Registered Trustees Getrudes Gardens v Kenya Medical Women's Association & another (Miscellaneous Application 390 of 2016) [2025] KEHC 6305 (KLR) (Commercial and Tax) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION 390 OF 2016

F GIKONYO, J

MAY 8, 2025

BETWEEN

REGISTERED TRUSTEES GETRUDES GARDENS ..... APPLICANT

AND

KENYA MEDICAL WOMEN'S ASSOCIATION ..... 1ST RESPONDENT

KEYSIAN AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. The applicant filed the notice of motion dated 29th January 2025, seeking for: -
   a. Leave for the firm of Ochieng' Opiyo & Co. Advocates to come on record for the applicant in place of the firm of Rachier & Amollo Advocates; and
   b. release to Ochieng' Opiyo & Co. Advocates all monies plus interest currently held in Access Bank Limited Account Number 000210293 Westlands Branch.
2. The application is based on the grounds outlined in its body and the annexed affidavit of Alfred Ochieng' dated 29th January 2025.

Necessary background

3. On 23rd June 2022, the applicant instructed the firm of Ochieng' Opiyo & Co. Advocates to take over the conduct of this matter and the arbitration proceedings from the firm of Rachier & Amollo Advocates.

4. Pursuant to an order of 15th March 2017 by Ochieng' J (as he then was), parties were directed to open a joint interest-earning account in which the respondent would deposit the disputed additional rent of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-). The funds in the joint account are the subject of this application.

Grounds

5. The grounds of the application are that the applicant was successful in the arbitration proceedings and that the tribunal ordered that the monies so held vests in the applicant. The applicant wishes to undertake the reconciliation of accounts with the respondent to ascertain how much money the respondent is liable to pay the applicant. However, the applicant's previous counsel on record, Rachier & Amolo Advocates, declined to execute the release forms to enable Access Bank to release the said funds forthwith in compliance with the award claiming a lien over the same for other services rendered to the applicant.

6. Through written submissions dated 4th March 2025, the applicant submitted that the firm of Rachier & Amollo Advocates were estopped from claiming lien over monies that were deposited in a joint interest earning account as the same were already subject of an arbitration and therefore depending on the outcome and whoever would have been the successful party would be the one entitled to the same.

7. The applicant also submitted that a lien claim ought to be for an ascertained debt by a creditor, but in the instant case, the firm of Rachier & Amollo Advocates has not demonstrated that the amount claimed was already due or that their advocate-client costs had been taxed.

8. The applicant relied on Lesinko Njoroge & Gathogo Advocates v Invesco Assurance Co. Limited & another High Court Embu Miscelleanous Civil Application No. 73 of 2018, where Justice Muchemi held that for a lien to arise, the party claiming the same must establish the existence of a debt or duty in respect of which it secures.

9. The applicant further submitted that since they did not participate in the conclusion of the arbitration proceedings, the applicant's incoming counsel ought to have been the joint signatory together with advocates for the respondent being LJA Associates and the firm would never have gotten an opportunity to lay any claim thereto.

10. The applicant highlighted that the application has been brought in good faith and without inordinate delay and that it stands to suffer irreparable loss if the prayer sought is not granted.

Response

11. In opposing the application, Rachier & Amollo Advocates filed a replying affidavit sworn by Steven Ligunya on 19th February 2025. He faulted the applicant for nondisclosure of its failure to pay for various legal services offered with the promise that the firm could recover the fees of over Kshs. 3,596,000/- upon conclusion of the arbitration. He acknowledged that the firm received a letter dated 24th October 2024 from the respondents requiring a release of the funds held, but asserted that the firm has the right to exercise lien.

12. Mr. Ligunya proposed that in the alternative, the applicant deposits Kshs. 3,596,000/- as security for the outstanding fees before the firm releases the Kshs. 2,300,000/- held. He also sought 14 days to file the firm's bills of costs for taxation before any funds can be released. He asserted that it would be a travesty of justice for the funds to be released without any security provision.

13. It was submitted that the non-disclosure of material facts by the applicant must have consequences, and any possible advantage to be derived therefrom must be denied. The firm relied on Aviation & Airport Services Workers Union (K) v Kenya Airport Authority & another [2014] eKLR on the duty to make full and fair disclosure of all material facts.

14. The firm highlighted that in the letter of 27th September 2021, the applicant admitted the existence of pending fees. It submitted that it is entitled as of right to hold lien over the applicant's money held. It relied on Booth Extrusions Limited (Formerly Booth Manufacturing Africa Limited) v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR, and Republic v Lucas M. Maitha Chairman, Betting Control And Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited [2015]

15. The firm also relied on B. M. Mung'ata & Co. Advocates v Seke (Environment and Land Miscellaneous Application 5 of 2021) [2022] KEELC 12706 (KLR) (28 September 2022) (Ruling) to argue that it had a legitimate expectation that it would be paid its legal fees by the applicant regardless of whether the advocate-client relationship was severed.

16. Statutory Manager United Insurance Company Limited v Edward Muriu Kamau, Njoroge Nani Mungai & Peter Munge Murage P/A Muriu Mungai & Co. Advocates [2013] eKLR where the court handling a similar matter relating to client's fund under advocate's lien observed that the taxation process cannot, of itself, be prejudicial to the applicant.

Analysis and Determination

17. A mix of issues. Leave for Ochieng' Opiyo & Co. Advocates to come on record for the applicant in place of the firm of Rachier & Amollo Advocates; and release of the money deposited in the joint account to the incoming advocates; and advocates lien by the outgoing advocates on the said funds.

Change of Advocates after Judgment

18. Change of advocates after judgment is governed by Order 9 Rule 9 of the Civil Procedure Rules; it is by an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

19. In Global Impex Machinery Limited v Vlan Construction Limited (HCCC NO. E193 OF 2019) [2021] eKLR, the court observed as follows:-

> "…. the court cannot stand in the way of a party seeking to exercise this right to legal representation as long as it is shown that such representation will not prejudice any of the parties to the suit and that the legal fees of the previous advocates on record are settled."

20. The rule in Order 9 Rule 9 of the Civil Procedure Rules came in to cure a mischief; instances where parties change advocates to deny the outgoing advocate legal fee.

21. In this matter, the previous advocates have opposed the application based on unpaid legal fees for various services rendered to the applicant. Therefore, the court ought to balance the applicant's right to legal representation and the previous advocates lien for payment of its legal fees in full. This balance will be demonstrated after the court has determined the question of the advocate's lien over the funds.

The funds and the advocates' lien

22. The second prayer is for an order to release to Ochieng' Opiyo & Co. Advocates all monies plus interest currently held in Access Bank Limited Account Number 000210293 Westlands Branch.

23. The applicant submitted that the firm of Rachier & Amolo Advocates were estopped from claiming lien over monies that were deposited in a joint interest earning account as the same were already subject of an arbitration and therefore depending on the outcome and whoever would have been the successful party would be the one entitled to the same.

24. However, the applicant also indicated that it was successful in the arbitration proceedings, and the Tribunal ordered that the monies so held vests in the applicant. Making the funds chargeable under the advocates lien.

25. The outgoing firm of advocates asserted that it had a right to exercise a lien over the funds held for its pending legal fees for various services rendered to the applicant.

Right to lien

26. Advocates have a right to hold a client's property as a lien under Section 52 of the *Advocates Act*. The lien may be general or particular. A right to lien entails the advocate's right to retain a client's property which is lawfully and continuously in his possession until his fees are satisfied. But, advocate's lien does not mean a right to the client's property.

27. A robust exposition of advocates lien, the undelying policy as well as its attributes was done in Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR, by the late Onguto J 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.
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> 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."

28. Where a sum of money is deposited in an account in the joint names of the counsel for the parties pending the hearing and determination of an arbitration, the advocate cannot claim a right to lien. However, the right of lien may be exercised against a client who is determined to be the party entitled to the funds so held.

29. This position was superbly explained in Republic v Lucas M. Maitha Chairman, Betting Control And Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited (Miscellaneous Civil Application No. 370 Of 2010), Justice Odunga thus: -

> " What then is the position where a sum of money is deposited in an account in the joint names of the counsel for the parties pending, say, the hearing and determination of an appeal? As long as the stay is in place pending the determination of the appeal, none of the parties can claim entitlement to the amount and therefore at that stage no right to a lien can be claimed. However, upon determination of the appeal any of the counsel whose client is determined to be entitled to the said fund may claim a lien thereon for the payment of his fees. That therefore means that the advocate whose client is unsuccessful cannot lay claim to that money as his client's entitlement has been extinguished and a right to a lien by an advocate can only arise where his client is entitled to the money in question. Again for the right to a lien to succeed, the advocate must be in possession of the funds. Where the advocate is nolonger, lawfully, in possession of the funds or the client's property, the right to a lien cannot be claimed. In this case it is not in doubt that the Firm ceased acting for the ex parte applicant herein. It is not contended that the Firm was unlawfully removed from the record. However, the funds which were deposited were still in account bearing the Firm's name. Whether in those circumstances the Firm can successfully claim the right to the sum in the said account is the subject of the yet to be heard and determined application."

30. The applicant also submitted that a lien claim ought to be for an ascertained debt by a creditor, but in the instant case, the firm of Rachier & Amollo Advocates has not demonstrated that indeed the amount claimed was already due or that their advocate-client costs had been taxed.

31. I note that the applicant does not expressly deny that the previous advocates provided it various legal services. I also note that the firm submitted evidence in the letter of 27th September 2021 showing that the applicant admitted the existence of pending fees.

32. Although the fees claimed have not been taxed, 'the existence of the lien arguably does not rest upon a bill having been rendered to the client': Re Taylor [1891] 1Ch 590, 596.

33. The firm urged the court to order that the applicant deposits Kshs. 3,596,000/- as security for the outstanding fees before the firm releases the Kshs. 2,300,000/- held. He also sought 14 days to file the firm's bills of costs for taxation before any funds can be released.

34. Under Order 52 Rule 4 (3), 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.

35. However, a right to lien ought to be commensurate to the claim for fees, and for the right of lien to succeed, the advocate must be in possession of the funds. Justice Odunga in Republic v Lucas M. Maitha Chairman, Betting Control And Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited (Miscellaneous Civil Application No. 370 Of 2010), noted that:-

> "In this case, I cannot determine at this stage and the Firm has not indicated the amount it claims in respect of its fees. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589."

36. Accordingly, I find that the firm of Rachier and Amolo Advocates is entitled to exercise the right of lien over the funds held pending the taxation of its bills of costs which shal be paid out those funds.

37. In this case, charging the advocates lien over the funds held of Kshs. 2,300,000/- is the lower risk of injustice in a claim of fees in the sum of Kshs. 3,596,000/-. It also attains a proportioned balance of the rights of the parties herein in the firm retaining Kshs. 2,300,000/- as lien, considering that its fees have not been taxed.

Disposal

38. In conclusion, after taking care of the advocate's lien over the funds, there is absolutely nothing which should impeded the applicant's right to legal representation by legal counsel of own choice. The application is therefore, partially successful.

39. In the upshot, I order that:-

    1. Leave is granted to the firm of Ochieng' Opiyo & Co. Advocates to come on record for the applicant in place of the firm of Rachier & Amollo Advocates in the matter;

    2. Rachier & Amolo Advocates do file their bills of costs within 14 days from the date of this ruling;

    3. Rachier & Amolo Advocates shall retain and hold a sum of Kshs. 2,300,000/- out of the funds held in the joint account as security (lien), for the advocates' fees pending taxation of its bills of costs.

    4. No orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 8TH DAY OF MAY, 2025

F. GIKONYO M

JUDGE

In the presence of: -

1. Ms. Adunga h/b Rachier for outgoing firm

2. Orwenyo for applicant

3. Opiyo for respondent

4. CA- Kinyua