



REPUBLIC OF KENYA



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Oddiaga t/a Stephen Oddiaga & Company Advocates v Kanji & 2 others (Civil Case E119 of 2018) [2025] KEHC 12316 (KLR) (17 July 2025) (Judgment)

Neutral citation: [2025] KEHC 12316 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE E119 OF 2018
F WANGARI, J
JULY 17, 2025**

BETWEEN

**STEPHEN ODDIAGA T/A STEPHEN ODDIAGA & COMPANY
ADVOCATES PLAINTIFF**

AND

**VIKRAM C. KANJI 1ST DEFENDANT
SANJEEV KHAGRAM 2ND DEFENDANT
FAIYAZ ANJARWALLA PARTNERS AT A.B. PATEL & PATEL
ADVOCATES 3RD DEFENDANT**

JUDGMENT

1. Through an amended plaint dated 17th October, 2019 and filed on even date, the Plaintiff prays for judgement against the Defendants jointly and severally as follows: -
 - a. Judgment to be entered for the Plaintiff against the Defendant for Kshs. 23,796,998.36/=;
 - b. A declaration that the Defendants have no right to continue holding on the fixed account without a court order;
 - c. A declaration that the Defendants can only hold the title of the portion of Plot No. Kwale/Diani Beach/203 which his client bought and pursuant to the agreement as captured in HCC No. 312 of 2008;
 - d. An order that the Defendants to return to the Plaintiff a portion of Plot No. Kwale/Diani Beach/203 which does not belong to the Defendants client;
 - e. An order compelling the Defendants to comply with the consent order of 11th June, 2010 recorded in HCC No. 315 of 2008;



- f. The Defendant be directed to sign documents releasing the Fixed Deposit amount of Kshs. 23,796,998.36/= to the Plaintiff forthwith and unconditionally;
 - g. The Defendant be directed to sign documents releasing the Fixed Deposit amount of Kshs. 23,796,998.36/= to the Plaintiff forthwith and unconditionally;
 - h. Costs and interests at court rates from the date of filing this suit until payment in full; and
 - i. The court be pleased to issue any order it thinks fit and fair in the circumstances.
2. Several other interlocutory applications were made. From the proceedings on record, it appears that none of the said applications were substantively considered. It appears that they were subsumed in the main hearing. This being the case, the judgement herein shall only concern itself with the merits of the main suit. All the interlocutory applications are deemed spent.

Pleadings

3. In his amended plaint, the Plaintiff avers that sometime on 29th November, 2010, he together with the Defendants opened a joint account pursuant to a court order in HCCC No. 315 of 2008. According to the Plaintiff, the said order was specific and only limited to the suit whose details were given in the said order such that the Plaintiff and the Defendants were to release the fixed deposit and release the money to the Plaintiff on terms of the order in HCCC No. 315 of 2008.
4. It is the Plaintiff's position that the Defendants in the meantime collected the Title Deed for Plot Kwale/Diani Beach/203 and gave a professional undertaking which they subsequently reneged and the Plaintiff applied for execution which application was settled by consent leading to the deposit in issue. It is averred that the fixed deposit account was opened in the name of the Plaintiffs and the Defendants and that the 2nd Defendant signed the deposit slip on behalf of the partnership and thus all the partners are jointly liable.
5. The Plaintiff contends that even after the close of the suit leading to the deposits, the Defendants has refused, ignored and or rejected demands to have the deposit released and has acted contrary to the orders of this court and further stubbornly insisted on keeping the deposit on a fixed deposit account for no apparent reason.
6. It is the Plaintiff's position that he has tried in the past to have the deposit stopped but the Defendants have declined by insisting that there is a case being ELC No. 134 of 2012 and that the fixed deposit cannot be released until the finalization of that suit. Accordingly, it is the Plaintiff's position that the Defendants' stance is erroneous since there is no order issued by the court in ELC No. 134 of 2012 touching on the issue of deposit held by the parties herein.
7. The Plaintiff avers that the Defendants have filed ELC No. 134 of 2012 claiming that Plot No. Kwale/Diani Beach/203 has been fraudulently taken away and transferred to other people yet the property is still in the Defendants' clients name as recent as July, 2019 such that ELC Case No. 134 of 2012 is just a waste of time.
8. He further avers that in compliance with the court order in HCCC No. 315 of 2008, he released the title deed and lease for Plot No. Kwale/Diani Beach Block/203 to the Defendants together with the FR map for registration, retain the portion belonging to the Defendants' clients and return the other copies to him but this has never been done and as such he now demands that the Defendants be compelled to register the subdivision and return the title to him.



9. The Plaintiff's position is that the Defendants are illegally holding the entire title for Plot No. Kwale/Diani Beach Block/203 and yet they are only entitled to a portion of the land as per the sale agreement which was the basis of HCCC No. 315 of 2008. He further contends that the Defendants are bound by the court order in HCCC No. 315 of 2008 and have no right to refuse to sign for the release of the amount in the fixed deposit for reason that the suits giving rise to the deposit in issue are spent and closed and that there is no order requiring continuous retention of the deposit.
10. He states that the Defendants cannot create a situation where money held in the Fixed Deposit Account indefinitely for reason that he has picked up fresh issues with the person who sold him the property and that the Defendant is now abusing the process of court. His position is that the purpose of the fixed deposit having been satisfied, he wants to come out of it and now wants the court to come in and give orders for the release of the money to avoid the current uncertainty.
11. Accordingly, the Plaintiff believes that all the money in the joint fixed account should be released to him to deal further including having his fees paid from the same amount.
12. It is on this backdrop that he now demands the Defendants to be ordered by the court to sign and release the amounts in the fixed deposit account amounting to Kshs. 23,796,998.36/= as of 21/12/2018 to the Plaintiff forthwith and in default, judgement be entered for the Plaintiff against the Defendant for the said amount plus costs and interest at court rates from the date of filing the suit in court.
13. The Defendants filed a joint amended statement of defence dated 19th November, 2019 and filed on even date. At the onset, they deny trading as A.B. Patel & Patel Advocates but that they are only partners in the firm of Messrs. A.B. Patel & Patel Advocates holding a fixed deposit account with Stephen Oddiaga & Company Advocates at the Bank of India. Accordingly, there can be no cause of action as against the Defendants as sued and plead that the suit ought to be struck out and dismissed against them with costs.
14. It is averred that the Plaintiff has no and cannot have any cause of action as against the firm of Messrs. A.B. Patel & Patel Advocates given that the joint account was opened in the name of the Advocates of the parties to Mombasa HCCC No. 315 of 2008 (Vipin Maganlal Shah & Another v Hamadi Juma Mwakibibo) pursuant to the orders made therein and consequently, the present suit out to be struck out or dismissed with costs.
15. On the substance of the averments in the amended plaint, the Defendants state that Mombasa HCCC No. 315 of 2008 was filed by the Plaintiffs in that case, Vipin Maganlal Shah & Vijay Lakhani against Hamadi Juma Mwakibibo to specifically enforce an agreement for sale dated 21st December, 2007 in respect of Kwale/Diani Beach Block/203 and a decree therein was issued in respect thereof on 19th December, 2008 following the orders made on 11th December, 2008.
16. It is averred that pursuant to the terms of the decree, the balance of the purchase price in respect of Kwale/Diani Beach Block/203 was to be paid upon certain terms being complied with as set out thereunder and the property being effectually transferred from the said Hamadi Juma Mwakibibo to Vipin Maganlal Shah and Vijay Lakhani or their nominees.
17. It is the Defendants' position that part of the payment terms was complied with by the said Vipin Maganlal Shah and Vijay Lakhani but just as the said property known as Kwale/Diani Beach Block/203 was transferred to the said individuals and/or their nominee, they became aware of a claim filed by Seaview Investments Limited in Mombasa HCCC No. 211 of 2006 as against the said Hamadi Juma Mwakibibo claiming proprietorship interest over the said property



18. It is averred that the said Seaview Investments Ltd subsequently enjoined Aniket Property & Investments Limited, the transferee and Vipin Maganlal Shah's and Vijay Lakhani's nominees into the suit and obtained restraining orders as against it preventing its dealing with the property in any manner whatsoever. Consequently, a consent order was recorded in Mombasa HCCC No. 315 of 2008 to have the sum of Kshs. 13,500,000/= deposited in a joint interest earning account of the parties' advocates.
19. It is said that in 2011 or thereabouts, the said Hamadi Juma Mwakibibo fraudulently and unlawfully purported to obtain certificates of lease in respect of the alleged sub-divisions of Kwale/Diani Beach Block/203 (when in fact, the original title to the property is in the custody of Aniket Property & Investments Limited and such sub-divisions could not be effected without its surrender) and purported to sell the purported sub-division to Venture Holdings Limited and other third parties in 2012.
20. On 14th June, 2012, it is said that the Plaintiff wrote to Messrs. A.B. Patel & Patel Advocates as a matter of urgency acknowledging the property known as Kwale/Diani Beach Block/203 was transferred to Aniket Property & Investments Limited and that "...part of the proceeds from sale of that transaction is still being held in a joint account awaiting finalization of the case affecting this plot..." and drawing Messrs. A.B. Patel & Patel Advocates attention to the fraud by Hamadi Juma Mwakibibo, it is averred that the Plaintiff in the same letter beseeched the firm of Messrs. A.B. Patel & Patel Advocates to take appropriate action to protect the proprietary interests of its clients.
21. It is the Defendants' position that the Plaintiff clearly recognized and acknowledged that the said Hamadi Juma Mwakibibo was not entitled to the sums placed in the joint account so long as the cases affected the plot remained unfinalised.
22. They state that there is and still remains pending Mombasa ELC Case No. 134 of 2012 (Aniket Property & Investments Limited v Hamadi Juma Mwakibibo, Venture Holdings Limited & Others) arising out of the fraudulent and unlawful attempt by Hamadi Juma Mwakibibo to defeat Aniket Property & Investments Limited's proprietary interest and deprive it of the exclusive use, possession and occupation of the said property.
23. It is averred that Hamadi Juma Mwakibibo cannot seek to benefit from or be entitled to any sums deposited in the joint account given his fraudulent and unlawful conduct until the court make final findings upholding Aniket Property & Investments Limited's title and cancelling all the other titles and vitiating claims against the property comprised in Kwale/Diani Beach Block/203.
24. It is further pleaded that the Plaintiff is not and cannot in the premises or in any event claim the sums paid into the joint account in his own capacity given that he was only acting as an Advocate for Hamadi Juma Mwakibibo and rightfully acknowledges his client was engaged in unlawful and fraudulent conduct as he should in order to uphold his personal, moral and ethical integrity.
25. The allegation of undertaking is vehemently denied and that the Plaintiff in his personal capacity as an Advocate lacks locus standi to enforce the same. It is averred that it is apparent that the Plaintiff's claim appears to be against Hamadi Juma Mwakibibo who he previously represented for his fees and the same cannot be enforced as against the Defendants, the firm of Messrs. A.B. Patel & Patel Advocates nor Aniket Property & Investment Limited since Hamadi Juma Mwakibibo's entitlement to the sum in issue is yet to crystallize.
26. Therefore, it is the Defendants' position that the Plaintiff is not entitled to an order to compel the release of the said amount of Kshs. 23,796,998.36/= from the joint account nor judgement be entered against them as prayed. It is stated that the Plaintiff is not entitled to the release of the sum of Kshs. 23,796,998.36/= whether as claimed or at all. They pray that the suit be dismissed with costs.



27. The Plaintiff filed his reply to the amended statement of defence dated 27th November, 2019 and filed on the same day where he negated the issues raised in the amended statement of defence. Key among them is that subsequent to the decree in HCCC No. 315 of 2008, the Plaintiffs defaulted on the payment and the Defendant took out warrants for execution.
28. It is averred that the Plaintiff made an application for stay of execution and review of the judgement and the Defendants in that suit made their own application which applications were settled by another consent dated 11/6/2010 allowing the balance of the sums to be deposited in a joint account between the Plaintiff and the Defendant.
29. The Plaintiff states the Plaintiff in HCCC No. 315 of 2008 was aware that HCCC No. 211 of 2006 was withdrawn and that based on order number (c) in HCCC No. 315 of 2008, the funds in the joint deposit account would be released after finalisation of the dispute which had been raised by a party in HCCC No. 211 of 2006 challenging the withdrawal and the court confirmed the withdrawal to be proper in its ruling in HCCC No. 211 of 2006.
30. Several other negotiations have been made and the court has given due consideration to the same. In totality, the Plaintiff urges the court to disregard the amended statement of defence and allow the suit as prayed in the amended plaint.
31. Parties filed their respective lists of issues. The Plaintiff's list of issues is dated 27th January, 2021 and filed on the same day. He has identified five (5) issues among them whether the Plaintiff and the Defendant opened a joint account on 29th November, 2010 pursuant to a consent recorded in HCCC No. 315 of 2008. If yes, who signed the account opening forms and was the amount to be released to the Plaintiff in terms of the consent/order entered into in HCCC No. 315 of 2008? The other question posed is whether the Defendant collected a title deed in favour of the client from the Plaintiff and whether the release of the said title was condition.
32. On the part of the Defendants, their list of issues is dated 26th October, 2021 and filed on 27th October, 2021. It contains seventeen (17) grounds among them whether the Plaintiff has any sustainable cause of action against the Defendants and whether the Plaintiff act or have instructions to act for and on behalf of Hamadi Juma Mwakibibo in so far as the subject suit is concerned.
33. Other issues are whether there is any existing joint account opened in the names of the Plaintiff in his personal capacity and in the personal names of the three Defendants is the suit as alleged and whether Mombasa ELC Case No. 134 of 2012 (Aniket Property & Investments Limited v Hamadi Juma Mwakibibo, Venture Holdings Limited & Others) is still pending hearing in the ELC Court.

Parties' Testimony

34. The Plaintiff testified as the only witness. He adopted his statements dated 19/12/2018 and 17/10/2019. He also produced three (3) sets of documents which were marked as exhibits 1 to 28.
35. On cross examination, he stated that he was claiming the money in a joint account between Oddiaga & co and A.B. Patel to be released to him. He confirmed that the same had been deposited pending hearing of the case and that it was part of the purchase price of Plot 203. He confirmed that the Vendor was Hamadi Juma Mwakibibo who was his client at that point.
36. On suit No. 211 of 2006, he stated that the same was filed because there was a claim by the Purchaser that there was a pending suit that was yet to be determined and that the suit related to the same land. He confirmed that a third party was claiming an interest in the land and that the money continues to be in the joint account.



37. On the letter dated 14/6/2012, he stated that it related to Kwale Diani Beach 1543 which was a portion of Plot Diani Beach 203. He confirmed that the plot was in issue and that the first paragraph confirmed that the portion had been transferred to A.B. Patel's client. He denied that the money was to secure the interest of A.B. Patel's client and that the letter was to alert A.B. Patel since he had released the entire parcel. He confirmed that the letter talked about fraud and collusion but he did not know who received the titles.
38. He confirmed that the letter had enclosed a sale agreement wherein Hamadi Juma Mwakibibo and Venture Holdings were seller and purchaser respectively. He denied knowing who was selling but stated that his former client colluded to obtain sub-division when the title was with A.B. Patel Advocates. He also confirmed that it was not possible for Mwakibibo to obtain any sub-divisions when the original title was with A.B. Patel & Patel Advocates.
39. He added that he came to learn of the case later. He contended that if his client made a fraudulent sub-division then it was a fraudulent venture but denied that his former client was not entitled to the purchase price. Shown a green card filed in ELC 134 of 2012, he confirmed that entry no. 9 showed that sub-divisions had been done. On why he warned Aniket if he believed that it was it was the one subdividing, he answered he could still have warned them.
40. He stated that the person entitled to the balance of the purchase is not Hamadi Mwakibibo. He added that he refused to extend F.D.R since he had a dispute with his former client and that he wanted to recover his fees from the money in the joint account. He confirmed that the balance of the purchase price to Mwakibibo will not crystallize if the subdivisions are upheld and that all monies will go to Aniket.
41. It was his position that the money to Mwakibibo could not crystallize till the case is finalized and that he will not be entitled until the land court makes the final orders. He confirmed that he was no longer acting for Mwakibibo and that though Mwakibibo said that he had paid him fees, he stated that it was not true. He insisted that the dispute he has with Mwakibibo is properly before court and though the dispute was between him and Mwakibibo, he had a right to demand money. That marked the close of the Plaintiff's case.
42. The 2nd Defendant testified on behalf of the Defendants. He adopted his statement dated 19/11/2019 as his evidence in chief and produced three (3) sets of documents which were numbered as exhibits 1 – 46.
43. On cross examination, he confirmed that two individuals brought the property and that there was an assignment by the two individuals to Aniket Property. He confirmed action in suit no. 315 and his duty was to enforce the agreement. He confirmed making an application to join Oddiaga & Co. Advocates in Suit No. 315/2008 but he confirmed that the same was concluded.
44. He confirmed releasing various amounts of money to various individuals among them Mwakibibo and Thomas Mwinyikai. He also stated that the Plaintiff was present when payments were being made. He stated that he only received the mother title and the scheme.
45. He concluded that the money in the joint account if the suit is successful, Mr. Mwakibibo will be entitled to the same. His position was that the court was aware the money was in a joint account. He contended that A.B. Patel is a partnership having three (3) partners and that he was testifying on behalf of the partnership. That marked the close of the Defendants' case.



46. Directions were taken to canvass the parties' rival arguments by way of written submissions. It is only the Plaintiff who filed his submissions. They are dated 28th February, 2024. They majorly restate the parties' respective pleadings and reiterate that the Plaintiff is entitled to the sums in the joint account.
47. The decisions in *United Insurance Co. Ltd v Edward Muriu Kamau, Njoroge Nani Mungai and Peter Mungai Murage t/a Muriu Mungai & Co. Advocates* [2013] eKLR and *Mutahi Maseki v Imran Nurshad Manji* [2005] eKLR were cited in support.

Analysis and Determination

48. I have considered the pleadings, the evidence tendered both oral and documentary, the Plaintiff's submissions together with the authorities relied upon as well as the law and in my view, the following are the issues for determination: -
 - a. Whether the Plaintiff has any sustainable cause of action against the Defendants herein;
 - b. If the answer to (a) above is answered positively whether the Plaintiff is entitled to the reliefs sought; and
 - c. What is the order as to costs?
49. At the centre of the dispute herein is a joint Fixed Deposit Interest earning account between the Plaintiff and the Defendants. It is not in dispute that a sum of Kshs. 13,500,000/= was deposited in this joint account as a result of a consent entered into between the disputants. The genesis of the deposit was a sale agreement dated 21st December, 2007 in respect of Kwale/Diani Beach Block/203 between Vipin Maganlal Shah & Vijay Lakhani as the Purchasers and Hamadi Juma Mwakibibo as the Seller.
50. In order to enforce the said agreement, Vipin Maganlal Shah & Vijay Lakhani filed a suit being Mombasa HCCC No. 315 of 2008 against Hamadi Juma Mwakibibo. The Defendant, Hamadi Juma Mwakibibo filed a statement of admission and based on his admission, a consent dated 8th December, 2008 was signed between the respective advocates for the parties in HCCC No. 315 of 2008.
51. Based on the consent, judgement dated and delivered on 11th December, 2008 was issued wherein the terms of the consent were adopted as the terms of the judgement. Consequently, a decree dated 11th December, 2008 to give effect to the consent and the ensuing judgement was issued on 19th December, 2008. It clearly set out what each party was required to do in order to conclude the transaction.
52. It is also not in dispute that the Plaintiffs in HCCC No. 315 of 2008 partly complied with the payment terms and that indeed, Kwale/Diani Beach Block/203 was transferred to Aniket Property & Investment Limited which was the Plaintiffs' nominee. This is evidenced by the certificate of lease dated 3rd March, 2009 as attached to the Plaintiff's letter dated 6th March, 2009.
53. In their amended statement of defence, the Defendants averred that just as the property subject of HCCC No. 315 of 2008 was transferred to their clients and/or nominee, it was noted that there was another claim filed by a party called Seaview Investments Limited against the 1st Defendant, Hamadi Juma Mwakibibo in Mombasa HCCC No. 211 of 2006 wherein Seaview Investments Limited was claiming proprietorship interest over the same property.
54. It was further averred that Seaview Investments Limited subsequently joined Aniket Property & Investments Limited to HCCC No. 211 of 2006 and obtained restraining orders against Aniket preventing it from dealing with the property in any manner whatsoever. Having gone through the exhibits produced by both parties, the court notes that the consent dated 11th June, 2010 and adopted on 14th June, 2010 is the key document in resolving the conundrum herein.



55. Clause 3 of the corrected and counter-signed consent reads as follows: -

“The Plaintiffs do deposit on or before 15th August, 2010 the amount of Kshs. 13,500,000/ = in a joint interest deposit account between the parties’ Advocates pending the final determination in favour of the Plaintiffs and/or Aniket Property and Investments Limited of High Court Civil Case No. 211 of 2006 (Seaview Investments Limited v Hamadi Juma Mwakibibo & Others) whether in the High Court or on any appeal preferred therefrom whereby the proprietary rights of the said Plaintiffs and/or Aniket Property & Investments Limited in respect of Kwale/Diani Beach/203 are upheld and findings of proprietorship made in their favour with finality.”

56. This order was adopted as an order of the court on 14th June, 2010. However, from the ruling in Mombasa ELC No. 211 of 2006, the suit therein was withdrawn on 27th January, 2009 when the Notice of Withdrawal dated 10th December, 2008 was filed. However, despite the said withdrawal, it appears that the same was only formalized through the court’s ruling dated and delivered on 7th October, 2014.

57. This leaves no doubt that as at the time the consent dated 11th June, 2010 was being adopted as an order of the court, there was still in existence Mombasa ELC No. 211 of 2006. Having found as above, it is imperative to interrogate the consent dated 11th June, 2010. The operative words are as follows: -

“...The Plaintiffs do deposit on or before 15th August, 2010 the amount of Kshs. 13,500,000/ = in a joint interest deposit account between the parties’ Advocates pending the final determination in favour of the Plaintiffs and/or Aniket Property and Investments Limited of High Court Civil Case No. 211 of 2006...” (Underlining for emphasis).

58. From the wording of this consent, the sums in the joint account were to be deposited in a joint account “between the parties’ Advocates.” Therefore, I have no doubt in my mind that this money was being held for and on behalf of the parties. Not their respective advocates. Though the Plaintiff avers in the reply to the amended defence that the order in the consent was specific and only limited to the suit whose details were given in the said order, this court holds a contrary view.

59. The last part of the consent dated 11th June, 2010 provided as follows: -

“...pending the final determination in favour of the Plaintiffs and/or Aniket Property and Investments Limited of High Court Civil Case No. 211 of 2006 (Seaview Investments Limited v Hamadi Juma Mwakibibo & Others) whether in the High Court or on any appeal preferred therefrom whereby the proprietary rights of the said Plaintiffs and/or Aniket Property & Investments Limited in respect of Kwale/Diani Beach/203 are upheld and findings of proprietorship made in their favour with finality.”

60. The suit subject of the consent, that is, Mombasa HCCC No. 211 of 2006 was formally marked withdrawn on 7th October, 2014 through the ruling of S. Mukunya, J (as he then was). Did the said withdrawal determine the proprietorship of either Seaview Investments Limited or Aniket Property & Investments Limited in respect of Kwale/Diani Beach/203 with finality? I am afraid not.

61. By the time of the said withdrawal, Mombasa HCCC No. 134 of 2012 had been filed against Hamadi Juma Mwakibibo and Venture Holdings Limited on 11th July, 2012. Similarly, though the Plaintiff avers that Mombasa HCCC No. 315 of 2008 was determined through the decree issued on 19th December, 2008, I note that this case was transferred to Kwale Environment and Land Court and assigned a new number ELC No. 63 of 2021 and the same is still pending.



62. The issue of release of the funds in the joint account between the parties herein is a live issue before the Environment and Land Court and that court is the one properly seized with matter to determine the proprietary rights of all the competing parties with finality.
63. The court has found for a fact that the funds in the joint account is not being held on behalf of the Advocates but for the parties. The Plaintiff has cited several authorities on an Advocate's lien. The cited authorities though espousing the correct legal position cannot come to the Plaintiff's aid.
64. Even though Hamadi Juma Mwakibibo owes fees to the Plaintiff and that the funds in the joint account are being held to his account, the various issues raised in the cases pending before the Environment and Land Court makes any order for release of the said funds as premature. His right to claim the funds in the joint account is yet to crystallize.
65. This court in *Ocean View Plaza Limited v Gor Chitranjan Bhanuprasad and Gor Shishir Sooryakant Bhanuprasad trading as C.B Gor & Gor Advocates* [2020] eKLR while dealing with an almost similar issue observed as follows: -
- “...In my view, if the Defendant is still acting together with Oraro & Company advocates as it purported, then it is under the duty to finish the business for which they were retained and not to raise the issue of fees at this stage...”
66. In arriving at the said decision, the court relied on an excerpt from *Halsbury's Laws of England*, 4th Edition, paragraph 114 where the author stated: -
- “...a solicitor is a skilled person and it would be of no use to employ him except for the purpose of taking all the steps necessary to bring the suit to an end. If that is the nature of his employment, his contract is an entire one to carry on the action to its conclusion...”
67. Though parties appear to suggest that the Plaintiff is no longer acting for Mr. Hamadi Juma Mwakibibo, the funds are jointly held between the parties herein on account of Hamadi Juma Mwakibibo. The said funds can only be released upon conclusion of the matters in the Environment and Land Court and the issued on proprietorship is conclusively determined. In *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited* [2015] eKLR, Odunga, J (as he then was) held as follows: -
- “...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...”
68. Now to conclude on the first issue, there was no basis for the Plaintiff to institute the present suit as against the Defendants as the funds in issue were not being held to his account. The issue of his fees can only be determined upon conclusion of ELC No. 134 of 2012 and ELC No. 63 of 2021. The funds are still in a joint account and both the Plaintiff and the Defendants still wields control over the said funds.



69. If the same was to be released to any of the disputants herein, the very reason why the consent dated 11th June, 2010 was entered into would have been rendered a mockery to the parties whom the court sought to be protected. Furthermore, the amount the Plaintiff seeks to be released to him has not been specified how the same has been arrived at. It is trite that an Advocate can only exercise a lien on only the portion commensurate to his or her fee and not the entire amount. In *Republic v Lucas M. Maitha Chairman, Betting Control and Licensing Board & 4 others Ex -parte: Interactive Gaming and Lotteries Limited* (supra), the court observed thus: -

“...However, a lien is simply security for an advocate’s fees and an advocate is not entitled to exercise a right to a lien 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...”

70. In totality, I return a finding that the Plaintiff lacked any sustainable action as against the Defendants in their respective capacities as advocates for parties to a transaction.

71. Having found as above, the second issue becomes moot and therefore, any consideration thereof is rendered academic.

72. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. Furthermore, this discretion must be exercised judiciously and courts should not deprive a plaintiff/defendant of his or her costs unless it can be shown that they acted unreasonably. *The Halsbury’s Laws of England, 4th Edition (Re-issue), [2010], Vol.10, para 16, notes as follows: -*

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”

73. Any departure from this trite law can only be for good reasons which the Supreme Court in *Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR* noted includes public interest litigation since in such a case, the litigant is pursuing public interest as opposed to personal gain. The award of costs is therefore not cast in stone but courts have ultimate discretion.

74. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited [2014] eKLR* the court noted as follows: -

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Costs follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”



75. Considering that the parties herein are Advocates, I do not find it prudent to strain their relationship further. I believe the relationship as it is now as gleaned from the rival affidavits on record deserve a chance to be mended. In the circumstances, there will be no order as to costs.
76. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The suit instituted by way of the amended plaint dated 17th October, 2019 lacks merit and the same is hereby dismissed;
 - b. Considering the orders made in Miscellaneous Applications No. 458 of 2008, 532 of 2008, 546 of 2008 and E191 of 2023, the Plaintiff shall await the determination of ELC No. 134 of 2012 and ELC No. 063 of 2021;
 - c. Based on (b), the Plaintiff shall be at liberty to move the court accordingly; and
 - d. No orders as to Costs.
- Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17TH DAY OF JULY, 2025.

.....

F. WANGARI

JUDGE

In the presence of;

Mr. Oddiaga Advocate for the Plaintiff

Mr. Khagram Advocate for the Defendant

Ms. Norah, Court Assistant

