



Hussein & 2 others (Suing as the administrator of the Estate of Mohamed Hussein Absura (Deceased)) v United Care Limited & 2 others; Nyangito t/a Nyangito & Associates (Applicant); Hussein & 2 others (Client) (Environment & Land Case 151 of 2018) [2023] KEELC 20753 (KLR) (17 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20753 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 151 OF 2018
CA OCHIENG, J
OCTOBER 17, 2023

BETWEEN

FATUMA MOHAMED HUSSEIN 1ST PLAINTIFF
ZAKARIA MOHAMED HUSSEIN 2ND PLAINTIFF
TWAHA MOHAMED HUSSEIN ABSURA 3RD PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF MOHAMED
HUSSEIN ABSURA (DECEASED)

AND

UNITED CARE LIMITED 1ST DEFENDANT
AMIR FAUD AHMED 2ND DEFENDANT
ASHA ABDULKADIR 3RD DEFENDANT

AND

LAWRENCE OIGORO NYANGITO T/A NYANGITO &
ASSOCIATES APPLICANT

AND

FATUMA MOHAMED HUSSEIN CLIENT
TWAHA MOHAMED HUSSEIN ABSURA CLIENT
ZAKARIA MOHAMED HUSSEIN (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF MOHAMED HUSSEIN ABSURA (DECEASED) CLIENT



RULING

1. What is before Court for determination is the Applicant Advocate's Notice of Motion Application dated the 5th May, 2023 and the Client's/Respondent Notice of Preliminary Objection dated the 29th May, 2023.
2. In the Advocate's Notice of Motion Application, it seeks the following Orders:
 1. Spent
 2. That in the spirit of enforcement of the court order issued on 15th October, 2021 by Hon. Angote J, the Honourable Court be pleased to grant the order sought *exparte*.
 3. Spent
That in the alternative
 4. Spent
 5. That upon inter parte hearing of this Application, the Honourable Court be pleased to issue an order directing the Deputy Registrar sitting at Machakos High Court ELC Division to execute and attest all transfer documents on behalf of the client in relation to the property Nairobi/Block 60/485 in order to facilitate transfer in favour of the advocate by the respective Land Registrar and in compliance to the orders issued on 15th October, 2021 by Justice Angote.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Lawrence Oigoro Nyangito. He confirms that the Advocate filed its Bill of Costs against the Client and the same was taxed on 1st October, 2020 for a sum of Kshs 7,094,870 by the Taxing Master. He explains that the Client being aggrieved with the decision, filed a Reference contesting the Bill of Costs while the Advocate applied for the taxed Bill of Costs to be entered as Judgment of the Court. He avers that Justice Angote vide his Ruling dated the 15th October, 2021 dismissed the Client's Reference and adopted the Bill of Costs as a Judgment of the Court. Further, the Judge directed that the Client's property Nairobi/Block 60/485 which the Advocate was holding as a Lien for the security of payment of his fees to be transferred to the Advocate's name. He states that since the delivery of the Ruling, the same has not been complied with. Further, that the Client is not willing to comply unless compelled by the court.
4. In opposition to the instant Application, the Client filed a Notice of Preliminary Objection dated the 29th May, 2023 which is premised on the following grounds:
 1. The Notice of Motion dated 5th May, 2023 is fatally and incurably defective and irredeemably fails to properly invoke the Hon. Court's jurisdiction, in violation of Article 162 (b), Constitution as read with Article 170(5), Constitution and Section 5, Kadhi's Court Act in as far as it seeks for the alienation, disposal and transfer of property Nairobi/Block 60/485, which property – at all material times – is subject of succession proceedings in Kadhi's Court Succession Cause No 56 of 2017 in respect of the administration and distribution of the Estate of Mohamed Hussein Absura (deceased).
 2. Ergo, the instant Notice of Motion dated 5th May, 2023 filed herewith should be struck out in limine with costs to the Clients/Respondents on a full indemnity basis.



5. The Notice of Motion Application and Notice of Preliminary Objection were canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application, Supporting Affidavit, Notice of Preliminary Objection and rivaling submissions, the following are the issues for determination: Whether the Notice of Preliminary Objection is merited. Whether the Advocate is entitled to orders sought in the instant Notice of Motion application.
7. The Advocate in his submissions insisted that he is entitled to the orders as sought in the instant Notice of Motion Application as he held Lien over the aforementioned property and Client had not paid fees. Further, he handled the Succession Cause which was concluded and he is yet to be paid. To support his averments he relied on the following decisions: [*Juliana Muthoni Kilotolo v Adan Ahmed Sheikh t/a Wetangula, Adan & Co Advocates; Osman Batur Dedeoglu \(Interested Party\)*](#) [2022] eKLR and [*Booth Extrusions \(formally\) Booth Manufacturing Africa Limited v Dumbeyia Muturi Harun t/a Nelson Harun & Co. Advocates*](#) [2013] eKLR.
8. The Client in their submissions, contended that the Notice of Preliminary Objection is merited since the suit property is subject to Succession proceedings in the Kadhi's Court. Further, that the Environment and Land Court (ELC) does not have jurisdiction to handle this matter. They argued that the orders sought in the instant Notice of Motion Application were untenable. To support their averments, they have relied on the following decisions: [*Nabashon Onyango Otieno v George Onyango Otieno*](#) (2021) eKLR; [*Beatrice Wambui Kiarie & v Beatrice Wambui Kiarie & 9 others*](#) (2018) eKLR and [*Isaac Kinyua & 3 others v Hellen Kaigongi*](#) (2018) eKLR.
9. The Advocate has sought for an order to be issued directing the Deputy Registrar, ELC to execute and attest all transfer documents on behalf of the Client in relation to the property Nairobi/Block 60/485 in order to facilitate transfer in its favour by the respective Land Registrar and in compliance with the orders issued on 15th October, 2021 by Justice Angote. The Client insists in the Notice of Preliminary Objection that this Court has no jurisdiction to handle the transfer of land by dint of Article 162(2) (b) of the [*Constitution*](#) since the said land is subject to Succession proceedings in the Kadhi's court. The Advocate argues that the Succession proceedings at the Kadhi's court have since been concluded and he actually represented the client therein.
10. From the Ruling of Justice Angote, dated the 15th October, 2021, it emerged that the Advocate held a Lien over the aforementioned property. The question we need to ponder is the status of a Lien held over the suit property vis a vis the Succession proceedings at the Kadhi's Court. In the case of [*Booth Extrusions \(Formally\) Booth Manufacturing Africa Limited v Dumbeyia Muturi Harun t/a Nelson Harun & Co. Advocates*](#) [2013] eKLR Onguto, J expressed himself as follows:

"There is no doubt that this case raises sharply the question as to the nature and extent of an advocate's lien. In its simplest application a lien generally depends on "the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his favour without giving or tendering performance of the obligations incumbent upon himself": See *John D. Hope & Co. v Glendinning* [1911] AC 419, 413. Simply put the legal notion of a lien is the right to resist a demand for performance of an obligation until a counter obligation is performed by the person demanding...The policy underlying liens briefly puts it that it would 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 the lien. Consequently, the advocate having a



retaining lien over documents in his possession is entitled to retain the documents against the client until the full amount of his costs is paid...Provided that the costs in question have been incurred, the existence of the lien arguably does not rest upon a bill having been rendered to the client...In so much however as the lien protects the advocate, the general lien confers only a right to retain the property. It exists for no other purpose...It does cease when the advocate receives payment. It also will exist only when the referable relationship is one of advocate and client so that if at the date of demand the relationship is not so referable the advocate will lose whatever entitlement to a lien he or she may have enjoyed...where there was a change in the character of the solicitor's possession of the deeds of title from possession as solicitor to and on behalf of the original client (mortgagor) to possession as solicitor to and on behalf of a different client (mortgagee). The lien will also be ousted and lost where it is expressly excluded by agreement between Advocate and client...It is also lost where the client who delivered the documents or chattels has a lesser right than a third party...The basis for this proposition being perhaps that an advocate cannot claim a lien on documents where her or his client would not be entitled to withhold the documents against a third party...Effectively that would also mean that if the third party has no higher right to claim the documents than the client then the third party's claim is subject to the lien...an advocate cannot have a better title than his client."

11. In this instance, it is not disputed that the Advocate holds a Lien over the aforementioned property. I note during the hearing of the Reference before Justice Angote, where the Bill of Costs was adopted as a Judgment of the Court, the Client did not raise any Preliminary Objection in relation to the jurisdiction of the Court to handle the matter relating to the subject property. At this juncture, I opine that the Court is past dealing with the issues of jurisdiction as contained in Article 162 (2) (b) of the *Constitution* since there is already a valid Judgment on the Advocates' costs from a court of competent jurisdiction which has not been appealed from and the Advocate simply seeks to enforce it. Further, that the rights of the respective parties as related to costs had already been determined by the Justice Angote in its impugned Ruling. It is my considered view that since the Lien created contractual obligations between the Advocate and the Client, and with the Client's Estate having appointed representatives, if the Client was aggrieved by Justice Angote's impugned Ruling, they ought to have appealed the said Ruling instead of raising the instant Notice of Preliminary Objection.
12. In the foregoing, I find the Notice of Preliminary Objection dated 29th May, 2023 unmerited and will disallow it. I further find the instant Notice of Motion Application dated the 5th May, 2023 merited and will allow it in the following terms:
 - a. The Deputy Registrar ELC Machakos be and is hereby directed to execute and attest all transfer documents on behalf of the Client in relation to the property known as Nairobi/Block 60/485 in order to facilitate transfer in favour of the Advocate by the Chief Land Registrar and in compliance to the orders issued on 15th October, 2021 by Justice Angote.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

