



**Waiyaki Way Developers Limited v Asega t/a NK Mugo & Co Advocates (Civil Appeal E262 of 2024) [2025] KEHC 12179 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 12179 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E262 OF 2024**

**TW CHERERE, J**

**MAY 15, 2025**

**BETWEEN**

**WAIYAKI WAY DEVELOPERS LIMITED ..... APPLICANT**

**AND**

**NORMAN KHAGAI ASEGA T/A NK MUGO & CO  
ADVOCATES ..... RESPONDENT**

**RULING**

“An advocate’s entitlement to fees does not automatically confer a right to withhold a client’s files. The law safeguards both the advocate’s remuneration and the client’s access to justice—each within its proper forum.”

1. This ruling relates to an application arising from a dispute between a client and its former advocates over the release of legal files. The Applicant was formerly represented by the Respondent firm of advocates.
2. Following the termination of the advocate-client relationship, the Applicant instructed the firm of Messrs. Tito & Associates Advocates to take over the conduct of its legal affairs.
3. Despite several written requests by the Applicant’s new advocates, the Respondent has declined to release the files, prompting the Applicant to file the present Originating Summons dated 04<sup>th</sup> December 2024, and subsequently amended on 18<sup>th</sup> March 2025.
4. The amended Originating Summons seeks:
  1. An order directing the respondent to deliver to the applicant all legal files in its custody relating to the applicant’s matters



2. Costs of the application.
5. The application is supported by the affidavit of Patrick Sagwa Kisia, the applicant's business manager, sworn on 04<sup>th</sup> December 2024. Annexed to the affidavit are letters and email correspondence marked "WTT 1" evidencing the applicant's efforts to retrieve the files.
6. The Respondent opposes the application through a replying affidavit sworn by Mr. Norman Khagai Asega advocate, on 26<sup>th</sup> February 2025. The Respondent raises issues among others that:
  1. The Applicant has not settled legal fees due and has therefore not approached the court with clean hands;
  2. The Respondent is lawfully exercising a statutory and common law lien over the files until the said fees are paid;
  3. The files contain confidential information, including third-party data protected under the *Data Protection Act, 2019*.
7. The Respondent subsequently filed a further affidavit sworn by Mr. Norman Khagai Asega, advocate, on 23<sup>rd</sup> April 2025. He deposes that:
  1. Files for which no legal fees are outstanding have already been released to the applicant;
  2. A bill of costs dated 22nd April 2025 has been filed and is currently pending taxation;
  3. It is only fair and just that the respondent continues to hold the remaining files under a lien to secure payment of outstanding legal fees

### **Issues for Determination**

8. From the affidavit evidence on record, the following issues fall for determination:
  1. Whether the Respondent has a lawful right of lien over the Applicant's files in the circumstances of this case
  2. Whether the *Data Protection Act, 2019* bars or limits release of the files
  3. Who should bear the costs of the application.

### **Analysis and Determination**

#### **Right of Lien by Advocates**

9. Although an advocate may assert a lien over a client's files for unpaid fees, such a right must be exercised within lawful bounds and cannot defeat access to justice.
10. In *John Karungai Nyamu & Another v Muu & Associates Advocates* [2008] KEHC 3197 (KLR), the Court held:

"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."



11. The issue of lien was also addressed in the persuasive decision in *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] KEHC 6096 (KLR) where it was stated:

“I agree with the learned Judge's holding that the Advocate's fee only becomes due after the bill of costs has been taxed by the court. Before the bill is taxed, there is no telling how much is due to the Advocate. The position therefore is that an advocate cannot exercise lien over client's money on the basis of a bill of cost that is yet to be taxed. It is improper for an advocate to withhold a client's money on account of fees that is yet to be ascertained through the taxation process. The Advocate should release the client's money to him.”
12. Similarly, in *Ocean View Plaza Limited v Gor Chitranjan Bhanuprasad and Gor Shishir Sooryakant Bhanuprasad trading as C.B Gor & Gor Advocates* [2020] KEHC 604 (KLR), the Court observed:

“Sections 46 and 47(1) of the *Advocates Act* make it mandatory that an advocate shall not commence any suit for recovery of costs until a bill of costs has been delivered and taxed. The right of lien being ancillary to recovery of fees, cannot be perfected unless and until the bill is taxed or an agreement exists. Until then, the lien cannot be asserted to withhold the client's files or obstruct ongoing proceedings.”
13. The same reasoning was adopted in *Zachary Mogeni v Standard Chartered Bank of Kenya Ltd* [2021] eKLR, where the Court held:

“I agree with the applicant that the respondent is not entitled to hold on to the file demanding payment of the legal fees as the same is tantamount to “ransom”. The issue of fees can be settled by filing an advocate/client bill of costs. .”
14. In the present case, the Respondent has not demonstrated that it has delivered a fee note, filed a bill of costs, or initiated recovery proceedings. Its continued refusal to release the applicant's files is therefore without legal justification.

### **Application of the Data Protection Act**

15. Whereas the Act establishes principles for the lawful processing of personal data, including the obligations of data controllers and data processors under Section 29, it does not extinguish a data subject's right to access their personal data.
16. In this case, the Applicant qualifies as a data controller subject under Section 2 of the Act and also has control over the data in question in its capacity as the Respondent's client. Additionally, the third parties alluded to are the Applicant's client that were purchasing property through the Respondent and their data for the purposes of this case belongs to the Applicant.
17. Accordingly, the Data Protection Act cannot be invoked to justify withholding the Applicant's legal files. No provision of the Act authorizes an advocate to deny a client access to their own documents, especially where there is no demonstrated risk to third-party privacy or confidentiality.



## **Costs**

18. In *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* [2016] eKLR, the Court held:

“The Court has discretion in awarding costs and that discretion must be exercised judicially and not whimsically. A successful party should ordinarily be awarded costs unless the Court for good reason directs otherwise.”

19. The respondent's conduct necessitated the filing of this application. The applicant is the successful party and is entitled to costs.

20. In the end, this court finds the respondent's continued retention of the applicant's files to be without legal basis. Accordingly, the following orders are issued:

1. The Respondent shall within seven (7) days deliver to the Applicant, through its current advocates, all files and documents in its custody relating to the Applicant's legal matters;
2. The costs of this application shall be borne by the Respondent.

Orders accordingly.

**DELIVERED AT NAIROBI THIS 15<sup>th</sup> DAY OF May 2025**

**WAMAE.T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Mr. Nyambala

For Applicants - Ms. Owuor for Tito & Associates Advocates

For Respondents - Ms. Mathii for N.K.Mugo & Co. Advocates

