



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC NO E022 OF 2020**

**JULIANA MUTHONI KILOTOLO..... PLAINTIFF**

**VERSUS**

**ADAN AHMED SHEIKH T/A WETANGULA, ADAN & CO ADVOCATES....DEFENDANTS**

**AND**

**OSMAN BATUR DEDEOGLU.....INTERESTED PARTY**

**JUDGMENT**

**INTRODUCTION:**

1. Vide Originating Summons dated 20<sup>th</sup> July 2020 and supported by an affidavit of even date, the Applicant herein approached the court seeking the following Reliefs:

(i) That the Honourable court be pleased to order the Defendant to unconditionally release and deliver up to the Applicant the original title deed over LR No 2/326 situated in Elgeyo Marakwet Close, Nairobi.

(ii) That the costs for the suit be awarded to the Applicant.

2. The Subject Summons is premised on the following Grounds:

a) That on 14<sup>th</sup> January 2016 or thereabouts, the Plaintiff entered into a Joint venture Agreement with Osman Batur Degeoglu for the development of 45 residential units at her property known as LR No 2/326 situated in Elgeyo Marakwet Close, Nairobi.

b) The firm of Wetangula, Adan and Co Advocates( the Respondent herein) prepared the agreement and the Applicant in discharge of her contractual obligations surrendered the title/conveyance along with other ownership documents to Mr. Adan Ahmed Sheikh, Advocate, for safe custody.

c) The intended project has never materialized and was effectively terminated/frustrated when the financier and developer, Mr. Osman Batur Degeoglu confirmed as much in Arbitral Proceedings instituted by him on 28<sup>th</sup> October 2019 before Jackie Oyuyo Githinji, FCI Arb.

d) In light of the termination of the joint venture agreement, the Applicant, in undated correspondences demanded return of her title deed from the Defendant to no avail.

e) That there is no legal basis to the unfair withholding and/or retention of the title deed.

f) That the Applicant's matrimonial house is erected on the property and the refusal by the Respondents to release ownership documents has caused immense distress, anxiety and uncertainty to the Applicant and her family.

g) The title deed has been with the Respondents for 4 years.

h) The Applicant is apprehensive that the Respondents will exploit the situation to unjustly/illegally dispossess and or alienate the

Applicant's ownership of the property.

i) The Respondent's actions of continued possession of the Applicant's title documents infringe on her right to property under Article 40 of the Constitution and therefore curtail her enjoyment of the same.

j) The property has a high market value and there is no demonstrable indebtedness of the Applicant to the Respondent equal to the value of the property.

3. Upon being served with the Application, the Respondent filed a Replying affidavit sworn on 14<sup>th</sup> August 2020, wherein he concedes that the Applicant, together with her husband were clients of his firm. That the two agreed with one Osman Batur Dedeoglu to get into a joint venture agreement on Land Reference Number 2/326.

4. It is further averred that in order to effect the agreement, they deposited the title to the property with the Respondent's firm. However, a dispute arose around May of 2016 and after a couple of years ended up before an arbitrator for resolution.

5. Besides, the Respondent has further stated that Applicant had, in a counterclaim before the arbitration tribunal prayed for an order for the return of her original title deed from Osman Batur Dedeoglu.

6. Owing to the foregoing, the Respondent has further Stated that his firm thereafter filed an Advocate-Client Bill of Costs on 29<sup>th</sup> May 2017 against the Applicant and her husband. That a ruling was delivered on 7<sup>th</sup> March 2018, taxing the Bill to Ksh. 11,177,289.40 Only, which has not been paid to the Respondent.

7. Pursuant to the taxation of the Bill of costs, the Respondent filed a Notice of Motion Application dated 21<sup>st</sup> June 2018, for entry of judgement against the Applicant. However, before the Application for entry of Judgment could be heard, the Applicant herein filed a Reference, vide Miscellaneous Application Number 98 of 2017, which is currently pending delivery of a Ruling before Justice Eboso, Judge.

8. The Respondent has further averred that his firm has an advocate's right to lien on account of the unpaid legal fees. Besides, there is also another case before the Chief Magistrate's Court Number 4032 of 2018, between Osman Batur Dedeoglu and the Applicant and her husband, for a loan of Ksh. 5,000,000 advanced by Osman for which the title is intended to be security.

9. On the other hand, the Respondent has stated that the Applicant willfully failed to disclose all the material facts regarding the ongoing tribunal proceedings and taxation matters and that therefore the application ought to be struck out.

10. Other than the Respondent, one Osman Batur Dedeoglu, was admitted as an interested party in the matter and upon being so admitted, same filed a Replying affidavit in opposition to the Applicant's application on 30<sup>th</sup> July 2021.

11. Vide the Replying Affidavit, the Interested Party admits that on 14<sup>th</sup> January 2016 or thereabouts, he entered into a joint venture agreement with the Applicant and her husband, to construct 45 residential units on their property, LR No. 2/326 situate in Elgeyo Marakwet Close.

12. The Interested Party has further averred that the parties mutually agreed to appoint the Respondent's firm to prepare and register the joint venture agreement. That title to LR No. 2/326 was submitted to the Respondent for transfer to the Joint Venture Company after registration.

13. Besides, the Interested Party has averred that in furtherance to their plan, he paid the costs expended in getting a change of user, incorporating the joint venture and obtaining the necessary consents.

14. Further, the Interested Party has also stated that he additionally incurred Kenya Shillings 3,600,000 Only, in commission fees and loaned the Applicant and her husband Ksh.5,000,000.

15. In the premises, the Interested Party has averred that given his capital investment, he has acquired an interest over the property. Consequently, the title deed is held by the Respondent's firm partly as a lien over the personal loan advanced to the Applicant and her husband.

#### **SUBMISSIONS:**

16. By consent, the Parties agreed to dispose of the Application by way of written submissions. In this regard, the Plaintiff filed her submissions on 24<sup>th</sup> November 2021. She largely adopts the contents of her application and adds that the Respondents were fully compensated in legal fees by the Interested Party and that therefore there is nothing owed from them.

17. It is the Applicant's position that no right of lien exists based on the joint venture agreement. The decisions in **Rolls Razor Ltd v Cox [1967] ALL ER**; **Booth Extrusions Ltd v Dumbeyia Nelson Muturi T/A Nelson Harun & Co Advocates [2017]eKLR**; **National Bank of Kenya v Kang'ethe George Joseph & Another [2015]eKLR**; **Re Fuld (1967) ALL ER** are relied upon.

18. It is the Applicant's contention that given the fact that the property is valued at 120,000,000, a lien on the title against the alleged legal fees is therefore unjustified, unproportional and unrealistic.

19. On the other hand, the Respondent filed his submissions on 15<sup>th</sup> December 2021. He submits that Order 52 Rule 4(3) of the Civil Procedure Rules gives advocates a right of lien over unpaid fees. It is his submission that the Applicant has misdirected herself on the directions and findings of the Arbitration tribunal.

20. Firstly, the Respondent submits that One such misdirection is that while the Interested Party was to bear the costs associated with a change of user, obtaining consents for architectural drawings and actual construction works, but not legal fees. That any legal fees paid by the Interested Party was done so on the basis of representations done on his behalf and was not meant to be payment on behalf of the Applicant.

21. In support of an advocates right to lien over unpaid fees, reliance is placed on **Dusan Construction Limited v S M Munikah, t/a Munikah & Co Advocates [2017]eKLR; Joseph Kithinji Gitonga & Another v Kiogora Mutai & Company Advocates [2017]eKLR; Ocean View Plaza v Gor Chitranjan Bhanuprasad and Gor Shishir Bhanuprasad t/a C B Gor & Gor Advocates; Republic v Lucas M Maitha ex parte Interactive Gaming and Lotteries Limited (2015)eKLR**. He thus urged the court to strike out the application.

22. On his part, the Interested Party filed his submissions on 14<sup>th</sup> December 2021. It is his submission that the title ought not to be released to the client, based on his right to lien as a lender. He cites the decision in **Hammonds v Barclay (1802) 2 East 227, 233; Evans Otieno Nyakwana v Cleophas Bwana Ongoro (2015) eKLR; Kenya Women Microfinance Bank Limited v Ruth Ndunge Mutulu & Another (2019) eKLR**. It is his position that should the Plaintiff's prayer be granted; he might be unable to recover the sum of Ksh. 5,000,000 lent to the Plaintiff and her husband and invested in the formation of the joint venture agreement.

#### **ANALYSIS AND DETERMINATION:**

23. Having reviewed the pleadings and submissions, filed by the respective Parties and the Written Submissions, the central question for determination is whether the Defendant has a right of lien over the Plaintiff's title deed to Land Reference Number 2/326.

24. From the facts of the case, it is not in doubt that the Applicant is the owner of Land Reference Number 2/326. It is also conceded that the Applicant and the Interested Party set out to register a joint venture company for the construction of 45 residential units upon the Plaintiff's land. In order to actualize this plan, the Applicant and the Interested Party retained the Respondent's firm for the purposes of registering the agreement.

25. With the understanding that upon registration, the Plaintiff's land would be transferred to the newly registered joint venture company, title to this land was deposited with the Respondent's firm. The plan would later unravel. Although the joint venture company was registered on 7<sup>th</sup> March 2016, discord between the Applicant and the Interested Party meant that the construction was never to take off.

26. However, the Applicant's case is that the Respondent ought to release the title document surrendered at the time of registering the joint venture company. The Respondent on the other hand asserts that he has a right to lien over unpaid legal fees. A taxed bill of costs amounting to Ksh. 11,177,289.40 only is presented in support.

27. On the other hand, the Applicant does not controvert the fact that she has not paid legal fees to the Respondent. She instead avers that the whole of the fees was settled by the Interested Party. Both the Interested Party and the Respondent disagree. Referring to Paragraph 6 of the Joint Venture Agreement signed between the Applicant and the Interested Party on 14<sup>th</sup> January 2016, they point out that the Interested Party was only mandated to meet the costs of effecting the change of user, obtaining necessary consents for architectural and related drawings as well as consents for the actual construction works of the premises to completion. Suffice it to say, it is clear that the fees charged by the Respondent is yet to be paid.

28. Owing to the foregoing, it is now appropriate to address the Issue of the Advocates Right of Lien and how the Right of Lien does arise and the Implications thereof.

For clarity, the legal underpinning to an advocate's right of lien is to be found under **Order 52 Rule 4(3) of the Civil Procedure Rules, 2010**. The section reads:

'If the advocate alleges that he has a claim for costs the court may make such order for the taxation and payment, or securing the payment, thereof and the protection of the advocate's lien, if any, as the court deems fit.'

29. The nature and parameters of operation of the lien have been the subject of numerous decisions. Seen **Barratt vs. Gough-Thomas [1951] 2 All ER 1048** cited with approval in the case of **Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex -parte: 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 vs. 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."

30. **In Re: The Resident's Magistrate's Court (Nairobi) (1929-1930) LRK 66, Sheridan, J** stated:

“An attorney or solicitor’s lien is a creature of the Common Law. In the case of *In re Sullivan vs. Pearson, ex parte Morrison*, 4QB (1868) page 153 at 154, Blackburn, J., expresses himself: ‘There is no doubt at all that where an attorney has by his labour or his money, obtained a judgement for his client, he has a lien upon the proceeds of such judgement.’ Although advocates in this country may occupy a different point from solicitors in England in many respects, in regard to the matter under consideration, which is quite different from the point decided in *Rasul Bux vs. Dalal*, they seem to me to occupy the same position, and in my opinion the words of (4) 2 of Kenya Colony Order in Council, 1921, are sufficiently wide to allow of the application of the ‘common law lien’ doctrine in the case of advocates in Kenya. At page 820, paragraph 1342 of Halsbury’s, Vol 26, it is stated:- ‘A solicitor has at common law and apart from any order of the court or statute a lien over property recovered or preserved or the proceeds of any judgements obtained for the client by his exercise.’”.

31. **Booth Extrusions (Formally) Booth Manufacturing Africa Limited vs. Dumbeya Muturi Harun T/A Nelson Harun & Co. Advocates [2017] 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. vs. 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.”

32. In ***John Karungai Nyamu & Another V Muu & Associates Advocates [2008] eKLR***, it was held as follows:

“The matter is very simple. Section 48(1) of the Advocates Act stipulates:

“Subject to this Act, no suit shall be brought for the recovery of any costs due to an Advocate or his firm until the expiry of one month after a bill for such costs, which may be in summarized form, signed by the Advocate or a partner in his firm, has been delivered or sent by registered post to the client, unless there is reasonable cause, to be verified by affidavit filed with the plaint for believing that the party chargeable there with is about to quit Kenya or abscond from the local limits of the Court’s jurisdiction, in which event action may be commenced before expiry of the period of one month.” It is clear from the foregoing that an Advocate’s fees are not due until his Bill of Costs has been served on the client and where it is not settled, until it is taxed by the court.

33. Owing to foregoing, the following the pertinent Issues do arise and are worthy of being taken into account and consideration.

- a. That it is a common law remedy.
- b. That it is predicated on the reasoning 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.
- c. That it confers an advocate a mere right to withhold possession of the documents or other personal property of his client or former until his client satisfies the amount of the demand.
- d. That the right ceases when the advocate receives payment.
- e. That the right is lost where the possessions withheld do not belong to the client, but to a third party.
- f. That the right crystallizes upon the taxation of a bill of costs.

34. In the premises, there existed an advocate-client relationship between the Applicant and Respondent. The Respondent’s bill of costs was taxed on 7<sup>th</sup> March 2018 at Ksh.11, 177,289.40/= only. The Applicant admits that she has not paid the fees. Besides, the title held by the Respondent is in the name of the Plaintiff.

In the Premises, during the pendency of the fees due and payable to the Defendant herein and which in any event, have since been taxed and certified, the Defendants Right of Lien, would remain in subsistence until the Fees, is fully liquidated and/ or otherwise, set aside vide Reference.

**CONCLUSION:**

35. In my considered view, the Defendant herein, was duly retained, engaged and/or instructed by the Plaintiff and the interested party, respectively and borne out of the said instructions a retainer arose.
36. Premised on the existence of retainer, the Defendant herein was obliged to be paid the professional fees which arose and/or accrued as a result of the instructions.
37. To the extent that the fees has not been paid, the Defendant has the right to exercise Right of lien over and in respect to the title to the suit property.
38. Consequently, the Originating Summons dated the 20<sup>th</sup> July 2020, is devoid of merits and same be and is hereby dismissed with cost to the Defendant only.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>th</sup> DAY OF JANUARY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

In the Presence of;

**June Nafula Court Assistant**

**Mr. Wangechi Mwangi for the Plaintiff**

**Mr. Adero for the Defendant**

**Ms. Chebet for the Interested party**