



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. E001 OF 2021 (O.S)

CLEMENT MUNYAO KAKENYI.....APPLICANT

AND

FLORENCE MWANGANGI & COMPANY ADVOCATESRESPONDENT

RULING

Introduction

1. Vide a Notice of Motion Application dated 9th February, 2021, the Applicant has sought for the following Orders; -

a. Pending the hearing and determination of the Application and suit, Certificate of Titles for properties L.R No. 7885/26 and L.R No. 7885/27 be released to Lesinko Njoroge and Gathogo Advocates for the applicant against a professional undertaking and the said Advocates shall hold the sale proceeds on balance of purchase price of L.R No. 7885/25, 7885/26 and 7885/27 in the tune of Kshs. 8,858,036.36 being the disputed legal fees and the same shall be paid upon determination of the Respondent's costs by way of taxation of Advocate/Client Bill of Costs between the applicant and Respondent.

b. The court be pleased to order the Respondent to file its bill of costs and the same be taxed by the Deputy Registrar of the Court.

c. That the costs to the Applicant.

2. The Application was supported by the Affidavit of the Applicant who deponed that he is the registered proprietor of land known as **L.R No.7885/25, 7885/26 and L.R No. 7885/27** (hereinafter referred to as the *suit properties*) and that although he had entered into Sale Agreements to dispose of the suit properties, the said sales had been frustrated by the Respondent who was holding the original title documents.

3. The Applicant deponed that the Respondent had refused to release to him the Original Title documents because of the disputed legal fees of Kshs. 8,858,036.36 and that the Respondent had erroneously based her legal fees on the consideration of Kshs. 19,000,000 per acre despite the fact that he was selling the suit properties at Kshs. 6,500,000 per acre.

4. It was deponed by the Applicant that the total acreage of land that he was selling was 12 acres, which the Respondent unilaterally and without any basis had valued at Kshs. 288,000,000 and that it was on the basis of these figure that the Respondent's legal fees was computed at Kshs. 8,858,036.36 which the Respondent is demanding prior to the release of the certificates of title.

5. The Applicant deponed that in respect of the ongoing sale transactions, which the Respondent had frustrated, he had obtained completion documents except the original Certificate of Titles; that the Respondent raised an exorbitant fee of Kshs. 8,858,036.36 which was not drawn according to the Advocates Remuneration Order and that he would be exposed to litigation and claims for breach of contract or uncompleted contractual obligation arising from the sale agreements and that he stands to suffer loss and prejudice.

6. It is the Applicant's deposition that his Advocates on record were ready and willing to issue an irrevocable professional undertaking to the Respondent to hold an amount equal to the disputed legal fees pending the filing and taxation of the advocate/client bill of costs which will form a good security for the disputed fees.

7. The Application was opposed by the Respondent who filed Grounds of Opposition in which he averred that the Application was without any merits both on facts and the applicable law; frivolous, vexatious and scandalous and an abuse of the process of the Court hence bad in law.

8. According to the Respondent, the Application is merely intended to unfairly and illegally prevent the Respondent from the enjoyment of the result of an advocate's work by non-payment of legal fees due and let the advocate seek payment elsewhere when payment could be easily gathered through the lien.

9. According to the Respondent, 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; that the lien of the title documents was meant to protect the advocate against the unpaid legal fees and that it was untrue that the Respondent has declined and/or refused to release to the Applicant the title documents.

Submissions

10. The Application was canvassed by way of written submissions. The Applicant's counsel submitted that the Applicant had since filed their Bill of Costs in Machakos ELC Misc. App Nos. E003, E004 and E005 of 2021 whose taxation was on 21st April, 2021 and that the Ruling was scheduled on 2nd June, 2021.

11. Counsel submitted that the Certificates of Title were required as completion documents in the ongoing sale transactions which were likely to be breached unless the Respondent was ordered to release the documents; that the balance payable is more than what is being claimed by the Respondent and that the said balance should be paid through the Applicant's law firm, which law firm is willing and ready to issue an undertaking to the Respondent.

12. Counsel for the Respondent submitted that they had an active lien over the said four (4) titles parcels of land which they registered for the Applicant on account of the unpaid fees and that the Applicant cannot be heard to ask the Court to order them to release the titles without the payment of the costs.

13. It was Counsel's submission that even before the Applicant filed the Application herein, the Respondent had already filed the bill of costs on account of the disputed legal fees; that the instant application offends the provisions of **Articles 47 (1) and 159 (2) (a) & (b)** of the Constitution and **Sections 1A, 1B** of the **Civil Procedure Act** and that the Application is an inefficient and imprudent use of the limited available judicial and administrative resources as it seeks to engage this Court unnecessarily.

14. Counsel submitted that the lien of the title documents is meant to protect the advocate against the legal fees which remains unpaid and that it is untrue that the Respondent has declined and/or refused to release to the Applicant the titles. Counsel relied on the case of **Booth Extrusions (Formerly) Booth Manufacturing Africa Limited vs Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR** where the court stated that in its simplest application, a lien generally depends on **"the fundamental principle that one party to a mutual contract cannot enforce performance of its obligations in his own favour without giving or tendering performance of the obligations incumbent upon himself"**.

15. Counsel lastly submitted that the Application was devoid of any merits and could only be as a result of real or pretended gross misconception of the Constitution and the relevant law, if not mere mischief and or bad faith and that the reasons advanced by the Applicant in the Affidavit supporting the Application did not in any manner aid the case advanced by the Applicant in the Application.

Analysis and Findings

16. Having considered the pleadings, the only issue that arises is whether the Certificates of Titles held by the Respondent should be released to the Applicant against a professional undertaking in respect of the legal fees that will be found to be due and owing after the advocates/client's bill of costs has been taxed.

17. It is not in dispute that the Applicant and Respondent entered into an Advocate-Client relationship. A review of case law in the context of an Advocate-Client relationship reveals that there is the general lien which confers upon the advocate the right to retain all papers, money or other chattel of their clients which come into possession of the advocates as their clients' advocate until all the costs and charges due to the advocates are paid (see **Booth Extrusions (Formerly) Booth Manufacturing Africa Limited vs Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR**).

18. 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.

19. As was held in **Booth Extrusions (Formerly) Booth Manufacturing Africa Limited vs Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates [2014] eKLR** the policy underlying liens 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.

20. 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/her costs are paid. 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**).

21. It has been held in numerous court decisions that in as much 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 advocate has no right of actively enforcing his demand (see **Barrat vs 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.

22. From the record, there is no evidence of a Certificate of Taxation from the Taxing Master as regards the Bill of Costs, or evidence that the taxed costs have been paid by the Applicant. However, it was submitted that the Respondent has since filed her Bill of Costs in Machakos ELC Misc. App Nos. E003, E004 and E005 of 2021. That being the case, the Applicant will have to settle the taxed costs before any order for the delivery of the Certificates of Titles can be made by the court.

23. For those reasons, I find no merit therefore in the Application dated 9th February, 2021. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED VIRTUALLY IN MACHAKOS THIS 8TH DAY OF OCTOBER, 2021

O.A. ANGOTE

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent

Court Assistant –John Okumu