

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

MISCELLANEOUS CAUSE NO. E053 OF 2021

(Consolidated with E054, E055, E056, E057, E058, E059, E060 of 2021

AND E034, E035, E036, E037, E038, E039 OF 2021)

KHALWALE & CO. ADVOCATES.....APPLICANT/RESPONDENT

VERSUS

DEVYAN FOOD INDUSTRIES KENYA LIMITED

(FORMERLY SAMEER AGRICULTURE

& LIVESTOCK KENYA LIMITED).....RESPONDENT/APPLICANT

AND

EFEX CONSULTING.....PROPOSED THIRD PARTY

RULING

1. The Applicant filed a Notice of Motion Application dated 4th May 2021 seeking for Orders that this Honourable Court be pleased to issue a temporary stay of the taxation of the bill of costs in each of the consolidated files pending the hearing and determination of this application. Further, that this Honourable Court be pleased to dismiss the Respondent's Bill of Costs against the Applicant and for cost of the suit to be provided for. The Application is premised on the grounds that on or about 10th May 2014, the Applicant entered into an agreement with Efex Consulting, the Proposed Third Party herein, for the provision of human resource consultancy services. It is asserted that the said agreement included provision of Legal Counsel on matters relating to employment law, among any other legal issues touching on the human resource function of the client. It is stated that the Miscellaneous Applications emanate from matters relating to employment law and that it is the Proposed Third Party who approached and contracted the Respondent to represent the Applicant in each of the consolidated suits. The Applicant asserts that since it was not privy to the contract between the Respondent and the Proposed Third Party it cannot be charged with the legal obligations of the Proposed Third Party under the contract. Further, that the Applicant terminated the agreement it had with the Proposed Third Party and cleared all the amounts owed to them including all legal costs but the Respondent has proceeded to file Bill of Costs against the Applicant who was not privy to the contract between the Proposed Third Party and the Respondent. That the Respondent should seek the amount it is owed, if any, from Efex Consulting and not the Applicant. That the Applicant is entitled to contribution and or indemnity from the Proposed Third Party and unless it is granted leave to enjoin the Proposed Third Party herein, it stands to suffer a greater injustice of defending a suit that ought to be between the Respondent and the Proposed Third Party. The Application is supported by the Affidavit sworn by the Assistant Human Resource Manager and Legal Officer of the Applicant company, Mr. Paul Maina who depones that the Applicant never gave the Respondent instructions to act on its behalf in any suit. He avers that the Applicant and the Proposed Third Party negotiated and signed a Deed of Settlement dated 21st September 2019 and the Proposed Third Party was paid Kshs. 3.3Million shillings as full and final settlement of all debts owed to it by the Applicant. That as such the Respondent has a right of action only against the Proposed Third Party and not against the Applicant and that the Applicant stands to suffer grave injustice and financial loss if the orders of this application are not granted as prayed.

2. The Respondent is opposed and filed an affidavit sworn by Mr. Wilberforce Khalwale, an advocate from the Respondent firm swore an Affidavit in Reply wherein he depones that he wrote to the Applicant on 16th August 2018 in the normal way to inform them of the hearing scheduled for 7th September 2018 and the need to avail their witnesses in court. That however the Applicant did not attend court nor avail their witnesses on the hearing date of 7th September 2018 and he telephoned Mr. Kenneth Kareithi, the Chief Operating Officer the same morning who requested him to adjourn the case to another hearing date. That the Court granted an adjournment on condition that the Applicant pays court adjournment fees and the Advocates thrown away costs of Kshs 7,000/-, which he paid on behalf of the Applicant in the hope of a refund. He avers that the Applicant has failed and neglected to refund him the said payment and instead denies knowledge of the said hearing. That he was served with an application by Messrs K. Cheloti Karanja Advocates seeking to take over the brief from his firm and which prompted a meeting with the Applicant on 13th September 2018 to discuss all the pending cases and the issue of payment of his legal fees. That on 27th September 2018, the Applicant wrote to them an email communicating that it was not in a position to afford their services and requested he prepares to handover all the files he was handling. That they thus drafted Bill of costs on all the files the Respondent firm was handling and forwarded the same to the Applicant for settlement. That on 31st October 2018, they received a letter from the firm of Ombongi Kiptoo & company Advocates requesting to be given all the Applicant's files to which they responded and informed them of their intention not to release the files unless their fees is paid.

3. The Applicant submits that Section 45 of the Advocates Act (Cap 16) establishes circumstances where the Advocate-client relationship

arises, which is vide an agreement fixing the amount of the advocate's instruction fee in respect thereof or his fees for appearing in court or both, that is, before, after or in the course of any contentious business in a civil court. It submits that there was no direct contractual relationship between it and the Respondent and that the Respondent has not provided any proof of any such direct relationship for the period in question 2013-2018, such as an agreement signed between the Respondent and Applicant or a letter of instructions for provision of legal services. That it is trite law that instructions from a body corporate should be in writing through a Resolution of the Company. That in the absence of a contract, written instructions or any evidence to that effect, this Court should find there was no a contractual relationship between the Respondent and the Applicant ab-initio. That for purposes of taxing the Advocate-Client Bill of costs, there must be an Advocate-Client relationship so as to give jurisdiction to the taxing master to entertain a bill of costs. The Applicant relies on the case of **County Council of Bureti v Kennedy Nyamokeri T/A Nyamokeri & Co. Advocates [2006] eKLR (Misc. 102 of 2005)**, where Kimaru J. held that it is imperative that the instructions of a public authority be in writing, just like in the case of a company or a public corporation because such a Public Authority can only act through its established organs. The Applicants submits that Kimaru J. went on to set aside the taxation by the Deputy Registrar of the court and dismissed the application for the taxation of the advocates-clients Bill of Costs as the respondent had failed to first establish existence an advocate-client relationship and further that such a client had given instructions that can be recognized by the law. The Applicant further relies on **Civil Appeal No. 154 of 2014, Wilfred N Konosi t/a Konosi & Co. Advocates v Flamco Limited** where the Court of Appeal in dismissing the appeal observed that in the absence of proof of existence of an advocate-client relationship, the taxing officer was justified in striking out the Bill of costs and the learned Judge of the High Court was right to uphold the decision of the taxing officer. The Applicant submits that the said taxation of the bill of costs should therefore be dismissed for want of instructions and since there is no Advocate-Client relationship between the Applicant and the Respondent, the Deputy Registrar should down their tools. That alternatively, and without prejudice to the foregoing, if the Honourable Court is inclined to find there existed an advocate-client relationship, then the Applicant is entitled to indemnity/contribution from the proposed third party. The Applicant further submits that the presence of the proposed third party is therefore crucial and critical in assisting this Honourable to make a just determination on this matter and that the Court is vested with the power to enjoin the proposed third party under Order 1 Rule 10(2) of the Civil Procedure Rules 2010. It invites the Court to find that the presence of the proposed third party in these proceedings is necessary to enable the Court effectively and completely settle all the questions in the dispute.

4. The Respondent submits that the Applicant has not denied that the Respondent advocate acted and represented them and that there is no communication exhibited between the alleged third party and the Respondent Advocate. That the argument that the proposed third party should be held responsible for the payment of the Respondent's fees is absurd because the Applicant engaged the Respondent to handle the cases long before the proposed third party was appointed and the Respondent is not party to the contract between the proposed third party and the Applicant. It submits that the Bill of costs is between the Respondent advocate and the Applicant client and that the appointment of the consultant does not change that relationship. The Respondent further submits that they have made out a case to justify the demand for legal fees.

5. In the matter before the Court, a bill of costs was drawn and on appearing before the Deputy Registrar there was an issue raised in regard to instructions which is a matter for the Judge and not the Taxing Master hence the appearance of the Miscellaneous Causes before me. The Respondent in the causes that led to this taxation was Sameer Agriculture & Livestock Kenya Limited. The firm was represented by Khalwale & Co. Advocates. There is evidence of instructions being emails, letters and even an email from Mr. Kenneth Kareithi, Chief Operating Officer which led to a handover of files from Khalwale & Co. Advocates to the Respondent in the suits. The Applicant therefor was in the relationship of advocate-client with the Respondent. Regarding the joinder, Eflex Consulting was only involved with the Respondent and therefore the issue of it being responsible for legal fees to the Applicant is not for this Court since there was no nexus between the Applicant and the intended Interested Party. As such the matters may proceed to taxation of the bills of cost as drawn since there is an advocate-client relationship between the Applicant and Respondent to the exclusion of other parties. Application by the Respondent is dismissed with costs to the Applicant.

It is so ordered.¹

DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY 2021

Nzioki wa Makau

JUDGE