REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENTAL & LAND DIVISION

ELC NO. 937 OF 2013 (O.S)

BOOTH EXTRUSIONS (Formerly)

BOOTH MANUFACTURING AFRICA LIMITED.....PLAINTIFF

-VERSUS-

DUMBEYIA NELSON MUTURI HARUN T/A

NELSON HARUN & COMPANY ADVOCATES.....DEFENDANT

JUDGMENT

1. The Plaintiff filed the Amended Originating Summons on 7th August, 2013 seeking orders for the delivery up by the Defendant of certain documents which the Plaintiff claimed had been deposited with the Defendant on the basis of an Advocate/Client relationship. The documents in question were an original Certificate of Title No. I.R 37819 and a Deed Plan No. 115846. Both were in respect of Land Reference No. 4953/1421 ("the suit property").

2. In support of the Amended Originating summons was an affidavit sworn by Okoth McOduol a manager with the Plaintiff who had authority to make the affidavit on behalf of the Plaintiff.

3. Briefly, the undisputed facts of the case could be stated in summary as follows. The Defendant was appointed by the Plaintiff in June 2002 to represent the Plaintiff in a conveyancing brief. The brief entailed transferring the property known as Land Reference Number 4953/1421 from Kaluworks Ltd then the registered proprietor to the Plaintiff. The Plaintiff had acquired the property from Kaluworks Ltd for the consideration of Kshs. 610,000/= even though the property was later valued at Kshs. 1,605,000/=. Tto facilitate the process of transferring the property to the Plaintiff the Defendant required the original title document. This was sent to the Defendant by the Plaintiff on 10th June, 2002. The transaction was however never finalized. The suit property was never transferred to the Plaintiff. It is also common ground that the Defendant generally and ordinarily acted for the Plaintiff.

4. Controversy however emerges when the Defendant in his rather prolix Replying Affidavit states that he acted as per the Plaintiff's instructions on the brief including bringing the intended transaction to a stop. The Plaintiff had alleged that the Defendant did nothing and the transaction fell through. There is also controversy when the Plaintiff denies that it assigned its rights in and to

property to the Defendant with a view to settling the Defendant's outstanding fees. The Defendant insists there was an absolute assignment, even though he misleading calls it forfeiture and that the chapter on the suit property was closed.

5. It is the answer to these points of controversy which will determine this originating summons.

6. Briefly, let me also point out that even though the parties had agreed as a case management strategy to file written submissions only the Plaintiff filed its written submissions in time. The Defendant did not and was consequently as a case management procedure, locked out. Attempts to arrest or stay this judgment were also twice rejected ex parte and chambers by myself. I hasten to add that the court has no regrets whatsoever on taking such an approach and locking out a party the court deemed less brisk and more injudicious. That said though, all the documents on record have been read and considered by the court very carefully.
7. There is no doubt that the Defendant acted for the Plaintiff. There is no doubt too that the Plaintiff retained the Defendant in the intended transfer of the suit property to the Plaintiff from Kaluworks Ltd. The transaction however fell through. The Plaintiff is not explicit on why the transaction fell through but rather lays blame on the Defendant for not taking any steps (paragraph 4 of the supporting affidavit). The Plaintiff also states that Kaluworks Ltd demanded for the return of the original title document (paragraph 5 of supporting affidavit) and hence this originating summons.

8. The Defendant on the other hand is much more open and explicit. The transaction fell through when the Plaintiff decided not to proceed with the transaction for economic reasons. The land rates as well as the land rent payable to both the central and local authorities outweighed the land value of the suit property especially in view of the restructuring the Plaintiff was undergoing. In these respects the Plaintiff's letter of 17thJuly, 2002, which was in reply to the Defendant's letter of 9th July, 2002 is telling. Copies of both letters are annexed to the Defendant's Replying Affidavit of 1st August, 2014.

9. I find as a fact that the intended transfer of the property to the Plaintiff was called off by none other than the Plaintiff. I also find, on the basis of the rather uncontroverted evidence on record that the Defendant prepared the requisite Sale Agreement between the Plaintiff and Kaluworks Ltd as had been instructed by the Plaintiff. The defendant also did undertake the routine conveyancing procedural matters expected of a conveyancer in starting to process the necessary and requisite clearances as well as consents on behalf to the Plaintiff , before the intended transfer was called off.

10. What happened after the Plaintiff called off the intended transfer cannot however be left to conjecture. It is a fact that as of April 2013 the original title deed was still being held by the Defendant (see OM – 5). The Defendant maintains that the Plaintiff forfeited its rights to the said title as well as to the suit property when the plaintiff agreed to assign the same to the Defendant in lieu of fees. ThePlaintiff contends that it did not effect such pledge or assignment or if any of its officers did they were not so authorized to bind the Plaintiff.

11. The Defendant has contended further that the said Kaluworks Ltd was or is a sister company of the Plaintiff. This fact was not resisted by the Plaintiff. Judging by the dealings involving the suit property between the Plaintiff and the said Kaluworks Ltd it would not be farfetched if one inferred that the two are not strangers. That aside, the fact still remains that the two were independent legal corporate entities capable of individually owning movable and immovable property.

12. With regard to the suit property, the documents availed by the parties do not reveal the same as ever having been transferred from the original registered owner to any other party. The documents however reveal that the Plaintiff agreed to wholly assign its rights to and over the suit property to the Defendant. This is pretty evident if one reads the letter dated 17th July, 2002 from the Plaintiff to the defendant as well as the letters dated 29th April, 2004, 5th May, 2004 and 8th September,

2004 all from the Plaintiff to the Defendant. These letters confirm that in lieu of paying the Defendant the outstanding legal fees for services rendered or then being rendered, the Defendant was to take over the suit property. That assignment seemed to have been consummated as far as the Defendant is concerned by the letters of 24th May, 2005 ,the meeting of 29th November, 2005 and the letter of 1st December, 2005. In the meeting as well as the said letters the Plaintiff was allaying the Defendant's fears that the registered proprietor Kaluworks Ltd had not sold the property to the Plaintiff. The Plaintiff also confirmed that the same was going to be transferred to the Defendant at the Plaintiff's instance.

13. It is for the foregoing reason that the Defendant contends that he is entitled to not only retain the original title document being Grant No. IR 37819 which came into his possession by virtue of the very special relationship of Advocate-client but also to effect a transfer of the suit property in this favour.

14. The Plaintiff will however hear none of that.The Plaintiff contends that the Defendant cannot establish a solicitor's lien over the title document. The Plaintiff also contends that there was no pledge of the title or the suit property and any purported pledge or assignment of the property was not valid and could not stand as the same was not sanctioned by the company. In the Plaintiff's view the Defendant did not render any services to claim any lien over the property (title document) and besides such lien could only hold if the work related to the property but not to any other work. Finally, the Plaintiff contends that the defendant has a wide range of remedies including taxing his bill of costs for any alleged fees. Before taxation of and assessment of the costs, the plaintiff is of the view that no claim in lien could be raised and sustained. On this latter point the Plaintiff placed reliance on the cases of **Simon Njumwa –vs- Chesaro & Co. Advocates [2014] eKLR** and **Adipo & Company Advocates –v- Kenya Pipeline Co. Ltd [2009] eKLR**. Finally, the Plaintiff states that the document in question being the title document does not belong to the Plaintiff for the Defendant to lay any claim.

15. As I understand it the Defendant is not even raising a defence of an advocate's lien. The Defendant's stand is that the Plaintiff let go of its interest in the property as well as in the title documents in favour of the Defendant and with the full knowledge of the third party Kaluworks Ltd.

16. There is no doubt that this case raises sharply the question as to the nature and extent of an advocate's lien.

17. 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 own favour without giving or tendering performance of the obligations incumbent upon himself": see **John D Hope & Co. – v- Glendinning [1911]AC 419, 431**. 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.

18. A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.

19. The policy underlying liens briefly put is 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 ,an advocate having a retaining lien over documents in her or his possession is entitled to retain the documents against the client until the full amount of his costs is paid: see **Barrat –v- Gough Thomas [1950]2 All**

ER 1048, 1053 . 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: see **Re Taylor [1891] 1Ch 590, 596**. In so much however as the lien protects the advocate, the general lien confers only a right to retain property. It exists for no other purpose. It is merely passive and "the solicitor [advocate] has no right of actively enforcing his demand" : see **Barrat –v- Gough Thomas [1950] 2All ER 1048, 10563**. Once the Advocates' taxable costs, charges and expenses are paid the client is no doubt entitled to an order for the delivery up of the retained documents.

20. The foregoing is a brief restatement of the nature of an advocate lien as founded on various common law cases and may be continued if one asks when the lien ceases.

21. 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: see **Barrat –v- Gough Thomas [1950] 2 All ER 1048** 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 (the mortgagor) to possession as solicitor to and on behalf of a different client (the mortgagee).

22. The lien will also be ousted and lost where it is expressly excluded by agreement between the Advocate and client: see **Re Messenger [1876] 3 Ch D 317**. It is also lost where the client who delivered the documents or chattels has a lesser right than a third party: see **Re Rapid Road Transit Company [1909]1 Ch 96**. The basis of 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: see **MutahiMaseki t/a Maseki& Co. Advocates –v- Imran Narshud Manji &Another [2005] eKLR**. Effectively that would also mean that if the third party has no higher right to claim the documents than the client then that third party's claim is subject to the lien. Perhaps too I may add that an advocate may lose a lien by abandoning it, waiving it or by taking out other security which displays an intention that it is a substitution of the lien.

23. With the foregoing in mind the substantial question which arises in light of the circumstances of this case is whether the Defendant Advocate released or waived his lien.

24. That question though is not a new controversy. In the case of **Re Morris [1908]1 KB 473** a similar question was considered. The English court of Appeal by a majority thought that a solicitor (advocate) who took security that was inconsistent or incompatible with the retention of the lien would be taken to have abandoned the lien unless he reserved it. Lord Alverstone C.J summarized the position as follows:

> *"Prima facie a solicitor has a lien for his charges upon the papers of his client. This lien may be lost released or waived in the same way as the lien which other person possess. The main difference between the case of a solicitor's lien and those other liens is where a solicitor takes any security which is in any degree inconsistent with the retention of a lien, it is his duty to give express notice to the client if he intends to retain the lien, and that should he not do so, his lien will be taken to be abandoned".*

25. I have a strong inclination to simply follow the guidance of the decision of the court in **Re Morris [1908]1 K.B 473** even though it does not absolve me from forming my own view in this matter and even though it is a 'foreign decision'.

26. In my view, taking security for ones costs would equate conversion of the papers held in lien to meet the same costs. Where an advocate holds documents against which he could set up a lien and both the Client and the advocate agree that the documents which have value be converted to pay off the advocates outstanding costs the lien or any intention to set the same up will be ousted and lost. The advocate once he accepts the conversion must be deemed to have abandoned his lien. He has waived it and he cannot set it up again on the same documents. The lien is gone. The client

must also be deemed to have changed its position and suffered the pain of losing the documents to settle a debt to the advocate. The client can also not set up a claim pegged on the documents delivered on the basis of an advocate – client relationship. In my view, the client's position vi-a-vis the advocate is deemed to have changed.

27. The question of waiver or abandonment of lien through receipt of security or conversion of documents held to payment is and must be one of intention. If it is shown that both parties have a positive intention to give and take security or convert the documents into payment then the lien must be deemed waived and abandoned. The case of **Re Taylor [1891]1 Ch 590** sets up this explication of the law.

28. In the instant case it is quite clear that both the Plaintiff and the Defendant had an actual intention to abandon any right to a lien. The Plaintiff decided to relinquish its interest in the documents and the Defendant agreed to appropriate the same. There was no inconsistency. I do not therefore find it necessary to consider the evidence of intention in any great detail but only make reference to the letters by the Plaintiff dated 17th July, 2002, 29th April, 2004, 5th May, 2004, 8th September, 2004 and 24th May, 2005. They were explicit. The title documents the subject of these proceedings, was to cover the fees and charges owed by the Plaintiff to the Defendant.

29. Notwithstanding my finding that there was intention, the next question is whether the letters bound the Plaintiff.

30. The Plaintiff submits that it is trite law that companies are only bound by actions of authorized persons. Consequently, in the plaintiff's view, the pledge- I would prefer to call it an assignment- only bound the plaintiff if was made by an authorized person or a party holding a power of attorney.

31. I have difficulty with this argument both on points of law and the factual foundation of this case. Firstly, even though the legal world has for solong strictly applied the *ultra vires* principles to limit a company's capacity to transact the same legal world has always also recognized the principle of apparent authority to bind the company even where there is no actual authority. As was held more than 150 years ago in the famous case of **Royal British Bank –v- Turquand 119 ER 886** a person dealing with a company is entitled to assume, in the absence of circumstances putting him on inquiry, that there has been due compliance with all matters of internal management of the company. He is in my view entitled to assume that the person he is dealing with in the company has authority unless he has notice or has been put on inquiry as to the irregularity or lack of authority.

32. To my mind the possible relevance of the rule in ***Turquand's case*** in the present context is obvious. The representations that the Plaintiff's officers had authority to instruct the Defendant herein were made. No instructions were issued under the company's seal or through a Board resolution. The representation to act and later on to appropriate the document were made by persons who had actual authority to manage the Plaintiff's business. This is borne by the fact that the Plaintiff's officers consistently dealt with and signed letters to the Defendant. Further, their actions in setting the fees due and owing as well as the conversion of the title documents held by the Defendant as payment was acknowledged in a meeting attended by the Plaintiff and the Defendant on 29th November 2005. The letters were also signed by the Plaintiff's agents under the notation "authorized signatory". Finally, the Defendant was certainly induced by such letters and actions and cited or relied on the same as a matter of fact. The Plaintiff in the circumstances cannot deny the assignment on the basis of want of authority. The acts of the officers of the Plaintiff bound the Plaintiff on the basis of apparent or ostensible authority. Besides, in the realm of liens the notion that the owner is not bound is not wholesome and if a party has ostensible or apparent authority to bind the owner the lien will hold good : see **Albermarle Supply Co. Ltd v Hind & Co [1928] 1 KB 307.**

33. To my mind, the assignment and surrender of its rights over the title documents was consummated

when the Plaintiff actually received a transfer in favour of the Defendant to be executed by the registered third party who had long relinquished its rights over the same property in favour of the Plaintiff.

34. Thereafter there would be no issue as to liens and fees but only the performance of the agreement to transfer or have the property transferred to the Defendant. Effectively and as the circumstances dictated the parties herein no longer wielded the Advocate/client relationship once it was confirmed to the Defendant that the third party being Kaluworks Ltd had agreed to transfer the property to the Plaintiff and were now, being directed by the same Plaintiff, to transfer the property to the Defendant. I have no difficulty therefore in accepting that the Defendant and the Plaintiff expected, intended and accepted that title document to the suit property was to be held and converted by the Defendant in settlement of the Defendant's fees.

35. I have been referred to the case of **Mutahi Maseki –v- Imran Nurshad Manji [2005]eKLR** to illustrate the point that an advocate cannot have a lien over a property that was owned by a third party. To underpin that contention the Plaintiff also made reference to the *nemo dat quod non habet* principle.

36. I read and quickly understood the Mutahi Maseki case with ease. In my view, it does not stand for the alleged principle that an advocate cannot claim a lien on a property which does not belong to a client. Rather, citing **Halsbury's Laws of England, Vol 44** the Mutahi Maseki case repeats the theme that "an Advocate cannot have a better title than his client". In fewer words, the advocate can only hold onto what his client would have held. Moreover in the Mutahi Maseki case the third party owner moved to be joined in the proceedings and was joined with a view to showing that the 3rd party had a much superior title to the motor vehicle than the client. In the instant case, that certainly is not so. Not even a letter allegedly demanding the title documents by the third party Kaluworks Ltd has been exhibited to demonstrate that Kaluworks Ltd had a superior claim to the documents than the Plaintiff. In addition, the evidence on record would certainly vindicate the contrary position that Kaluworks Ltd no longer had an interest in the title documents as well as the suit property.

37. I come to the conclusion that the Defendant's arguments on this matter as can be understood from the Replying Affidavit are to be preferred. The Defendant no longer holds the title documents if at all as a lien. The lien was long ousted. Likewise the advocate-client relationship also ceased upon the cancellation of the transaction where the Defendant was expected to use the title documents and the same surrendered to the Defendant. The Plaintiff in my view trifled the process when it moved the court under Order 52 of the Civil Procedure Rules. I would dismiss the Originating Summons , as amended, with costs to the Defendant. It is so dismissed. Orders accordingly

Dated, signed and delivered at Nairobi this 18th day of December, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

.....for the Plaintiffongut

..... for the Respondent