



Henkel & another v Bitala & Kakinga Advocates (Miscellaneous Civil Application E161 of 2022) [2022] KEHC 15619 (KLR) (Civ) (24 November 2022) (Ruling)

Neutral citation: [2022] KEHC 15619 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION E161 OF 2022
JN NJAGI, J
NOVEMBER 24, 2022
IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

BETWEEN

RUTH MARTHA HENKEL 1ST APPLICANT

HENKEL POLYMER COMPANY LIMITED 2ND APPLICANT

AND

BITALA & KAKINGA ADVOCATES RESPONDENT

RULING

1. The applicant filed originating summons dated February 22, 2022 brought pursuant to section 47 (1) of the *Advocates Act* and order 52 rule 4 (1) (a) (e) and (2) of the *Civil Procedure Rules* chapter 21 laws of Kenya for orders;
 - a. That this honourable court do and hereby order the respondent to immediately deliver up to the applicants the original title in their *lien* possession custody or relating to property bearing title number No LR 5341 and No Mombasa/Block/XL VIII/107;
 - b. That this honourable court do and hereby order the respondent to immediately deliver up to the applicant documents in their *lien* possession custody or relating to the applicants;
 - c. The respondent do deliver such cash accounts in respect to all payments received from the applicants in respect of the retainer agreement dated November 23, 2020;
 - d. That if the defendant law firm defaults in releasing the said titles and documents in terms of prayer 1 and 2 hereinabove, the court be pleased to make an enforcement order against the defendant law firm; and



- e. That costs of this suit be awarded to the applicant.
2. The application was supported by the affidavit of Ruth Martha Henkel where she averred that on November 23, 2020 she executed a retainer agreement on behalf of her company engaging the respondent to provide legal services to the company for a monthly sum of Kshs 200,000/=. In compliance with the agreement the company has been paying the respondent invoices raised.
 3. Sometime in 2021 the respondent unilaterally increased the monthly retainer fee from the agreed sum of Kshs 200,000/= to Kshs 400,000/= without any prior agreement with the applicants. The respondent consequently refused to provide legal services to the applicants when this increment was not paid. As a result of the refusal the respondent never attended to any of their cases which resulted in default judgements being passed due to non-attendance.
 4. She subsequently terminated the retainer agreement on September 13, 2021 and asked that the respondent renders an account. The respondent refused to do so and further refused to return the original title deeds and documents they held on their behalf.
 5. Upon instructing the present law firm of advocates to demand the documents on their behalf the respondents have refused and neglected to act on the demand by her advocates.
 6. The applicant submitted that the respondents have no legal authority to withhold the titles and in support they cited *National Bank of Kenya v Kang'ethe George Joseph and another* [2015] eKLR where it was held that;

“According to the plaintiff, advocates fees only becomes due after it is taxed by the court if it is disputed and that since in this case there was no taxation, there is no amount due capable of attracting *lien* to the client’s property. They relied on the cases of Simon Njumwea Maghanga v Joyce Jeptarus Kagongo [2013] eKLR and Beatrice v Karanja v Njeri Kariuki. In the latter case, Hon Justice Mwera J held that advocates fees is only due after taxation.

And in John Karungai Nyamu v MNU & Associates Advocates, Where the court held that an advocate had no right to fees before taxation hence there can be no lien where there is no right.

Relying on another decision in Mutari Maseki v Imran Naushad Nanji & another, where it was held that the right of *lien* of an advocate exists over a clients property but that in this case the title being held does not belong to the plaintiff client hence the advocate cannot have a right over it. Citing NBK v E Muniu Kamau & another, counsel for the plaintiff submitted that lien in the case of an advocate and client is special and is different from lien between the two parties and that it is because of that special nature that order 52 of the *Civil Procedure Act* was enacted. Further, that the court is given wider latitude under Order 52 to deal with cases of this nature to address specifically the issue of fees by ordering for taxation of fees between client and advocate and determine whether there is lien.

In addition, that the court can order release of title notwithstanding the right of the advocate to any fees due from the client.

.....

And even if there was no agreement on the fees payable under section 45 of the *Advocates Act*, the defendant could still demand for his fees as provided for under the Advocates Remuneration order which was not the case here. In view of that this court finds that there was no justification for the defendant to purport to exercise a lien over the title documents to



the property in question as the defendant advocate failed, neglected and or refused to render his services to the plaintiff client as agreed. In any event, nothing obstructed the defendant from presenting his bills of costs in court for taxation against the client, in the event that the client was unwilling to settle the same amicably.

.....

In my view, the defendants' conduct is unbecoming of the person of an advocate and hell bent to frustrate the plaintiff who now requires surrender of the documents that were being demanded by the deceased's family. Had the deceased and his family not been honest in servicing the advanced loan, the bank would no doubt have suffered loss as no charge was registered against the property for the advanced sum of Kshs 200,000 as contemplated in the loan facility and instructions to the defendant.

Furthermore, section 47 (1) of the *Advocates Act* allows an advocate to file his bill of costs for taxation where there is no agreement reached under section 46 of the Act."

7. The applicant argued that the respondent as far as claiming legal fees ought to be guided by the provisions of the *Advocates Act*. That it is unconceivable that the respondent has been holding security documents belonging to the applicant for this long stating that the applicant owes her legal fees yet the respondent knows quite well the procedure in law when fees are contested and which she is required to claim the same.
8. The application was opposed by the replying affidavit of Samali Kukundakwe dated June 21, 2022. In it he admitted that indeed on the November 23, 2020 they executed a retainer agreement for provision of legal services as general counsel excluding conveyancing work at the rate of Kshs 200,000/= per month exclusive of expenses and taxes. At the time of the engagement of the respondent and the 2nd applicant for the provision of legal services, the 1st applicant in her capacity as the director of the company executed a director's personal deed of guarantee and committed that their fees will be paid by the company and if not by herself.

This was also a term of the agreement that the said retainer agreement was for the first three months.
9. The purpose of this term as was discussed with the applicants in preliminary meetings preceding their engagement was to avoid a situation where the applicants pay more for less service or the client pay is less for a lot of input. Essentially there was a prior understanding to increase or reduce the retainer fee subject to the amount of work to be done.
10. As of November 29, 2020, after they had come on board, they handled 4 cases in the list of cases presented by the applicants. Of the 4 cases, one was a recent application filed to stay distress for rent by a landlord who owned the premises where the 2nd applicant had a warehouse. At the time the applicants were dealing with other law firms who were handling particular cases and they were not comfortable retaining those lawyers to continue with other cases on the list.
11. Effective November 23, 2020 they diligently delivered on their role as general counsel and particularly advised on several legal matters. They engaged and negotiated with creditors and made correspondences with opposing counsels. They did all that was within and outside of their scope. They further for all the work that they did presented a summarised status update to the client every month.
12. They raised their fee notes/invoices at the end of each month together with a schedule of expenses incurred on the clients account and the allegation by the applicant that the respondents did not provide cash accounts is untrue and malicious and are meant to mislead the court. The applicants had never



objected to their fee notes when they were raised and in fact the applicants have always mentioned that they intend to clear the fees which they have not.

13. Despite the clients' non-payment of their fees they continued to work without any reservations on the scope of work which did not change until May 2021 when the respondents received fresh summons for nine matters. At this point they informed the client that they wanted to renegotiate their fees to make provision for fair compensation for the increment of work should the applicants choose to retain them.
14. It is therefore not true that they unilaterally increased the monthly retainer fee from Kshs 200,000/= to 400,000/= without any prior agreement. That it is not also true that the respondent refused to attend court cases which then resulted in default judgements being passed against the 2nd applicant and the applicants have not provided proof of the same.
15. Soon after they started having discussions on the increase of their fees, the applicant engaged other lawyers on taking the matters that they had. He even attended meetings with the said lawyers and they discussed how they would take up the cases. In particular they met with Ms Olga Omondi of Olga and Associates and Mr Edwin Thiongo of KCK Global on June 29, 2021.
16. The said lawyers did not take on the new matters until August 2021, a few days after they had indicated to the applicant that they were going to file their applications to cease acting. The firm of Olga and Associates filed and served notices of change of advocates in all the cases and at the moment their firm is no longer acting for the applicants because of unpaid fees.
17. Counsel added that the alleged termination of the retainer by the applicants was an afterthought because as of September 13, 2021 the respondent was no longer acting for the applicants because they had defaulted on payments and had about 30 days appointed another law firm. As a consequence, the respondent decided to subject documents in their custody to a solicitor's *lien* and the said *lien* was communicated to the applicants. The respondents indicated that they would only release the document upon payment as they delivered in their role as general counsel and they did not deliver on their obligation to pay their legal fees.
18. The respondents submitted that at the time of termination of the retainer the unpaid fees totalled to Kshs 2,385,385/=. The two titles that they have retained belong to the 1st and 2nd applicants respectively. They argued that the legal underpinning to their right of lien is found in common law and in support they relied in the case of *Barratt v Gough-Thomas* [1951] 2 All ER 1048 cited with approval in the case of *Republic v Lucas M Maitha Chairman, Betting Control and Board & 4 others Exparte: Interactive Gaming and Lotteries Limited* in which the court stated that:

“The nature of a solicitor’s general retaining lien has more than once been authoritatively stated. It is a right at common law depending, it has been said, on implied agreement. It has not the character of an encumbrance or equitable charge. It is merely passive and possessory, that is to say, the solicitor has no right of actively enforcing his demand. It confers on him merely the right to withhold possession of the documents or other personal property of his client or former client – in the words of Sir E Sugden in *Blunden v Desart* (2) (2 Dr & War 48):

“...to lock them up in his box, and to put the key into his pocket, until his client satisfies the amount of the demand.”

It is wholly derived from, and, therefore, co-existent with, the right of the client to the documents or other property...the capacity by reference to which the documents are held is



essential. The absence at any time of any right, to or property in the documents on the part of the client, seems, as a matter of principle, fatal to the continued existence of the *lien*.”

19. The respondents contended that *lien* is a common law remedy and that it would therefore be unfair for a party to enjoy the result of an advocate’s work without paying the advocate and then let the advocate seek payment elsewhere when payment could be easily gathered through *lien*. That it confers an advocate mere right to withhold possession of documents or other personal property of his client or former until his client satisfies the amount of the demand.

Analysis and Determination

20. I have given due consideration to the originating summons application herein, the affidavits sworn in support and in opposition thereof as well as the submissions by both parties. I have also given due consideration to the vast authorities that have been cited by the parties in their submissions and the relevant law with regard to issues arising herein. The issue that has arisen for determination is whether the respondent has a right of lien over titles IR 5341 and No Mombasa/Block/XL VIII/107.

21. From the record it is undisputed that the applicant had retained the respondents as their counsel and that there are unpaid legal fees. The respondent alleged that they are owed Kshs 2,385,385/=. The applicants however contended that the respondents have no legal authority to withhold the titles.

22. In *Ocean View Plaza Limited v Gor Chitranjan Bhanuprasad and Gor Shishir Sooryakant Bhanuprasad Trading as CB Gor & Gor Advocates* [2020] eKLR it was held that:

“In my respectful view, whether the defendant will be paid the said of Kshs 8,672,996/= can only be ascertained after taxation as envisaged under section 47(1) of The *Advocates Act* if no agreement is reached under section 46 of the said Act. It is only until then that a right of lien can be exercised. For the aforesaid reason, this court finds that there was no justification for the defendant to purport to exercise a *lien* over the title documents to the property in question.”

23. Similarly, in *National Bank of Kenya Limited v Kangethe George Joseph & another* [2015] eKLR and in *Beatrice N Karanja v Njeri Kariuki* the courts held that advocates fees are due and payable after taxation. The respondent in this matter has not attached any certificate of taxation to confirm their position. It is only until then that a right of lien can be exercised.

24. Consequently, and for the afore said reason this court finds that there was no justification for the respondent to exercise lien over the title documents to the properties in question. Accordingly, the originating summons dated February 22, 2022 are hereby allowed and the following orders issue;

1. Respondent to immediately deliver up to the applicants the original title in their possession relating to property bearing title number No LR 5341 and No Mombasa/Block/XL VIII/107.
2. The respondent do deliver such cash accounts in respect of all payments received from the applicants in respect of the retainer agreement dated November 23, 2020.
3. The respondents to have the costs of the originating summons.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 24TH NOVEMBER 2022

J NYAGA NJAGI

JUDGE

In the presence of:



Mr Osiemo for applicants.

Miss Murugi holding brief Mr Kakinga for respondent.

Court Assistant - Ubah

30 days R/A

