



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

MISC APPLICATION NO. E013 OF 2021

IN THE MATTER OF ADVOCATES CLIENT BILL OF COSTS

AND

IN THE MATTER OF THE ADVOCATES REMUNERATION (AMENDMENT) ORDER

AND

IN THE MATTER OF TAXATION OF COSTS

AND

IN THE MATTER OF KISUMU CAUSE NO. 125 OF 2016

HARRIET FRIDAH SAKWA.....CLAIMANT

VERSUS

SAMEER AGRICULTURE & LIVESTOCK CO LTD.....RESPONDENT

BETWEEN

KHALWALE & CO ADVOCATES.....APPLICANT

VERSUS

DEVYAN FOOD INDUSTRIES LTD

(formerly SAMEER AGRICULTURAL & LIVESTOCK CO LTD.....RESPONDENT

AND

EFEX CONSULTING.....PROPOSED THIRD PARTY

RULING

1. Khalwale & Co. Advocates (the advocate) filed an advocate/client bill of costs against Devyan Food Industries Ltd (the Respondent) on 22 February 2021.

2. On 4 May 2021, the Respondent filed a Motion seeking orders:

(a) THAT this Honourable Court be pleased to issue a temporary stay of taxation of the bill of costs in Miscellaneous Application No. E12 of 2021, Miscellaneous Application No. E13 of 2021 and Miscellaneous Application No. E14 of 2021 pending the hearing and determination of this application.

(b) THAT this Honourable Court be pleased to grant leave to issue a third Party notice against Efex Consulting.

(c) THAT this Honourable Court be pleased to dismiss the Respondent's Bill of Costs against the applicant in Miscellaneous Application No. E12 of 2021, Miscellaneous Application No. E13 of 2021 and Miscellaneous Application No. E14 of 2021.

(d) THAT costs of this suit be provided for.

3. The advocate filed an affidavit in opposition to the Motion on 21 May 2021. On 24 May 2021, the Court directed the filing and exchange of a further affidavit by the Respondent and submissions.

4. The Respondent filed the further affidavit and submissions on 25 June 2021, while the advocate's submissions were not on record by the set timeline.

5. The Respondent foremost opposed the taxation of the advocate/client bill of costs on the ground that there was no advocate/client relationship between itself and the applicant advocate.

6. In this respect, the Respondent asserted that the advocate had not exhibited any written instructions to act in Kisumu Cause No. 125 of 2016, *Harriet Fridah Sakwa v Sameer Agriculture & Livestock Co Ltd* and that in any case, there was no resolution appointing the applicant law firm to act (the Respondent cited *County Council of Bureti v Kennedy Nyamokeri t/a Nyamokeri & Co. Advocates* (2006) eKLR and *Wilfred Konosi t/a Konosi & Co. Advocates v Flamco Ltd* (2017) eKLR).

7. In the same vein, the Respondent contended that it entered into an agreement with a third party for the provision of services on matters including *inter alia* employment laws, labour laws and industrial court matters and that any legal fees, if any, due to the advocate had been paid through the said third party.

8. The Respondent developed the argument by contending that it was entitled to indemnity or at the very least some contribution from the third party for any legal fees, if any, due to the applicant.

9. Towards this end, the Respondent submitted that it became necessary to join the third party to the instant proceedings.

10. Lastly, the Respondent accused the advocate of material non-disclosure in that the applicant had not revealed that it was aware of the arrangements in place with the third party way back in 2013.

11. In opposition to the Motion, the applicant asserted that the Respondent contracted it in 2009 to render legal services (copies of Memorandum of Appearances and Statements of Defence exhibited) and that in the course of executing the instructions, it had even paid monies on behalf of the Respondent.

12. The advocate also stated that its instructions came directly from the Respondent and not through a proxy or a third party, and therefore it is the Respondent who was liable to pay legal fees.

13. The advocate stated that with time, the Respondent instructed another firm of advocates to take over from it, and it held meetings with the Respondent to be paid pending fees, but since there was no agreement, the bill of costs was filed.

14. The Court has considered the Motion, affidavits and submissions.

15. Before moving further, the Court must observe that in the supporting affidavit, the Respondent appeared to be challenging the giving of instructions in respect to Kisumu Cause No. 125 of 2016, *Harriet Fridah Sakwa v Sameer Agriculture & Livestock Co Ltd* while it sought orders in respect of bill of costs in Kisumu Cause No. 326 of 2013, *Eric Onyango Mbara v Sameer Agriculture & Livestock Co Ltd* and Kisumu and Kisumu Cause No. 434 of 2017, *Gertrude Khatera v Sameer Agriculture & Livestock Co Ltd*.

16. The Court has looked at the service agreement dated 27 September 2010 between the Respondent and the third party.

17. There is nothing on the face of the agreement to suggest that the advocate herein was privy to its existence. There is also no evidence to show that the advocate was part of the Confidentiality Agreement dated 11 October 2010.

18. The Court has also seen a Memo dated 11 December 2015 from the third party to the Respondent giving a summary of certain monies said to have been paid to the advocate.

19. In the view of the Court, these payments should have been part of deliberation or contestation during the taxation of the Bill of Costs itself and, therefore, the question of material non-disclosure before this Court is not an issue.

20. On the question of instructions, the advocate has not exhibited any written instructions from the Respondent authorising it to represent or act in respect of court cases and more so the ones the subject of the bills of costs.

21. There is also no express agreement between the Respondent and the third party authoring it to appoint advocates to act on behalf of the Respondent.

22. However, the Court has noticed that the Respondent's Chief Operating Officer swore an affidavit on 1 July 2019, in which he deposed at paragraph 2 that the Respondent had terminated the services of Khalwale & Co. Advocates.

23. In another email dated 27 September 2018, the Respondent's Chief Operating Officer informed the applicant that:

We have therefore opted to cease using your legal services with effect from 30th September 2018.

For ease of handover and transition, kindly prepare all our case files that you have been working on our behalf so that we can send someone to collect them by Monday 1st October 2018. In addition, please prepare invoices for all payments that we have done to you for our internal audit purposes – what you gave us was receipts for amounts received.

24. The question which the said deposition raises in the Court's mind is, why the Respondent was terminating the services of the advocate if it had not given instructions in the first place, and asking for invoices instead of leaving that task to the third party?

25. In the Court's view, these correspondences constitute secondary evidence that the Respondent had retained the applicant law firm.

26. The Respondent also sought to rely on a provision in the *Agreement for the Provision of Human Resource Consultancy Services* between the Respondent and the third party to assert that it was the third party who instructed the applicant legal firm.

27. Clause 4(e) of the Agreement provided:

Provide legal counsel to the client on matters touching on employment laws, labour laws, industrial court matters, employment contracts, termination of employees, among any other legal issues touching on the Human Resource function of the client.

28. The provision, in the view of the Court, was meant to secure the rendering of advice to the Respondent and did not include contracting of legal services from external persons or advocates.

29. Moreover, even if the provision could be given the interpretation by the Respondent, it would lead to the inference that the third party was an agent of the Respondent.

30. In such a case, the Respondent as the principal would still be liable for the advocate's legal fees.

31. The Respondent also sought to argue that it made payments to the third party on account of the applicant law firm.

32. However, the foundation upon which such payments could have been made, such as invoices from the advocate, was not revealed, and the Court is unable to place a legal nexus with the instructions given to the applicant.

Conclusion and Orders

33. For the above reasons, the Court finds no merit in the Respondent's Motion filed in Court on 4 May 2021, and it is dismissed with costs.

34. This Ruling and orders to apply to Kisumu Misc Application No. E012 of 2021 and Kisumu Misc Application No. E014 of 2021.

Delivered through Microsoft teams, dated and signed in Kisumu on this 17th day of November 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For applicant Khalwale & Co. Advocates

For Respondent Eliud Maina Karanja Advocates

Court Assistant Chrispo Aura