



REPUBLIC OF KENYA



KENYA LAW
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Devyan Food Industries Kenya Limited formerly Sammer Agriculture & Livestock (K) Limited v Khalwale & Company Advocates (Miscellaneous Cause E032 of 2021) [2023] KEELRC 806 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELRC 806 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
MISCELLANEOUS CAUSE E032 OF 2021
M MBARŪ, J
MARCH 28, 2023

BETWEEN

DEVYAN FOOD INDUSTRIES KENYA LIMITED FORMERLY SAMMER AGRICULTURE & LIVESTOCK (K) LIMITED APPLICANT

AND

KHALWALE & COMPANY ADVOCATES RESPONDENT

RULING

1. The applicant, Devyan Food Industries Kenya Limited filed Chamber Summon application dated February 20, 2023 and seeking for orders that the ruling delivered on February 9, 2023 allowing the Advocate-Client Bill of Costs dated April 28, 2022 be set aside and the taxation be done afresh on the grounds that the Taxing Officer failed to comply with the principles of reasonableness in allowing the bill of costs as drawn and without taxing the same in accordance with the Advocates Remuneration Order.
2. The application is supported by the Supporting Affidavit of Paul Maina Advocate for the applicant and who avers that in the ruling of the Taxing Officer delivered on February 9, 2023 the Grounds of Opposition filed by the applicant herein were not considered or put into account together with the List of Documents filed in support thereof.
3. There were weighty issues addressed in the written submissions that the Bill of Costs relating to the period of September, 2021 to April, 2022 was when the Advocate did not hold a valid Practising Certificate contrary to Section 9 of the *Advocates Act*. the respondent, Khalwale Advocate has not had a valid Practising Certificate over the last 3 years and hence was unqualified person when he was representing himself and under Section 34(2) of the *Advocates Act*, any sums paid to such an unqualified person is recoverable summarily hence the decision to allow the Bill of Costs as drawn was contrary to statute.



4. The Taxing Officer also allowed various items under the Bill of Costs under items 3, 5, 7, 10, 11, 12, 13, 15, 18, 20 and 22 being travel expenses without proof or submission of the original receipts. Items under 1, 8, 9, 16, 17, 21, and 22 were manifestly high and without any reasons for such an award and for these reasons, the application seeking to ta the Bill of Costs afresh should be allowed.
5. The respondent was served but there was no attendance.
6. The application is not opposed but the court allowed the applicant to make oral submissions.

Determination

7. Under Rule 11(2) and (4) of the [Advocates Remuneration Order](#), the Taxation and Certificate of Costs issued by a Taxing Officer may be set aside for good cause.
8. The provisions of Rule 11 of the Advocates Remuneration Order is that;
 11. Objection to decision on taxation and appeal to Court of Appeal
 1. Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he objects.
 2. The taxing officer shall forthwith record and forward to the objector the reasons for his decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.
 3. Any person aggrieved by the decision of the judge upon any objection referred to such judge under subsection (2) may, with the leave of the judge but not otherwise, appeal to the Court of Appeal.
 4. The High Court shall have power in its discretion by order to enlarge the time fixed by subparagraph (1) or subparagraph (2) for the taking of any step; application for such an order may be made by chamber summons upon giving to every other interested party not less than three clear days' notice in writing or as the Court may direct, and may be so made notwithstanding that the time sought to be enlarged may have already expired.
9. The essence of an application pursuant to Rule 11 of the Advocates Remuneration Order is to bring to the attention of the court the decision of the Taxing Officer at the earliest possible for the same to be addressed without delay.
10. The respondent, Khalwale Advocate from the firm of Khalwale & Company Advocates filed Bill of Costs dated April 28, 2022 following judgment awarding costs in ELRC Cause No 419 of 2014. In a ruling of the Taxing Officer dated February 9, 2023 the Bill of Costs was allowed the same whereas the respondent and applicant herein has filed written submissions in opposition to the Bill of Costs and particularly that the Advocate filed the Bill of Costs on while he had no Practicing Certificate for the period of September, 2021 to April, 2022 contrary to Section 9 of the [Advocates Act](#) and further that the Advocate who filed the Bill of Costs has not had a valid Practicing Certificate for the last three (3) years and hence an unqualified person when he was representing himself. Such matter of an advocate attending court without a valid Practicing Certificate is addressed under Section 34(2) of the [Advocates Act](#) and that all monies paid to such an advocate is recoverable summarily and hence the decision to allow the Bill of Costs as drawn was invalid.



11. The applicant attached records extracted from the Law Society of Kenya showing that from the year 2020 to 2022 Khalwale Wilberforce Lukombo, Practice for 2022 and practicing under the name Khalwale & Co Advocates had no Practicing Certificate.
12. Without any reply to these assertions or having any contrary submissions, the records submitted are taken as correct.
13. Section 9 of the [Advocates Act](#) requires every advocate attending and representing clients in court to hold a valid Practicing Certificate. The requirement to hold a valid Practicing Certificate extends to such person drawing or executing documents as an advocate. Without a valid Practicing Certificate, any document drawn or executed is invalid.
14. This position is given emphasis by the Court of Appeal in the case of [National Bank of Kenya Ltd v Wilson Ndolo Ayah, Civil Appeal No 119 of 2002](#). The Court settled the law in the following terms;
15. Whether or not the instrument of charge and instrument of guarantee should be declared invalid ab initio for having been drawn by unqualified advocate is a conundrum. Courts in this country are not in agreement on the effect the absence of a [practising] certificate will have on validity of documents drawn by such an advocate. Section 34 of the [Advocates Act](#)... makes it an offence for an advocate not holding a current [practising] certificate preparing or drawing any document for a client for a fee. Neither the [Advocates Act](#) nor any other written law makes provision with regard to the validity or otherwise of such documents. The [Stamp Duty Act](#), unlike the [Advocates Act](#), makes provision in Section 19 saying an unstamped document is inadmissible in evidence. The legislature, we think, not only made the documents unregistrable but also made the document invalid for any other purpose before stamping...
16. The rationale is given as being that;
17. Section 34... 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, it 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.
18. It is therefore not just for purposes of addressing the interests of the Advocate attending court to act for a party without a valid Practicing Certificate but a matter of concern for the court that such practice is perpetuated by an officer who ought and should uphold the rule of law. the list(s) of Advocates holding valid Practicing Certificates in any given period are not only available at the Law Society of Kenya but to the court. such is to ensure adherence to the law and good practice.
19. In addressing as similar matter as herein, the court in [Republic v Resident Magistrate's Court at Kiambu Ex-Parte Geoffrey Kariuki Njuguna & 9 others \[2016\] eKLR](#) that;
20. Besides, the Law Society of this country publishes annually, a list of advocates who hold a [practising] certificate, for general information. This is a fact we take judicial notice of, as Courts are also provided with such a list for purposes of denying audience to advocates who do not appear on the list. For that reason, the public is deemed to have notice of advocates who are unqualified to offer legal services at a fee. It is also noteworthy that the [Advocates Act](#) itself makes provision for the recovery of the fees paid to such an advocate. So the innocent party is reasonably covered, although in our view provisions similar to Section 19 of the [Stamp Duty Act](#), should have been included in the [Advocates Act](#) to remove any doubt as to the validity of documents drawn by unqualified advocates.



21. In this case, Khalwale Advocate trading under the firm of Khalwale & Company Advocates filed the Bill of Costs dated April 28, 2022 within a period when as a legal practitioner, he had no valid Practising Certificate. Such then removed him from the benefits under the *Advocates Act* to act or receive funds in costs or otherwise under the trading name or as a practicing advocate in this matter.
22. The application seeking for the Bill of Costs dated April 28, 2022 allowed in the ruling delivered on February 9, 2023 based on an invalidity ought and should not have been filed in the first instance. To remit it back to the Taxing Officer to be taxed afresh would be to perpetuate such invalidity the essence of which would go contrary to the Rule of Law.
23. This is aptly addressed by the Supreme Court in the case of *Anami Silverse Lisamula v IEBC & Others (Sup Ct Petition No 9 of 2014; [2015] eKLR)* that;

The facts of this case, and its clear merits, lead us to a finding and the proper direction in law, that, no instrument or document of conveyance becomes invalid under Section 34(1) (a) of the *Advocates Act*, only by dint of its having been prepared by an advocate who at the time was not holding a current practising certificate. The contrary effect is that documents prepared by other categories of unqualified persons, such as non-advocates, or advocates whose names have been struck off the roll of advocates, shall be void for all purposes.

instruments or documents that are drawn by an advocate who did not, at the time of drawing such an instrument or document, have a current practicing certificate cannot be applied to negate the provisions of Section 9 and 34 of the *Advocates Act* for such persons to proceed and file a Bill of Costs as a practicing Advocate. See *Amigos Nuts and Commodities Limited v Kam Hung Tsui [2020] eKLR*

24. Accordingly, application dated February 20, 2023 is hereby allowed and the Bill of Costs dated April 28, 2022 hereby quashed and the subsequent ruling delivered on February 9, 2023 set aside. The person of Khalwale Wilberforce Luhombo shall bear costs herein.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

