



Lantech (Africa) Limited v Alex Masika t/a Masika & Koross Advocates (Commercial Case E241 of 2023) [2024] KEHC 6475 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6475 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E241 OF 2023**

MN MWANGI, J

MAY 15, 2024

IN THE MATTER OF THE ADVOCATES ACT, CAP 16 LAWS OF KENYA

-AND-

**IN THE MATTER OF AN APPLICATION FOR AN ADVOCATE TO DELIVER
UP A CASH ACCOUNT OF MONEY HELD BY AN ADVOCATE TO THE
CLIENT**

-BETWEEN-

BETWEEN

LANTECH (AFRICA) LIMITED PLAINTIFF

AND

ALEX MASIKA T/A MASIKA & KOROSS ADVOCATES DEFENDANT

RULING

1. The plaintiff's Originating Summons dated 23rd May, 2023 has been filed pursuant to the provisions of Sections 3 & 3A of the [Civil Procedure Act](#), Cap 21 Laws of Kenya, Order 52 Rule 4 of the [Civil Procedure Rules](#), Section 47 of the [Advocates Act](#) and all other enabling provisions of the law. The plaintiff seeks the following orders –
 - i. The respondent renders a cash account of the money received on behalf of the applicant from Geothermal Development Company pursuant to the decree issued in HCCOMM Misc. Appli. No. E776 of 2020 Lantech (Africa) Limited vs Geothermal Development Company and HCCOMM Misc. Appli No. E779 of 2020 Geothermal Development Company vs Lantech (Africa) Limited;



- ii. An order compelling the respondent to disburse to the applicants all the sums determined to be lawfully due to the applicant having taken into account the legal fees lawfully due to the respondent;
 - iii. This Honorable be pleased to issue an interlocutory order preserving the sum of Kes.9,226,227.33 and USD 310,197.42 currently held in the Bank Accounts of Messrs. Masika and Koross Advocates by ordering that the said funds be deposited in a Joint Interest Earning Account between the respondent and John M. Ohaga SC, CArb; and
 - iv. Costs of this application be borne by the respondent.
2. The application is premised on the grounds on the face of the Motion and is supported by affidavits sworn by Aquinas Wasike, the plaintiff's Chief Executive Officer on 23rd May, 2023 and 14th September, 2023. In opposition thereto, the defendant filed a replying affidavit sworn on 10th July, 2023 by Alex Simiyu Masika, an Advocate of the High Court of Kenya and the Managing Partner at the defendant law firm.
 3. The 2nd application is the defendant's Notice of Motion application dated 12th July, 2023 filed pursuant to the provisions of Order 2 Rule 15 (1) (a) & Order 52 Rule 4 (3) of the *Civil Procedure Rules*, 2010, Sections 1A, 1B & 3A of the *Civil Procedure Act* and all enabling provisions of the law seeking the following orders-
 - i. That the Honourable Court be pleased to strike out the plaintiff's suit and/or Originating Summons and Chamber Summons application thereto dated the 23rd May, 2023;
 - ii. That this Honourable Court be pleased to affirm the Advocates/applicants right of lien over all of the decretal sums received until full fees is paid in HC. Miscellaneous Cause E776 of 2020 Lantech (Africa) Limited v Geothermal Development Company as consolidated with Miscellaneous Cause E779 of 2020 between the same parties and or until taxation of the Advocate-Client Bills of costs lodged for taxation;
 - iii. That the costs of this application and of the suit be borne by the plaintiff.
 4. The application is premised on the grounds on the face of the Motion. In opposition thereto, the plaintiff filed a replying affidavit sworn by Aquinas Wasike, the plaintiff's Chief Executive Officer on 27th September, 2023.
 5. The applications herein were canvassed by way of written submissions. The plaintiff's submissions were filed on 12th October, 2023 by the law firm of Wandabwa Advocates, whereas the defendant's submissions were filed by the law firm of Masika & Koross Advocates on 5th October, 2023.
 6. Mr. Karani, learned Counsel for the plaintiff referred to the provisions of Order 37 Rule 16 and Order 52 Rule 4 of the Civil Procedure Rules, 2010 and submitted that Courts have held that an Advocate's fees only become due after the bill of costs has been taxed by a Court, since before a bill is taxed there is no way of ascertaining how much is due to the Advocate. He submitted that an Advocate cannot exercise lien over a client's money that has come to him/her for onward transmission to a client on the basis of a bill of costs that is yet to be taxed. He further submitted that since the plaintiff's case is that the defendant received money on its behalf but failed to remit the said money to it, the defendant ought to render an account of the exact amount of money received on the plaintiff's behalf and how they have been applied it.
 7. Counsel stated that this is a case that warrants this Court to order delivery of a cash account by the defendant of the monies received on behalf of the plaintiff in respect of the proceedings in HCCOMM



Misc. Appl. No. E776 of 2020 and HCCOMM Misc. Appl. No. E779 of 2020. In addition, that in view of the plaintiff's averments that the defendant has failed to account to it for the monies received on its behalf despite a demand being made, this Court's jurisdiction has properly been invoked. Mr. Karani relied on the cases of *Jack and Jill Supermarket Limited v Gitonga Kimani & another Milimani Misc. Appl. No. 388 of 2002*, *John Karungai Nyamu & another v Muu & Associates Advocates [2008] eKLR* and *Nyandoro and Company Advocates v National Water Conservation and Pipeline Corporation (Miscellaneous Application 157 of 2016) [2022] eKLR* and contended that the defendant cannot withhold the plaintiff's money without its consent as to do so is illegal. In view of the foregoing, Counsel asserted that the defendant's right to exercise a lien over the plaintiff's money has not yet accrued.

8. Mr. Simiyu, learned Counsel for the defendant submitted the dispute herein arises from the reception and disbursement of the decretal amount arising from HCCOMM Misc. Cause No. E776 of 2020 as consolidated with HCCOMM Misc. Cause No. E779 of 2020. He contended that since the aforementioned matters are still at the execution stage and the defendant is still collecting funds following various garnishee orders from Court, this Court does not have the requisite jurisdiction to entertain the suit herein. Counsel further submitted that the current expected sum is in the regions of Kshs.3,900,000,000/=, whereas the defendant has only been able to collect Kshs.57,000,000 so far. He asserted that a cumulative statement of account will be rendered on completion of the recovery garnishee proceedings in order to be able to share the fees as per the contentious Legal Fee Agreement.
9. It was stated by Counsel that in light of the foregoing facts, it is premature to seek a cash account at this time. He further stated that the defendant has demonstrated in its replying affidavit that even after the entire decretal sum is collected and the defendant's and Senior Counsel's legal fees deducted, the balance does not entirely belong to the plaintiff in view of the several professional undertakings the defendant entered into with third parties on instructions of the plaintiff, promising to pay them out of the decretal amounts collected. Mr. Simiyu contended that any decision by this Court interfering with the Legal Fees Agreement dated 18th May, 2023 or collection and disbursement of the decretal sum in any way has serious ramifications to the parties herein, the third parties to the irrevocable professional undertakings, and John Ohaga SC.
10. Mr. Simiyu relied on the Court of Appeal case of *Joel Kyatba Mbaluka t/a Mbaluka & Associates Advocates v Daniel Ochieng Ogola t/a Ogola Okello & Co Advocates [2019] eKLR*, and argued that where an Advocate breaches a professional undertaking, the Court has jurisdiction to order the enforcement of that undertaking. He submitted that the undertakings by the defendant are in excess of Kshs.140,761,447.50, thus if the orders sought in the plaintiff's application are granted, the defendant stands to suffer damages by virtue of being compelled to honour the said undertakings. Counsel further submitted that payment of the aforesaid undertakings matures once the entire decretal amount is realized. He stated that it would be proper for the parties herein to wait until the entire decretal sum is collected, and then monies assigned by way of undertakings is disbursed before the any issues touching on account and disbursements can be raised.
11. Counsel for the defendant relied on the cases of *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR* and *Bill Baba Owour v National Bank of Kenya [2022] eKLR*, to bolster his assertion that an Advocate has a right of lien over funds in his/her possession for fees owed by the client and that the defendant herein is entitled to a lien over the said funds to enable it meet its legal fees and its irrevocable professional undertaking to various third parties. In submitting that Courts have held that where an Advocate is in possession of the funds the right of lien succeeds. Mr. Simiyu cited the case of *Republic*



Analysis and Determination.

12. I have considered the applications filed herein, the grounds on the said applications and the affidavits filed in support thereof. I have also considered the replying affidavits by the plaintiff and the defendant in the two applications, together with the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the plaintiff's Originating Summons should be struck out;
 - ii. Whether the defendant should be compelled to render a cash account of the money received on the plaintiff's behalf;
 - iii. Whether the defendant should be compelled to disburse to the plaintiff all the sums determined to be lawfully due to it less the legal fees lawfully due to the defendant;
 - iv. Whether an order should issue preserving the sum of Ksh. 9,226,227.33 and USD 310,197.42 currently held in the defendant's bank accounts in a Joint Interest Earning Account between the defendant and John M. Ohaga SC, CARb; and
 - v. Whether the defendant has a right of lien over all of the decretal sums received until full fees is paid in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc appl. No. E779 of 2020 dated 23rd May, 2023.
13. In the affidavit filed by the plaintiff, it averred that it instructed the defendant to represent its interest in arbitral proceedings whose final award became the subject of the proceedings in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc appl. No. E779 of 2020, and for the said reason, the parties herein executed a retainer agreement for legal fees paid to the defendant and its Lead Counsel.
14. The plaintiff deposed that the aforesaid matters were determined in favour of the plaintiff vide a Judgment and decree dated 28th January, 2021 for USD 18,585,866.6 and costs of Kshs.5,034,400/= together with interest at a rate of 14%. In addition, that Geothermal Development Company Limited was also ordered to pay the costs of the two suits.
15. The plaintiff averred that the defendant then started executing the aforesaid decree for its benefit and has so far collected Kshs.16,456,047.30 and USD 310,197.42 has been recovered from GDC's accounts on account of Garnishee Orders obtained. It was further averred that out of the said sum, Kshs. 16,456,047.3 and USD 310,197.42 held by the defendant, Kshs.6,230,480.00 has been disbursed by the defendant on the plaintiff's instructions.
16. In view of the above, the plaintiff contended that the defendant currently holds Kshs.9,226,227.33 and USD 310,197.42 belonging to it. The plaintiff asserted that the defendant has refused to disburse the said monies to it and has instead filed two bills of costs in respect of matters it alleges it undertook for the plaintiff.
17. The plaintiff stated that in view of the above, it is apprehensive that the monies held by the defendant could be dissipated to its detriment given its financial obligation. It urged that it is in the interest of justice for the orders sought by the plaintiff to be granted, and in any event the defendant stands to suffer no prejudice.



18. The defendant in response thereto stated that the plaintiff's application does not disclose a reasonable cause of action as against it. This is because, the plaintiff has admitted to being indebted to the defendant and even proposed to settle the defendant's legal fees in instalments, and for that reason, the plaintiff's application ought to be struck out.
19. It averred that after the first garnishee proceedings in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020, it rendered accounts to the plaintiff on 24th March, 2023 of the monies received and/or recovered towards realizing the decree herein. The defendant further averred that the plaintiff has engaged its services for legal representation in various matters, some of which have been concluded while others are still active and ongoing. That the said matters include inter alia Nairobi HCCOMM Misc appl. No. E776 of 2020 from arbitration to the High Court, and then to the Court of Appeal and back to the High Court, Kajiado HCCC No. 7 of 2016, Arbitration proceedings between the plaintiff and the County Government of Mombasa, and the Public Procurement Administrative Review Board Application No. 38 of 22nd July, 2015.
20. The defendant contended that it has also been instructed by the plaintiff's Directors in other cases such as Nairobi HCCOMM No. E310 of 2020, Nairobi HC Judicial Review Misc. No. 89 of 2020, Communications and Multimedia Appeals Tribunal Appeal No. 2 of 2021, now the subject of appeal in HCCA No. E379 of 2022, and Nairobi HCCA No. E379 of 2022. The defendant deposed that if orders are granted in respect to the plaintiff's application, the said orders will be detrimental to the defendant, since the plaintiff has no known assets or any other source of income, and there will be no lien to be exercised by the defendant.
21. The defendant averred that the retainer agreement referred to by the plaintiff is now a subject of contestation between the parties herein since the defendant has now spent more resources in terms of personnel, time and money than earlier anticipated due to the protracted nature of the case. It further averred that the defendant was forced to get into a separate fee agreement dated 6th April, 2023 with the Lead Counsel and has since paid the Lead Counsel a deposit of his professional fees from the sums received from the first garnishee proceedings. It stated that the balance that remained after the said payment was effected, was utilized as deposit for the defendant's professional fees.
22. It was stated by the defendant that even if the Court was to rely on the retainer agreement between the parties herein referred to by the plaintiff, it will find that the plaintiff owes the defendant Kshs.264,433,621.30 on the lower side. Further, that out of the possible decretal sum together with interests amounting to Kshs 3,525,781,618.00, the defendant has only managed to collect Kshs. 59,023,275.00, out of which Kshs.7,230,480.00 has been utilized to meet the plaintiff's tax obligation, disbursements and advance payments to the plaintiff's Directors.
23. In view of the above, the defendant asserted that the plaintiff's application would be justified only if it was holding funds beyond the amount due to the defendant as its firm's legal fees, or if the defendant had collected the entire decretal sum. The defendant contended that until it realizes its full fees from the aforementioned decretal amount as provided for in the retainer agreement, it has a right to exercise a lien in accordance with Order 52 Rule 4(3) of the *Civil Procedure Rules*, 2010. The defendant stated that due to the numerous complaints filed by the plaintiff against the defendant, the parties herein no longer enjoy a cordial Advocate - Client relationship, thus it has become necessary for the defendant to safe guard its interests
24. The defendant contended that acting on the plaintiff's instructions it issued an irrevocable professional undertaking to Sidian Bank Limited stating that upon receipt of funds arising from the garnishee proceedings and/or upon realizing the fruits of the decree, it will pay the said bank



Kshs.122,801,247.43 being the debt due and owing from the plaintiff to the bank, and which sums can only be paid on the understanding that full professional fees is first duly made good to the Advocates and/or the decretal sum is fully recovered.

25. In a rejoinder, the plaintiff averred that it has not admitted to being indebted to the defendant, and in the spirit of goodwill following mediation talks presided over by Mr. John Ohanga (SC), the plaintiff pledged to avail some funds to the defendant as a way to assuage the hostile situation. It further averred that it made concessions for purposes of unlocking the stalemate so that the defendant could release its money and allow it to attend to urgent business, and payment of dues and taxes due. The plaintiff contended that no fee notes have been raised by the defendant, hence there is no basis for the defendant to claim that he is owed fees when no demand for fees has ever been made.
26. The plaintiff referred to the letter dated 24th March, 2023 produced by the defendant as proof that it had rendered accounts for the sums received from the judgment-debtor and asserted that it is a statement generated by the defendant and not the defendant's bank account which would have been in a better position to demonstrate exactly how much was received from the judgment-debtor for onward transmission to the plaintiff. The plaintiff contended that it is a stranger to the alleged Fees Agreement between the defendant and its Lead Counsel.
27. The plaintiff denied that the defendant issued Sidian Bank Limited with a professional undertaking since it only requested the defendant to give a conditional notification to the Bank that after they realized their decretal proceeds, the Bank's facility would be settled.

Application dated 12th July, 2023.

28. The plaintiff in its replying affidavit contended that this application has been filed under the mistaken belief that an Advocate can hold monies (as lien) that come to him for onward transmission to his client. It averred that Courts have held that an Advocate's fee only becomes due after the bill of costs has been taxed by the Court. It argued that before a bill of costs is taxed, there is no way of ascertaining how much is due to an Advocate, hence an Advocate cannot exercise a lien over a client's money on the basis of a bill of costs that is yet to be taxed.
29. The plaintiff argued that it is improper for the defendant to withhold the plaintiff's money on account of fees that are yet to be ascertained through the taxation process. It was stated by the plaintiff that since the parties herein entered into a contingency agreement for legal fees, the defendant voided its right to exercise a lien.

Whether the plaintiff's Originating Summons should be struck out.

30. The defendant contended that the plaintiff's Originating Summons against it discloses no reasonable cause of action against it, and it should be struck out. The plaintiff on the other hand asserted that the defendant has received and/or collected money on its behalf from the judgment-debtor in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 as a result of garnishee proceedings, but the defendant has refused to release the said funds to the plaintiff and/or render accounts of the said money. For this reason, the plaintiff was compelled to institute these proceedings against the defendant for the Court to compel the defendant to do so.
31. The defendant's application to strike out the plaintiff's application has been filed pursuant to the provisions of Order 2 Rule 15(1) (a) of the [Civil Procedure Rules](#), 2010 which states as hereunder –

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that -



- a. it discloses no reasonable cause of action or defence in law.”
32. The Court of Appeal in the case of *D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & another* [1980] eKLR, held as follows in regard to summary dismissal of suits -
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
33. Similarly, in the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the Court of Appeal held that -
- “A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”
34. It is not disputed that the parties herein have been enjoying an Advocate-Client relationship in several matters including Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 which gave rise to the instant proceedings. It is noteworthy that the defendant together with Mr. John M. Ohaga SC, CARb as Lead Counsel represented the plaintiff in Arbitral proceedings that gave rise to the aforementioned suits, which were eventually determined in favour of the plaintiff. Further, it was agreed between the parties herein and Mr. John M. Ohaga SC, CARb vide an agreement for fees dated 18th May, 2021, that legal fees due to the defendant and Mr. John M. Ohaga SC, CARb as a result of services rendered at the Arbitral proceedings, Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 and any potential proceedings before the Court of Appeal shall be 15% of the amount recovered in accordance with the award, including interest thereon.
35. In as much as the defendant contends that the said Fees Agreement is contested on the grounds that it has ended up spending more resources in rendering its services to the plaintiff than what was anticipated thus the legal fees therein should be reviewed upwards, it acknowledges having executed the said Fees Agreement dated 18th May, 2021. It is evident from the record that the plaintiff extracted a decree in favour of the plaintiff in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 and thereafter instituted garnishee proceedings with a bid to execute the said decree. The parties herein agree that the defendant has since been able to collect Kshs. 16,456,047.30 and USD 310,197.42 from the judgment debtor as a result of the garnishee proceedings.
36. What is in dispute is whether the defendant was under an obligation to transmit the money received from the judgment-debtor to the plaintiff as soon as the same was received by the defendant, or whether it was supposed to first deduct its fees and those owing to Mr. John M. Ohaga SC, CARb, pay out the



plaintiff's debts as a result of alleged professional undertakings it issued on the plaintiff's behalf under its instructions, and thereafter, release the balance to the plaintiff.

37. Given the above factors, it is my considered view that the plaintiff's Originating Summons against the defendant discloses a reasonable cause of action that warrants this Court's determination. I therefore decline to strike it out.

Whether the defendant should be compelled to render a cash account of the money received on the plaintiff's behalf.

38. An order for delivery of a cash account is provided for under Order 52 Rule 4 (1) (a) of the [*Civil Procedure Rules*](#), 2010 and it states as follows –

“Where the relationship of advocate and client exists or has existed the court may, on the application of the client or his legal personal representative, make an order for -

- a. the delivery by the advocate of a cash account...”

39. As explained in some of the preceding paragraphs, the defendant has so far collected Kshs.16,456,047.3 and USD 310,197.42 which is approximately Kshs. 59,023,275.00, being part of the decretal sum in Nairobi HCCOMM Misc appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 from the judgment debtor. The plaintiff does not dispute that the defendant on its instructions has utilized a total of Kshs.7,230,480.00 to meet the plaintiff's tax obligation and as disbursements and advance payments to the plaintiff's Directors.

40. The parties herein agree that vide a Fees Agreement dated 18th May, 2021, it was agreed between the parties herein and Mr. John M. Ohaga SC, CARb, that legal fees due to the defendant and Mr. John M. Ohaga SC, CARb as a result of services rendered at the Arbitral proceedings, Nairobi HCCOMM No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. No. E779 of 2020 and any potential proceedings before the Court of Appeal shall be 15% of the amount recovered in accordance with the award, including interest thereon. It is worthy of note that the said agreement is still valid and binding to the parties thereto, since it has not been set aside and/or varied by the parties herein or a Court of competent jurisdiction. In addition, none of the parties herein allege fraud, coercion and/or non-disclosure of material facts in respect to the said agreement.

41. On perusal of the said fee agreement, it is evident that the said fees shall be based on the net recovery having regard to the taxes already incurred by the plaintiff and due to the Kenya Revenue Authority. Notably, Clause 2(iv) of the fees agreement provides that the plaintiff undertook to make good the agreed fees within one week upon receiving payment, including instalment payments into its accounts. Parties are in consensus that upon receipt of the said Kshs.59,023,275.00, Kshs.7,230,480.00 was used to meet the plaintiff's tax obligation, disbursements and advance payments to the plaintiff's Directors. The defendant averred that the balance thereof, was used to pay the deposit of its professional fees and the fees owing to Mr. John M. Ohaga SC, CARb. I am persuaded that in doing so, the defendant was acting in accordance with the provisions of Clause 2(iv) of the fees agreement dated 18th May, 2021.

42. The parties herein agree that the defendant is yet to recover the entire decretal sum due to the plaintiff from the judgment debtor in Nairobi HCCOMM Misc. appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020. I therefore agree with Counsel for the defendant that there is no money held by the defendant on behalf of the plaintiff at this juncture to warrant the plaintiff being granted an order under Order 52 Rule 4 (1) of the Civil Procedure Rules, 2010.



43. In view of the above finding, this Court finds that the defendant cannot be compelled to disburse to the plaintiff all the sums determined to be lawfully due to it, less the legal fees lawfully due to the defendant, since once the defendant and Mr. John M. Ohaga SC, CARb recover what would be part of their professional legal fees, there will be nothing left for the defendant to hold on to, on behalf of the plaintiff and/or for onward transmission to the plaintiff. Further, there will also be nothing left to warrant an order for preservation. It is also noted that the defendant gave a professional undertaking for amounts due and owing from the plaintiff, which it will have to honour.

Whether the defendant has a right of lien over all of the decretal sums received until full fees is paid in HCCOMM Misc. appl. No. E776 of 2020 as consolidated with HCCOMM Misc. appl. No. E779 of 2020.

44. The defendant contended that it has a right of lien over all the decretal sums received in Nairobi HCCOMM Misc. appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020. In the case of Booth Extrusions (Formally) Booth Manufacturing Africa Limited vs. Dumbeya Muturi Harun T/A Nelson Harun & Co. Advocates the Court stated as follows in respect to an Advocate's right of lien -

“...a lien generally depends on “the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his favour without giving or tendering performance of the obligations incumbent upon himself”: See John D. Hope & Co. vs. Glendinning [1911] AC 419, 413. Simply put the legal notion of a lien is the right to resist a demand for performance of an obligation until a counter obligation is performed by the person demanding...The policy underlying liens briefly puts it 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, the advocate having a retaining lien over documents in his possession is entitled to retain the documents against the client until the full amount of his costs is paid...” (Emphasis added).

45. Having found that the balance of the decretal sum already received by the defendant on behalf of the plaintiff has been used to pay what would be part of the defendant's and Mr. John M. Ohaga SC, CARb professional legal fees, this Court holds that the defendant is no longer holding any money forming part of the decretal sum in Nairobi HCCOMM Misc. appl. No. E776 of 2020 as consolidated with Nairobi HCCOMM Misc. appl. No. E779 of 2020 on behalf of the plaintiff. For this reason, this Court is not in a position to affirm the defendant's right of lien over that which is not in its custody.

46. In the end, I find that the plaintiff's Originating Summons dated 23rd May, 2023 and the defendant's application dated 12th July, 2023 are not merited. They are hereby dismissed. Each party will bear its own costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Karani for the plaintiff



Mr. Simiyu for the defendant

Ms B. Wokabi – Court Assistant.

