



**Kivindyo v Nzioki Mutua & Associates (Miscellaneous Application  
E074 of 2020) [2023] KEHC 21798 (KLR) (Family) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21798 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MISCELLANEOUS APPLICATION E074 OF 2020  
PM NYAUNDI, J  
JULY 18, 2023**

**BETWEEN**

**PETER ISAI KIVINDYO ..... APPLICANT**

**AND**

**NZIOKI MUTUA & ASSOCIATES ..... RESPONDENT**

**RULING**

1. The applicant herein presents notice of motion under section 3A, 63 (c) and (e) of the [Civil Procedure Act](#) and Order 40 rule 1, Rule 2, Rule 4 and Rule 10 (1) and Order 50 rule 1 of the [Civil Procedure Rules](#) and seeks the following orders: -
  1. Spent
  2. That the respondent acting by themselves, their servants or agents or otherwise be restrained by way of injunction from offering for sale, taking possession, disposing or otherwise dealing with Land reference Number 36/1/247 in any manner whatsoever until the final hearing and determination of this application or pursuant to further orders by this Honourable Court.
  3. That the respondent herein be directed to release to the applicant the Title Deed to Land Reference Number 36/1/247 in line with Court order dated October 1, 2021.
  4. That in the alternative to (3) above, the respondent be directed to deposit this honourable court the Title Deed to Land Reference Number 36/1/247 with this honourable court to ensure its safety and security.
  5. That the applicant be granted leave to deposit Kshs 756,598/- with this honourable court in line with the court order dated October 1, 2021.



6. That the honourable court do make such orders as it may deem just and expedient.
7. That the costs of this application be borne by the Respondent.
2. The notice of motion is supported by the applicant's affidavit sworn on October 6, 2022. The respondent opposes the Application and has sworn an affidavit in Opposition on December 14, 2022.
3. The court directed that the parties to canvass the application by written submissions. The applicants' submissions are dated April 17, 2023. The respondent did not file submissions.
4. The applicant seeks to enforce the ruling of the taxing court delivered on September 30, 2021. The applicant is aggrieved that the respondent has declined to receive the sum of Kshs 756,598 and to surrender the original Title Deed to Land reference Number 36/1/247.
5. The applicant contends that the withholding of his Title constitutes a threat to his constitutional right to property.
6. The respondent in his replying affidavit states that he has filed a reference against the ruling of September 30, 2021 in Miscellaneous Application No. 198 of 2021 and that the title is held as lien for fees owing.

### **Analysis And Determination**

7. Upon reviewing the pleadings filed herein, submission and authorities I discern the following as the issues for determination
  - a. Whether the respondent is justified in withholding the applicant's Title Deed as lien
  - b. Whether the respondent should be ordered to release the said title documents
  - c. Who should pay costs?
8. The first issue calls for a consideration on the nature and extent of an advocate's lien. It is not disputed that the professional fees between the applicant and the respondent is yet to be settled. The issue is whether the Applicant can hold onto the title in the circumstances of this case.
9. The nature and extent of the Advocates' lien were set out by Onguto J in *Booth Extrusions (Formerly) Booth Manufacturing Africa Limited v Dumbeya Nelson Muturi Harun t/a Nelson Harun & Company Advocates* [2014] eKLR where he stated
  19. 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] 1 Ch 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] 2 All ER 1048, 1056. 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.

20. 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.
  21. 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).
10. What can be readily discerned from the decision is that the Advocate ought to meet the following conditions 1.) That there at the date of demand the referable relationship must be one of advocate and client and 2.) The costs in question must have been incurred.
  11. The second point was well articulated in the case of *Simon Njumwa Maghanga v Joyce Jeptarus Kagongo T/A Chesaro & Co. Advocates* [2014] eKLR where Kasango J held

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)

14. 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.



12. In the instant case the respondent has filed a reference challenging the taxation by the taxing court, the fees are therefore yet to be determined. For this reason, I find that the respondent having received the title in question with instructions to effect a transfer cannot now turn around and purport to hold it as lien for fees that are yet to be determined.
13. Consequently, I order that the respondent immediately release Title Deed to Land Reference Number 36/1/247 to the applicant.
14. The matter be mentioned on July 20, 2023 to confirm compliance.
15. The respondent to pay costs of the Application.
16. It is so ordered

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 18<sup>TH</sup> DAY OF JULY, 2023.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

