



**Jethwa (Suing on Her Own Behalf and as the Administrator for the Estate of Harish Jethwa Banesingh and Mankuverba Jethwa) v Wambeyi Kennedy Makomere t/a Wambeyi Makomere & Co. Advocates (Environment & Land Case E1 of 2023) [2023] KEELC 21251 (KLR) (2 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21251 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E1 OF 2023**

**LA OMOLLO, J**

**NOVEMBER 2, 2023**

**BETWEEN**

**JASWANT KUMARBA B. JETHWA (SUING ON HER OWN BEHALF AND AS THE ADMINISTRATOR FOR THE ESTATE OF HARISH JETHWA BANESINGH AND MANKUVERBA JETHWA) ..... APPLICANT**

**AND**

**WAMBEYI KENNEDY MAKOMERE T/A WAMBEYI MAKOMERE & CO. ADVOCATES ..... RESPONDENT**

**JUDGMENT**

1. The Applicant commenced this suit vide the Originating Summons dated 9<sup>th</sup> December 2022.
2. The Originating Summons is expressed to be brought under Article 40 of *the Constitution*, Section 55 and 56 of the *Advocates Act*, Sections 1A, 1B and 3A of the *Civil Procedure Act* and Order 52 Rule 4 of the Civil Procedure Rules.
3. The Application seeks the following orders;
  - a. That this Honourable Court be pleased to order the Respondent to unconditionally release and deliver to the Applicants the original certificate of lease in respect of land parcels number Nakuru Municipality Block 10/96 and Nakuru Municipality Block 5/10 and any other relevant documentation held by him in respect to the said parcels of land.
  - b. That this Honorable Court be pleased to direct the Chiefs Land Registrar to register a caveat on behalf of the Applicants to protect the suit properties from any illegal disposals.



- c. That this Honorable Court does not make any other orders it deems fit.
  - d. That costs of this suit be provided for.
4. The Application is based on the grounds on its face and supported by the affidavit of one Jaswant Kumarba B. Jethwa. The supporting affidavit is sworn on 9th December, 2022.
5. Subsequent to filing the originating summons, the matter was scheduled for hearing on 8<sup>th</sup> February, 2023. On the said date, the Respondent informed the court that it had filed an application dated 6<sup>th</sup> February, 2023.
6. The Respondent was given time to file a response to the originating summons and the Applicant time to respond to the Notice of Motion application dated 6<sup>th</sup> February, 2023. The court ordered parties to appear on 7<sup>th</sup> March, 2023 for further directions.
7. On 7<sup>th</sup> March, 2023 the Respondent informed the court that he had filed submissions to its application dated 6<sup>th</sup> February, 2023 and also informed court that it had not responded to the Originating summons. I note that the Respondent filed submissions on its Notice of Motion Application dated 6<sup>th</sup> February, 2023 without taking directions for its hearing.
8. Parties were given more time to file their responses and come 20<sup>th</sup> March, 2023, the Respondents had still not filed their response to the Originating summons. The matter was adjourned to the 18<sup>th</sup> May, 2023 for submissions.
9. On 18<sup>th</sup> May, 2023, the Respondent was absent. The Applicant confirmed having filed submissions on her Originating motion and the matter was reserved for Judgment.
10. As at the time of writing this judgment, I have an application dated 6<sup>th</sup> February, 2023 wherein directions for hearing were not taken but the Applicant herein has responded to it. The said application seeks the following orders;
  - a. Spent
  - b. That the suit herein be struck out.
  - c. That the costs of this application and the entire suit be borne by the Respondents.

This application seeks that this suit be struck out for the reason that the Applicant herein lacks locus.

11. I am mindful of the provisions of Article 159(2)(d) of [the constitution](#) and also the provisions of the [Civil Procedure Act](#) as pertain to the inherent power of the court.
12. The Constitution under Article 159 on judicial authority has urged courts to do justice without undue regard to procedural technicality. Article 159(2)(d) provides as follows;

“Justice shall be administered without undue regard to procedural technicalities.”
13. Section 3A [Civil Procedure Act](#) provides as follows;

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”



14. Section 1A & 1B of the *Civil Procedure Act* provide for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes.
15. In *Wachira Karani v Bildad Wachira* [2016] eKLR the court stated thus;  

“the fundamental duty of the court is to do justice between the parties... Fundamental to that duty is that parties should be allowed a proper opportunity to put their cases upon the merits of the matter... The court is not powerless to  
grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit”
16. Bearing these provisions and the judicial decision in mind, I shall proceed to determine the Notice of motion application together with the Originating Summons.
17. My assessment of the Notice of Motion application dated 6<sup>th</sup> February, 2023 is that it is intended to respond to the Originating Summons and I will treat it as such.

**The Applicant’s Contention.**

18. The Applicant contends that she is the executor of the estate of Harish Jethwa Banesingh and Mankuverba Vajesingh Jethwa.
19. The Applicant also contends that she is a joint proprietor of the suit parcel of land known as Nakuru Municipality Block 10/96 alongside Pradeep B. Jethwa, Davendra B. Jethwa (Deceased), Nilesh B. Jethwa (deceased) and Harish B. Jethwa (Deceased).
20. The Applicant further contends that she is one of the registered proprietors of the land parcel number Nakuru Municipality/Block 5/10 alongside Harisingh Jethwa (Deceased) and Mankuverba Vajesingh Jethwa (Deceased).
21. She contends that the Respondent herein operates a law firm in the name and style of Wambeyi Makomere & Company Advocates.
22. She also contends that during the lifetime of her son, Mr. Nilesh Jethwa, the Respondent acted as his counsel and the original certificate of lease for Land Parcel Number Nakuru Municipality Block 10/96 and Land Parcel No .Nakuru Municipality/Block 5/10 were deposited with the Respondent’s firm.
23. She further contends that since Mr. Nilesh Jethwa (deceased) was occasionally resident in Nakuru they trusted him and delivered to him the original title deeds for safekeeping and also to facilitate the processing of extension of lease in respect of Land Title Number 10/96.
24. It is her contention that being joint tenants of Land parcel Number 10/96, all the deceased owners had an equal right over the said parcel of land and no transaction could be undertaken without prior consent of each of the surviving proprietors.
25. It is also her contention that unfortunately during his lifetime, the deceased misused the said title deeds by leasing out the suit parcels of land without their authorization and consent of the other joint tenants resulting in several suits against him.
26. It is further her contention that upon the demise of Mr. Nilesh Jethwa, they discovered that the original certificates of title in respect of the two parcels of land were deposited with the Respondent firm after which they embarked on the process of obtaining them.



27. She contends that the Respondent has, despite numerous demands and requests refused to release the original certificates of title being held by them citing that the original title deeds are being held as lien over alleged legal fees that accrued from services he rendered to the deceased during his lifetime.
28. She also contends that being a joint tenant, the deceased had an indeterminate share in the parcel of land known as Nakuru Municipality Block 10/96 and his interest in the suit property was extinguished upon his demise.
29. She further contends that the interest of the deceased in Land Parcel Number Nakuru Municipality Block 10/96 now vests in her and one Pradeep B. Jethwa jointly.
30. It is her contention that in regard to Land Parcel Number Nakuru/Municipality Block 5/10, the deceased held no share at all and the Respondent has no justification whatsoever for his continued retention of the said original certificate of title.
31. It is also her contention that if the deceased owed the Respondent legal fees for whatever services rendered to him during his lifetime, then the Respondent ought to have filed its bill of costs in court and take the appropriate steps to recover the same.
32. It is further her contention that the Applicants or any other party have never been served with a bill of costs by the Respondent for the alleged legal fees owing to the firm.
33. She contends there is no legal basis whatsoever for the Respondent's continued retention of the original title deeds for land parcel no's Nakuru Municipality Block 10/96 and Nakuru Municipality/ Block 5/10.
34. She also contends that owing to the Respondent's action, they have been denied and deprived of their proprietary rights in the suit properties as the Applicants cannot deal in any way with their rightfully owned parcels of land without the original title documents.
35. She further contends that the lease in respect of land parcel number Nakuru Block 10/96 is due for extension  
this year and the Respondent's refusal to release the original certificates of lease is impeding the extension of lease to their great detriment.
36. It is her contention that she is apprehensive that unless the Respondent is ordered to release the title deeds, the lease which is due to expire in December, 2023, shall expire and they shall lose their property as a result of the Respondent's conduct.
37. It is also her contention that Respondent's continued withholding of the original title deeds in respect of the suit properties is unlawful, unprofessional and devoid of any reason.
38. She ends her deposition by stating that in the circumstances, it would be just if this Honourable Court allows the Originating Summons and the Respondent ordered to forthwith and unconditionally surrender to  
them the original title deeds in his possession together with any other relevant documentation in respect to the two suit properties.

### **The Respondent's Response**

39. The Respondent filed a Replying Affidavit sworn on 17<sup>th</sup> March, 2023 on 20<sup>th</sup> March, 2023.



40. The Respondent contends that the Originating Summons as filed is not original in itself and stands on a 'borrowed stool' that is three legged.
41. The Respondent also contends that the Originating Summons 'committed suicide' the moment it was placed on the altar of justice.
42. The Respondent further contends that the Applicant lacks the locus standi of instituting the suit as she lacks grant of letters of administration.
43. It is his contention that on that ground alone, the suit 'dies'.
44. It is also his contention that the suit touches on an advocate-client relationship and that the court should take judicial notice on the nature of the said relationship that exists between an advocate and a client on matters of confidentiality.
45. It is further his contention that he would be of unsound mind if he held the client's title deed without any justification.
46. He contends that he is holding the title deed as security towards his pending bills with the deceased.
47. He ends his deposition by stating that he handled a matter with counsel for the Applicant touching on the same title on the adverse side and counsel is now representing a client whom he once sued.
48. In the Notice of Motion application dated 6<sup>th</sup> February, 2023 the Respondent contends as follows;
  - a. That contends that their firm was retained by a client known as Nilesh B Jethwa in the year 2008 with instructions that were carried out till his demise.
  - b. That during the subsistence of the advocate-client relationship, various confidential and privileged information and issues happened during the span of over thirteen years.
  - c. That the said client travelled to India in March, 2022 for specialized cancer treatment but succumbed on 8<sup>th</sup> March, 2022.
  - d. That during his life time, their firm represented the deceased in both contentious and non-contentious matters.
  - e. That the Applicant has brought the present suit premised on the Advocate-Client relationship between their firm and the deceased.
  - f. That at no time did the Applicant exhibit her locus to enable her bring the present suit.
  - g. That the Applicant was neither a client nor a personal representative of the estate of their deceased client to invoke the jurisdiction of this court as enshrined in Order 52 Rule 4(1) of the Civil Procedure Rules.
  - h. That the Applicant has not met the threshold for having the locus to institute, maintain and prosecute this suit and that the suit is therefore void and a non-starter.
  - i. That the firm of Kavraj Kaur & Associates Advocates sued their late client over the subject property and in this regard, there is a conflict of interest.



49. The Applicant responded to the Notice of Motion application dated 6<sup>th</sup> February, 2023. In my analysis, this response reiterates the contents on the originating summons and the affidavit in support. She contends as follows:

- a. That the Respondent herein is not disputing that he is holding the original title deeds subject to this suit.
- b. That the Respondent has admitted to holding the original title deeds subject of this suit allegedly as lien for fees which he has not taken any steps to justify.
- c. That the Respondent annexed documents which purportedly instructed him to either sell the two properties or extend the lease of one property being Nakuru Municipality Block 10/96.
- d. That parcel Block number 10/96 is a joint tenancy in which she is one of the proprietors together with her four sons Pradeep B. Jethwa, Davendra B. Jethwa (deceased), Harish B. Jethwa (deceased).
- e. That by virtue of a joint tenant, all transactions relating to the said property, be it a sale or lease extension had to be sanctioned by all the proprietors.
- f. That as stated in her affidavit in support of this motion, dated 9<sup>th</sup> December, 2021, she trusted her son Nilesh B. Jethwa (now deceased) and delivered to him the original certificates of title to facilitate the process of lease extension and represent her interest thereof.
- g. That the deceased acted as her agent in the said transaction and so she has locus to institute the suit.
- h. That the Respondent/Applicant vide its letter dated 14<sup>th</sup> February, 2020 represented Nilesh Jethwa and Harish B. Jethwa, in respect of whose estates she had grant of letters of administration, in a sale transaction.
- i. That by its letter dated 8<sup>th</sup> July, 2020, the Respondent stated that his clients Davendra Jethwa and Nilesh Jethwa had approached him on behalf of the entire Jethwa family which was an indication that the deceased acted as their agent in some transactions.
- j. That she has the locus to institute this suit as she is one of the proprietors in the suit properties and also the administrator of the estate of two persons one of whom the Applicant admits to have acted for.
- k. That she is advised that justice should be administered without undue regard to technicalities as provided for under Article 159 of *the Constitution* of Kenya, 2010.
- l. That the Respondent should justify his alleged fees by filing a bill of costs rather than holding the title deeds for no reason whatsoever.
- m. She ends by stating that the Respondent/Applicant's application is an abuse of the court process and is meant to delay the matter and deny her proprietary rights by illegal retention of the original title deeds.



50. In summary, the Respondent in filing the Notice of Motion Application dated 6<sup>th</sup> February, 2023 herein prays that this suit be dismissed for two reasons. One is that the Applicant lacks locus and the second is that it has a right of lien over the title documents for unpaid legal fees in respect of legal services rendered to its client one Nilesh B. Jethwa who is the deceased son on the Applicant herein.
51. Both parties filed submissions to the Notice of Motion application which I have read and taken into consideration in determining this matter.

### **Submissions.**

52. The Applicant filed her submissions on 5<sup>th</sup> May, 2023 while the Respondent did not file his submissions to the Originating Summons.
53. The Applicant in her submissions submits on both the Respondent's Notice of Motion application dated 6<sup>th</sup> February, 2023 and the Originating Summons.
54. In regard to the Originating Summons, the Applicant submits on the following issues;
1. Whether the applicant has satisfied conditions for grant of orders sought in the Originating Summons.
  2. Who should bear costs of the suit.
55. On whether she has satisfied conditions for grant of orders sought in the Originating Summons, the Applicant/Respondent submits that the Respondent/Applicant is holding the title deeds to the suit properties as lien for his fees and yet he has not filed any bill of costs.
56. The Applicant/Respondent relies on Booth Extrusions (Formerly) Booth Manufacturing Africa Limited vs Dumbeya Muturi Harun T/A Nelson Harun & Co. Advocates [2017] eKLR and submits that the Respondent/Applicant has not justified his exercise of right of lien over the subject title documents and they should therefore be released.
57. The Applicant/Respondent also relies on the judicial decision of Re Estate of Stephen Cheruiyot Kositany (deceased) [2019] and submits that once Nilesh Jethwa passed on, his interest in the land extinguished upon his death and now vests in the surviving owners.
58. On the issue of costs, the Applicant/Respondent submits that the Respondent/Applicant's retention of the original title deeds is an illegality and seeks that the court allows her Originating Summons.

### **Analysis And Determination.**

59. After considering the Applicant's Originating Summons and the Respondent's Notice of Motion Application, considered as a response to the origination summons, the following issues arise for determination;
- a. Whether the Applicant has locus to institute these proceeding?
  - b. Whether the Respondent has a right of lien over the title documents to the suit properties
  - c. Whether the court should order the Respondent to release the Original Certificates of Lease for land parcel numbers Nakuru Municipality Block 10/96 and Nakuru Municipality Block 5/10.



d. Who should bear costs of the suit.

**A. Whether the Applicant has locus to institute these proceeding?**

60. The Respondent seeks that this suit be struck out on the ground that the Applicant/Respondent lacks the locus standi to file the present suit on behalf of the estate of Nilesh Kumar Banesingh Jethwa.
61. The Respondent submits that this suit is premised on an advocate-client relationship and that the Applicant is neither his client nor a personal representative of the estate of his client Nilesh Kumar Banesingh Jethwa.
62. The Applicant, on the other, hand argues that she was a joint proprietor of the suit properties and she therefore has locus to commence the present proceedings. The Applicant/Respondent also argues that the Respondent/Applicant does not dispute that he is holding the certificates of title to the suit properties.
63. A perusal of the cause title of Originating Summons shows that the Applicant/Respondent has instituted the present suit on her own behalf and also the administrator of the estate of Harish Jethwa Banesingh and Mankuverba Vajesingh Jethwa.
64. She has annexed to the Originating Summons a copy of the Certificate of Lease for land Parcel No. Nakuru Municipality Block 10/96. It shows that the parcel is registered in the name of the Applicant, Davendra B. Jethwa, Pradeep B. Jethwa, Nilesh B. Jethwa and Harise B. Jethwa.
65. It is clear from the said copy of the certificate of lease that the Applicant/Respondent and the persons named therein are joint proprietors of land Parcel No. Nakuru Municipality Block 10/96.
66. Also annexed to the Originating Summons is a copy of the Certificate of Lease for land parcel No. Nakuru Municipality Block 5/10. It shows that the owners of the said property are the Applicant/ Respondent and Mankuverba Vajesingh and Harisingh Jethwa.
67. The Respondent alleges that his client Harish B. Jethwa is not listed as one of the proprietors of land parcel No. Nakuru Municipality Block 5/10.
68. As indicated before the Respondent alleges that the Applicant/Respondent does not have the locus standi to institute the present proceedings on the ground that she does not have the grant of letters of administration ad litem of the estate of the late Nilesh B. Jethwa.
69. In response the Applicant argues that she does not need a grant of letters of administration for the estate of the late Nilesh B. Jethwa as she was a joint owner of the suit properties.
70. The Respondent does not dispute the Applicant's assertions that she is a joint owner of the suit properties and that Nilesh Jethwa (deceased) is among the proprietors of land parcel No. Nakuru Municipality Block 5/10.
71. In In re Estate of Johnson Njogu Gichohi (Deceased) [2018] eKLR it was held as follows;

“

“ 13. Section 60 of the *Land Registration Act* provides:

“If any of the joint tenants of any land, lease or charge dies, the Registrar shall, upon proof of death delete the name of the deceased tenant from the register by registering the death certificate.”



This means that where property is in the names of joint owners, upon the death of one of them, the surviving owner automatically becomes the owner upon presenting the evidence of death of the joint tenant i.e. death certificate to the registrar. The property automatically passes to the surviving joint tenant.” (Emphasis mine)

72. As was held in the above judicial decision, on the death of Nilesh B. Jethwa died, ownership of land parcel No. Nakuru Municipality Block 10/96 automatically passed to the Applicant. What is left is presentment of the death certificate to the Land Registrar and amendment of the register to reflect the names of the surviving joint owners.
73. My view, therefore, is that the Applicant does not need grant of letters of administration ad litem to the estate of Nilesh Jethwa in order to commence the present proceedings. I find that, the Respondent’s Notice of Motion application dated 6<sup>th</sup> February, 2023 lacks merit.

**B. Whether the court should order the Respondent to release the Original Certificates of Lease for land parcel numbers Nakuru Municipality Block 10/96 and Nakuru Municipality Block 5/10.**

74. The Applicant is seeking that the court orders the Respondent to release the original certificates of lease for land parcel No’s Nakuru Municipality Block 10/96 and Nakuru Municipality Block 5/10.
75. The Applicant seeks the said order on the ground that she is the joint proprietor of land parcel No. Nakuru Municipality Block 10/96 together with Pradeep B. Jethwa, Davendra B Jethwa(deceased), Nilesh B. Jethwa (deceased) and Harish B. Jethwa(deceased).
76. The Applicant also argues that she is one of the registered proprietors of land parcel No. Nakuru Municipality Block5/10 together with Harisingh Jethwa (deceased).
77. It is the Applicant’s case that the Respondent acted as Nilesh Jethwa’s (deceased) advocates and he had deposited the two Certificates of Lease with him.
78. It is also the Applicant’s case that after the death of Nilesh Jethwa, the Respondent declined to release the said Certificates of Lease to her.
79. The Respondent on the other hand argues that he came into possession of the Certificates of Lease as a result of the Advocate-Client relationship that existed between him and Nilesh Jethwa(deceased).
80. The Respondent also argues that the Applicant lacks locus to institute the present proceedings. This issue has been dealt in (A) above.
81. Order 52 Rule 4 of the Civil Procedure Rules provides as follows;

“ 4.

- (1) Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for—
  - (a) the delivery by the advocate of a cash account;
  - (b) the payment or delivery up by the advocate of money or securities;



- (c) the delivery to the Applicant of a list of the money or securities which the advocate has in his possession or control on behalf of the Applicant;
  - (d) the payment into or lodging in court of any such money or securities;
  - (e) the delivery up of papers and documents to which the client is entitled.
- (2) Applications under this rule shall be by originating summons, supported by affidavit, and shall be served on the advocate.
  - (3) 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."

82. It is not disputed that the Respondent is in possession the original certificates of lease for the suit properties.

83. The Respondent justifies holding the said certificates of title on the ground that he is holding them as security for unpaid legal fees incurred by his client who is deceased. However, he doesn't state how much is owing and whether or not he has taxed his costs against his client.

#### **C. Who should bear costs of this suit?**

84. The general rule is that costs follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act*. (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

85. In the result, I find that this suit is merited. Consequently, the Applicant's Originating Summons dated 9<sup>th</sup> December, 2022 is allowed in the following terms:

- a. The Respondent is hereby ordered to unconditionally and forthwith release and deliver to the Applicants the original certificate of lease in respect of land parcels number Nakuru Municipality Block 10/96 and Nakuru Municipality Block 5/10 and any other documents held by him in respect of the said parcels of land.
- b. The Applicant shall have costs of the suit.

86. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF NOVEMBER, 2023**

**L. A. OMOLLO**

**JUDGE**

**In the presence of:**

**Kimunge for Kavraj for the Applicant.**

**Simuyu for the Respondents.**



**Court Assistant: Ms. Monica Wanjohi.**

