



REPUBLIC OF KENYA



**KENYA LAW**  
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**Corat Africa v Mbohu t/a Kyalo & Associates (Civil Case E284 of 2023)  
[2025] KEHC 3101 (KLR) (Commercial and Tax) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3101 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E284 OF 2023  
F GIKONYO, J  
MARCH 13, 2025**

**BETWEEN**

**CORAT AFRICA ..... PLAINTIFF**

**AND**

**MATHEW KYALO MBOBU T/A KYALO & ASSOCIATES ..... DEFENDANT**

**RULING**

1. Before the court are two applications. One by the defendant and the other by the plaintiff, dated 18<sup>th</sup> September 2023 and 27<sup>th</sup> November 2023, respectively. The former is seeking stay of proceedings on the basis of advocates' lien. The latter is seeking striking out of the defence and counterclaim and entry of judgment on admission.
2. This ruling determines the issues of whether the defendant has made a case for stay of proceedings based on an advocate's lien and whether the plaintiff has made a case for the striking out of the defence and counterclaim and/ or entry of judgment on admission. The issues arise from the applications filed by the defendant and the plaintiff dated 18<sup>th</sup> September 2023 and 27<sup>th</sup> November 2023 respectively.

**Background**

3. The dispute between the parties emanated from the appointment of the defendant as the plaintiff's advocate to represent it in the sale of two parcels of land known as LR No. 7777/8 and LR No. 7777/9 Karen. The defendant drew the agreements for sale. The purchase price for the two parcels was Kshs. 250,000,000/-, payable in instalments to the defendant to hold as stakeholder pending completion. The purchasers deposited the entire purchase price of Kshs. 250,000,000/- to the defendant on various dates. The transfer instruments were registered on 6<sup>th</sup> January 2022. The defendant released Kshs. 153,000,000/- to the plaintiff with the purchaser's authorization on various dates. However, despite



demand, the defendant failed to remit to the plaintiff the balance of Kshs. 97,000,000/-, precipitating this suit.

4. In addition to the balance of Kshs. 97,000,000/-, the plaintiff claims interest at 15% from April 2022 until payment in full, Kshs. 2,606,508.87/- to be paid in penalties and interest for late payment of capital gains tax, incurred interest in the sum of KES. 8,069,380.17/- on the loan and overdraft facility at Standard Chartered Bank Kenya Ltd, Kshs. 4,876,000.00/- on lost interest on investment of Kshs. 50,000,000/- and costs of the suit.
5. The defendant entered appearance on 27<sup>th</sup> July 2023 and thereafter filed a defence and counterclaim dated 9<sup>th</sup> August 2023. He admitted that an advocate-client relationship existed between the parties and that he held the purchase price on behalf of the plaintiff, part of which is not remitted to the plaintiff. However, he denied holding the Kshs. 97,000,000/- illegally, claiming that he was holding the unremitted amount as lien for the various legal services rendered to the plaintiff.
6. The plaintiff filed a reply to defence and counterclaim dated 23<sup>rd</sup> August 2023.

### **First application**

7. The first application dated 18<sup>th</sup> September 2023 by the defendant seeks stay of proceedings pending hearing and determination of ELC Misc Civil Application No. E050/ E051/ E057/ E058 and E173 of 2023 which are due for taxation before the Taxing Master of the Court on 28<sup>th</sup> November 2023.
8. The application is supported by the affidavits sworn by Mathew Kyalo Mbobu on 18<sup>th</sup> September 2023 and 20<sup>th</sup> November 2023. The defendant also filed initial and supplementary written submissions dated 20<sup>th</sup> November 2023 and 27<sup>th</sup> March 2024 respectively.
9. The application is opposed by the plaintiff through grounds of opposition dated 2<sup>nd</sup> October 2023, a replying affidavit sworn by the plaintiff's director, Oliver Kisaka Simiyu on 2<sup>nd</sup> October 2023 and written submissions dated 21<sup>st</sup> November 2023. The core contention is that the defendant has not met the legal threshold for stay.

### **Second application**

10. The second application dated 27<sup>th</sup> November 2023 by the plaintiff seeks striking out the defence and counterclaim dated 9<sup>th</sup> August 2023 for disclosing no reasonable defence and cause of action against it and entry of judgment on admission against the defendant for the sum of KES. 112,551,889.04/- together with interest and costs of the suit as sought in the Plaintiff.
11. The application is supported by affidavits sworn by Oliver Kisaka Simiyu on 27<sup>th</sup> November 2023 and 27<sup>th</sup> September 2024 and written submissions dated 27<sup>th</sup> September 2024.
12. The grounds are that the defendant has admitted to the principal amount of KES. 97,000,000/- and the accruing penalties and additional charges that the plaintiff suffered as a result of the failure to remit the principal amount.
13. The defendant opposed the application through a replying affidavit sworn on 18<sup>th</sup> January 2025 and written submissions dated 7<sup>th</sup> February 2025. The main argument is that the defence and counterclaim cannot be said to an admission that is clear, plain, unequivocal and/ or obvious and the suit should proceed for a full hearing to dispose the issues fully.



## Analysis and Determination

14. The two applications raises the following three major issues:-
1. Whether the defendant has met the threshold for stay of proceedings pending taxation of its bills of costs.
  2. Whether the plaintiff has made a case for entry of judgment on admission.
  3. Whether the plaintiff has made a case for the striking of the defence and counterclaim.

## Stay of proceedings

15. According to the defendant, these proceedings should be stayed as a way of ensuring a just determination of the dispute between the parties. submitted that he has met the threshold for stay of proceedings. His reason is the advocates' lien over the funds subject of this suit for payment of his costs which are yet to be taxed. In his opinion, staying these proceedings is the lower risk of injustice and which meets the ends of justice. He cited Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokebii Civil Appeal No. 326 of 2013 [2014] eKLR and Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000. He also relied on Sections 1A, 1B & 3B of the [Civil Procedure Act](#).
16. On its part, the plaintiff submitted that the defendant has not met the legal threshold for stay; the court has not issued an order that is being appealed or capable of leading to the relief of stay of proceedings under Order 42 Rule 6; the present suit is not related to the bills of costs filed by the defendant that could lead to possible conflicting decisions; and the application is a delaying tactic made in bad faith, is frivolous, vexatious.
17. From the defence, the replying affidavit and submissions, the defendant's case is that he is holding the balance of Kshs. 97,000,000/- as lien for his unpaid fees for the various legal services rendered to the plaintiff.
18. I do note that at the time of filing the application, there were bills of costs filed by the advocate which were pending taxation. However, in its further affidavit, the plaintiff deposed that the defendant acknowledges Kshs. 4,072,150/- out of the total amount claimed in the bills of costs of Kshs. 12,737,241.70/-. That the bill of costs in ELC Misc E050/2023, E051/2023, E057/2023 and E058/2023 relate to the sale of LR No. 7777/8 and 7777/9. That the bills of costs filed in ELC Misc E050/2023, E051/2023, E057/2023 and E058/2023 have since been determined and dismissed or struck out. That only one bill of costs in Misc. E407/2024 is pending determination.
19. The plaintiff exhibited taxation rulings in ELC Misc E050/2023 and E057/ 2023, E058 and E051 of 2023, ELC Misc E006 of 2023, ELC Misc E007 of 2023, ELC Misc E008 of 2023, ELC Misc E009 of 2023. It also exhibited its reference applications against the taxation rulings in ELC E006 of 2023, ELC E007 of 2023, ELC Misc E008 of 2023, E009 of 2023 that are pending.
20. An advocate has a right to hold a client's property as lien under Section 52 of the [Advocates Act](#). Statutory Manager United Insurance Company Limited v Edward Muriu Kamau, Njoroge Nani Mungai & Peter Munge Murage P/A Muriu Mungai & Co. Advocates [2013] eKLR.



21. In Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR, the late Justice Onguto explained that:-

“ 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.”

22. In this case, the defendant has raised a defence of an advocate’s lien. However, some of the bills of costs have been concluded. In addition, the plaintiff has indicated that the defendant acknowledges Kshs. 4,072,150/- out of the total amount claimed in the bills of costs of Kshs. 12,737,241.70/-. The amount that is still under consideration is 8,665,091.70/-.

23. The defendant is holding the balance of Kshs. 97,000,000/-. The plaintiff asserted that though the defendant could argue that he would hold a lien, the legal fees would not be the entire KES. 97,000,000/-. In *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited*, Justice Odunga (as he then was) stated that: -

“ ...a lien is simply security for an advocate’s fees and an advocate is not entitled to exercise a right to alien in respect of the whole property when his costs can only be recovered from part only of the property. In other words, the lien ought to be commensurate to the claim for fees and no more.’



24. In accordance with the constitutional principle on proportionality of remedy, the advocate's lien should 'be commensurate to the claim for fees and no more'. Lucas M. Maitha case (ibid). Accordingly, holding a sum of Kshs. 97,000,000/- on lien for advocates' fee which at most, will be Kshs. 8,665,091.70/-, defeats the principle of proportionality of remedy and only works extreme prejudice to the client.
25. He seeks the stay of proceedings in the matter until the legal fees are resolved. In light of proportionality requirements, and the fact that stay of proceedings is such a draconian remedy and a rude interruption of a party's right of litigation especially where it is not founded on solid grounds, there is no justification to stay these proceedings on the ground cited. It will be unjust to stall these proceedings. On the other hand, continuation of these proceedings will not prejudice the defendant; but, staying them would greatly prejudice the plaintiff's right to fair hearing.
26. Except, to lower the risk of injustice and attain a proportioned balance of the interests of both parties; the court shall require the plaintiff to furnish security for the payment of the legal fees as per Section 52 of the Advocates Act.
27. The amount of security is upon the court's discretion but to the extent sufficient to cover the costs if they become due and payable.

### **Striking out defence**

28. The plaintiff applied for the striking out of the defence and counterclaim for it raises no reasonable defence. On this subject, I am content to cite a long but relevant narrative in Saudi Arabian Airlines Corporation v Sean Express Services Ltd [2014] eKLR that: -

“A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the Sheridan J Test in Patel v E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 (Duffus P.) that “...a triable issue ...is an issue which raises a prima facie defence and which should go to trial for adjudication.” Therefore, on applying the test, a defence which is a sham should be struck out straight away.

29. Guided by the above and upon looking at the defence, I am not convinced that it is a sham. The defence raises issues relating to whether the plaintiff is entitled to Kshs. 2,606,508.87/- to be paid in penalties



and interest for late payment of capital gains tax, incurred interest in the sum of KES. 8,069,380.17/- on the loan and overdraft facility at Standard Chartered Bank Kenya Ltd, Kshs. 4,876,000.00/- on lost interest on investment of Kshs. 50,000,000/- and costs of the suit.

30. Therefore, I find that the plaintiff has not met the threshold for the striking out of the defence and counterclaim.

### **Judgment on admission**

31. The third issue is whether the plaintiff has made a case for the entry of judgment on admission. Order 13 Rule 2 of the Civil Procedure Rules provides that:-

“2. Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court admissions for such judgment or order as upon such admissions he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.”

32. In *Choitram v Nazari* [1984] eKLR, the Court of Appeal outlined the guiding principles for entry of judgment on admission, as follows:-

“For the purpose of order XII rule 6, admissions can be express or implied either on the pleadings or otherwise, e.g. in correspondence. Admissions have to be plain and obvious, as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning. Much depends upon the language used. The admissions must leave no room for doubt that the parties passed out of the stage of negotiations onto a definite contract. It matters not if the situation is arguable, even if there is a substantial argument, it is an ingredient of jurisprudence, provided that a plain and obvious case is established upon admissions by analysis. Indeed, there is no other way, and analysis is unavoidable to determine whether admission of fact has been made either on the pleadings or otherwise to give such judgment as upon such admissions any party may be entitled to without waiting for the determination of any other question between the parties. In considering the matter, the judge must neither become disinclined nor lose himself in the jungle of words even when faced with a plaint such as the one in this case. To analyse pleadings, to read correspondence and to apply the relevant law is a normal function performed by judges which has become established routine in the courts...”

33. The plaintiff submitted that the current case is fit for entry of judgment on admission as it is clear and plain due to alleged admissions by the defendant confirming receipt of the purchase price and that he is holding the money to date.

34. The plaintiff pointed to paras. 17 and 18 of the Defence and Counterclaim which read as follows:-

“17. Paragraph 13 of the plaint is admitted save that the transfer of LR No. 7777 was not effected until 6/01/2022, whereafter counsel for the 2<sup>nd</sup> buyer requested for time to confirm the disbursement of the balance of the proceeds of sale pending official search and pending confirmation of change of particulars of ownership with the Nairobi County Government.



18. Accordingly, when the plaintiff called for the remittance of the outstanding balance of the purchase price in or about 4/4/2022, the Defendant informed it of the issue raised by the counsel for the 2<sup>nd</sup> buyer and in respect whereof the matter has never been formally resolved.”
35. The plaintiff also relied on letters exhibited at page 46-48 of the exhibit OKS-1, where the defendant states that the funds were misappropriated by his partners in the firm of Kyalo and Associates where he is a sole proprietor. The plaintiff also added that the defendant promised to make good the principal sum and penalties soonest possible. The plaintiff asserted that though the defendant could argue that he would hold a lien, the legal fees would not be the entire KES. 97,000,000/-. It pointed out that the court has already decided the bills of cost relating to this transaction and found that all fees owed to the defendant were already paid.
36. On the other hand, the defendant argued that the defence and counter claim raise triable issues between the parties which require that the suit be heard at full hearing for the court to determine the issue of liability in this suit.
37. The court has power to enter judgment on admission on facts which have been admitted in the pleadings or otherwise without waiting for determination of any other question between the parties. The defendant has admitted that he holds a sum of Kshs. 97,000,000 for the plaintiff except he holds it upon the advocates’ lien for fees.
38. The admission is clear.
39. Therefore, the court is satisfied that admission of fact has been made, and that the plaintiff is entitled to the entry of judgment on admission for the part of its claim against the defendant for Kshs. 97,000,000/-.

### **Final disposal**

40. The upshot is that: -
1. The defendant’s application dated 18<sup>th</sup> September 2023 is dismissed for want of merit.
  2. The plaintiff’s application dated 27<sup>th</sup> November 2023 partially succeeds, and is allowed in the following specific terms: -
    - i. That judgment on admission is entered in favour of the plaintiff against the defendant for the admitted sum of KES. 97,000,000/- together with interest thereon at court rate from the date of filing of the suit.
  3. The defendant shall retain and hold a sum of 8,665,091.70/- as security (lien), for the advocates’ fee once taxed.
  4. The remainder of the claims to proceed to hearing.
  5. Orders accordingly.

**DATED, SIGNED AND DELIVERED THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 13<sup>TH</sup> DAY OF MARCH, 2025.**

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**F. Gikonyo M**  
**Judge**



In the presence of: -

Ms. Linet for defendant

Waiyaki for Plaintiff

CA - Kinyua

