



**Oddiaga t/a Stephen Oddiaga & Company Advocates v Mwakibibo; Aniket  
Property Investments Limited (Affected Party) (Miscellaneous Civil  
Application 458 of 2008) [2025] KEHC 12301 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12301 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CIVIL APPLICATION 458 OF 2008**

**F WANGARI, J  
JULY 17, 2025**

**BETWEEN**

**STEPHEN ODDIAGA T/A STEPHEN ODDIAGA & COMPANY  
ADVOCATES ..... APPLICANT**

**AND**

**HAMADI JUMA MWAKIBIBO ..... RESPONDENT**

**AND**

**ANIKET PROPERTY INVESTMENTS LIMITED ..... AFFECTED PARTY**

**RULING**

1. There are three applications subject of this ruling. The first application is the one dated 25<sup>th</sup> November, 2024 which the application dated 20<sup>th</sup> December, 2024 appears to be a response. There is also the Notice of Preliminary Objection dated 7<sup>th</sup> February, 2025. For the expeditious disposal of the applications in issue, directions were taken to dispose the three of them simultaneously.
2. For ease of reference, the application dated 25<sup>th</sup> November, 2024 shall be referred to as the first application, the one dated 20<sup>th</sup> December, 2024 the second application and the preliminary objection as the third application. The first application brought under the provisions of Order 52 Rule 6 of the Civil Procedure Rules, section 52 of the Advocates Act and all other enabling provisions of the law seeks the following orders: -
  - a. Spent;
  - b. That the court to order a lien on money held in a Fixed Deposit Joint Account Number 001xxx at the Bank of India Mombasa Branch until the Applicant fees is paid in full;



- c. The court be pleased to order payment of the Applicant fees in this matter from sums held in the Fixed Deposit Joint Account Number 001xxx at the Bank of India Mombasa Branch;
  - d. Costs of the application be provided for.
3. The grounds in support of the application are briefly that there is money held in a joint account where the Applicant is involved and this money was procured through his professional effort. The Applicant's efforts to pursue payment of his professional fees has been successful and an order for a lien at this point is necessary and well founded.
4. The Respondent has been reluctant to pay the Applicant and his effort to execute has not been successful either and the only property the Applicant now knows of is the money in the Fixed Deposit Joint Account which the Respondent has an interest. The Respondent is no longer co-operative and is unwilling to pay the Applicant his fees despite the same being taxed and a decree issued.
5. The money in the joint account belongs to the Respondent and is partly in the Applicant's possession and the reason for seeking for a lien. It is stated that interest of justice in the matter requires that the application be allowed to protect the Applicant's fees especially where the money is a judgement obtained on his exertion, strain and effort. It is thus urged that the application be allowed to enable the Applicant recover his fees.
6. The application is supported by the Applicant's affidavit sworn on even date. Save for the annexures, it is but a restatement of the grounds in support and I do not see any benefit in rehashing the averments therein. Before venturing to the second application, this court notes that there are three other related files between the same parties herein. These are Miscellaneous Applications No. 532 of 2008, 546 of 2008 and E191 of 2023.
7. Parties consented to have the orders in this application to apply to the other three matters referred above. I also note that in Miscellaneous Application No. 546 of 2008, an application dated 7<sup>th</sup> June, 2024 seeking similar orders as the first application herein came up on 20<sup>th</sup> November, 2024. The record notes that it was unopposed and thus the same was allowed and orders to that effect issued on 22<sup>nd</sup> November, 2024.
8. It is these orders that seems to have precipitated the second application. The application is hinged upon the provisions of section 3A, 3B and 63 of the Civil Procedure Act and the inherent powers of the court. It seeks the following orders: -
  - a. Spent;
  - b. That Aniket Property Investments Limited be joined as an Affected Party/Respondent in this matter;
  - c. That the order made herein on 20<sup>th</sup> November, 2024 and issued on 22<sup>nd</sup> November, 2024 be stayed pending the hearing and determination of this application inter-partes;
  - d. That the order made on 20<sup>th</sup> November, 2024 in so far as it directs the joint account funds held in Fixed Deposit Account No. 001xxx at the Bank of India, Mombasa between the Applicant and Messrs A.B. Patel & Patel Advocates be held under lien and/or paid out to the Applicant be set aside;
  - e. That the costs of the application be awarded to the Affected Party/Respondent.
9. The grounds in support of the application are that the Applicant's application seeking a lien and payment out of the joint account funds held in Fixed Deposit Account No. 001xxx at Bank of India,



- Mombasa is mischievous and an abuse of court process. The joint account funds in the sum of Kshs. 13,500,000/= were placed pursuant to a court order issued in Mombasa High Court Case No. 315 of 2008 (*Vipin Maganlal Shah & Vijay Lakhani v Hamadi Juma Mwakibibo*).
10. It is stated that subsequent thereto, the property in respect of which these funds were placed in a joint account namely Kwale/Diani Beach Block/203 became the subject of Mombasa Environment and Land Court Case No. 134 of 2012 (*Aniket Property & Investments Limited v Hamadi Juma Mwakibibo & 12 Others*) and the Respondent, Hamadi Juma Mwakibibo is not and cannot be entitled to the sum of Kshs. 13,500,000/= at this stage.
  11. It is further contended that even if the Respondent became entitled to any funds if Aniket Property & Investments Limited were successful in Mombasa Environment and Land Court Case No. 134 of 2012 (*Aniket Property & Investments Limited v Hamadi Juma Mwakibibo & 12 Others*), this could be limited to only Kshs. 13,500,000/= but this can only happen upon final conclusion of the dispute over ownership.
  12. It is said that the Applicant has filed a suit against A.B. Patel & Patel Advocates in Mombasa High Court Civil Case No. 119 of 2018 (*Stephen Oddiaga T/a Stephen Oddiaga & Company Advocates v Vikram C. Kanji & 2 Others T/a A.B. Patel & Patel Advocates*) which is still pending and had been deferred pending conclusion of Mombasa Environment and Land Court Case No. 134 of 2012 (*Aniket Property & Investments Limited v Hamadi Juma Mwakibibo & 12 Others*).
  13. It is stated that the Applicant had also in Kwale ELC No. 63 of 2021 (*Vipin Maganlal Shah & Vijay Lakhani v Hamadi Juma Mwakibibo*) sought for release of funds in the joint account which was declined.
  14. It is its position that the present proceedings seeking a lien on the entire joint account funds and payment out therefrom is not only mischievous but is also an abuse of court process and intended to steal a march on Aniket Property Investments Limited which has not had use of the property subject of the dispute in Mombasa Environment and Land Court Case No. 134 of 2012 (*Aniket Property & Investments Limited v Hamadi Juma Mwakibibo & 12 Others*).
  15. It concludes that the Applicant is being less than candid and has deliberately misled the court in granting the orders sought. The application is further supported by the affidavit of even date sworn by Irene Njoki, the Affected Party's Legal Officer. It is equally a restatement of the grounds in support of the application save for the annexures. I shall thus not reproduce the same.
  16. The Applicant responded to the first application by way of a Notice of Preliminary Objection dated 7<sup>th</sup> February, 2025 (third application). This was in Miscellaneous Application No. 532 of 2008. The grounds of objection are as follows: -
    - a. The Intended Affected Party/Respondent cannot be a party to these proceedings for reasons that the proceedings herein relate to an Advocate and his Client in an Advocate – Client Bill of Costs;
    - b. That the issue between the Applicant and the Respondent had been determined and a judgement and decree issued, execution attempted but warrants returned unexecuted and the execution process can only be stayed by the Respondent and upon satisfying Order 42 Rule 6 where there is an appeal and Order 22 Rule 51 where there is an objection to execution and in the case at hand, there is no appeal and no objection to execution;



- c. The Intended Affected Party/Respondent has never been a party to HCC No. 315 of 2008 now ELC 63 of 2021, Kwale and cannot purport to authoritatively speak on matters in that suit;
  - d. The suit referred to by the Intended Affected Party/Respondent which is 134 of 2012 has no orders blocking the release of money in a joint account furthermore, there is no order barring release of money from Account No. 001xxx and the purported Intended Affected Party/Respondent cannot rely on this suit without a specific order;
  - e. The Intended Affected Party/Respondent has failed to disclose to court that MSA HCC No. 315 of 2008 now ELC No. 63 of 2021 has since abated and the said suit does not exist in law and cannot be a basis of blocking the Applicant from executing his fees;
  - f. The money subject matter of the sale whose balance is in the joint account has been paid out to several other parties including costs to the Intended Affected Party/Respondent Advocates such that for all purposes and intents, the matter regarding the sale is now closed and the balance deposited in the joint account belongs to the Respondent. The evidence of payments made are found in paragraphs 7, 8 and 9 of pages 92 and 93 of the Intended Affected Party bundle of documents.
17. For the said reasons, the Applicant is opposed to the Intended Affected Party/Respondent from joining the proceedings herein. In addition to the Notice of Preliminary Objection, the Applicant has filed a replying affidavit sworn and dated and on 21<sup>st</sup> February, 2025. Briefly, the Applicant contends that the Intended Affected Party/Respondent lacks locus standi in the matter since they are Advocate – Client proceedings seeking to enforce Advocates’ fees.
  18. It is averred that the Intended Affected Party having not been the Applicant’s client cannot purport to come and stop an Advocate from pursuing his fees from the Respondent who is the Applicant’s client. It is stated that the Applicant has a judgement and decree against the Respondent who is his client and the obligation to pay cannot be transferred a third party such as the Intended Affected Party.
  19. The Applicant states that he has no dealing with the Intended Affected Party since he is not a party to ELC No. 134 of 2012 and that the present case does not bar him from demanding his fees from the Respondent and recovering it from a deposit which he is a signatory and which came to the account for the benefit of the Respondent through his effort and the reason he is a signatory to the said account is to protect the Respondent’s interests.
  20. Making reference to paragraph 11 of the Intended Affected Party’s pleadings in Civil Suit No. 134 of 2012, the Applicant avers that the money in the fixed deposit account was to be released to the Respondent upon finalization of HCC No. 211 of 2006 which is said was finalized in 2014. However, it is said that Mr. Sanjeev Khagram Advocate has continuously refused to release the said amount and has insisted on holding on the deposit which belongs to the Respondent.
  21. On the re-amended plaint, it is the Applicant’s position that there is no prayer concerning the money in the fixed account and neither is there an order directing that the same be held intact in the joint account until the matter is heard and determined. It is said that in the entire suit, there is no claim that the 1<sup>st</sup> Defendant should refund the purchase price in the purchase of the suit property subject of ELC No. 134 of 2012 and the Intended Affected Party cannot now come and lay a claim to the money in the joint account which clearly belong to the Respondent.
  22. The Applicant confirms suing the Law Firm of A.B. Patel & Patel Advocates but the suit is to recover his fees. The Applicant also alludes to a disciplinary report made against Mr. Sanjeev Khagram Advocate



before the Law Society of Kenya (LSK). In conclusion, the Applicant states that as long as his fees remain unpaid having followed all due processes, to recover the same, his position is that he is entitled to the amount and the Intended Affected Party has no business blocking his payment.

23. The Applicant thus registered his strong opposition to the Intended Affected Party/Respondent joining the proceedings since according to him, these are special proceedings between an Advocate and his Client and no other party can be allowed to join. The Applicant also points out that there was no company resolution authorizing the deponent to swear the supporting affidavit, no evidence of deponent's employment in the Intended Affected Party's employment or a practicing certificate for both the year 2024 and 2025. He thus sought for the affidavit to be expunged.
24. Directions were taken to have the applications canvassed by way of written submissions. As at the time of writing this ruling, it is only the Applicant who had filed his submissions. They are dated 26<sup>th</sup> February, 2025. The Respondent neither filed any responses nor submissions.

### **Analysis and Determination**

25. I have considered the applications, the responses, the Applicant's submissions and the law and the issues falling for the court's determination are: -
  - a. Whether the Notice of Preliminary Objection dated 7<sup>th</sup> February, 2025 is well taken;
  - b. If so, whether the application dated 20<sup>th</sup> December, 2024 has any merits; and
  - c. Who bears the costs?
26. It is not in dispute that the application dated 20<sup>th</sup> December, 2024 was precipitated upon by the orders dated 20<sup>th</sup> November, 2024 and issued on 22<sup>nd</sup> November, 2024 in this matter. The same orders applied to Miscellaneous Applications No. 532 of 2008, 546 of 2008 and E191 of 2023. This ruling therefore applies to all the four files herein.
27. There being a preliminary objection on record, the same must be determined first since if the court upholds the objection, the application dated 20<sup>th</sup> December, 2024 shall fall by the way side.
28. The parameters for consideration of a Preliminary Objection are now well settled. A Preliminary Objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700, Law, JA stated: -

“A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles Newbold, P added: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”



29. This point was underscored by J.B. Ojwang, J (as he then was) in the case of *Oraro v Mbaja* [2005] eKLR where the court held as follows: -

“...I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed...”

30. For a Preliminary Objection to succeed the following tests ought to be satisfied; Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit or application.

31. Having considered the six (6) grounds argued in support of the preliminary objection, I have no hesitation to hold that they do not raise pure points of law capable of disposing of the application dated 20<sup>th</sup> December, 2024. They are argumentative inviting facts to be adduced and as such, they do not pass muster. In *Ushago Diani Investment Limited v Abdulwahab* (Environment & Land Case 12 of 2023) [2023] KEELC 20213 (KLR) (27 September 2023) (Ruling), the court considering a preliminary objection raised observed as follows: -

“...It will be necessary for this Honourable Court to peruse the proceeding in the High Court matter. That determination being a factual one, it cannot form the subject of a preliminary objection unless the facts are agreed...”

32. The issue of abatement of suit, payment of third parties from the same account, orders in other suits among others require evidence to be adduced. As such, the Notice of Preliminary Objection dated 7<sup>th</sup> February, 2025 is not well taken and the same is hereby dismissed.

33. Having found as above, I now turn to the two contested applications. As pointed out elsewhere in this ruling, the application dated 7<sup>th</sup> June, 2024 is a word for word replica of the one dated 25<sup>th</sup> November, 2024 which was only filed in Miscellaneous Application No. E191 of 2023. The order granted on 20<sup>th</sup> November, 2024 applied to the two other matters, that is 532 of 2008 and 546 of 2008. The court record shows that the same were allowed since they were not opposed.

34. However, it appears that the Intended Affected Party got to learn of those orders and thus sought to stay their implementation. This is why the court considers the application dated 20<sup>th</sup> December, 2024 as a response to the one dated 25<sup>th</sup> November, 2024. Having settled on the foregoing position, can the Intended Affected Party be joined in the application?

35. In answering this question, a consideration of who an affected party must be settled. The Civil Procedure Rules neither defines an affected party nor an interested party. Does this make the words non-existent? I do not think so. Rule 79 of the Court of Appeal Rules appears to be the guiding provision in this realm.

36. In *Center for Rights Education and Awareness & Others v John Harun Mwau & 6 others* [2012] eKLR, the Court of Appeal cited its earlier decisions in *Kamlesh Pattni v Starwood Hotels and Resorts World Wide Inc & 7 Others* Civil Application No Nai 330 of 2001 (UR 176/2001) and *Commercial Bank*



*of Africa Limited v Isaac Kamau Ndirangu*, Civil Appeal No 157 of 1991, (CA); [1992] eKLR and held thus: -

“...The person referred to in the Rule is, at least, one whose property rights are affected by the judgment appealed against and that he need not have been party to the superior court case to be served and allowed to participate in the appeal...”

37. It has been held that joinder of a party is not an automatic right but one which is granted upon exercise of the discretion of the court concerned. The court should however exercise such discretion under defined parameters being that it must be satisfied that: -
- a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral;
  - b. The intended party's presence would enable court to resolve all the matters in the dispute;
  - c. The intended party would suffer prejudice in case of non-joinder; and
  - d. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings.
38. The role of this court at this juncture is to juxtapose the parameters above as against the Intended Affected Party. To do so, a consideration of the decree dated 11<sup>th</sup> December, 2008 and issued on 19<sup>th</sup> December, 2008 in HCCC No. 315 of 2008 is paramount. The Respondent herein agreed to specifically perform the agreement dated 21<sup>st</sup> December, 2007 through his statement of admission. The Plaintiffs in the matter were Vipin Maganlal Shah and Vijay Lakhani.
39. The decree was followed by a consent by way of a letter dated 11<sup>th</sup> June, 2010 and submitted to court on 14<sup>th</sup> June, 2010. This consent was adopted as an order of the court. Item No. 3 of the said consent provided for deposit of a sum of Kshs. 13,500,000/= between the Applicant's firm and the firm of A.B. Patel and Patel Advocates. This sum was to remain in the joint interest earning account pending the final determination in favour of the Plaintiff or Aniket Property Investments Limited in HCCC No. 211 of 2006. Therefore, I find that Aniket Property Investments Limited is not a busy body and its interests can only be catered for if it is admitted as a party herein.
40. The sum of Kshs. 13,500,000/= was agreed to be held in a joint interest earning account pending determination of all the cases affecting the parties herein. If the same were to be subject of a lien or an order to have the said sums released at this stage, there are parties who will be greatly prejudiced. However, I do not see any prejudice that any party stands to suffer if what they had agreed prior to depositing the funds in an escrow account is allowed to mature.
41. This position was clearly captured in the court's ruling in Kwale ELC No. 63 of 2021 dated 25<sup>th</sup> March, 2022. It is not in contest that there is a pending case between the two firms of advocates herein being Mombasa HCCC No. 119 of 2018 seeking among other orders release of funds held in a joint account. This being the case, it would be premature to make an order for lien or release of funds before Mombasa HCCC No. 119 of 2018 is determined.
42. Similarly, this court takes judicial notice of the fact that Kwale ELC No. 63 of 2021 (Formerly Mombasa HCCC No. 315 of 2008) is yet to be determined. Though the Applicant averred that the said suit had abated, no evidence was presented to support that position. If indeed that is the position, nothing was easier than to move the Environment and Land Court appropriately. I think I have said enough to show that the application dated 20<sup>th</sup> December, 2024 is merited.



43. On costs, the same follows the event. This is the import of section 27 of the *Civil Procedure Act*. However, the court retains discretion whether to award the same or not. Though the Notice of Motion dated 20<sup>th</sup> December, 2024 has succeeded, it would be onerous to condemn any party to costs at this juncture. The application dated 25<sup>th</sup> November, 2024 is not an idle one. In the circumstances, costs shall abide the outcome in Mombasa HCCC No. 119 of 2018.
44. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notice of Motion Application dated 20/12/2024 has merits and same is allowed in terms of prayers 2 and 4;
  - b. Consequent to (a) above, the orders made on 20th November, 2024 and issued on 22nd November, 2024 are hereby set aside as they were issued prematurely;
  - c. The Applicant is at liberty to move the court accordingly in terms of the orders made in Mombasa HCCC No. 119 of 2018; and
  - d. These orders shall apply to Miscellaneous Applications No. 532 of 2008, 546 of 2008 and E191 of 2023.
  - e. File deemed as closed.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF JULY, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Mr. Oddiaga Advocate for the Applicant.

Ms. Kouna Advocate for the Respondent

Mr. Khagram Advocate for Affected Party

Ms. Norah, Court Assistant

