makau (DR) was decided by this court in its ruling on 20th February 2025. It was anticipated that the respondent would appeal against the said ruling but there is no appeal pending. I find the respondent’s application seeking leave to appeal to be vexatious, frivolous and abuse of court process. It is not disputed that the bill costs in question has been taxed twice by different taxing masters. The first



taxation was set aside while the second one was upheld by this court. It is this court's view that litigation must come to an end and parties cannot litigate forever.

23. For the above reasons, I find that the application for leave to appeal from the ruling of 20th February 2025 is not deserved and it is hereby dismissed.
24. The application dated 6th October 2023 seeks among other orders that the ruling on taxation by Hon. Nancy Makau on 6th October 2023 be adopted as a judgment of this court.

Section 51(2) of the *Advocates Act* provides as follows;

“The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.”

25. In the case of *Musyoka & Wambua Advocates v Rustam Hira Advocate* [2006] eKLR, the court held as follows;

“Sub-section (2) of section 51 of the *Advocates Act* gives the court the discretion to make such order in relation to a certificate of taxation that has not been set aside or altered as the court thinks fit, including, in a case where the retainer is not disputed, an order that judgment be entered for the sum certified to be due with costs.....

.....Section 51 of the Act makes general provisions as to taxation, as the marginal note indicates. One of those provisions is that the court has the discretion to enter judgment upon a certificate of taxation which has not been set aside or altered where there is no dispute as to retainer. This, in my view, is a mode of recovery of taxed costs provided by the law, in addition to the filing of suit, where such suit would be unnecessary because, one, the certificate of taxation has not been set aside or altered and, two, there is no dispute as to retainer. Unless there is any other matter as would require ventilation in a trial, what would be the necessity of filing suit? In my view the court would be entitled to enter judgment under section 51(2) even where there is no suit filed. I so hold.” (Emphasis mine)

26. The above being the legal position, all that is required of this court to confirm is that a Certificate of Costs was duly issued and that there has been no decision made to set aside and/or alter the ruling by the Taxing Master.
27. Being satisfied that these two requirements have been met, I find that the application dated 6th October 2023 has merit and the same is allowed in its entirety with costs to the applicant.
28. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 30TH DAY OF SEPTEMBER, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

