



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. E032 OF 2021

KHALWALE & COMPANY ADVOCATES.....APPLICANT

- VERSUS -

DEVYAN FOOD INDUSTRIES KENYA LIMITED, FORMERLY,

SAMEER AGRICULTURE AND LIVESTOCK CO. LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

RULING

The applicant Devyani Food Industries Kenya Limited Formerly Sameer Agriculture and Livestock Limited filed an application on 26.11.2021 through Eliud Maina Karanja & Company Advocates. The application was by the chamber summons under rule 11(4) of the Advocates Remuneration Order, Article 50, 159(1) (d) of the Constitution of Kenya, and sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of law. The applicant prayed for orders:

- a) (Spent).
- b) The Honourable Court be and is hereby pleased to grant leave to the applicant to file this reference on the ruling dated 2nd September 2021.
- c) (Spent).
- d) That Christopher Mulinya, the process server who purportedly effected service of the bill of costs upon the applicant be summoned for cross-examination on the contents of his affidavit.
- e) That the costs of the application be in the cause.

The application was based upon the annexed affidavit of Paul Maina, the respondent's Assistant Legal and Human Resource officer of the applicant client. The grounds in support of the application are that the bill and notice of taxation were not served upon the applicant and, there exists no client and advocate relationship between the applicant and the respondent to the application being Khalwale & Company Advocates.

The respondent to the application Khalwale & Company Advocates opposed the application by filing on 07.12.2021 the replying affidavit of Wilberforce Khalwale. The replying affidavit has exhibited the affidavit of service by Christopher Mulinya a process server who has stated that he served the Advocate-Client bill of costs dated 02.06.2021, the taxation notice dated 02.06.2021, list of documents dated 02.06.2021 and a copy of submissions dated 04.06.2021 both physically at the offices of the applicant and also by courier services. The Court finds that there is no reason to doubt that service was duly effected. While making that finding, the Court has considered rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on service of court processes upon corporate bodies like the respondent. The rule provides that where the process server is unable to find any of the officers of the corporate body (secretary, director or any other principal officer of the corporate body) service may be effected by leaving the pleadings at a conspicuous place at the registered office of the corporate body; sending the pleadings by registered post to the last known postal address of the corporate body if it does not have a registered office or postal address; sending the pleadings by registered courier service to the registered office of the corporate body; or leaving the pleadings at a conspicuous place where the corporate body carries out business.

In the instant case the process server left the documents at the applicant's place of business at the office the guards on duty directed him to and, further served by registered courier. The Court finds that the service was effected in accordance with the applicable rule.

The replying affidavit at paragraph 4 states that the Advocates acted for the applicant in **ELRC Case No. 419 of 2014 Gideon Muteti Njau –Versus- Sameer Agricultural & Livestock (Kenya) Limited** from the start to the end. At paragraph 20 of the supporting affidavit it is stated that the applicant did not instruct the respondent advocates and the client-advocate relationship is denied. In the further supporting affidavit of Paul Maina filed on 17.01.2022, at paragraph 5 is stated that with respect to **ELRC Case No. 419 of 2014 Gideon Muteti Njau –Versus- Sameer Agricultural & Livestock (Kenya) Limited** the respondent advocates were paid by the applicant Kshs.100, 000.00 and the taxing master had not been informed about that payment. In view of those assertions, the Court returns that it should now be obvious that the applicant and the respondent were in a client-advocate relationship and the second ground in support of the application will collapse. The respondent admitted receipting Kshs.100, 000.00 but it was not with respect to services rendered in **ELRC Case No. 419 of 2014 Gideon Muteti Njau –Versus- Sameer Agricultural & Livestock (Kenya) Limited**. The Court considers that the purpose for which Kshs.100, 000.00 exchanged between parties would go beyond the scope of the present application and the issue may not fall for proper resolution in the instant ruling.

The Court has as well considered the submission for the applicant that the decree and the taxation proceedings be set aside and the Court observes that the application did not make such a prayer. In any event there is also no prayer for consequential steps if leave to make the reference were to be granted.

The Court has found that the two main grounds in support of the application have collapsed and the application is liable to dismissal with costs.

In conclusion the application dated 25.11.2021 and filed on 26.11.2021 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 25TH FEBRUARY, 2022.

BYRAM ONGAYA,

JUDGE