



**Kenya Commercial Bank Limited v Rachier & Amollo Advocates (Commercial Case E270 of 2022) [2024] KEHC 12108 (KLR) (Commercial and Tax) (4 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12108 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E270 OF 2022**

**MN MWANGI, J**

**OCTOBER 4, 2024**

**BETWEEN**

**KENYA COMMERCIAL BANK LIMITED ..... PLAINTIFF**

**AND**

**RACHIER & AMOLLO ADVOCATES ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff filed this suit vide an Originating Summons dated 19<sup>th</sup> July, 2022 pursuant to the provisions of Section 47(1) of the *Advocates Act* of Kenya, Order 52 Rules 4 (1)(b), (2) & (5) of the Civil Procedure Rules, and all other enabling provisions, seeking inter alia determination of whether this Court should order the defendant to release the sum of Kshs.5,600,000.00 to the firm of Igeria & Ngugi Advocates, together with interest at Court rates from 10<sup>th</sup> February, 2006 to date.
2. The suit is premised on the grounds on the face of the Summons and is supported by an affidavit sworn on the same day by Lilian Sogo, the plaintiff's Director-Legal Services Division. She stated that the plaintiff instructed the defendant to represent it in the sale of a property, L.R. No. 12467, along Enterprise Road. According to Ms. Sogo, the defendant received a deposit of Kshs.5,600,000.00 from the purchaser, to be held as stakeholder's money under clause 3 of a sale agreement dated 10<sup>th</sup> February, 2006. She averred that the sale fell through, and the purchaser filed a lawsuit against the plaintiff, being HCCC No. 407 of 2008 (Elecon Developers Limited v Kenya Commercial Bank), which is still ongoing.
3. She stated that during the pendency of the said suit, the plaintiff instructed the law firm of Igeria & Ngugi Advocates to take over representation from the defendant. Ms. Sogo averred that the plaintiff through the law firm of Igeria & Ngugi Advocates has repeatedly demanded for the defendant to release the Kshs.5,600,000.00 held from the sale deposit, but the defendant has refused to release the said



- money and instead, the defendant issued a fee note for its services, which was settled on 9<sup>th</sup> November, 2021. Ms Sogo deposed that the defendant has not released the money, claiming a lien for unpaid fees, despite no fees being formally taxed in its favour against the plaintiff.
4. In response to the Originating Summons, the defendant filed a replying affidavit sworn on 13<sup>th</sup> October, 2022 by Dr. Jotham Okome Arwa, an Advocate of the High Court of Kenya practicing as the Managing Partner of the defendant law firm. He averred that the defendant was engaged by the plaintiff to handle a conveyancing transaction for the sale of L.R. No. 12467 along Enterprise Road, as the plaintiff was exercising its statutory power of sale, and that the purchaser, Elecon Developers Limited, paid a deposit of Kshs.5,600,000.00 to the defendant, but the sale was not completed. That as a result, the purchaser filed HCCC No. 407 of 2008 against the plaintiff, and although the defendant initially represented the plaintiff in the said suit, the plaintiff later engaged the law firm of Igeria & Ngugi Advocates to take over the case.
  5. Dr. Arwa averred that the defendant issued a fee note of Kshs.3,730,000.00 on 27<sup>th</sup> February, 2019 for services rendered in HCCC No. 407 of 2008, which was paid in November 2021. He noted that the relationship between the parties herein begun before the conveyancing transaction linked to HCCC No. 407 of 2008, as the defendant had also represented the plaintiff in HCCC No. 1588 of 2000 (Waihenya Chomba & 3 others v Emco Steel Works & Kenya Commercial Bank), subsequent to which the defendant issued a fee note of Kshs.6,536,775.25 on 14<sup>th</sup> January, 2002, which remains unpaid. Dr. Arwa contended that the defendant has the right to retain client property, including the Kshs.5,600,000.00 deposit, until all outstanding fees are fully paid by the plaintiff.
  6. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 7<sup>th</sup> December, 2022 by Lilian Sogo, the plaintiff's Director-Legal Services Division. She averred that since the plaintiff has fully paid the defendant's legal fees for HCCC No. 407 of 2008, the defendant has no reason to withhold the Kshs.5,600,00.00 deposit, which it holds as stakeholder's funds. She acknowledged that while an Advocate may have a lien over a client's property to recover fees, the lien ends once the fees are paid as is the case herein. She confirmed that the defendant also represents the plaintiff in HCCC No. 1588 of 2000, but that suit is unrelated to the proceedings herein, with a different subject matter and parties. She stated that the proceedings in HCCC No. 1588 of 2000 are still ongoing and the defendant is still acting on the plaintiff's behalf, thus the defendant cannot claim its fees are due in that matter.
  7. This suit was canvassed by way of written submissions. The plaintiff's submissions were filed on 31<sup>st</sup> January, 2023 by the law firm of Igeria & Ngugi Advocates, whereas the defendant's submissions were filed by the law firm of Rachier & Amollo LLP on 16<sup>th</sup> February, 2023.
  8. Mr. Gitau, learned Counsel for the plaintiff relied on the case of *Barrat v Gough Thomas* [1950] 2ALL ER 1048 cited by the Court in *Clement Munyao Kakenyi v Florence Mwangangi & Company Advocates* [2021] eKLR, and submitted that the defendant's right to hold the Kshs.5,600,000.00 as lien was extinguished when the defendant's fees were paid on 9<sup>th</sup> November, 2021. He further relied on the case of *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun T/A Nelson Harun & Company Advocates* [2014] eKLR, and argued that the Advocate-Client relationship between the parties herein ended when the law firm of Igeria & Ngugi Advocates took over representation of the plaintiff, thus the defendant no longer has any right to hold the Kshs.5,600,000.00 as a lien.
  9. Counsel cited the provisions of Section 52 of the *Advocates Act* and relied on the case of *Nyandoro and Company Advocates v National Water Conservation and Pipeline Corporation (Miscellaneous Application 157 of 2016)* [2022] KEHC 142 (KLR) and submitted that in HCCC No. 1588 of 2000, the defendant's fees are not due until the Advocates' bill of costs is taxed, but since that case is ongoing



and the defendant is still representing the plaintiff, it is unjust for the defendant to exercise a lien over undetermined fees. Mr. Gitau referred to the case of John Karungai Nyamu & another v Muu & Associates Advocates [2008] eKLR, and contended that the defendant has no legal right to hold money that has come to it for onward transmission to its client as a lien, as is the case herein. She contended that the continued holding of the plaintiff's money is illegal.

10. Ms. Maina, learned Counsel for the defendant relied on the Halsbury Laws of England 4<sup>th</sup> Edition definition of a lien, and the case of Unibuilt Kenya Ltd u receivership) v Mukhi and Sons Ltd [2004] 2 EA 340, and submitted that the defendant has a right to a general lien over the monies held by the plaintiff. She contended that since the plaintiff has not shown proof of payment for fees in HCCC No. 1588 of 2000, the defendant is entitled to exercise a lien over the sums received on behalf of the plaintiff as a stakeholder, until such fees are paid. She submitted that the lien serves as security for unpaid fees, especially since the defendant no longer represents the plaintiff in HCCC No. 407 of 2008, leaving no other avenue for recovering its fees.
11. Ms. Maina relied on the case of Republic v Lucas M. Maitha Chairman, Betting Control And Licensing Board & 4 others Ex-parte: Interactive Gaming and Lotteries Limited cited with approval in the case of Booth Extrusions (Formally) Booth Manufacturing Africa Limited v Dumbeya Muturi Harun T/A Nelson Harun & Co. Advocates (supra) and argued that a lien allows the defendant to hold the stakeholder's sums until the fees in relation to HCCC No. 1588 of 2000 are paid.

### **Analysis And Determination.**

12. Upon consideration of the instant application, and the affidavit filed in support thereof, the replying affidavit by the defendant as well as the written submissions by Counsel for the parties, the issue that arises for determination is whether the defendant should exercise the right of a lien over monies deposited by a Purchaser of L.R. No.12467.
13. From the pleadings filed, it is manifest that the defendant has acted for the plaintiff in two suits being HCCC No. 407 of 2008 (Elecon Developers Limited v Kenya Commercial Bank) and HCCC No. 1588 of 2000 (Waihenya Chomba & 3 others v Emco Steel Works & Kenya Commercial Bank). It is evident that the two suits are between the plaintiff and two different parties. In addition, no evidence has been tendered by either of the parties to the effect that the suits are related and/or that they arose from the same cause of action. It is not disputed that HCCC No. 407 of 2008 was as a result of the sale of L.R. No. 12467 along Enterprise Road by the plaintiff, in its exercise of its statutory power of sale to Elecon Developers Limited (the purchaser). The said transaction was being handled by the defendant on behalf of the plaintiff, thus the purchaser deposited Kshs.5,600,000.00 with the defendant to be held as stakeholder's money. The aforesaid sale fell through, and as a result, the purchaser lodged HCCC No. 407 of 2008 against the plaintiff.
14. During the pendency of HCCC No. 407 of 2008, the plaintiff instructed the firm of Igeria & Ngugi Advocates to take over the conduct of the said suit on its behalf and demanded release of the said Kshs.5,600,000.00. Instead of releasing the said funds, the defendant issued the plaintiff with a fee note for services rendered in the said suit, which fee note was fully settled on 9<sup>th</sup> November, 2021. Despite the foregoing, the defendant has still refused to release the said funds, claiming that it is exercising its right of lien over the funds until its fees for services rendered for the plaintiff in HCCC No. 1588 of 2000 are paid. The defendant averred that the fee note in HCCC No. 1588 of 2000 was raised on 14<sup>th</sup> January, 2002, but has not been settled to date. It submitted that it has a right of a lien over the said sum, which serves as security for unpaid fees especially since it no longer represents the plaintiff in HCCC No. 407 of 2008. It contends that if it was to release the sum of Kshs.5,600,000.00 to the plaintiff, it will be left with no other avenue of recovering its fees.



15. In the oft cited case of Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeyia Nelson Muturi Harun t/a Nelson Harun & Company Advocates (supra) the Court laid down the nature and extent of the Advocates lien as hereunder -

“A review of case law in the context of an Advocate – Client relationship, will reveal that there is the general lien which confers upon the advocates the right to retain all papers, money or other chattel the property of their client which came into possession of the advocates as their clients’ advocate until all the costs and charges due to the advocates are paid. The lien is general and not restricted to costs owing in respect to the property which the client is claiming possession. It is simply a retaining lien premised upon the advocate having actual physical possession of the property the subject of the lien.

The policy underlying liens briefly put is that it would be unfair for a party to enjoy the result of an advocate’s work without paying the advocate and then let the advocate seek payment elsewhere when payment could be easily gathered through the lien. Consequently, an advocate having a retaining lien over documents in her or his possession is entitled to retain the documents against the client until the full amount of his costs is paid: see *Barrat v Gough Thomas* [1950] 2 All ER 1048, 1053. Provided that the costs in question have been incurred, the existence of the lien arguably does not rest upon a bill having been rendered to the client: see *Re Taylor* [1891] 1Ch 590, 596. In so much however as the lien protects the advocate, the general lien confers only a right to retain property. It exists for no other purpose. It is merely passive and “the solicitor [advocate] has no right of actively enforcing his demand”: see *Barrat v Gough Thomas* [1950] 2All ER 1048, 10563. Once the Advocates’ taxable costs, charges and expenses are paid the client is no doubt entitled to an order for the delivery up of the retained documents.

The foregoing is a brief restatement of the nature of an advocate lien as founded on various common law cases and may be continued if one asks when the lien ceases.

It does cease when the advocate receives payment. It also will exist only when the referable relationship is one of Advocate and client so that if at the date of demand the relationship is not so referable the advocate will lose whatever entitlement to a lien he or she may have enjoyed: see *Barrat v Gough Thomas* [1950] 2 All ER 1048 where there was a change in the character of the solicitor’s possession of the deeds of title from possession as solicitor to and on behalf of the original client (the mortgagor) to possession as solicitor to and on behalf of a different client (the mortgagee).” (Emphasis added).

16. From the above excerpt, it is evident that in order for an Advocate to successfully exercise the right of a lien, he has to demonstrate that at the date of the demand, there existed an Advocate-Client relationship between him and the party whose property it intends to exercise the right of a lien over, and that the costs in question must have been incurred. In *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] eKLR, the Court addressed the issue of when an Advocates fees become due by stating that -

“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. The client has exercised its rights under Order LII rule 4(1) (d) of Civil Procedure Rules which stipulates thus -

O. LII. r.4 (1) 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. ...
- b. ...
- c. ...
- d. The payment into or lodging in court of any such money or securities.”

The Advocate has no right under any law to hold monies that which have come to him for onward transmission to his client as lien, at least no such law has been cited to the court. What the Advocate is doing by holding onto the Plaintiffs’ monies, is irregular and the court cannot condone the same.” (Emphasis provided).

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.”

17. In Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates (supra), the Court held that a general lien is not restricted to costs owing in respect to the property which the client is demanding, it is premised upon the Advocate having physical possession and/or custody of the property the subject of the lien. The defendant herein averred that in retaining possession of the Kshs.5,600,000.00, it is exercising its general right of lien over the said sums until the plaintiff pays its fees due in HCCC No. 1588 of 2000, which have been due and owing for a period of over twenty (20) years now.
18. It is not disputed that the defendant acted and continues to act for the plaintiff in HCCC No. 1588 of 2000 which suit is still pending in Court. In as much as the defendant contends that it served the plaintiff with a fee note in HCCC No. 1588 of 2000 dated 14<sup>th</sup> January, 2002, no evidence has been tendered in support of the said allegation. Further, it is not disputed that the plaintiff has neither settled the fee note dated 14<sup>th</sup> January, 2002, nor has the defendant taxed its costs in HCCC No. 1588 of 2000. I agree with the Court’s finding in the case of Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/ A Chesaro & Co. Advocates (supra) 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.
19. Therefore, even if this Court was to find that the defendant served the fee note dated 14<sup>th</sup> January, 2002 in HCCC No. 1588 of 2000 to the plaintiff, the fees therein have neither been settled nor taxed by a Taxing Officer. For this reason, it is my finding that the defendant’s fees in HCCC No. 1588 of 2000 are not yet due in order for the defendant to exercise its right of a lien over the said Kshs.5,600,000.00.
20. It is also apparent that the said money was deposited with the defendant as stakeholder’s funds under Clause 3 of a sale agreement dated 10<sup>th</sup> February, 2006 for the sale of property L.R. No. 12467, and not for onward transmission to the plaintiff. Clause 3 of the said agreement states that –  
  
“... The chargee’s Advocates will place the said deposit in Call deposit account with a recognized and reputable Bank and the interest thereon will be on account of the purchaser if the transaction does not go through the default of the vendor but in all other cases it will be on account of the vendor.”



21. The sale of L.R. No. 12467 contemplated by the sale agreement dated 10<sup>th</sup> February, 2006 was not completed, and there is a suit between the plaintiff and the purchaser of L.R. No. 12467 that is still pending in Court. As such, at this juncture, it cannot be said the said sum of Kshs.5,600,000.00 belongs to the defendant. It is not disputed that the money was deposited with the defendant by the purchaser. In the premise, I am not persuaded that the defendant has any legal right to exercise general lien over the said sum of Kshs.5,600,000.00.
22. In the end, it is my finding that the plaintiff has made out a case to warrant being granted the orders sought herein.
23. The upshot is that the Originating Summons dated 19<sup>th</sup> July, 2022 is merited. I make the following orders –
  - i. The defendant is hereby directed to immediately release the sum of Kshs.5,600,000.00 held as stakeholder monies to the firm of Igeria & Ngugi Advocates, together with interest that has accrued since the money was deposited in a call deposit account; and
  - ii. Costs of this suit shall be borne by the defendant.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 4<sup>TH</sup> DAY OF OCTOBER, 2024.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Mr. Ometto h/b for Mr. Lugunya for the defendant

Mr. Gitau h/b for Ms Ndirangu for the plaintiff

Ms B. Wokabi – Court Assistant.

