



Khalwale & Co. Advocates v Devyani Food Industries Kenya Limited (Formerly Sameer Agricultural and Livestock Co. Ltd) (Miscellaneous Application E012 of 2021) [2024] KEELRC 751 (KLR) (11 April 2024) (Ruling)

Neutral citation: [2024] KEELRC 751 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E012 OF 2021**

**CN BAARI, J
APRIL 11, 2024**

BETWEEN

KHALWALE & CO. ADVOCATES ADVOCATE

AND

DEVYANI FOOD INDUSTRIES KENYA LIMITED (FORMERLY SAMEER AGRICULTURAL AND LIVESTOCK CO. LTD) CLIENT

RULING

1. The ruling herein relates to a Chamber Summons application dated 9th October, 2023, brought pursuant to Sections 1A, 1B and 3A of the [Civil Procedure Act](#), and Rule 11 (2) of the [Advocates Remuneration \(Amendment\) Order](#). The Applicant seeks orders THAT:
 - i. The Honourable Court be pleased to vacate and set aside in its entirety the Ruling of the Honourable Beryl Omollo, Deputy Registrar, dated and delivered on the 27th September, 2023, allowing the Advocate-Client Bill of costs dated 19th February, 2021.
 - ii. The Honourable court do find that the Taxing Master erred in law in taxing and allowing the Bill of costs dated 19th February, 2021, and in failing to consider the Applicant/Client submissions, Replying affidavit and list of documents.
 - iii. The Honourable court be pleased to refer the Advocate-Client Bill of costs for a fresh taxation by another taxing officer.
 - iv. The costs of this application be provided for.
2. The Applicant's contention is that the taxing officer erred in principle by proceeding to tax the Advocate-Client Bill of costs, when instructions were taken from the Client when the Advocate did not hold a practicing certificate.



3. It is its further assertion that the Taxing officer exceeded her discretion by taxing items 3-19 of the impugned Bill of costs, despite the fact that the Advocate/Respondent herein, was an unqualified person when he rendered the services subject of the Bill, and was thus not entitled to fees for failure to hold a practicing certificate.
4. It is the Applicant's position that the Taxing officer refused and/or ignored its weighty objection and evidence raised in its submission, replying affidavit and list of documents, and thereby rendering the erroneous ruling on 27th September, 20223.
5. The Respondent/Advocate opposed the application vide a Replying affidavit sworn on 27th November, 2023. On its part, the Respondent avers that the application is res judicata on the basis that the issues raised in the application were raised or ought to have been raised in the previous applications that was dealt with by the court.
6. The Respondent contends further that the instant application is fatally defective for failure to comply with the provisions of Rule 11 of the Advocates Remuneration Order, which requires an aggrieved litigant to issue a Notice to the Taxing officer on the items he wishes to challenge.
7. It is his further assertion that Rule 11 requires the litigant to lodge such a Notice within 14 days of the ruling, and this aspect of the law has not been complied with, and therefore the reference is untenable, misconceived, bad in law and otherwise an abuse of the court process
8. The Respondent avers that the Applicant/Client are dishonest, and have filed a reference to frustrate and deny the Advocate legal fees for services rendered having now filed a total of four applications in the same matters. It is their position that litigation must come to an end and the issues being raised now, were raised/or ought to have been raised in the previous applications.
9. Parties filed submissions on the application, and which have been duly considered.

Determination

10. I have carefully considered the application, grounds and affidavit in support, together with the replying affidavit in opposition, and the rival submissions. I have also carefully appraised the Ruling delivered by the Hon. Taxing Master on 27th September, 2023. The issue that arise for my determination is whether sufficient grounds have been advanced to warrant the setting aside of the Taxation of 27th September, 2023.
11. The instant application is brought pursuant to Rule 11 (1) of the Advocates Remuneration Order, which provides thus:

“Should any party object to the decision of the taxing officer, he may within 14 days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.”
12. The Respondent/Advocate's assertion is that there was no notice issued by the Applicant/Client to the Taxing officer prior to lodging this application.
13. The wording of the foregone provision is not couched in mandatory terms, and therefore, failure to issue notice does not in my view render the taxation reference defective. In the circumstances, I will proceed to evaluate the merits of the application as filed.



14. The application is premised on the allegation that the Respondent/Advocate did not hold a practicing certificate at the time of taking instructions, and which according to the Applicant, disentitles him to fees for being an unqualified person.
15. The Court notes that the Respondent/Advocate did not deem it necessary to respond to the question of whether or not he held a valid practicing certificate at the time of taking instructions, being the basis of the objection, and which then means that the Applicant's assertion is uncontroverted.
16. Section 31 of the *Advocates Act* states thus on unqualified persons: -
- “(1) Subject to section 83, no unqualified person shall act as an advocate, or as such cause any summons or other process to issue, or institute, carry on or defend any suit or other proceedings in the name of any other person in any court of civil or criminal jurisdiction.
- (2) Any person who contravenes subsection (1) shall—
- (a) be deemed to be in contempt of the court in which he so acts or in which the suit or matter in relation to which he so acts is brought or taken, and may be punished accordingly; and
- (b) be incapable of maintaining any suit for any costs in respect of anything done by him in the course of so acting (emphasis own); and
- (c) in addition, be guilty of an offence.”
17. The Respondent/Advocate has not in anyway shown prove that he held a practicing certificate at any point when he purported to represent the Applicant in the matter subject of this motion. It then follows, that for all intends and purposes, he was an unqualified person, and was incapable of maintaining any suit for costs in relation to that suit.
18. Section 9 of the *Advocates Act* makes provision for qualifications for practicing as an advocate, and the qualifications include having in force a current practicing certificate.
19. The Court of Appeal in *Geoffrey Orai Obura v Koome* [2001] KLR 109 held thus on unqualified persons: -
- “The contention on behalf of the applicant appears to us to be well founded. However, Mr. K'Owade for the respondent, submitted that section 9 of the Act should be so construed that the act of an unqualified person does not render his acts invalid because of lack of qualification unless the client was aware of such lack of qualification. Apparently, this submission is based on the common law of England. It is said that proceedings are not invalidated between one litigant and the opposite party merely by reason of the litigant's solicitor being unqualified, for example for his not having a proper practicing certificate in force. With respect, we reject this argument. The facts of this case are governed clearly by the provisions of the *Advocates Act* and not the Common Law in England. The provisions of section 9 are unambiguous and mandatory and the principles of common law do not apply as the jurisdiction of this Court is to be exercised in conformity with *the Constitution* and subject thereto, all other written laws.”



20. The same Court (differently constituted) in *National Bank of Kenya Ltd v Wilson Ndolo Ayah* [2009] eKLR stated:

“Section 34, above, as worded seems to be concerned with offering legal services at a fee when one is not qualified as an advocate. If that be so, what is the rationale for the invalidation of acts done by such an advocate” It is public policy that citizens obey the law of the land. Likewise is good policy that courts enforce the law and avoid perpetuating acts of illegality. It can only effectively do so if acts done in pursuance of an illegality are deemed as being invalid.”

21. The upshot is that the Respondent/Advocate having been unqualified to take instructions, was incapable of maintaining a claim for costs.

22. The motion thus succeeds, and the Ruling of the Honourable Beryl Omollo, Deputy Registrar, dated and delivered on the 27th September, 2023, allowing the Advocate-Client Bill of costs dated 19th February, 2021, is hereby vacated and is set aside in its entirety.

23. I make no orders on costs.

24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 11TH DAY OF APRIL, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Khalwale Present for the Respondent/Advocate

Mr. Maina Present for the Applicant/Client

Mr. Erwin Ongor - Court Assistant

