



Diaspora Design Build Limited & 5 others v Mulondo and Company Advocates (Environmental and Land Originating Summons E020 of 2024) [2025] KEELC 4797 (KLR) (26 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4797 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E020 OF 2024
SO OKONG'O, J
JUNE 26, 2025**

**BETWEEN
DIASPORA DESIGN BUILD LIMITED & 5 OTHERS PLAINTIFF
AND
MULONDO AND COMPANY ADVOCATES DEFENDANT**

RULING

1. The Plaintiffs brought this suit through an Originating Summons dated 14th March 2024 under the *Advocates Act*, Chapter 16 Laws of Kenya, seeking the following reliefs;
 1. A declaration that the Defendant's withholding of the sum of Kshs. 15,967,812.90 (being Kshs. 15,000,000/- plus interest at 12% per annum less taxed costs of Kshs. 371,055.40) due and owing as at 4th March 2024 with further interest at the rate of 12% per annum belonging to the 1st Plaintiff being the outstanding amount arising from the provision of consultancy services by the 1st Plaintiff in respect of the construction of Egerton University Ultra-Modern Library is unlawful.
 2. An order that the Defendant do unconditionally release and deliver to the 1st Plaintiff the said sum of Kshs. 15,967,812.90 as at 4th March 2024 together with further interest at the rate of 12% per annum.
 3. A declaration that the Defendant's withholding of the title deeds for land parcels; Kisumu Municipality/Block 4/100, Kisumu Municipality/Block 12/137, Kisumu Municipality/Block 10/494, Mavoko Municipality No. I.R 211204, Mavoko Municipality No. I.R 211089, Mavoko Municipality No. I.R 211090, and Mavoko Municipality No. I.R 211091 is unlawful.
 4. An order compelling the Defendant to unconditionally release and deliver to the 2nd to 6th Plaintiffs the title deeds for land parcels, Kisumu Municipality/Block 4/100, Kisumu Municipality/Block 12/137, Kisumu Municipality/Block 10/494, Mavoko Municipality No.



I.R 211204, Mavoko Municipality No. I.R 211089, Mavoko Municipality No. I.R 211090, and Mavoko Municipality No. I.R 211091 respectively.

5. An order that the Defendant pay to the 1st Plaintiff the sum of Kshs. 1,338,868.30 being interest at court rates on the unlawfully withheld principal sum of Kshs. 15,000,000/- from 31st May 2023 until 1st March 2024.
6. An order that the Defendant pay the costs of the suit.
2. The Originating Summons was brought on the grounds set out on the face thereof. The Plaintiffs averred that in June 2019, the 1st Plaintiff instructed the Defendant to represent it in an arbitration between the 1st Plaintiff and Egerton University (the University) in which an award of Kshs. 102,850,000/- was made in favour of the 1st Plaintiff on 22nd April 2022. The Plaintiffs averred that the University forwarded to the Defendant a sum of Kshs. 40,000,000/- as the first instalment in settlement of the said award for transmission to the 1st Plaintiff. The Plaintiffs averred that the Defendant remitted to the 1st Plaintiff a sum of Kshs. 25,000,000/- only and kept the sum of Kshs. 15,000,000/- claiming that it was on account of its legal fees. The Plaintiff averred that there was an understanding between the Plaintiffs' director, Gad Opiyo and the Defendant that in consideration of Gad Opiyo referring conveyancing work to the Defendant, which Gad Opiyo had done for several years, the Defendant would handle Gad Opiyo's general matters for free. The Plaintiffs averred that as a result of the Defendant's handling of various conveyancing matters for Gad Opiyo, title deeds for land parcels, Kisumu Municipality/Block 4/100, Kisumu Municipality/Block 12/137, Kisumu Municipality/Block 10/494, Mavoko Municipality No. I.R 211204, Mavoko Municipality No. I.R 211089, Mavoko Municipality No. I.R 211090, and Mavoko Municipality No. I.R 211091 (hereinafter referred to together as "the suit properties") owned by the 2nd to 6th Plaintiffs were in the custody of the Defendant. The Plaintiffs averred that the Defendant refused to release the said sum of Kshs. 15,000,000/-, as well as the said title deeds for the suit properties.
3. The Plaintiffs averred that on diverse dates, the 1st Plaintiff paid to the Defendant a total sum of Kshs. 6,200,000/- for its professional fees for the services rendered to the 1st Plaintiff. The Plaintiffs averred that despite payment of the said sum of Kshs. 6,200,000/-, the Defendant still refused to release to the 1st Plaintiff the sum of Kshs. 15,000,000/- which it withheld from the proceeds of the arbitration award and the title documents and transaction files belonging to the 2nd to 6th Plaintiffs that were handed over to it by Gad Opiyo. The Plaintiffs averred that the Defendant filed Advocate-Client Bill of Costs against the 2nd Plaintiff, which was taxed at Kshs. 371,055.40 on 23rd November 2023. The Plaintiffs averred that the 1st Plaintiff was entitled to a sum of Kshs. 15,967,812.90 from the Defendant as at 1st March 2024, comprising of the principal sum of Kshs. 15,000,000/- plus interest from 31st May 2023 to 1st March 2024 less taxed costs of Kshs. 371,055.40. The Plaintiffs averred that they did not owe the Defendant any legal fees. The Plaintiffs averred that the Defendant's act of unlawfully withholding the 2nd to 6th Plaintiffs' land title documents violated their right to property. The Plaintiffs averred that the Defendant's claim that it was exercising a right of lien over the said land title documents and the sum claimed by the 1st Plaintiff had no basis, as the legal fees due to the Defendant had been paid in full.
4. In response to the Originating Summons, the Defendant filed a Notice of Preliminary Objection dated 22nd October 2024. The Defendant contended that this court had no jurisdiction to entertain the Plaintiffs' suit under the provisions of Article 162 (2) (b) of the *Constitution of Kenya* and Section 13 of the *Environment and Land Court Act* 2011. The Defendant contended that the suit was an abuse of the process of the court and should be dismissed.



5. The Plaintiffs filed a replying affidavit sworn by Gad Opiyo on 24th January 2025 in opposition to the Preliminary Objection. The Plaintiffs contended that the Originating Summons concerned a dispute over titles to land and as such it was this court that had jurisdiction to hear and determine the same. The Plaintiffs urged the court to dismiss the objection with costs.
6. The Preliminary Objection was argued by way of written submissions. The Defendant filed submissions dated 20th February 2025 while the Plaintiffs filed submissions dated 10th March 2025. The Defendant submitted that its Preliminary Objection raised a pure point of law and as such was admissible. The Defendant submitted that it had not in any way claimed proprietary rights over the suit properties. The Defendant submitted that it merely exercised a lien over the titles for the suit properties and never took possession of the same. The Defendant submitted that in the circumstances, the dispute before the court was not over title to land but over legal fees which had remained unsettled and on account of which a right of lien was exercised by the Defendant. The Defendant submitted that the lien was a possessory right rather than a proprietary right. The Defendant submitted that the court will have to determine whether there are legal fees due from the Plaintiffs to the Defendant. The Defendant submitted that this court had no jurisdiction to determine the issue. The Defendant urged the court to uphold the Preliminary Objection and dismiss the Plaintiff's suit with costs. The Defendant referred to several authorities in support of its submissions which the court has considered.
7. In their submissions in reply, the Plaintiffs submitted that the Defendant's preliminary objection was wrongly raised and was intended to delay the course of justice. The Plaintiffs submitted that the dispute before the court concerned the recovery of the title documents for the suit properties and the sum of Kshs. 15,000,000/- wrongly held by the Defendant. The Plaintiffs submitted that it was only this court that could determine a dispute over the titles for the suit properties. The Plaintiffs submitted that the issue that the court would be called upon to determine is whether the right of lien exercised by the Defendant over the titles of the suit properties was lawful. The Plaintiff submitted that when called upon to determine its jurisdiction in a case such as the one before the court, the court must consider the dominant issue in dispute and whether it relates to the environment and the use and occupation of, and title to land. The Plaintiffs submitted that the dominant issue for determination in the suit before the court was the unlawful retention by the Defendant of the Plaintiffs' title deeds. The Plaintiffs submitted that this court had jurisdiction to hear and determine the Plaintiffs' suit. The Plaintiffs cited several authorities in support of their submissions, which the court has considered.

Analysis and Determination

8. I have considered the Defendant's Preliminary Objection and the Plaintiffs' response to it. I have also considered the submissions by the advocates for the parties. The Defendant's Preliminary Objection is on the jurisdiction of the court. The issue of jurisdiction can be raised at any time. In [Hassan Ali Joho & Another v Suleiman Said Shabbal & 2 others](#) [2014] eKLR, the Supreme Court stated as follows on preliminary objections:

“To restate the relevant principle from the precedent setting case, *Mukisa Biscuit Manufacturing Co. Ltd. v West End Distributors* (1969) EA 696. ‘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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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 exercise of judicial discretion.”

9. In *Oraro v Mbaja*[2005]1KLR141, the court stated that:

“A preliminary objection correctly understood is 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 process of evidence. Any assertion which claims to be 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.”

10. The following is my view on the matter: From the material before the court, the matters in which the 1st Plaintiff and the 2nd to 6th Plaintiffs engaged the Defendant through their common director were different. The 1st Plaintiff engaged the Defendant to act for it in a commercial arbitration involving the 1st Plaintiff and Egerton University (the University). The arbitration was concluded and an award made on 19th April 2022. The award was adopted as a judgment of the court by the High Court of Kenya, Milimani Commercial & Tax Division on 6th March 2023 and a decree was issued by the court on 11th April 2023. The arbitration matter involved a purely commercial dispute, and that explains why the award was adopted as a judgment of the High Court, Commercial & Tax Division. Any dispute regarding the Defendant’s legal fees for acting for the 1st Plaintiff in the arbitration can only be determined by the High Court and not this court. This court, therefore, has no jurisdiction to determine whether part of the arbitration award in the sum of Kshs. 15,000,000/- withheld by the Defendant is lawfully withheld. The determination of the issue would require taxation of costs that can only be done by the High Court.

11. Concerning the 2nd Plaintiff, it appears from the evidence on record that the 2nd Plaintiff instructed the Defendant to act for it in a Constitutional Petition which was filed against the 2nd Plaintiff and others to stop the development that the 2nd Plaintiff was carrying out in Kisumu on land parcel, Kisumu Municipality/Block 12/137. The petition was filed in the Environment and Land Court at Kisumu. The 2nd Plaintiff and the Defendant disagreed on the issue of legal fees payable to the Defendant. The Defendant filed its Advocate and Client Bill of costs dated 1st August 2023, which was taxed at Kshs. 371,055.40 after deduction of the payments that had been made to the Defendant. There is no evidence before the court showing that apart from the services that the Defendant rendered to the 2nd Plaintiff in the said petition and in respect of which its bill had been taxed and paid according to the 2nd Plaintiff, there were any other services rendered by the Defendant to the 2nd Plaintiff. Since the petition in which the Defendant acted for the 2nd Plaintiff was filed before this court and concerned the use of land, and the Defendant’s bill of costs was also taxed by this court, this court has jurisdiction to hear and determine whether the right of lien being exercised by the Defendant on the 2nd Plaintiff’s title deed on account of an alleged outstanding legal fees is lawful.

12. Concerning the 3rd, 4th, 5th and 6th Plaintiffs, the Plaintiffs have contended that their title deeds came into the possession of the Defendant in the course of some conveyancing transactions that the Defendant was undertaking for the Plaintiffs on the instructions of their common director, Gad Opiyo. The Plaintiffs have not provided the particulars of these transactions and the services rendered, if any. At the time of filing the Preliminary Objection, the Defendant had not filed a replying affidavit in response to the Originating Summons. The nature of the services rendered by the Defendant to the 3rd to 6th Plaintiffs is therefore not clear at this stage. I am of the view that it would be premature to say that the court has no jurisdiction to determine the 3rd to 6th Plaintiffs’ claim seeking the release of the titles of their properties held by the Defendant. The 3rd to 6th Plaintiffs’ case is that the titles are unlawfully held.



The Defendant has tried to distinguish between possessory and proprietary rights. The court is unable to determine at this stage whether the Defendant claims proprietary rights or possessory rights over the titles to the suit properties. This is because the Defendant has not told the court why it is keeping seven titles for properties, which, according to the Plaintiffs, are valued at more than Kshs. 1 billion, and Kshs. 15,000,000/- in cash. Furthermore, the dispute between the parties has been pending since 2023. If the Defendant was exercising its right of lien, it should have filed its bills of cost by now for taxation. I am not persuaded that this court has no jurisdiction to determine whether the right of lien being exercised by the Defendant against the land titles and files belonging to the 3rd to 6th Plaintiffs is being lawfully exercised.

Conclusion

13. In conclusion, it is my finding that the Defendant's Preliminary Objection succeeds only as concerns, the 1st Plaintiff's claim for Kshs. 15,000,000/- together with interest which should have been lodged in the High Court. I will however not condemn the 1st Plaintiff to pay the costs of the suit and the Preliminary Objection. I am of the view that this suit would not have been brought by the Plaintiffs if the Defendant had complied with the law on recovery of legal costs. When there is a genuine dispute between an advocate and a client over fees, what an advocate is required to do is to file his bill of costs for taxation. It is after the bill of costs is taxed and the taxed costs are not settled that an advocate can claim that it is lawfully exercising a right of lien over a client's title to land or file. For the foregoing reasons, I hereby make the following orders in the matter;

1. The 1st Plaintiff's claim herein against the Defendant for Kshs. 15,967,812.90 together with interest is struck out with each party bearing its own costs.
2. The 2nd to 6th Plaintiffs' claims shall proceed to hearing on merit.

DELIVERED AND SIGNED AT KISUMU ON THIS 26TH DAY OF JUNE 2025

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF;**

Mr. Arori for the Plaintiffs

Ms. Obwari for the Defendant

Ms. J. Omondi-Court Assistant

